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BIS Ready to Accept License Applications for Transferred Items

The Bureau of Industry and Security (BIS) is ready to start accepting export applications for aircraft and gas engines transferred to the Commerce Control List (CCL) from the U.S. Munitions List (USML) even though it will not issue licenses until the regulations implementing the shift go into effect Oct. 15, BIS Under Secretary Eric Hirschhorn said May 15. BIS is willing to work with exporters before the effective date to help them navigate the transfer and have licenses ready when rules become effective, he told the American Conference Institute's annual Global Export Controls Conference.

The first transfers moved numerous items from USML Category VIII (aircraft and associated equipment) to Export Control Classification Numbers (ECCN) in the 9A6xx series. The transfers were published in the April 16 Federal Register but won't go into effect for 180 days from that date.

Hirschhorn said BIS and the Directorate of Defense Trade Controls (DDTC) will continue to roll out final list transfers over the coming months after notifications to Congress and will issue proposals for additional USML categories. A proposal for satellites in USML Category XV should be published by the end of May, he said.

With the reform process well on its way, Hirschhorn said he is planning other changes to export controls, although he emphasized that his ideas have not yet received interagency approval. Among his goals are streamlining the Export Administration Regulations (EAR), which have not been reviewed and updated since 1996. He also wants to complete the CCL "cleanup" already underway and revise the recordkeeping requirements. In addition, Hirschhorn said he wants to amend the rules for "routed transactions" to clarify the responsibility of parties to an export and bring the EAR closer to Census rules. He also wants to address the issue of radiation hardening of semiconductors to avoid bringing civilian chips under USML controls.

CAFC Rejects Patent Challenge against Nintendo's Wii

Merely filing suit in federal court to protect a patent is not sufficient to establish the existence of a "domestic industry" under the unfair import provisions in Section 337 of the Trade Act, the Court of Appeals for the Federal Circuit (CAFC) ruled May 13,

rejecting a patent infringement suit aimed at Nintendo of America's Wii video game. The three-judge appellate panel upheld an International Trade Commission's (ITC) ruling which also rejected the 337 petition for relief filed by Motiva, LLC. A parallel suit in the Seattle U.S. District Court has been stayed pending the CAFC decision.

The CAFC opinion, written by Judge Sharon Probst, noted that the ITC's administrative law judge (ALJ) had agreed with Nintendo that the patent litigation against Nintendo was Motiva's only activity that could be related to commercializing the technology covered by its two patents at the time the complaint was filed. The ALJ found that the suit was not adequately directed toward licensing activities related to the practical application of the patents' claimed inventions, and the ITC agreed with its ALJ.

"Motiva's investment in the litigation against Nintendo could indeed satisfy the economic prong of the domestic industry requirement if it was substantial and directed toward a licensing program that would encourage adoption and development of articles that incorporated Motiva's patented technology," Probst wrote. "Relying on extensive documentary evidence and witness testimony, the ALJ concluded that the presence of the Wii in the market had no impact on Motiva's commercialization efforts or ability to encourage partners to invest in and adopt its patented technology," she noted. Probst also found that the Wii would not have competed with Motiva's intended use of its patent, which was aimed at athletic performance and training and not a game.

"Motiva was never close to launching a product incorporating the patented technology – nor did any partners show any interest in doing so, for years before or any time after the launch of the Wii," Probst wrote. "Moreover, the evidence demonstrated that Motiva's litigation was targeted at financial gains, not at encouraging adoption of Motiva's patented technology. The inventors looked forward to financial gains through Motiva's litigation, not hopes of stimulating investment or partnerships with manufacturers," she said.

Congress Working on Bipartisan Fast-Track Legislation

Democrats and Republicans in the House and Senate have started work on legislation to grant the president fast-track negotiating authority – also known as Trade Promotion Authority (TPA) – and are, for now at least, playing down the tough issues that have divided the parties during previous efforts to enact a TPA bill. Congressional staff are aiming to meet the goals set by House Ways and Means Committee Chairman Dave Camp (R-Mich.) and Senate Finance Committee Chairman Max Baucus (D-Mont.) to have a bipartisan measure ready this summer (see **WTTL**, April 29, page 1). Most of the work being done so far has involved reviewing the last fast-track bill that expired in 2007, reviewing new trade issues that have arisen in the last 10 years and starting to get advice from industry and public groups.

As with previous fast-track legislation, a new measure is expected to have three main parts: a section identifying the goals for U.S. trade negotiations, the process the president must follow for consulting with Congress before launching negotiations, and the legislative process for bringing a bill approving and implementing any trade deal through committees and to the Senate and House floors for up-or-down votes. At this stage, some issues are already beginning to surface that are likely to stir debate over what should be in the legislation. Some members are pressing for the measure to include

the remedying of currency manipulation as one negotiating goal. Democrats are also expected to demand that extension of Trade Adjustment Assistance (TAA) be tied to any fast-track bill.

Some members, who are dissatisfied with the executive branch's consultations over past trade accords, want new legislation to include stronger consultation requirements. With new trade talks, especially coming negotiations with the European Union, expected to deal with regulatory issues in the jurisdiction of committees other than Finance and Ways and Means, bill drafters are also trying to figure out how to bring those committees into the fast-track policy without bogging down the procedure.

Hirschhorn Defends Higher Fences Around More Products

Amidst industry concern that the Obama administration's export control reforms are putting higher fences around less sensitive exports instead of around a "smaller yard," BIS Under Secretary Eric Hirschhorn said BIS will be using its resources to help the State Department conduct overseas investigations. "They have their Blue Lantern program, and we are going to work with them to have joint visits so that if there are Commerce and State items that need to be checked – either a pre-license check or post-shipment verification – maybe there will be people from both agencies or Commerce or perhaps Customs and Border Protection or the FBI or the Foreign Commercial Service to make those visits," Hirschhorn told the American Conference Institute's annual Global Export Controls conference May 15.

"It's a lot easier to follow an F-18 than a bolt for an F-18," Hirschhorn said. BIS has requested "more than \$8 million to increase the number of enforcement officers; to increase the number of analysts; to increase the number of export control officers we have overseas," Hirschhorn acknowledged. "I really can't address the State Department budget. I have enough trouble trying to deal with my own budget," he said.

Industry has become skeptical about the reform program's promise to put "higher fences around a smaller yard" because more money and personnel are being appropriated for BIS enforcement of dual-use items, including the purportedly less sensitive parts and components being transferred from the USML to the CCL, than for State's enforcement for sensitive equipment staying on the USML. Exporters have complained that they are more likely to face civil fines or warnings, even for minor violations, from BIS than from State. This is why State gets more voluntary disclosures than BIS, one industry executive told WTTL.

Comments on U.S.-EU Trade Pact All Over the Map

U.S. trade officials pondering the structure and scope of a U.S.-European Union (EU) Transatlantic Trade and Investment Partnership (TTIP) have their work cut out for them. When the U.S. Trade Representative (USTR) asked for comments in advance of a hearing on the talks, it received a deluge of more than 350 public comments and requests to testify at a public hearing planned for May 29-30. This number does not include over 9000 citizen signatures gathered by one Florida congressman. The range of topics in the

comments includes: investor-state dispute settlement, tariffs on such diverse products as cranberries and footwear, tobacco carveouts, the Barry Amendment, environmental and animal protection regulations, and intellectual property.

The U.S. Chamber of Commerce repeated its call for a comprehensive and ambitious agreement. The Chamber said it “has consistently has supported a ‘no exclusions’ stance in trade negotiations, meaning that the Chamber opposes the exclusion of specific commodities and sectors from liberalization under new trade agreements.”

On the other hand, the American Cancer Society, along with dozens of private individuals, said it supported a carveout of tobacco products so countries can maintain strong regulations. The tobacco industry “is using trade agreements and investment treaties to generate disputes to undermine labeling and packaging requirements and other ways nations have attempted to advance health objectives,” it wrote.

The National Foreign Trade Council (NFTC) covered several topics in its own comments, ranging from timing of completing talks, regulatory cooperation, intellectual property rights and international flows of information to strengthened rules for cross-border investment protection. It noted its four priorities are: (1) boosting participation in the global digital marketplace; (2) enhancing the transatlantic framework for intellectual property rules and protections and bolstering collaboration vis-à-vis third countries and global forums; (3) facilitating global mobility; and (4) improving disciplines on state-owned enterprises.

The Pharmaceutical Research and Manufacturers of America (PhRMA) filed comments including a copy of joint views it filed earlier in cooperation with the European Federation of Pharmaceutical Industries and Associations (EFPIA). “The innovative biopharmaceutical industry strongly supports efforts to address regulatory differences and duplicative requirements that can impede efficiency in global drug development, review and evaluation,” Pharma wrote.

Among the issues it said it wants the U.S-EU talks to address are the EU’s “short-sighted cost containment measures” and “data disclosure policies.” In addition, any agreement should “clarify that if a government entity in the U.S. or EU establishes prices for innovative pharmaceuticals based on prices of the same product in other countries, it should only be used as a reference mechanism to facilitate negotiations with a manufacturer, rather than a rigid or even singular determinant of a product’s price.” “By addressing these key issues and promoting greater regulatory cooperation between the U.S. Food and Drug Administration (FDA) and the European Medicines Agency (EMA), PhRMA believes that the U.S. Government and the European Commission will help spur further pharmaceutical innovation, which will lead to healthier patients and more dynamic economies,” the drug group stated.

The AFL-CIO expressed its support for “positive lists,” which would clearly enumerate what is covered. “Positive lists are less likely to create confusion regarding intended commitments and less likely to subject newly conceived laws and regulations to ‘necessity tests,’ ‘regulatory impact analyses,’ and other similar barriers.” The union also said it opposes “further liberalization in trade in financial services.” The Distilled Spirits Council wrote about several areas in which the TTIP negotiations could “further improve bilateral spirits trade.” Specifically, it said it is “seeking the removal of discriminatory

excise taxes in some EU member states, elimination of remaining tariffs on certain spirits, adoption of a TTIP Spirits Annex setting out regulatory best practices for distilled spirits, and improved rules of origin that reflect current global supply chains.” The Humane Society urged the “harmonizing upward of animal welfare standards specifically in the implementation and enforcement of environmental laws relevant to the TTIP and in the areas of farm and laboratory animals,” it wrote.

Other comments came from companies such as Ferrari, Coca-Cola, Cigna, Fonterra, Federal Express, Volvo Cars of North America and Wal-Mart and from groups like the Teamsters, US Rice Federation, AFL-CIO, Truck and Engine Manufacturers Association (EMA), California Table Grape Commission, Coalition of Services Industries, International Intellectual Property Alliance (IIPA), Tech America, National Association of Manufacturers, and Satellite Industry Association.

Lawmakers Positive About U.S.-EU Trade Talks

A House Ways and Means trade subcommittee hearing May 16 on a U.S.-EU free trade agreement revealed that even lawmakers traditionally opposed to free trade deals seem optimistic about this one. “I think there’s a lot of excitement for it. This is a real opportunity for our longest allies to make an agreement,” subcommittee chairman Devin Nunes (R-Calif.) told reporters after the hearing. “We are really hopeful that the Europeans move as quickly as they can, and we move as quickly as we can, as long as everything’s on the table,” he said.

Nunes noted that some have suggested carving out certain sectors from the talks, while Republicans and Obama administration officials have said everything is up for negotiation. “There are people who want to exclude things; there are people in Europe who want to exclude things. Time is understandable, but [taking] issues totally off the table is not, especially financial services,” he said.

Private-sector witnesses at the hearing represented agriculture, manufacturing and technology. Questions from subcommittee members focused on workforce mobility, financial services, mandatory labeling of genetically modified food and non-tariff barriers such as sanitary and phyto-sanitary (SPS) requirements. These issues also were raised in more than 350 public comments the USTR’s office received on TTIP on the talks ahead of a public hearing it will hold May 29-30 (see related story, page 3).

Separately, the TTIP was discussed at a White House meeting between President Obama and United Kingdom Prime Minister Cameron May 13. “President Obama and I have both championed a free trade deal between the European Union and the United States. And there is a real chance now to get the process launched in time for the G8. So the next five weeks are crucial,” Cameron said at a press conference after the meeting. The G8 meeting is planned for June 1-18 in Northern Ireland.

“To realize the huge benefits this deal could bring will take ambition and political will -- that means everything on the table, even the difficult issues, and no exceptions. It’s worth the effort. For Britain alone, an ambitious deal could be worth up to 10 billion pounds a year, boosting industries from car manufacturing to financial services,”

Cameron said. He played down concerns that plans for a UK referendum on withdrawing from the EU might hurt negotiations on a trade deal. “Well, first of all, on the issue of a referendum, look, there’s not going to be a referendum tomorrow,” he said. “I want to see Britain’s relationship with the European [Union] change and improve. So it would be a false choice between the status quo and leaving,” he added.

“Everything I do in this area is guided by a very simple principle, which is what is in the national interest of Britain. Is it in the national interest of Britain to have a transatlantic trade deal that will make our countries more prosperous; that will get people to work; that will help our businesses? Yes, it is. And so we will push for this transatlantic trade deal,” Cameron stated.

WTO Formally Taps Azevedo for Director-General Post

The World Trade Organization’s (WTO) General Council formally selected Brazilian Ambassador Roberto Azevedo to be its next director-general (DG) at a May 14 meeting marked by praise for the incoming leader and for the outgoing chief, Pascal Lamy. The two received compliments from 52 WTO members and observers Iran and Ethiopia. Azevedo will take up his new post Sept. 1. Four yet-to-be-named deputy directors-general will take office on Oct. 1. There are no set rules for selecting the deputies, although they often represent different regions of the world. They are normally announced in the first month after a new director-general takes office.

Carefully noting that he could not speak as the director-general yet, Azevedo told the General Council that he is determined to “restore the WTO to the role and pre-eminence it deserves and must have,” according to his prepared remarks. “In this instance, the new DG and the members will be ready to immediately start working towards solving the most pressing challenges faced by this organization. Bali, an important event for this organization at this critical juncture, is just around the corner and we have no time to lose,” he said.

Azevedo acknowledged the diversity of the nine candidates that were running for the director-general job and the way the “troika” of three WTO chairmen who facilitated the selection handled their task. “More than anything, the troika carried out its mandate in such a way that the new DG will be in a position to start his term without having to heal the wounds of a divisive and caustic process,” Azevedo said.

Congress, Administration Urged to Tackle Indian Policies

India’s mercantile policies are beginning to rank with China’s as a subject that Congress and the Obama administration should tackle. “India’s recent embrace of innovation mercantilist policies threatens to imperil the historically strong U.S.-India trade relationship,” contends a report issued by a Washington think tank, the Information Technology & Innovation Foundation (ITIF), May 14. “U.S. policymakers should meet this challenge first with dialogue, but then if necessary through a combination of carrots and sticks,” it says. To ameliorate the effect of Indian policies on U.S. industry, an abstract of the ITIF report urges Congress to “begin the process of withdrawing India’s participation from

the Generalized Systems of Preferences (GSP).” In addition, “Congress should immediately direct the U.S. International Trade Commission (ITC) to initiate an investigation of how India’s mercantilist policies damage the U.S. economy” as it did in 2011 with a report on China, the abstract noted.

Former USTR Charlene Barshefsky, on an ITIF call with reporters, said the two largest issues with Indian industrial policy are local content requirements, including forced localization of manufacturing in such sectors as electronics and energy, and forcing companies to surrender intellectual property in the bio-pharmaceutical sector.

She said pending negotiations, including on the TTP and TTIP, provide “ample opportunity” to address the issues in India. This is a “perfect area for the administration to aggressively push innovation policy,” she said. Although India and China are not involved in those talks, “India and China will begin to get the message,” she argued.

CIT Panel Gives Firm Another Shot at Byrd Duties

A three-judge panel of the Court of International Trade (CIT) gave the U.S. subsidiary of a Taiwanese plastics firm May 10 another chance to claim it is eligible to receive Byrd Amendment distributions, citing a 2012 Court of Appeals for the Federal Circuit ruling in *PS Chez Sidney v. ITC* (see **WTTL**, July 16, 2012, page 4). As in the appellate court case, Nan Ya Plastics Corporation of America had taken no position in the antidumping investigation against polyester staple fiber from Korea and Taiwan.

“Under the holding of the Court of Appeals in *PS Chez Sidney*, however, checking the ‘take no position’ box of the questionnaire in the final phase of the ITC’s investigation does not negate a prior expression of support made by the checking of the ‘support’ box in the preliminary phase,” wrote Judge Timothy Stanceu for the CIT panel which also included Judges Gregory Carman and Leo Gordon. The panel vacated an early CIT decision dismissing Nan Ya’s suit to receive a share of collected dumping duties and granted its request for a rehearing of its plea. At the same time, it rejected Nan Ya’s constitutional claims supporting rehearing.

“In deciding to vacate the judgment and to allow an amendment to the complaint, we do not decide that there necessarily is merit in plaintiff’s statutory claims, *i.e.*, the claims that Customs and the ITC violated the CDSOA in denying Nan Ya eligibility for disbursements. Nor do we find any error in our previous dismissal of plaintiff’s constitutional claims, for which the holding of *PS Chez Sidney* did not change the controlling law as established by the holding of *SKF*,” Stanceu explained.

“The fact that this litigation was commenced more than five years ago does not convince us that plaintiff should be precluded from amending its complaint,” Stanceu wrote. “Prior to the decision of the Court of Appeals in *PS Chez Sidney*, it was reasonable for Nan Ya not to accord any particular significance to its expression of support for the petitions in the preliminary phase questionnaire due to its expression of non-support for the petitions in the final phase. It was only after the Court of Appeals issued its opinion in *PS Chez Sidney* that the significance for this case of a preliminary phase expression of support in an ITC questionnaire became clear,” he added.

*** * * Briefs * * ***

JUSTICE: Steve Pelak, Justice Department's first National Export Control Coordinator and principal deputy chief of its Counterespionage Section, will leave government in early June to join D.C. law office of Holland & Hart. When named to his post in 2007, he was given job of enhancing capacity and expertise of Justice prosecutors to handle complex export control and trade embargo investigations and prosecutions. Since then, his team has helped Assistant U.S. Attorneys and investigators around country prosecute scores of trade cases. At Justice for 24 years, Pelak formerly was Assistant U.S. Attorney in D.C. and earlier was in private law practice.

USTR: First furloughs of USTR staffers as result of "sequestration" reductions in federal budget are expect to take place June 13 and 17.

STEEL PIPE: Bristol Metals, LLC, Felker Brothers Corp., and Outokumpu Stainless Pipe, Inc. petitioned ITC and ITA May 16 to investigate alleged dumping of imports of welded stainless pressure pipe from Malaysia, Thailand and Vietnam.

AMMONIUM NITRATE: In 6-0 affirmative "sunset" vote May 13, ITC determined that revoking dumping order on ammonium nitrate from Ukraine would renew injury to U.S. industry, keeping existing duties on these imports.

EXPORT ENFORCEMENT: Volodomyr Ponomarenko, Ukrainian citizen, was sentenced May 2 to 24 months in prison in Brooklyn, N.Y., U.S. District Court for conspiring to violate AECA. He pleaded guilty Feb 22, admitting he attempted to export military-grade night vision equipment to Ukraine without license (see **WTTL**, March 4, page 8).

AUSTRALIA: Exchange of notes in Canberra, Australia, May 16 brings U.S.-Australia Defense Trade Treaty into force. "The creation of an approved community of users makes it easier for our two defense industries to collaborate in developing and fielding new technologies. Australia is already a significant defense trade partner of the United States and one of our closest allies, and this treaty deepens our relationship even further," said Secretary of State John Kerry in statement (see **WTTL**, May 13, page 7).

LIBYA: DDTC updated industry guidance for defense exports to Libya May 10 to explain how exporters can provide certain items to government of Libya for security and disarmament assistance in compliance with UN arms embargo.

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