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## BIS Enforcement Will Move to ICE After Export Reforms

If and when the White House submits and Congress enacts legislation to form a single export licensing agency, the export enforcement functions and staff of the Bureau of Industry and Security (BIS) will be transferred to the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE), the administration reportedly has agreed. BIS special agents would move to ICE regional offices and likely to be assigned to export enforcement as part of DHS's Homeland Security Investigations (HSI) staff.

From the very beginning of the Obama administration's export control reform initiative, it has been expected that BIS, as well as State's Directorate of Defense Trade Controls (DDTC), would cease to exist in their current forms and would be absorbed into the new single agency. The White House, so far, has not revealed where it wants the new licensing agency to be located, but a likely location would be in DHS where it would operate beside Customs and Border Protection (CBP) and ICE.

The move of BIS enforcement staff to ICE suggests that the planned single agency would not have its own enforcement staff and would be primarily a licensing agency. At the beginning of the export reform initiative there was a turf battle between BIS and ICE over which agency would have the lead role in export enforcement for exports subject to the Export Administration Regulations (EAR).

BIS officials beat back an early attempt by ICE to take over that job. As a result, plans for creating a single export enforcement office were revised to give the Export Enforcement Coordination Center (E2C2), which is located in ICE, only a coordination and deconfliction role. Meanwhile, HSI has expanded its export enforcement efforts, benefiting from the availability of some 7,000 ICE special agents for support, 210 domestic field offices and 75 attachés in 48 foreign countries.

## U.S. Not Monitoring Chinese Commitments Well, GAO Says

The problem is not getting China to make commitments to open its markets, the problem is determining whether Beijing has kept those promises, claims a report from the Government Accountability Office (GAO) released Feb. 11 (GAO-14-102). The government

watchdog agency said the U.S. Trade Representative (USTR), Commerce and Treasury should provide clearer and more comprehensive reporting on Chinese implementation of agreements, as well as “a more clearly identified source for consolidated information, which could be an existing report.”

GAO analyzed 10 software commitments China made from 2008-2011 and found the status of implementation could not be clearly identified. “More comprehensive reporting would give Congress and other policy makers a clearer understanding of progress and the role of the dialogues as they continue to assess challenges in the U.S.-China relationship,” the report noted.

In response to a request from Rep. Dana Rohrabacher (R-Calif.), chairman of House Foreign Affairs Committee Europe, Eurasia, and Emerging Threats subcommittee, the GAO identified 298 trade and investment commitments made by China in the U.S.-China Joint Commission on Commerce and Trade (JCCT) since 2004 and the U.S.-China Strategic and Economic Dialogue (S&ED) and its predecessor since 2007. The commitments “range from affirmations of open trade principles to sector-specific actions,” including intellectual property and investment, GAO wrote.

“U.S. agencies track commitment implementation through several means, including outreach to domestic stakeholders, issue-based working groups with China in the JCCT, and consultations in advance of S&ED annual meetings. No single document is used to track implementation, according to U.S. officials,” the report said. “In addition, although there have been calls to use metrics such as exports and sales in developing commitments, agencies identified only one such commitment in the dialogues and cited challenges in identifying appropriate data,” it added.

The agencies themselves had different responses to the GAO recommendations. “In written comments, USTR and Commerce did not directly agree or disagree with the recommendation, but raised several concerns. USTR maintained current reporting is comprehensive and Commerce noted resource constraints,” the report noted.

## **Froman Counters Criticism of Administration Trade Agenda**

USTR Michael Froman gave a speech Feb. 18 that many pro-trade advocates probably wish President Obama had given. In his speech to the progressive Center for American Progress, Froman defended the administration’s trade agenda and tried to counter criticism of labor, environmental and consumer groups that oppose passage of fast-track trade promotion authority and new trade deals with Asia and the European Union (EU). A USTR speech supporting trade agreements, however, is like a speech by the Agriculture secretary backing farming.

Froman used his speech to announce formation of a new Public Interest Trade Advisory Committee (PITAC) that will join the Labor Advisory Committee and the Trade and Environment Policy Advisory Committees to advise on trade negotiations.

“We are calling on NGOs, academics, and other public interest groups to submit their candidates to be founding members of the PITAC,” he said. He also promised to issue a public update on the status of negotiations in the Trans-Pacific Partnership (TPP) talks

and to release a “plain English” explanation of U.S. negotiating objectives in Transatlantic Trade and Investment Partnership (TTIP) negotiations.

Apparently, no one in USTR’s office recognized that the PITA acronym is texting slang for a %#@X problem person. At the same time, some groups dismissed the USTR’s effort.

Creation of the committee tries “to mollify critics by attempting to bring some of the most vocal critics of the lack of transparency ‘into the fold’ (which will include strict confidentiality agreements), hoping that this shuts them up,” wrote Mike Masnick in his blog, TechDirt.com, which often criticizes U.S. trade policies. “It takes an astounding amount of cluelessness to think that the proper response to a lack of transparency is to create another committee with secret access to the negotiating text,” he added.

In his speech, Froman added little on what the administration wants in fast-track trade promotion authority (TPA) legislation except to endorse inclusion of language based on the May 10, 2007, agreement between the George W. Bush administration and congressional Democrats on labor and environment provisions in trade deals. He also said he supports inclusion of provisions on the Internet and digital trade, two issues dear to the heart of new Senate Finance Committee Chairman Ron Wyden (D-Ore.)

“Congress has not updated these instructions since 2002. That was 12 years ago,” Froman said. “Among other things, it predates the bipartisan May 10th agreement on labor, environment and intellectual property rights initiated by House Democrats. It predates much of the explosion of activity on the Internet and the emergence of the digital economy. And it doesn’t address newer issues affecting our ability to compete in the global economy, such as leveling the playing field between state-owned enterprises and our private firms,” he said in his prepared remarks.

Beyond that, however, Froman seemed willing to leave the TPA fight up to Congress. “We are eager for Congress to step forward and update its role in trade negotiations, to make clear which members or committees should be involved, how those consultations should be conducted and what rules of transparency should apply,” he said. “Congress sets the terms. Congress sets the timeline. Congress has the final say,” he added.

Froman responded to criticism of trade deals by saying it was out of date. He emphasized the proposed inclusion in pending trade pacts of provisions on labor, environment, sustainable development and intellectual property protection. “Some of the criticisms I hear of our agenda describe the state of the trade policy in 1994, not 2014. They are criticisms of a trade policy this president has explicitly rejected,” he said. “The question we face is not whether we can roll back the tide of globalization. It is whether we are going to shape it or be shaped by it, whether we are going to do everything we can to ensure that it reflects our values or let the values of others define it, “ he declared.

## **Froman Gives Opaque Statement on TTIP Review**

After two days of meetings with EU Trade Commissioner Karel De Gucht Feb. 17-18, USTR Michael Froman issued a bland statement describing the outcome of their talks on the status of negotiations on a Transatlantic Trade and Investment Partnership (TTIP) deal. Despite his claims of transparency, Froman said little about the details of his

discussions with De Gucht (see related story below). To help parse what Froman's statement meant, WTTL offers this annotated version of his official statement, which is absolutely tongue in cheek and unauthorized by USTR's office:

"I have just wrapped up two days of productive [Would we say otherwise?] discussions with EU Trade Commissioner Karel de Gucht on the Transatlantic Trade and Investment Partnership agreement that the United States and the EU are negotiating. We took stock of the progress [That didn't take long] our teams have made through the first three rounds of negotiations.

"We also reviewed some of the most difficult issues [They're all difficult.] that confront us and charted paths forward [No goals, just a path.] on those and other issues. In particular, we discussed how we will meet our joint objective of eliminating tariffs on all goods we trade between each other [Surprise.]; reducing unnecessary regulatory barriers [Theirs are unnecessary; not ours.] to trade while maintaining appropriate levels of health, safety, and environmental protection [We're not changing anything]; and expanding transatlantic opportunities [You're on your own, buddy.] for our service providers. In addition, we agreed on the important role the public [They vote.] has in continuing to shape our negotiations' objectives.

"We both see opportunities to make substantial progress in the coming months [No rush.], as well as some challenges [Oh boy, do we have challenges]. But our resolve and the political will [We'll give more speeches.] to reach an ambitious [A lot of chapters], comprehensive [A lot of pages.] agreement remain strong."

## De Gucht Acknowledges Challenges in TTIP Talks

Compared to the bland statement from USTR Michael Froman following their talks Feb. 17-18, EU Trade Commissioner Karel De Gucht gave a more candid assessment of the hurdles facing the negotiations on a TTIP during a press briefing after the meetings. Even on the subject of tariffs, which are already low in the two economies, De Gucht acknowledged disagreements over recent tariff-cutting offer the U.S. and EU exchanged the week of Feb. 10.

"Just last week, the EU and the U.S. exchanged offers on the tariff cuts they are ready to make. This presents challenges and we'll have to see where bridging those differences is possible to ensure balance – which is critical for any deal to succeed," De Gucht said in his opening statement.

The EU trade chief also stressed that a TTIP agreement won't address the longstanding dispute over the EU ban on hormone-treated beef. "Let me be very clear again: we do not even discuss hormone beef in TTIP and we will NOT at any point in our discussions. Why? Because hormone beef is prohibited in Europe, and we do not intend to change this. And our American partners know this very well," he said (his emphasis).

De Gucht conceded that efforts to harmonize regulatory policies and practices in a TTIP may be one of the toughest issues in the talks. "Yes, there will be areas where we will not be able to agree. That's ok," he said. "As to the regulatory part of the agreement, we've always said that this would probably be the toughest nut to crack. But even here I see progress," he said. In response to critics who claim a TTIP would lead to the

lowering of standards, De Gucht emphasized that the EU will maintain its current rules. “Our standards on consumer protection, on the environment, on data protection and on food are not up for negotiation. There is no ‘give and take’ on standards in TTIP,” he declared. “Standards are already being set by our different regulatory agencies on both sides of the Atlantic, not by TTIP negotiators,” he added.

Demands in Europe to maintain current rules and standards are likely to steer positions on any TTIP pact of members of the European Parliament, which must approve the agreement. “I am sure that the European Parliament will not in the end approve a trade deal that undermines our European values or the social standards we have built over so many years,” he said. “Ultimately, there is clear democratic oversight every step of the way by all EU member state governments and the European Parliament,” he added.

“There will be no lowering of our safety or consumer standards in Europe to get this deal done. A lot of trade barriers can be removed without even moving a millimeter on them,” De Gucht told reporters. “We are happy to be scrutinized on this: no standard in Europe will be lowered because of this trade deal; not on food, not on the environment, not on social protection, not on data protection. I will make sure that TTIP does not become a ‘dumping’ agreement,” he declared.

Separately, in a speech to the Atlantic Council Feb. 18, De Gucht cited some areas where regulations could need to be harmonized. “If we want to be credible we need to find a critical mass of regulatory solutions for specific sectors,” he said. Among the places where such harmonization might occur are car safety standards, double inspections at pharmaceutical or medical devices plants, international rules on finance, food products approvals and duplicate inspections and product safety. If those subjects are addressed, “then TTIP will have a positive impact on our economies straight away,” De Gucht said.

## **Court Rejects Shortcut Around Remand Decision**

Court of International Trade (CIT) Judge Richard Eaton Feb. 18 rejected a Chinese chair company’s request for another remand of a Commerce new shipper review because the firm failed to exhaust its administrative remedies at the department and neither the “futility” or “question of law” exception applied to its case (slip op. 14-17). After an earlier remand order in the case, which involves folding metal tables and chairs, Commerce had responded to all the court’s objections and released its draft remand decision. Xinjiamei Furniture Co., Ltd., did not file comments on the draft and instead filed its complaint at the CIT.

“Plaintiff has attempted to make no response to the Department’s arguments that it has failed to exhaust its administrative remedies,” Eaton wrote. “Xinjiamei makes no mention in its papers of any response it made to the Draft Results or of any communications with the Department that would presage the objections raised here for the first time. Indeed, plaintiff also appears to have nothing further to add to counter the Department’s position,” he said.

In its remand determination, Commerce adequately defended why it used Indian import data from the Global Trade Atlas (GTA) to determine surrogate values and not advertising data, which Xinjiamei wanted used, the court agreed. The results did not yield an

aberrational average unit value (AUV), Eaton found. Failure to exhaust administrative remedies is not always fatal to a party's objections when it can show that filing comments would have been futile or the case raises a pure question of law, Eaton noted. In this case, however, neither of these common exceptions apply, he ruled.

"Futility can excuse a party from additional practice before the agency when it has already fully presented its arguments to the Department in some form and had those arguments rejected, but not where it declines to present the arguments at all because it believes the agency will be unlikely to accept them," he wrote. "Accordingly, this is not an instance where a plaintiff has fully made their case before the Department and additional practice before the agency would have served no purpose," he decided.

The "pure question of law" exception applies only where the issue can be addressed without further factual development or further agency exercise of discretion, Eaton said, quoting precedents in the *Itochu* case. "Moreover, even where the question is one of statutory construction, exhaustion may be required if the Department's interpretation would be entitled to *Chevron* deferences and the Department's position was not made clear on the administrative record," he wrote. "Plaintiff's objections are not pure questions of law. Indeed, no question of statutory interpretation is at issue here," he ruled, saying Xinjiamei's objections deal with factual questions about the data Commerce used in its determination.

## **ITDS Data System to Be in Place by End 2016, Obama Orders**

First proposed in 1993, initiated by Vice President Al Gore in 1995 and mandated by Congress in 2006, the International Trade Data System (ITDS) will provide a single electronic system of exporting and importing information by the end of 2016, President Obama ordered in a Feb. 19 Executive Order (EO). The long, slow history of ITDS parallels the difficult journey for adopting of the Automated Commercial Environment (ACE), into which ITDS is supposed fit.

In all, some 48 federal agencies are supposed to bring some 119 importing forms and 49 exporting forms into the ITDS to allow for trade documentation to be submitted electronically to the government through a "single window" that will eliminate the need to submit duplicate cargo-related information. After several years of slow progress, ITDS got a boost with enactment of the SAFE Port Act of 2006, and in the last three years has moved significantly ahead, one source reported.

The EO implements the mandate in the Port Act which said ITDS "shall be implemented not later than the date that the Automated Commercial Environment (commonly referred to as 'ACE') is fully implemented." With ACE moving into operation, the December 2016 deadline in the EO appears likely to meet the statute's deadline.

Adoption of ITDS, however, will not have an impact on the export control reform goal of creating a single license application for both defense and dual-use exports. "ITDS implementation will not impact on plans for developing a single licensing form for EAR and ITAR licenses," a BIS spokesperson said in an e-mail to WTTL. He noted that the order covers documentation for the release of imported cargo and clearance of cargo for

export but not applications for permits, licenses or certifications. Administration officials have said work has not even begun yet on creating a single export licensing application. The effort to set up a single information technology system has focused so far on getting State and BIS to merge their internal licensing data systems from SNAP-R and D-Trade into Defense's USXport system. State has already made that transition; BIS isn't expected to be part of it until this summer. Work on a single license won't start until the fall, one official said.

ITDS has been managed by a board of directors chaired by Treasury. Most of the work, however, has been done by Customs. The EO keeps the board in place but creates a newly expanded group, the Border Interagency Executive Council (BIEC), which "will be responsible for improving coordination among the dozens of agencies with import and export requirements and with outside stakeholders. The BIEC is charged with cutting red tape and reducing supply chain inefficiencies, while managing the risks presented by goods flowing in and out of the United States," the order states.

In its final report released Jan. 14 for fiscal year 2013, which ended Sept. 30, 2013, the ITDS board said "changes in the ACE program are expected to lead to continued rapid progress on ITDS." It also reported that CBP and the Census Bureau began last year "re-engineering" the Automated Export System (AES) to transfer "its capabilities to a modern platform, in order to reduce costs and facilitate the addition of ITDS capabilities to AES. The re-engineered AES will be expanded to include additional data elements (now collected on paper) and expanded processing capabilities for ITDS agencies."

The two agencies will also incorporate into AES data elements that will supplant some paper forms currently required by ITDS agencies for reporting exports. "The ability to use the Document Image System (DIS) with AES will allow the electronic transmission of images of the remaining forms required for reporting exports," the report said.

The report also identified challenges facing ITDS implementation. "In the past, competing priorities have resulted in delays in implementing ITDS priorities and ITDS funds being redirected for other uses," it said. "It is critical that progress on the current plan for implementing ITDS functions continue, so that the experience and knowledge developed in the preparation and planning for ITDS are not lost due to retirement and rotation of staff from the ITDS agencies," the report added.

USTR Michael Froman praised Obama's action and said it would help the U.S. implement commitments it made as part of the trade facilitation agreement adopted at the World Trade Organization's (WTO) ministerial in December. "The United States is a leader in facilitating trade around the world, but the President's action ensures that the elimination of red tape begins here at home," Froman said in a statement.

## **Autos, Rice Still Block U.S. Deal with Japan on TPP**

Two of the longest and toughest bilateral disputes between the U.S. and Japan – autos and rice – are continuing to block Tokyo's participation in a Trans-Pacific Partnership (TPP) deal and an overall agreement as well. A meeting Feb. 15 between USTR Michael Froman and Japanese Economic and Fiscal Policy Minister Akira Amari in Washington apparently didn't resolve differences, while a team of U.S. negotiators were in Japan the

week of Feb. 17 trying to make progress. The U.S. and Japan are trying to reach a bilateral agreement on these and other agriculture issues before they are addressed by a TPP deal. “We’re not there yet. We’ve not yet achieved the level of market access or the resolution of auto issues that we need to achieve in order to have a successful outcome with Japan,” Froman said Feb. 18 after a speech at the Center for American Progress.

Froman said the U.S. made it clear in consultations with Japan before it joined the TPP talks that any deal would have to address “the historical barriers to access that have plagued U.S. auto makers to that market over the decades.” So far, talks haven’t achieved that. “We’ve made it clear that a robust outcome on autos is absolutely critical if we’re going to complete TPP with Japan,” he added.

Rice and other agriculture issues are facing the same tough going. “On market access, I’d say the same is true,” Froman said. “We’ve made clear our market access issues with Japan and our negotiators are engaging,” he added.

Critics of Japanese trade policies have questioned whether any trade deal can address the underlying problems blocking U.S. access to the Japanese auto market. Most of the barriers to entry to the market are not the result of government policies or tariffs. Instead, they are due to the closed dealer distribution system controlled by Japanese automakers, the high cost of opening independent foreign dealerships due to land prices and a marketing system where Japanese car salesmen maintain close personal relations with the customers for many years.

Meanwhile, Froman left for Singapore Feb. 20 to hold another round of talks with trade ministers from the other 11 countries participating in TPP negotiations. Their last meeting in December failed to close the deal, and there is no expectation that this meeting will produce a final agreement. “We expect to make meaningful progress in Singapore this month. Negotiators have been working hard and ministers have been engaging on outstanding issues since their productive meetings in December,” Froman said in a statement before leaving D.C.

Before he left town, Froman received a letter from 122 House Democrats, more than half of the party’s caucus, urging him in Singapore to continue his efforts to go “in the right direction on an environment chapter” in TPP. They noted their concerns about leaked text of draft environment provisions, but said they appreciated assurances from Froman that the U.S. will insist on robust environment provisions in any deal (see **WTTL**, Jan. 20, page 7). The Democrats urged Froman to build on the May 10, 2007, agreement between the Bush administration and Democrats on labor and environment rules in trade pacts and to seek new and robust commitments on protecting forests, oceans and wildlife and compliance with multilateral environment agreements.

Froman also received a letter Feb. 20 from 40 trade groups organized as the Business Coalition for TPP. They renewed the call for a comprehensive, world-class TPP deal, but also raised concerns that some countries aren’t offering enough in the talks. “For example, while every nation has sensitive sectors, we are very concerned that neither Japan nor Canada has been willing to offer comprehensive market-access liberalization. According to published reports, both countries seem intent on preserving the status quo for their most protected sectors,” the letter said.

**\* \* \* Briefs \* \* \***

FCPA: Knut Hammarskjold, former CEO of PetroTiger Ltd, British Virgin Islands oil and gas company, pleaded guilty Feb. 18 in Camden, N.J., U.S. District Court to violating FCPA. He and Joseph Sigelman, another ex-CEO, were indicted Jan. 6 for allegedly bribing Colombian official in exchange for assistance in securing approval for oil services contract worth roughly \$39 million (see WTTL, Jan. 13, page 8). Sentencing is set for May 16, 2014. Charges against Sigelman are still pending. PetroTiger's former general counsel, Gregory Weisman, pleaded guilty to bribery and fraud charges connected to same scheme and is awaiting sentencing.

TRADE AGREEMENTS: Depending on what's asked, polls can give opposite results. Example is National Association of Manufacturers poll released Feb. 20 that claims "overwhelming support for Congress and the President to work together to negotiate more trade agreements." This contradicts previous poll finding opposite (see WTTL, Feb. 3, page 5). "The majority of likely voters, regardless of their political affiliation and ideology, are more likely to vote for a candidate who supports such trade agreements," NAM's poll of 1,000 likely voters found.

NAFTA: After meeting in Mexico Feb. 19, presidents of U.S. and Mexico and prime minister of Canada said they are committed to concluding TPP talks. "We seek to set new standards for global trade through the prompt conclusion of a high standard, ambitious, and comprehensive Trans-Pacific Partnership, as we promote further trade liberalization in the Asia-Pacific region," their joint statement noted. At press conference, President Obama addressed TPP opponents. "What I've said to President Peña Nieto and Prime Minister Harper is we'll get this passed if it's a good agreement," he said. "Those who are concerned about losing jobs or outsourcing need to understand some of the old agreements put us at a disadvantage. That's exactly why we've got to have strong agreements," he added; not accusing either Mexico or Canada by name.

WTO: National Foreign Trade Council (NFTC) Feb. 18 released its post-Bali agenda for WTO. Its suggestions include: implement trade facilitation agreement; conclude Trade in Services Agreement; update Information Technology Agreement; address global challenges, including through eliminating tariffs on environmentally friendly goods; setting global standards for foreign investment; enhancing transparency in government procurement, improving global health outcomes; facilitating digital trade; and leveraging WTO's existing infrastructure.

ITAR: DDTC in Feb. 11 Federal Register updated International Traffic in Arms Regulations. Changes include: removing "Managing Director of Defense Trade Controls" as authorized official; updating marking and reporting requirements for UK defense treaty exemption to be consistent with Australia treaty; correcting typo in Lebanon export policy; and correcting "error of syntactical arrangement" regarding export of items subject to ITAR.

TRADE REMEDIES: What's happening at Commerce? In two major cases it found either no dumping or subsidies or very low margins. While finding mostly low dumping margins in preliminary rulings Feb. 18 on oil country tubular goods (OCTG) from eight countries, it found no dumping by imports from Korea. It made a negative preliminary determination Feb. 20 in countervailing duty case on steel concrete reinforcing bar from Turkey, finding de minimis aid. Other OCTG margins ranged from 118.32% for imports from Thailand to 2.65% for Taiwan.

SURROGATE LAND VALUES: Commerce's use of land values around Subic Bay in Philippines instead of from Thailand was acceptable use of its discretion, CIT Chief Judge Donald Pogue ruled Feb. 19, affirming department's remand determination in countervailing duty case against aluminum extrusion from China. He rejected request of Aluminum Extrusions Fair Trade Committee to remand decision again. "The selection of lower infrastructure properties in Subic Bay as a land value benchmark is a reasonable response to the *Zhaoqing* Remand. While the Department selected Subic Bay without reference to the full range of evidence used in some prior comparable cases, its decision is neither inconsistent with the Department's precedent and practice nor unreasonable," Pogue ruled (slip op. 14-19).