

Vol. 29, No. 13

March 30, 2009

BIS Weighs In on Export Controls for Cloud Computing

The use of “grid” or “cloud computing” may or may not be subject to the Export Administration Regulations (EAR) depending on how and where it is being used and what supporting software is exported to operate these systems, the Bureau of Industry and Security (BIS) said in an advisory opinion posted on its website. The growing use of cloud computing was underscored in a front-page story in the March 26 issue of the *Wall Street Journal*. The BIS advice came in a Jan. 13 letter responding to a request for guidance from an unidentified company.

Grid computing allows a customer to run applications on a “group of loosely coupled, sometimes heterogeneous and geographically dispersed computers,” BIS explained. Customers use the internet to access the grid. Cloud computing is also accessed through the internet; however, computational capacity under cloud computing is further interconnected via the Internet, it said.

The company seeking the advice posed five questions to BIS: (1) whether grid and cloud computing services, in the absence of any transfer of software or technology subject to the EAR, is subject to the EAR under part 734; (2) whether grid and cloud computing services constitute an “activity unrelated to exports” under section 744.6 of the EAR; (3) whether grid and cloud computing service providers are “exporters” of any derivative data resulting from the use of the computational capacity and liable for export screening on that basis alone; (4) whether computational access restrictions found in section 740.7(b)(2) of License Exception APP apply to grid and cloud computing service providers; and (5) whether the grid or cloud computing service provider must inquire about the nationality of the customer or user.

“The service of providing computational capacity would not be subject to the EAR as the service provider is not shipping or transmitting any commodity, software, or technology to the user,” BIS advised. If the provider ships software that is subject to the EAR, then an export would occur it said. The EAR might also apply if the provider of cloud computing knows the service will assist in a proliferation activity covered by the regulations, said the letter signed by C. Randall Pratt, director of the BIS information technology controls division.

Debate Starts on Climate-Change Tariffs

Congress is moving toward legislation that would put pressure on U.S. trading partners to cut carbon emissions from their factories or face tariffs on goods exported to the United States, a House hearing March 24 indicated. What such a measure might eventually look like and how it



will affect U.S. and foreign manufacturers remains to be seen. Nonetheless, the hearing revealed that any effort to enact climate-change trade legislation is likely to widen the gap between Democrats and Republicans over trade. “The clear fact is that we can – and we must – tackle both the environmental and the economic challenges facing our country and the world today,” said Ways and Means trade subcommittee chairman Sander Levin (D-Mich.) at the hearing on climate-change legislation and its possible impact on trade relations.

At the center of the impending debate is the impact such a law could have on U.S. industry and the reaction of America’s trading partners, if Washington adopts the changes unilaterally, particularly if the law imposed a border tariff on imports from high-polluting countries. The main target of climate-change tariffs would be emerging manufacturing giants such as China and India.

“It simply will not work to take action at home to reduce our own emissions of greenhouse gases, while ignoring what is happening in other countries,” Levin said in his opening remarks. “If we regulate emissions and other nations do not, we run the risk that our environmental objectives be defeated, as polluters and pollution will merely migrate from the United States to countries with less stringent regulations – taking U.S. jobs with them,” Levin said.

The panel’s ranking member, Rep. Kevin Brady (R-Texas), warned that “millions of American jobs” depend upon international trade and the path to economic recovery lies in making it easier for U.S. companies to sell goods and services in overseas markets. Brady also criticized Energy Secretary Steven Chu’s plan to impose so-called “carbon tariffs” on countries based on the amount of carbon emissions generated by the production of goods imported into the U.S.

Panelists who testified before the subcommittee largely represented groups that favor border measures as an environmental tool. “All products consumed in the U.S. [must] demonstrate the same commitment to combating climate change, no matter where they are produced,” Leo W. Gerard, head of the United Steelworkers of America, told the subcommittee. David Hamilton, the director of global warming issues for the Sierra Club, proposed imposing a “border adjustment” on polluter nations. “It would require [overseas] companies without comparable carbon restrictions to buy allowances at the border that reflected either firm-specific data on carbon emissions or national averages from the home country,” Hamilton said.

But a panelist who runs a company warned that such a proposal might do more harm than good. “It would increase the cost of raw materials we use to manufacture our products – costs we cannot typically pass along,” said Robert E. Clay, the chief executive officer of Pridgeon & Clay, Inc., a Grand Rapids, Mich., supplier of exhaust systems and catalytic converters for cars. With the increased costs, Clay said, comes the higher probability that his company would have to lay off employees in its Michigan and Indiana plants and move the jobs to Mexico.

WTO Appellate Body Drills Parties on Zeroing Dispute

One of the first publicly open hearings before the World Trade Organization’s (WTO) Appellate Body (AB) March 23-24 closely resembled a trial before a U.S. appellate court or congressional hearing. By lifting the veil over AB proceedings, the hearing could encourage more AB and dispute-settlement panel hearings to be open to the public. It also could dispel criticism that the WTO dispute-settlement process is a “kangaroo court” conducted by faceless bureaucrats. The hearing heard cross-appeals by the European Union (EU) and U.S. to a compliance-panel ruling on whether the U.S. has complied with a previous WTO ruling against the application of “zeroing” in antidumping administrative reviews. Japan participated as a third-party.

The hearing included carefully presented arguments by U.S., EU and Japanese lawyers, but also lots of sharp questioning from Appellate Body members, according to WTTL’s correspondent in Geneva Scott Billquist. It was held in one of the WTO’s larger conference rooms and broadcast via closed circuit TV to nearly two-dozen lawyers, trade diplomats and interested parties in another room. The three Appellate Body members were Lilia Bautista of the Philippines,

Shotaro Oshima of Japan and Jennifer Hillman of the United States. Officials from countries party to the case sat on the margins of the room. After opening statements from the parties on the first day, the hearing became more dynamic as AB members questioned the government representatives of the parties in the case.

On the second day, questions were directed mostly to the U.S. and EU. The AB members pressed the parties for historical, legal and factual information, previous cases, and the claims in the EU's submission. They also sought opinions on various measures in WTO and national rules, cases and procedures. Members asked about the application of previous WTO cases, including on softwood lumber, ball bearings from the UK, and hot-rolled carbon steel from the Netherlands.

Lead attorneys traded barbs, called out errors in opposition statements, clarified information and defended positions in responses to the AB's questions. Each question prompted responses from the EU or the U.S., follow up questions from the panelists and comments by the other parties. Answers were direct and to the point. Lead U.S. and EU attorneys answered almost all the questions, consulting little with colleagues before replying. The U.S. was questioned on compliance and administrative reviews, Section 129 determinations, cash-deposit-rate calculations and other antidumping procedures. U.S. answers were direct, citing previous disputes, national and WTO rules and EU claims. [Editor's Note: Copies of prepared opening statements by U.S., EU and Japan will be sent to WTTL subscribers on request.]

EU Claims U.S. Gambling Enforcement Violates WTO Rules

The European Union (EU) says it wants to negotiate a settlement with the U.S. over its claims that U.S. enforcement of American gambling laws violates WTO rules. The call for talks came with the announcement March 26 of the results of an internal EU staff investigation of U.S. prosecution of European individuals who operated Internet gambling sites that the U.S. contends violated laws against online gambling. U.S. laws prohibiting online gambling have been the target before of WTO dispute-settlement and a panel ruling in favor of a complaint by Antigua and Barbuda claiming U.S. laws violated U.S. commitments under the General Agreement on Trade in Services (GATS) (see **WTTL**, Aug. 18, page 1).

"The investigation has found that U.S. laws on remote gambling and their enforcement against EU companies constitute an obstacle to trade that is inconsistent with WTO rules," an EU statement said. "Although the provisional conclusions of the report imply that WTO proceedings against U.S. measures would be justified, the report also indicates that the issue should be taken up with the U.S. administration, with a view to finding a negotiated solution," it added.

"It is for the U.S. to decide how best to regulate Internet gambling in its market, but this must be done in a way that fully respects WTO obligations," said EU Trade Commissioner Catherine Ashton. "I am hopeful that we can find a swift, negotiated solution to this issue," she added. The investigation and report responded to a complaint filed by the Remote Gambling Association (RGA). The group asked for the investigation because some of its members have been the target of prosecution in the U.S. even though they withdrew from the U.S. market in 2006

BIS Wants to Rationalize Iran Controls with OFAC Rules

Bureau of Industry and Security (BIS) staffers want to make the rationalization of export controls on Iran a top priority for incoming political leaders. Their goal would be to end the duplication and overlap of licensing and regulatory jurisdiction between BIS and Treasury's Office of Foreign Assets Control (OFAC). "BIS has actually placed this issue as the priority issue, if not one of the top priority issues, of our strategic plan," senior BIS policy analyst Tony Christino told the BIS Export Control Forum in Newport Beach, Calif., March 16. "As the leadership comes on board, we do intend to address that to see if there is a way, particularly in

light of the National Academy study, to rationalize controls so we do not have as much overlap between OFAC and BIS,” he said. Exporters often complain about the divided licensing and regulatory requirements imposed by OFAC and BIS for exports to Iran. The issue drew renewed questions from the business community when BIS issued new rules in January on reexports to Iran (see **WTTL**, Jan. 19, page 2). The revisions to the EAR extended reexport licensing requirements for items under 10 Export Control Classification Numbers.

Christino said OFAC and BIS worked closely in drafting and issuing the new rules, which were aimed at equipment that could be used in Improvised Explosive Devices (IED) against U.S. troops in Iraq and Afghanistan. Reexports to Iran have been the target of several BIS enforcement actions against both U.S. exporters and foreign reexporters. “Where the problem really seems to arise is that reexporters and distributors don’t seem to understand that they can’t replenish inventory knowing that they have a demand from Iran,” Christino said. When exporting to customers or distributors in the Middle East especially, even without knowledge of a reexport, U.S. firms could face “some kind of jeopardy,” he said.

DoD Cites China’s Attempts to Obtain U.S. Technology

The Defense Department’s annual report on China’s military capabilities, released March 25, says the Chinese are continuing a “systematic effort to obtain dual-use and military technologies from abroad through legal and illegal commercial transactions.” The report, however, mostly repeats the same charges as reports in previous years without indicating any new targets for Chinese espionage. The dual-use technologies that Beijing is seeking to acquire to support the People’s Liberation Army (PLA) includes software, integrated circuits, computers, electronics, semiconductors, telecommunications, and information security systems, Defense states.

“Several high-profile legal cases highlight China’s efforts to obtain sensitive U.S. technologies (e.g., missile, imaging, semiconductor, and submarine) illegally by targeting well-placed scientists and businessmen,” the report notes. “Current and former senior U.S. intelligence officials continue to cite China as posing a growing threat to national security due to China’s sustained efforts to obtain U.S. technology illegally,” the report says.

“Many of the technologies identified during investigations into the illicit operations of PRC-based entities publicized within the last year involve sensitive military systems or programs, such as military source code, night-vision equipment, cruise missile technology, and dual-use systems and components for radar and communications equipment,” it adds. “The U.S. intelligence community has noted that, of all foreign intelligence organizations attempting to penetrate U.S. agencies, China’s are the most aggressive,” the report says.

Slump in Trade Looks Worse Than Drop in Global Production

The World Trade Organization’s (WTO) forecast that world trade will slump 9% in 2009 probably exaggerates the decline in global industrial production, WTO economists suggest. Production is expected to fall only 1%. “The gross flow [of trade] will always exceed the income number ... on the upswing” and downswing, said Patrick Low, the WTO’s chief economist, following release March 23 of the WTO projections for this year. The sharp decline in trade also reflects a rebound from the significant jump in the value of trade in 2008 due to the rise in oil and commodity prices.

Low noted that a 1-2% fall in production can result in a greater reduction in world trade. When the world economy grew at 3-4%, world trade grew 10%. The decline in trade also may be greater than the decline in production because components are sometimes tallied multiple times crossing borders during production, Low said. Developing country exports will drop 2 to 3% this year, Low predicted. Industrialized country exports are expect to fall about 10%, he

said. Protectionism isn't yet a major factor in the world trade declines, said Low. Nonetheless, a statement March 26 by WTO Director General Pascal Lamy on the WTO's monitoring of trade actions by WTO members warned that use of protectionist measures is on the rise. Such measures could hobble trade as a tool for recovery, Lamy said.

"Contradictory signals are rampant," one trade diplomat told WTTL. "There is a lot of volatility," he said. Some branches of production that crashed in one quarter have fully recovered, he said, citing anecdotal accounts from Latin America. For example, Brazilian car sales sagged late in 2008 but recovered this year, an industry executive said. The boost was helped by lower taxes on cars in that country, he said. Brazil also didn't have the sub-prime bubble, he said. In addition, the housing markets in the U.S. and Europe are starting to have some activity, the executive said.

The service sectors are also struggling, the executive said. The downturn has been "sharp" for law firms and other suppliers of services to the financial sector, he said. Other service providers will be less affected, said Pascal Kerneis, managing director of the European Services Forum. Drastic changes aren't expected for companies that depend on consumer telecom contracts for income, he said. The overall supply chain will resume after manufacturing orders ramp up, Kerneis said. "It's going to take a few more months to see some light in" maritime transport, the cargo airlines and certain other services, Kerneis said.

U.S. Can Limit Section 129 Reviews to WTO Inconsistencies

The USTR and Commerce can limit Section 129 reviews specifically to the question of how to come into compliance with WTO dispute-settlement rulings, while rejecting requests to extend the review to topics not covered in the WTO complaint, Court of International Trade (CIT) Senior Judge Richard W. Goldberg ruled March 23 (slip op. 09-19). Goldberg rejected a suit by steelmaker Thyssenkrupp seeking to have the International Trade Administration (ITA) consider clerical errors as well as WTO issues in the Section 129 review of a panel report against the use of "zeroing" in an antidumping investigation of imports of stainless steel sheet and strip in coils from Italy. The firm claimed that correction of the errors would have brought the dumping margin below the *de minimis* level.

"Overall, Section 129 provides a procedural mechanism for aligning inconsistent determinations with the provisions of the WTO agreements, and envisions an extensive consultative process," Goldberg wrote. "From this framework alone, it is not evident how allowing Commerce to expand the scope of Section 129 determinations to unlitigated issues would relate to this goal or fit within this process," he added. "Section 129 does not allow the USTR or Commerce to go outside this area in adjusting its prior determination. Accordingly, the USTR's instructions were in accordance with law and did not violate their statutory mandate," Goldberg ruled.

Meanwhile, in a separate action, Thyssenkrupp's affiliates in Mexico, ThyssenKrupp Mexinox and Mexinox USA, Inc, filed a first request March 11 for a NAFTA binational review panel to examine the ITA's final 2006-2007 antidumping administrative review of stainless steel sheet and strip in coils from Mexico.

USTR Promises to Review Policies on Transparency

The U.S. Trade Representative's (USTR) office is considering a request from nongovernment organizations (NGOs) to make public all meetings with foreign officials and to bring NGO representatives into the process of setting trade policies. Representatives of those groups say they received a promise from USTR officials at a March 19 meeting to consider changing their

policies on transparency and the role of NGOs in developing trade and negotiating policies. "The review is expected to be completed within a few months," said a blog written by James Love of Knowledge Ecology International (KEI), one of the participants in the meeting. "The process will include a meeting within a month to discuss initial specific proposals for openness and transparency," he wrote.

The groups asked the USTR's office to evaluation: (1) disclosure of all negotiating texts and policy papers; (2) disclosure of all meeting agenda (as soon as they are available), and participant lists, extending to plurilateral, regional and bilateral negotiations the same policies that are common at multilateral institutions; (3) accreditation of civil society NGOs to attend meetings, including in plurilateral, regional and bilateral negotiations, as is common at multilateral institutions; and (4) public consultations and comment periods, including those that accept comments to web based forums.

The groups met with the USTR officials to follow up on President Obama's pledge to make the government more transparent. The meeting was chaired by Daniel Sepulveda, assistant USTR for congressional affairs; and attended by Tim Reif, USTR general counsel; Catherine Field, USTR chief counsel for legal affairs, and Stanford McCoy, assistant USTR for intellectual property and innovation, Love reported. NGO participants were from KEI, Consumers Union, Essential Action and the Electronic Frontier Foundation.

Mac Aviation Charged with Exporting Helicopter Engines to Iran

The arrest March 14 of Iranian businessman Hossein Ali Khoshnevisrad on charges of exporting helicopter engines to Iran has revealed a broader government investigation and has led to the unsealing of a related indictment naming Ireland's Mac Aviation Group, Mac Aviation Nigeria, the company's director and owner Thomas (Tom) McGuinn, his son Sean McGuinn, and Sean Byrne. The indictment unsealed in the DC U.S. District Court March 24 accused the company and its executives of arranging for the export of the engines and other aviation components for Khoshnevisrad through Malaysia and other countries. Arrest warrants have been issued for the McGuinns and Byrne (see **WTTL**, March 23, page 4).

The alleged illegal activity took place between August 2005 and July 2008, according to the indictment. Among the charges in the court papers was a plan by Mac Aviation on behalf of Khoshnevisrad to buy 17 model 250 turbo-shaft helicopter engines from Rolls-Royce Corp's gas-turbine engine division in Indiana for \$4.27 million, ship them to Iran through third countries, and not divulge their ultimate destinations to either Rolls-Royce or the U.S. government. The engines would not have needed a license for exports to Malaysia alone.

* * * Briefs * * *

CHILE: U.S. and Chile March 27 announced agreement to resume U.S. beef exports to Chile immediately. Exports were blocked in September 2008 in dispute over grade labeling.

THREADED ROD: In final antidumping determination March 26, ITC voted 6-0 that imports of steel threaded rod from China are injuring U.S. industry.

IRON FITTINGS: On 6-0 vote March 24, ITC made "sunset" determination that lifting of antidumping order on malleable cast iron pipe fittings from China would likely lead to renewed injury to U.S. industry.

BIS: In March 20 Federal Register BIS asked for public comment on why exporters fail to export goods for which they have obtained export licenses or export less than license permits. "BIS is particularly interested in whether characteristics of the export license application review process induce applicants to apply for greater authorizations than they need and, if such is the case, any costs associated with such applications," agency said.