

Vol. 31, No. 35

September 5, 2011

Industry Hopeful about Potential of Export Control Reform

The head of one of America's largest defense firms has praised the Obama administration's export control reform initiative but also warned that current controls could encourage foreign development of competing military technologies, particularly in the field of unmanned aerial vehicles (UAVs). "The Defense Department is promoting what is clearly the best export reform policy – build higher walls around fewer things. For this they deserve credit and encouragement," Northrop Grumman CEO and President Wes Bush told an Association for Unmanned Vehicle Systems International (AUVSI) forum in Washington, D.C., Aug.17.

"Their primary motive for such reforms makes eminent sense: to better support our allies, and to codify the technology sharing that occurs every day on the battlefield and in the joint training we perform," he said. In his speech, however, Bush bemoaned current policies. "Let me be clear: Export restrictions are hurting this industry in America without making us any safer. And they could cause the U.S. to relinquish to other nations its lead in these technologies," he said.

"We somehow thought that we had a corner on that [satellite] technology, but we were badly mistaken. The very policies that were intended to keep this technology secure for us actually encouraged others who could not buy it from us to develop their own," Bush said. "In fact, they even marketed their products as 'ITAR free.' America lost valuable export opportunities, and we are no safer as a result," he added.

Bush said export control reform will allow U.S. companies to form new partnerships abroad. "This common sense approach recognizes the clear advantages of solidifying a common capability with like-minded allies. After all, our allies will seek to field those capabilities. It is my point of view that it is in our nation's interests to ensure our allies have the best systems available, procured with as much fiscal efficiency as possible," he noted.

Wikileaks Releases Some 1,000 USTR-Related Cables

Wikileaks, the controversial website that has been releasing thousands of purloined U.S. government diplomatic cables and documents, posted a new set of material Aug. 26, including about 1,000 wires sent to the U.S. Trade Representative's (USTR) office and other departments from American embassies and missions abroad. The cables, some marked confidential or sensitive, date from 2001 to 2010 and often include detailed memos written by embassy staffers on trade and investment disputes with the countries in which they are located, negotiations on free



trade agreements (FTAs) and accession to the World Trade Organization (WTO), positions on Doha Round talks and meetings that embassy or USTR officials had with government officials in those countries. In many cases, the information in the cables has been overtaken by later developments and now just offer a chance for vicarious voyeurism.

Many of the cables responded to assignments that State and the USTR sent to the embassies to provide reports on the investment climate in their countries, progress on intellectual property rights (IPR) protection for the annual Special 301 report and foreign compliance with telecommunications agreements. Several cables monitored press coverage of trade talks or disputes with the U.S. Among topics covered were Sri Lanka's desire for an FTA with the U.S., IPR piracy in Brunei, rice access in Italy and tariffs on cell phone imports into Ecuador.

In some cases, embassy authors added their own candid assessments and color to events covered in their reports. For example, the January 2005 unveiling of the Airbus A380 aircraft was a "well-organized ceremony [that] resembled a combination of Olympics opening and heavy-weight prize fight," one cable said. It noted comments by German Chancellor Schroeder signaling his support for broadening the participation of other European countries, including possibly Russia, in the ownership of Airbus' parent company, EADS. "Comment: Germany may find attractive the prospect of diluting French influence in EADS and Airbus," the cable added.

A cable from March 2007 reported on a meeting between then-Deputy USTR John Veroneau and Peru's President Garcia, who played down the influence of Venezuelan President Chavez in the rest of Latin America. "Returning to the challenge posed by Chavez, Garcia said, 'I think we'll beat him.' The Venezuelan leader is trying to reinvent himself as Castro but the latter's unique image among Latin Americans won't transfer to Chavez," the cable reported. "Garcia spoke in frank terms of his disappointment with Brazil, which along with Argentina has become complicit with Chavez. Brazil is only in favor of South American union when it directly serves Brazilian interests; the GOB had been the greatest impediment to the FTAA [Free Trade Area of the Americas]," the Lima Embassy stated.

A report on the October 2009 visit of a U.S. delegation led by USTR Ron Kirk to India for the first Trade Policy Forum described in detail the progress of various working groups and the concerns raised by both U.S. and Indian officials about bilateral trade problems. One session headed by Assistant USTR Christine Bliss on investment also touched on a potential bilateral investment treaty (BIT). Bliss told the meeting that although the U.S. was reviewing the model BIT to see if it meets the goals of the Obama administration, "the USG is not expecting to make major revisions," the cable noted.

"The focus of the revisions has been on national treatment, financial services, and state-owned enterprises although the private sector has pushed for labor and environment issues to be also included in the review. The USG view is that negotiations should begin based on the model text, which is the same message it has shared with other negotiating partners in China, Vietnam, and Mauritius," the embassy reported.

Wikileaks Cables Show U.S. Focus on Labor Issues in Colombia

Among the batch of USTR-related cables that Wikileaks released Aug. 26 were several reporting on labor rights in Colombia, including violence against union officials. One cable from October 2009 cited a teachers' union report that "about 40% of murdered unionists in Colombia are public-sector educators." It quoted one Colombian official who said "armed groups on both ends of the political spectrum target educators because they are visible, influential community leaders, not necessarily because they are unionists." Colombian educators are often the only literate members of rural communities, and frequently take on greater civic responsibilities than teaching alone. Criminal gangs frequently target community leaders who do not cooperate in their illicit activities, he said. By January 2010, the cables reported progress in the reduction of murders of union members, citing one union leader who acknowledged the positive trend,

but warned that focusing on murders alone masked the true nature and scale of the violence. “He said that homicides represented only 26% of the 10,364 ‘violations of life, liberty, and integrity of union workers’ that had occurred since January 1, 1986,” the cable stated.

“The majority of violations consisted in death threats (4,418) and forced displacements (1,611), and, to a lesser extent, arbitrary detentions, harassment, non-lethal attacks, disappearances, kidnappings, torture, and illegal searches. While murders had steadily fallen, non-lethal crimes had continued unabated, he said,” it added.

A cable from February 2010 noted new independent academic research being done into labor violence in Colombia and cited a report by Daniel Mejia and Maria Jose Uribe, who found no statistical evidence that greater union activity led to greater violence. “On the contrary, their results showed a strong correlation between violence against union members and areas with high levels of general violence and low levels of economic development. The study also concluded that violence against union members had decreased at a faster rate than violence against the total population,” the cable said; but adding the study “is not without its detractors.”

An example of the continuing labor problems in Colombia was given in a February 2010 cable reporting on the efforts of Drummond, a U.S. mining company, to fire union members after a court found the union’s March 2009 strike to be illegal. Union leaders were seeking a negotiated solution to avoid the dismissals. “Drummond executives defended the company’s safety record, and refused to entertain further negotiations with the union’s current leadership, citing its role in organizing the illegal strike” and other political goals, the cable said.

U.S., EU Argue over Size of Subsidies for Boeing

A key issue arising during a WTO Appellate Body hearing on a dispute-settlement panel’s finding that Boeing had received illegal subsidies from the U.S. government and states is how the purchase of services from a private firm should be treated under the WTO Agreement on Subsidies and Countervailing Measures (SCM). The European Union (EU) argued that the panel’s interpretation of the agreement led to undercounting the subsidies Boeing received, while the U.S. claimed the panel overcounted them (see **WTTL**, April 4, page 3). The Appellate Body heard the opposing arguments on the EU and U.S. cross-appeals of the panel report during Aug. 16 oral arguments that were broadcast for the public on Aug. 23.

The EU statement focused on subsidy-related issues and previewed matters dealing with adverse effects that are on the agenda for an October hearing. The U.S. statement focused on financial contributions, benefits and specificity.

The EU is trying to upset “the delicate balance” in the SCM Agreement between those who sought “to impose more disciplines on the use of subsidies and those that sought more disciplines on the application of countervailing measures,” the U.S. statement said. It framed payments the National Aeronautic and Space Administration (NASA) and Defense Department (DoD) made to Boeing and other companies for scientific research and development of “dual use” technologies as benefitting the general public.

The EU claimed the dispute panel erred by excluding transactions as purchases of services from the SCM Agreement. The panel failed to properly apply the “customary rules of treaty interpretation,” thus creating a “loophole” in SCM Agreement coverage that “will frustrate its object and purpose,” the EU said. The panel finding that some DoD R&D transactions, namely “DoD procurement contracts” were not “financial contributions” should be “reversed,” the EU argued. The interpretation is incorrect and provides a “road map” to subsidize in the future “without discipline by using slight of hand to package together purchases of services with grants and other types of financial contributions,” it asserted.

Brazil and Canada, whose support for the development of their own large civil aircraft sectors will face the disciplines that the Appellate Body’s final ruling will impose, also participated in

the hearing as third parties, but took different sides in the argument. Brazil agreed with the EU that the panel erred by excluding payments that were ostensibly “purchases of services.” Canada, along with Australia, said only those subsidies that fall within the scope of the SCM Agreement are subject to disciplines. They said purchases of services are not covered. Canada agreed with the panel’s methodology. Japan, another third party, agreed that certain waivers and transfers were not specific to Boeing, but rather were part of a government-wide policy.

JPMorgan Chase Pays \$88 Million to Settle OFAC Charges

JPMorgan Chase Bank (JPMC), one of the largest banks in the U.S., is paying an \$88.3 million fine to settle allegations that it violated eight different trade sanctions programs, Treasury’s Office of Foreign Assets Control (OFAC) announced Aug. 25. OFAC claims the bank violated sanctions targeting Cuba, Iran, Sudan, plus orders blocking the assets of various entities, including ex-Liberian leader Charles Taylor and vessels linked to the Islamic Republic of Iran Shipping Lines. According to OFAC, JPMC handled transactions that violated these sanctions by processing funds transfers, letters of credit and in one case, transferring 32,000 ounces of gold bullion valued at \$20,560,000 to a bank in Iran for the benefit of the Iranian government.

The penalty was based in part on OFAC’s determination that “JPMC is a very large, commercially sophisticated financial institution, and that JPMC managers and supervisors acted with knowledge of the conduct constituting the apparent violations and recklessly failed to exercise a minimal degree of caution or care with respect to JPMC’s U.S. sanctions obligations,” the agency stated. OFAC considered some of the violations to be egregious and others non-egregious. In some cases, the bank had made voluntary self-disclosures but in others it had not.

None of the alleged violations “involved any intent to violate OFAC regulations,” JPMorgan said in a statement. “These rare incidents were unrelated and isolated from each other. The firm screens hundreds of millions of transaction and customer records per day and annual error rates are a tiny fraction of a percent. We are pleased to have resolved these matters and to move forward with enhancements to our global OFAC compliance program,” it added.

The fine imposed on JPMC was less than the \$114.4 million base penalty that OFAC calculated and was reduced due to several mitigating factors, including the bank’s cooperation with OFAC. Among the aggravating factors was JPMC’s alleged failure to respond to an administrative subpoena. “In response to this subpoena and a subsequent communication, JPMC compliance management failed to produce several responsive documents in JPMC’s possession, and repeatedly stated that JPMC had no additional responsive documents,” OFAC said. In the end, the bank provided the documents after OFAC learned from a third party that JPMC had them. “This prompted JPMC to correct its prior statements that the bank possessed no additional responsive documents and to produce more than 20 responsive documents,” OFAC noted.

As part of the settlement, OFAC said it would “release and forever discharge JPMC, without any finding of fault, from any and all civil liability arising under the legal authority that OFAC administers in connection with the apparent violations detailed in this Agreement.” The agreement calls for JPMorgan to provide OFAC with copies of all updates of the bank’s sanctions compliance programs for the next two years and results of all internal or external compliance audits, including explanations of any remedial measures taken as a result of the audits.

Hatch Demands Briefing on Trade Reorganization Plans

Sen. Orrin Hatch (R-Utah) complained to President Obama that neither he nor his staff has been briefed on administration plans to consolidate 12 export promotion agencies and departments. Obama had called for the reorganization of trade programs in his Jan. 25 State of the Union address. Although the White House chief performance officer in charge of the effort has said he has had dozens of meetings with congressional staff, “to date, I have not received any

briefing regarding this process and my staff has been briefed only once, and that was at our request,” Hatch wrote in an Aug. 24 letter to the president. “As the Ranking Member of the Senate Finance Committee, I expect to be fully briefed and kept up to date on the status of any recommendations to reorganize the trade agencies that fall within our Committee’s jurisdiction,” Hatch wrote. “I am deeply concerned about any proposals to place the Office of the United States Trade Representative into any other agency. This small but highly effective agency is one of the few bright spots in an otherwise bloated bureaucracy,” he added.

Hatch noted a New York Times article that said the administration is considering creating a “Department of Jobs” or a “Department of Competitiveness” – as part of its upcoming release of a jobs plan. “Mr. President, the solution to America’s trade competitiveness does not lie in creating a new ‘Department of Jobs’ or a new ‘Department of Competitiveness.’ It lies in fighting to aggressively open foreign markets to U.S. exports. One of the most effective ways to do that is through negotiation and implementation of strong international trade agreements,” Hatch argued.

BIS Publishes Transshipment Best Practices

The Bureau of Industry and Security (BIS) released a new set of best practices Aug. 31 to help exporters “guard against the diversion of dual-use items shipped to a transshipment ‘hub,’ or to any intermediate country before being shipped to the country of ultimate destination.” The advice posted on the BIS website offers seven best practices, ranging from paying heightened attention to red flag indicators to avoiding routed export transactions unless an exporter has a longstanding and trustworthy relationship with the foreign principal party in interest and its agent.

BIS first proposed these best practices in September 2010, asking for public comments from industry (see **WTTL**, Sept. 13, 2010, page 4). The agency got five written comments in response to its proposal. In addition, BIS received 52 comments through individual meetings and outreach activities with stakeholders.

BIS also suggested that exporters and reexporters use only trade facilitators and freight forwarders that administer sound export management and compliance programs which include best practices for transshipment. It advised companies to “know” their foreign customers by obtaining detailed information on their bona fides and credentials to measure the risk of diversion. This research is especially important when the foreign customer is a broker, trading company or distribution center, BIS said.

ITA Heeds Concerns about Foreign Government Certifications

The International Trade Administration (ITA) won’t require – for now – foreign governments to certify the truthfulness of information they submit to the agency in antidumping and countervailing duty investigations under new rules issued in February. In recognition of comments objecting to the requirement, ITA published a supplemental rule in the Sept. 2 Federal Register saying foreign governments can continue to submit certifications either in the format that was in use prior to the February rule or the format provided in the Interim Final Rule. The new certification requirements drew strong objections from the Chinese government and some trade attorneys (see **WTTL**, Aug. 8, page 1).

“Some parties contend that it is inappropriate for the Department to impose a certification requirement that, these parties claim, subjects foreign government officials to potential liability from which they are immune, absent limited exceptions, pursuant to U.S. statutory law (e.g., the Foreign Sovereign Immunities Act) and common law,” ITA noted. “In addition, the new certification requirements include language which, certain parties claim, imposes additional, enforceable legal obligations on foreign governments,” it added. “The Department requires additional time to analyze these comments as they relate specifically to the government

certifications, to obtain public views on the comments described above, and to address fully the parties' comments. This supplemental interim final rule is applicable only to foreign government certifications (i.e., it is not applicable to company certifications or representative certifications)," the ITA notice explained.

* * * **Briefs** * * *

SYRIA: OFAC added three more Syrian officials to its specially designated nationals list Aug. 30. They are Foreign and Expatriates Minister Walid Al-Moallem, Presidential Political and Media Advisor Bouthaina Shaaban and Syria's Ambassador to Lebanon Ali Abdul Karim Ali. These officials "are principal defenders of the regime's activities," said Treasury Under Secretary for Terrorism and Financial Intelligence David S. Cohen. Meanwhile, EU Council Sept. 2 followed U.S. lead and agreed to prohibit imports of oil from Syria as well as financial and insurance services for such transactions. It also froze assets of several Syrian individuals and entities. At same time, council agreed to exemption to asset freeze for humanitarian purposes, including for delivery of medical supplies, food or evacuation of foreign nationals from Syria (see **WTTL**, Aug. 22, page 1). Separately, USA*Engage, trade group that represents many large multinational companies and espouses open trade, cautioned against use of unilateral sanctions. Unilateral sanctions in many cases "have been counterproductive and have unintended consequences for American businesses in an increasingly globalized marketplace," the group stated.

POLYESTER FIBER: ITC Aug. 30 made "sunset" determination on 6-0 vote that lifting antidumping orders on polyester staple fiber from Korea and Taiwan would lead to recurring injury to U.S. industry. Textile industry representatives cite this order in objections to lifting duties on fiber under U.S.-Korea FTA.

RAW MATERIALS: China notified WTO Aug. 31 that it will appeal panel report that found its export restrictions on various raw materials to be inconsistent with WTO rules (see **WTTL**, July 11, page 2).

EXPORT ENFORCEMENT: Howard Combs of St. Louis, Mo., former director of business development and support at PPG Industries, agreed to pay \$250,000 to settle one charge of conspiracy to violate EAR, BIS announced Aug. 26. Combs neither admitted nor denied charges. Combs is latest individual caught in wide-ranging conspiracy to export epoxy paint thinner to plant owned by the Pakistan Atomic Energy Commission, which is on BIS Entity List (see **WTTL**, July 18, page 4).

MORE EXPORT ENFORCEMENT: Ram International, freight forwarder in St. Louis, Mo., will pay \$40,000 to settle two BIS charges that it aided and abetted act prohibited by regulations. In 2006, Ram allegedly arranged for export of salvage scrap electrolytic tin plate (ETP) steel, designated as EAR99, to Allied Trading Company of Karachi, Pakistan, which is on BIS Entity List, BIS announced Aug. 16. Ram neither admitted nor denied charges.

MORE EXPORT ENFORCEMENT: Serfilco Ltd. of Northbrook, Ill. agreed to pay \$44,000 to settle eight BIS export charges: four of engaging in prohibited conduct by exporting industrial pumps and pump components controlled for chemical and biological reasons under ECCN 2B350 without required licenses to Russia, Israel and India, and four charges of failure to file shipper's export declarations or Automated Export Systems records, BIS announced Aug. 16. Serfilco neither admitted nor denied charges. Firm previously paid \$65,000 fine and was denied export privileges to Middle East countries in 2003 to settle BIS charges that in 1996 it had violated temporary denial order.

ANTIBOYCOTT: Chemguard Inc. of Mansfield, Texas, agreed to pay \$22,000 civil fine to settle seven BIS charges of violating antiboycott regulations: two charges of furnishing information about business relationships with boycotted countries or blacklisted persons and five charges of failing to report receipt of request to engage in restrictive trade practice or foreign boycott against a country friendly to U.S., BIS announced Aug. 18. From 2004 through 2007, Chemguard engaged in transactions from U.S. to UAE and Oman. Chemguard neither admitted nor denied charges.

SERVICES: Contrary to long-held fears that outsourcing services abroad takes jobs away from U.S. residents, services activities abroad support nearly 700,000 U.S. jobs, says International Trade Commission (ITC) working paper released Aug. 31. The paper, *U.S. Multinational Services Companies: Effects of Foreign Affiliate Activity on U.S. Employment*, finds that "services multinationals' activities abroad increase U.S. employment by promoting intra-firm exports from parent firms to their foreign affiliates. These exports support jobs at the parents' headquarters and throughout their U.S. supply chains," it noted. Of the jobs supported by services investment, almost half -- 367,739 -- were in the category of "royalties and license fees," which included newspaper, periodical, book and directory publishing; software publishing; motion picture and video industries; sound recording industries; and radio and television broadcasts.