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BIS Says Plan Will Enhance Foreign Availability Reviews

Bureau of Industry and Security (BIS) officials say the Washington Tariff & Trade Letter drew incorrect conclusions in an article which said BIS had ceded its authority to make foreign availability determination to an interagency panel (see **WTTL**, Nov. 10, page 1). “In fact, BIS has not changed any of its existing foreign availability authority under the Export Administration Act or Part 768 of the Export Administration Regulations (EAR). BIS has established inter-agency agreed procedures that actually expand the universe of items subject to foreign availability assessments to cover all items on the Commerce Control List,” they told **WTTL**.

In a letter to **WTTL**, BIS noted that Commerce conducts two types of foreign availability assessments – one for items subject to National Security (NS) controls and one for non-NS controlled items. For NS controls, the department follows procedures set in Section 5(f) of the Export Administration Act and EAR Section 768. As part of that process, it consults with State, Defense and other agencies. “Ultimately, the Secretary of Commerce has authority to make determinations of foreign availability,” BIS said.

“For items controlled for all other reasons, the Department has established interagency-agreed guidelines with the Departments of State, Defense, and Energy for conducting foreign availability assessments pursuant to the President’s Dual-Use Trade Reform directive,” it noted. “These guidelines establish, for the first time, procedures for making foreign availability determinations for items controlled for non-NS reasons (e.g., regional stability, missile technology, chemical/biological, anti-terrorism, nuclear-non-proliferation),” it added. The guidelines set deadlines for agencies to comment on reviews and a process for appealing cases to the National Security Council when consensus cannot be reached on a determination. “This initiative does not change existing authorities to conduct foreign availability assessments pursuant to Section 768 of the EAR,” BIS stated.

Trade Bar Proposal Would Expand CIT Jurisdiction

Lawyers practicing trade law have drafted legislation they hope to see enacted by the next Congress to expand the jurisdiction of the Court of International Trade (CIT), including in areas dealing with protests of Customs actions and civil enforcement actions under export control and trade sanction laws. Drafted by the Customs and International Trade Bar Association (CITBA), the “United States Court of International Trade Improvement Act” would establish new causes for judicial review and consolidate litigation that is now handled by U.S. district courts in the

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CIT. The association has been working with several lawmakers in the Senate and House on the bill and expects it to be introduced in the Senate by Sen. Charles Schumer (D-N.Y.).

The legislation would increase the workload of the CIT, which some in the trade community contend is underutilized, with too many judges for the number of cases it receives. While supporters of the draft bill see it as a good governance proposal, the measure could face opposition from some agencies that would not want new causes created for judicial review.

“The proposed legislation has several purposes,” states a CITBA summary of the bill. “One is to correct jurisdictional anomalies that have come to light in case law since the Court of International Trade was created in the Customs Courts Act of 1980. A second purpose is to mesh the Court’s jurisdiction more closely with current agency procedures, notably including the widespread use of post-entry customs audits. A third purpose is to expand the Court’s jurisdiction to include more U.S. statutes governing international trade. A fourth and related purpose is to rebalance the workload in the federal judiciary by giving the Court jurisdiction over areas of the law that are logically related to its current role,” CITBA explained.

The bill would amend rules for filing administrative protests of Customs and Border Protection tariff rulings to reflect the increased use of post-import customs audits. In addition, it would establish the right of importers to protest “no-load” orders that Customs issues for cargos in foreign ports under its Cargo Security Initiative and advance filing requirements. The legislation would also change the standard of review for the Court of Appeals for the Federal Circuit in antidumping and countervailing duty cases. Under the proposal the circuit court would only, “determine whether the Court of International Trade misapprehended or grossly misapplied the ‘unsupported by substantial evidence’ or ‘arbitrary, capricious, or an abuse of discretion’ standard,” CIBA said.

The measure would also give the CIT exclusive jurisdiction over any civil action commenced against the United States, its agencies, or its officers, that arises out of the Export Administration Act, the International Emergency Economic Powers Act, the Trading with the Enemy Act, the Arms Export Control Act, the Iraq Sanctions Act, the Foreign Narcotics Kingpin Designation Act and the Clean Diamond Trade Act. The bill would not add any new reasons for judicial review of export controls or sanctions under these statutes and would only move existing civil cases from district courts to the CIT.

Chinese Investments and Cyber Attacks Cited in Report

The annual reports of the U.S.-China Economic and Security Review Commission always provide ammunition for critics of China to use in debates on national security and trade, and the 2008 report released Nov. 20 offers more warnings about Chinese behavior. Among its findings and recommendations, this year’s 393-page report stresses China’s continued attempts to use cyber attacks to gain access to sensitive U.S. information and technology and Beijing’s investment of some of its \$2 trillion in foreign exchange in Chinese front-companies that are buying firms in the U.S. while hiding their connection to the government.

“Chinese hackers have penetrated the White House, Obama, and McCain Web sites,” said Commission Chairman Larry Wortzel. “We don’t know who in China is doing it, but certainly servers based in China were involved,” he said.

The report says the Chinese in 2002 hacked into U.S. military websites including “the U.S. Army Information Systems Engineering Command, the Naval Ocean Systems Center, the Missile Defense Agency and Sandia National Laboratories.” It also states that China downloaded 10 to 20 terabytes of data. For comparison, it points out that the entire print section of the library of Congress contains approximately 10 terabytes of data. Wortzel said China’s “sovereign wealth funds were being used for political gain, not a return on capital investment.” He said “Sovereign wealth funds are being used to gain control of blocks of industries or technologies

the user might not want to share.” That is why a focus only on sovereign wealth funds misses some of these Chinese operations, he said. The report claims China in January in 2008 “bought \$150 million in bonds from the government of Costa Rica as part of an agreement signed the previous year under which the Central American nation cut diplomatic ties with Taiwan (after 63 years) and instead established relations with the People’s Republic of China.”

Commerce Needs to Speed Up Fix of BIS Computer System

The incoming secretary of Commerce in the Obama administration will need to get BIS to come up with a plan for speeding up the modernization of its “obsolete” computer system, the department’s Office of Inspector General (OIG) said in a Nov. 18 report identifying the top challenges Commerce management needs to address. The long delay in the modernization of the Export Control Automated Support System (ECASS) is not among the main issues facing the department, but it needs to be addressed because of BIS’ national security mission and the vulnerability of the system to hacking.

“The effort to modernize ECASS began in 1996, but the project has been underfunded and beset by technical problems and schedule slips that current management has been attempting to address in a budget-constrained environment,” the OIG report said. “The current projected completion date for the ECASS modernization is FY 2014,” it noted. “The total funding requirements for ECASS modernization are not clearly established. BIS must provide a comprehensive plan for what is required to modernize ECASS, including how much it will cost and how it will avoid the management and technical problems experienced in past modernization attempts,” the OIG reported.

“Commerce has had some notable security incidents that underscore the potential for harm,” the OIG said. “The Bureau of Industry and Security, which processes sensitive export license data, took one of its information systems off line in late 2006, after discovering it had been hacked, and the agency still has only limited Internet access. BIS reported that it reviewed firewall logs for the 8 months prior to detecting the intrusion, but could not determine how long the hackers were inside the system before their presence was discovered,” it said.

Doha Modalities “Not Impossible,” But Fallbacks Emerge

Doha Round negotiators say it is “not impossible” that they could reach agreement on modalities by the end of the year, but they are also looking at possible fallback objectives that could be achieved now with a promise to agree on the modalities later. One such fallback goal might be an agreement on an agriculture special safeguards mechanism (SSM), the stumbling block that caused a World Trade Organization (WTO) ministerial meeting to collapse in July.

A new drive to finish the Doha Round this year has started in the wake of the statement issued Nov. 15 by leaders of the top 20 economies in the world (G-20) at the end of their economic summit in Washington. “It’s either the modalities or not,” a Latin American trade official told WTTL. The whole issue is whether the G-20 meant what they said, he added; saying, “It shouldn’t be impossible.”

In their final statement, which dealt mostly with the global financial crisis, the G-20 said they would “strive to reach agreement this year on modalities that leads to a successful conclusion to the WTO’s Doha Development Agenda with an ambitious and balanced outcome. We instruct our Trade Ministers to achieve this objective and stand ready to assist directly, as necessary.”

WTO Director-General Pascal Lamy will meet with senior officials “who are coming to pave the way for final agreement” in the Green Room Nov. 23, one trade official said. The target date for concluding modalities is during the WTO General Council meeting on Dec. 18 and 19, trade sources say. Trade ministers could begin arriving in Geneva on Dec. 9, but the could

come as late as the 15th, one source calculated. Ministers will need the revised texts on Dec. 2 to give them a week's perusal, he added. Overshooting the 19th slides into Christmas week and a January scenario, which is not being discussed in the hallways of the WTO.

New positions in the agriculture negotiations will be needed by Nov. 28 to reach modalities this year, Crawford Falconer chairman of the farm talks told a Nov. 17 meeting. Falconer called on officials of countries that attended the Washington summit to show movement in their positions. Several delegates in the agriculture negotiating group said they needed time for officials to arrive in Geneva with any changed positions. The Doha agriculture negotiating text will have to be revised at the very latest by the first week of December to reach modalities before year-end, one trade official said (see **WTTL**, Oct. 27, page 3).

The situation in the non-agriculture market access (NAMA) talks may be even worse than in agriculture, said a former trade negotiator. High-level officials may also be needed to revise the industrial tariffs negotiating text, said Swiss Ambassador Luzius Wasescha, who is chairman of the negotiating group, after meetings the week of November 10. Sectorals is "where we're going to see whether the United States wants this or not," said the Latin American diplomat. Reaching a deal on sectorals will take too long, he said. "If the U.S. presses very hard that it wants something now, then it means that they don't want" to finish modalities, he argued. U.S. groups, particularly the National Association of Manufacturers, have insisted that an agreement on moving forward on sectoral talks must be part of any modalities' deal.

U.S. Industries Expect Obama to Revive Section 421

Import-sensitive U.S. industries are hoping President-Elect Barack Obama will put new life in the China special safeguards provisions of Section 421 of the Trade Act. The Bush administration has never agreed to apply import relief for firms that have sought 421 protection. "Obama supports countervailing duties. Obama plans to resuscitate section 421," Joe Dorn, a partner at King & Spalding told the Washington International Trade Association Nov. 20. Similar hopes for 421 were the buzz among lawyers attending the Nov. 19 CIT Judicial Conference. There were even whispers that Section 201 safeguard actions might come alive again.

Hopes for Obama's use of 421 were sparked by a letter he sent to the National Council of Textile Organizations (NCTO) before the election. "When domestic industries make use of trade remedy laws that call for Presidential determinations, such as the section 421 provision applicable to imports from China, I will decide those cases on their merits, not on the basis of an ideological rejection of import relief like that of the current Administration," Obama wrote NCTO.

The trade bar also expects to see an increase in the number of antidumping and countervailing duty cases as the recession deepens. Gary Horlick, a partner at Wilmer Hale, told WITA that "in a recession, in industries that have high fixed costs, everyone is selling at below cost, so everyone is dumping, and everyone is getting injured." Horlick warned that U.S. exporters could also face trade complaints in foreign markets with less open trade law procedures than the U.S. "As a U.S. exporter, you are almost always exporting to a smaller country. In other countries an antidumping report goes to elected representatives," he said.

* * * BRIEFS * * *

COMMERCE: Under Secretary for International Trade Chris Padilla reportedly leaving department to join C&M International, lobbying and trade consulting arm of Crowell & Moring law firm.

BROADCOM: ITC has asked CAFC for extra time to decide whether to ask for en banc appeal of ruling on Section 337 case against Qualcomm communications chips. ITC is also talking to Solicitor General about possible appeal of case to Supreme Court (see **WTTL**, Oct. 20, page 1).