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BIS, State to Reject, Revoke Licenses for Russia

As part of new sanctions imposed on Russia April 28, Commerce and State will go beyond their original policy of stopping the approval of certain export licenses to Russia and will now start rejecting pending applications and revoking existing licenses that could help Russian military capabilities. Commerce, State and Treasury also have imposed new sanctions on more than a dozen Russian individuals, companies and banks. The European Union (EU) and Canada have taken similar steps.

Until the latest round of sanctions, the Bureau of Industry and Security (BIS) and the Directorate of Defense Trade Controls (DDTC) were holding new licenses for exports to Russia but were continuing to process them.

"Effective immediately, BIS will deny pending applications for licenses to export or re-export any high technology item subject to the EAR to Russia or occupied Crimea that contribute to Russia's military capabilities," BIS said. "In addition, the Department is taking actions to revoke any existing export licenses which meet these conditions," it added. DDTC issued an identical statement relating to defense exports.

BIS also added 13 companies to the Entity List based on a determination that "they are involved, or pose a significant risk of becoming involved, in activities contrary to the national security and foreign policy interests of the United States." At the same time, Treasury's Office of Foreign Assets Control (OFAC) designated seven Russian government officials, including two key members of the Russian leadership's inner circle, and 17 entities as Specially Designated Nationals (SDNs). Several of the newly sanctioned entities are owned or controlled by Gennady Timchenko or Bank Rossiya, which were placed on the SDN list March 20 (see **WTTL**, March 24, page 1).

Solicitor General Opposes Giving Deference to CIT Rulings

The Office of Solicitor General (OSG), the government's lawyer in Supreme Court cases, urged the high court April 28 to reject a writ of certiorari seeking to overturn the Court of Appeals for the Federal Circuit's (CAFC) policy of conducting *de novo* reviews of rulings from the Court of International Trade (CIT). In its brief in *NSK v. ITC*, the Solicitor General backed the appellate court's position that it does not owe the CIT

deference in antidumping and countervailing duty cases because of the CIT's expertise (see **WTTL**, April 21, page 2). OSG views often strongly influence Supreme Court decisions on whether to grant certiorari. In a long-running legal battle, the CAFC had overturned CIT orders that forced the International Trade Commission (ITC) to reverse its injury findings in the "sunset" review of the antidumping orders on ball bearings from Japan and the United Kingdom. In seeking *en banc* CAFC review of the decision, NSK had argued that the CAFC should give deference to the CIT ruling.

"The Court of Appeals correctly rejected that argument, and petitioners identify no sound reason to adopt an unprecedented rule of deference applicable exclusively in the trade context. Further review is not warranted," the OSG brief said.

The brief claimed the CAFC had followed normal appellate courts practice in the review of lower court decisions on administrative proceeding, including under the Administrative Procedure Act (APA). "Accordingly, when a statute provides for initial review of an agency's action in the district court, the district court and the court of appeals ultimately perform 'the identical task.' '(B)oth courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review'," the OSG wrote, quoting the decision in *Florida Power & Light*.

The government also saw support for the CAFC position in the 1979 Trade Act. "The text and history of the trade statutes confirm that Congress intended the federal circuit to follow that established practice in reviewing the CIT's substantial-evidence determinations in antidumping cases," it wrote. Since 1979, "Congress has repeatedly amended section 1516a, but it has never altered the *de novo* standard," it argued.

"Because the substantial-evidence determination in an agency-review case is an essentially legal one, a court of appeals owes no deference to a district court's resolution of that question," the OSG stated. "Indeed, because 'the agency itself is typically owed deference,' it would be 'anomalous' or even 'analytically impossible' for a court of appeals 'to defer also to another court's review,'" it explained, citing *Novicki v. Cook*.

"Under the prior statute, there was some uncertainty as to whether administrative antidumping determinations could be subject to *de novo* review by the United States Customs Court, the CIT's predecessor," it noted. The 1979 law was intended to exclude *de novo* court review of agency decisions in antidumping and countervailing duty determinations. "Consistent with this goal, Congress required that antidumping determinations like those at issue here be reviewed on the record made before the agency," OSG said. The statute also established that courts would uphold the agency actions unless a determination was unsupported by substantial evidence on the record, or not in accordance with law.

The OSG also disagreed with NSK's argument that *de novo* review of a CIT decision by the CAFC was the sort of "wasteful" and "duplicative" review Congress sought to eliminate in 1979. The office agreed with the appellate court majority that the law did not aim to eliminate duplication at the appellate level. Instead, the change in the law was intended to eliminate the judicial review in place in 1979, under which the Customs Court had often performed *de novo* review of agency findings of fact in antidumping and countervailing duty proceedings. "Although the CIT is a more specialized court than is the federal circuit, it is not the entity with primary responsibility for antidumping determinations. That role is assigned to the expert agencies," the brief said. "By directing

the CIT to apply the substantial-evidence standard, Congress sought to ensure that the court would not duplicate or second-guess the commission's assessment of conflicting evidence. In cases like this one, however, where the CIT rejects the commission's anti-dumping determinations, the purpose and practical effect of petitioner's approach is to require the federal circuit to defer to the CIT's decision rather than to the commission's, thus treating the CIT as the primary decision-maker. That approach subverts Congress's design," the OSG wrote.

USTR Removes Italy, Philippines from Special 301 Report

Acknowledging legislative progress as well as political upheaval affecting intellectual property (IP) protection around the world, the U.S. Trade Representative's (USTR) office put on its kid gloves in its annual Special 301 Report released April 30. This year, it removed Italy and the Philippines from its watch list, and did not name any country as a Priority Foreign Country or add any new country to the list. In February, it removed Israel from the watch list (see **WTTL**, March 3, page 2).

Also in February, the office announced plans to take a look at the entire Special 301 process, responding to criticism of the usefulness and perhaps legality of its self-created watch-list scheme to avoid naming priority countries. The new report didn't mention any change in the process.

Italy earned its removal because the Italian Communications Regulatory Authority's (AGCOM) adopted "long-awaited regulations to combat copyright piracy over the Internet," USTR noted. The AGCOM regulations "provide notice-and-takedown procedures that incorporate due process safeguards and establish a mechanism for addressing large-scale piracy," it said.

In the Philippines, removal "was based on the collective weight of a series of significant legislative reforms, a move toward more effective civil and administrative enforcement efforts, IP authorities' sustained and constructive engagement with the U.S. Government and members of the private sector, and commitments to continue to address remaining concerns," the report noted.

Ukraine has been given special treatment because of the current crisis in the country. In the 2013 report, it was named as a Priority Foreign Country (PFC). This year the USTR said its "acts, policies, and practices are unreasonable and burden or restrict United States commerce." Nonetheless, "due to the current political situation in Ukraine, no action would be taken at that time." For now, "USTR remains committed to addressing the problems that served as the basis for the designation of Ukraine as a PFC, and appreciates Ukraine's recent outreach and ongoing engagement in exploring how to ameliorate these problems and improve its overall IP regime," it added.

The USTR's office reviewed 82 trading partners for this year's report and placed 37 on the Priority Watch List or Watch List. The 10 countries on the Priority Watch List did not change 2014 from 2013, which concerned some in industry.

The agency will conduct out-of-cycle reviews of India, Kuwait, Paraguay and Spain. Despite congressional and industry calls for naming Canada and India as PFCs, USTR officials said they hope to find other avenues for addressing these concerns. "Indian

ingenuity and creativity, from Bollywood to vibrant music, publishing and software businesses, is almost unmatched in the world, but India needs to step up its efforts to ensure IP protection and enforcement in the country supports its own right holders as well as those from abroad,” the International Intellectual Property Alliance said in a statement.

“The lack of progress demonstrated by nations on the Priority Watch List – it did not change between 2013 and 2014 – remains a concern,” said Michelle Wein, trade policy analyst at the Information Technology and Innovation Foundation, in a statement. “ITIF hopes that over the next year steps can be taken to improve the protection of IPR in these 10 countries specifically,” she added.

\$5 Million Reward Offered for Indicted Chinese Exporter

In a move usually reserved for terrorists, the State Department is offering a \$5 million reward for information leading to the arrest of a Chinese national accused of running a network of front companies that allegedly have exported to Iran’s nuclear program. The reward targets Li Fangwei, also known as Karl Lee and 12 other aliases, who was named April 29 in a seven-count superseding indictment in Manhattan U.S. District Court, charging him with conspiracy to violate the International Emergency Economic Powers Act (IEEPA); conspiracy to commit money laundering, bank fraud, and wire fraud.

The federal indictment comes five years after Li, who is still a fugitive, was first indicted by a New York State grand jury in Manhattan for dealing with Iran. Along with the new indictment, Justice, Commerce, State and Treasury have taken coordinated actions aimed at his operations.

According to the indictment, Li controls a network of companies, one of which is LIMMT Economic and Trade Company Ltd. (LIMMT). “Over the years, Li Fangwei’s companies have done a great deal of business with Iran. This business has included selling to Iranian entities various metallurgical goods and related components that are banned for transfer to Iran by, among others, the United Nations, because the items are controlled by the Nuclear Supplier’s Group,” the indictment noted.

Along with the indictment, Treasury’s Office of Foreign Assets Control (OFAC), which previously added Li (in 2009) and LIMMT (in 2006) to its list of Specially Designated Nationals (SDN), added eight of Li Fangwei’s front companies to the list. Those companies in Dalian, China, are: Sinotech Industry Co., Ltd., MTTO Industry and Trade Limited, Success Move Ltd., Sinotech Dalian Carbon and Graphite Manufacturing Corporation, Dalian Zhongchuang Char-White Co., Ltd, Karat Industry Co., Ltd., Dalian Zhenghua Maoyi Youxian Gongsi aka Dalian Zenghua Trading Co., Ltd., and Tereal Industry and Trade Limited.

The Bureau of Industry and Security (BIS) also added eight Chinese suppliers and one Chinese individual with ties to Li to its Entity List. These include: Beijing Aeronautical Manufacturing Technology Research Institute, Chengdu Latest Electronics Technology Company, Dalian Ligong Safety Equipment Company Limited, Fushun Jinly Petrochemical Carbon Company Limited, Liaoyang Carbon Company, Limited, Shanghai Hentong Optics Technology Limited, Weihai New Era Chemical Industrial Company Limited, Xinghe Xingyong Carbon Company Limited, and Zhu Kuibao. Seven months

after the New York State indictment, the Wisconsin Project on Nuclear Arms Control, a proliferation monitoring group, issued a report in December 2009 that claimed Chinese firms were evading OFAC restrictions and continuing to do business in the U.S. under different names. It mentioned LIMMT by name (see **WTTL**, Jan. 11, 2010, page 3).

Service Talks Focused Mostly on Text for Rules

No additional offers were made during talks in Geneva the week of April 28 on a Trade in Services Agreement (TISA), as negotiators spent the bulk of their time discussing regulatory texts on disciplines for specific sectors, including telecom services, e-commerce, financial services, maritime and road transport, and energy services. Over the past year, 21 countries have made formal market-access offers, and the talks focused on consolidating those proposals as well as incorporating the services provisions in numerous free trade agreements (FTAs).

TISA has moved at “lightning speed” by Geneva standards, Deputy USTR Michael Punke said at a program on the talks. The offers are “for the most part ... very high quality” and go “far beyond” what was indicated during the 2008 services signaling conference, he said. Talks are now almost entirely text-based on the rules side, he said.

The U.S. recently circulated a revised offer that includes a financial services component, another trade official said, speaking on background. He said the U.S. has tried to reflect its best FTA-level of commitment for financial services in a hybrid format for the TISA, which explains why it took a while to prepare. It’s “most definitely” an improvement over U.S. commitments in the 1997 General Agreement on Trade in Services (GATS) agreement, he said.

The meeting also revealed a continuing split between the U.S. and European Union (EU) over whether to let China to join the TISA talks. A U.S. decision on whether to bring China into the negotiations is pending, the trade official said. The U.S. has questions about the “level of likemindedness” from China, which hasn’t offered sufficient assurances so far, he said. The EU recently has pressed to allow China into talks. The disagreement wasn’t helped by a Chinese trade official at the program who said high ambition and a broad level of participation are often contradictory objectives.

The EU is “pleased with the level of ambition” and offers on the table, Ignacio Iruarizaga Diez, the EU’s chief negotiator said. Negotiators still have to prove they can move more strongly on standards for market access and rules in areas where agreement couldn’t be delivered in Doha Round negotiations, Diez said.

Negotiators are “well on track” to meet TISA objectives, said Hamish McCormick, Australia’s WTO ambassador. “We’re very confident” that TISA can be delivered within a reasonable time, he said. While much of the TISA work has been based on GATS, some negotiators want to go beyond GATS and base a deal on the liberalization in FTAs, he said.

McCormick said Australia has proposed improving commitments on professional services to enable lawyers, architects and engineers to work overseas. The proposal calls for TISA parties to allow foreign professionals to provide their services without limiting the type of service they can provide or requiring them to set up an office or apply for

residency or live in that country, he said. TISA will cover “new territory” that GATS doesn’t, Mehmet Haluk Ilıcak, Turkey’s WTO ambassador said. “I strongly believe that Mode 4 will be one of them,” he said, referring to rules governing the movement of persons. Work should aim to “correct” the asymmetry between the level of liberalization with Mode 4 and other modes of supply, he said. Many Mode 4 issues were never discussed during Doha talks and the fact that it is on the agenda is “one of the most encouraging things about TISA,” another official said.

EU commitments on Mode 4 are set at the reference level of its best FTA, one EU official said, referring to its FTA with South Korea. He said Mode 4 is important for the success of the negotiation, but wouldn’t comment on its parity with EU commitments in its pending FTA with Canada.

Transparency is another issue being discussed in the talks. Australia is considering making its offer public, McCormick said. Colombia has shared its offer with the private sector, but not yet with the public, Gabriel Duque, Colombia’s WTO ambassador said. The EU is still considering its position on publishing the offer, a trade official stated.

USTR Froman Ducks Finance Committee Questions

Although no one expected a candid, thorough discussion of the details of trade negotiations, U.S. Trade Representative (USTR) Michael Froman refused to make any commitments on the timing or substance of ongoing talks on a Trans-Pacific Partnership (TPP) or other trade deals at a Senate Finance Committee hearing May 1. Froman carefully avoided direct answers to committee questions on a wide range of issues, including transparency, good governance, anticorruption, geographical indicators, access to Japan’s auto market, sanitary and phytosanitary (SPS) barriers, Brazil’s localization policies, agriculture market access, intellectual property, currency manipulation and the failure to enforce old trade deals, even the Keystone XL pipeline.

During the hearing, Committee Chairman Ron Wyden (D-Ore.) said he is fleshing out his own fast-track trade promotion measure, which he calls “smart track,” to reflect his goals for trade negotiations (see **WTTL**, April 14, page 1). But Wyden evaded questions from reporters after the hearing about the timing for his measure, saying only: “We’re working as quickly as possible. I’ve been meeting with colleagues on both sides of the aisle. This is a hugely important issue, and that’s why you get it done right.”

Among issues that Froman addressed were:

Fast Track: “We’re prepared to work with this committee as and when it’s ready to have a legislative process around trade promotion authority to move that forward in a way that can get broad bipartisan support,” Froman said.

Currency Manipulation: Asked if currency has been discussed as part of the TPP negotiations, Froman demurred. “Not as yet.” To which Sen. Charles Schumer (D-N.Y.) said, “I regret that it hasn’t been discussed yet given its level of importance.”

Currency Manipulation part 2: When challenged by Sen. Sherrod Brown (D-Ohio) on whether he was prepared to risk congressional defeat of a TPP deal that doesn’t address currency manipulation, Froman said, “I’m sorry I can’t answer that yes or no. All I can

say is we are continuing to work with Treasury Department and ourselves on this issue, and to see how best to address the underlying concern," he said.

India: "We've been very concerned about the deterioration of the innovation environment in India. We are looking forward for them to get through their election and for us to get to be able to engage the government on that, and have a real dialogue," he noted.

Keystone XL pipeline: "I don't believe we are involved in this," he said.

Transparency: After Wyden made a strenuous argument for more transparency in trade negotiations and asked Froman to commit to releasing the TPP text before President Obama signs any deal, Froman gave a dissembling answer. "Those sorts of timetables have been part of the TPA discussion in the past. There have been a range of practices in the past, and we'd like to work with you on a bipartisan, bicameral basis to figure out what the right timetables are," he said. "Our goal is to release the terms of the agreement as soon as we can. And once we have an agreement, we'll want to make sure that the terms are public as early as possible. But of course that means we have to reach an agreement, and that's where our focus is right now, is trying to reach the best possible agreement for the American people on TPP and on TTIP," Froman said.

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CATEGORY XV: Final rules transferring commercial satellites now controlled under USML Category XV to CCL, which could be published within next month, is likely to be short of what industry had hoped for, sources report. In final interagency drafting process, Defense Department insisted on additional restrictions on transfers, they say. BIS officials have said rule will be "interim final" and open for more public comments (see **WTTL**, March 17, page 1).

EXPORT ENFORCEMENT: John Alexander Talley of Seattle was sentenced April 30 in Tampa U.S. District Court to 30 months in prison for conspiracy to violate International Emergency Economic Powers Act and Iranian Transaction Regulations. Talley pleaded guilty in September 2013 to conspiracy with others to unlawfully export enterprise-level computer equipment to Iran and provide technology support services from 2009 to September 2012 (see **WTTL**, Sept. 23, 2013, page 11). His company Tallyho Peripherals Inc., which conducts business as Enterprise Solutions Systems, was given 12 months' probation.

UNITED KINGDOM: Export Control Organisation (ECO) published Open General Export Licence (OGEL) for Military Goods: A400M Collaborative Programme April 23. OGEL "has been developed to support a collaborative programme with seven partner countries (Belgium, France, Germany, Luxemburg, Spain, Turkey and the UK) and one export customer (Malaysia), to provide airlifter aircraft," it said. License "will permit the export or transfer of the majority of goods, software and technology required for the production and maintenance of A400M, for the end-use of all the listed partner nations and agreed export customer," it said. It will also permit exports to other destinations where sub-contracting may be taking place, provided that ultimately export will be for production or maintenance of A400M, it added.

NICKEL-PLATED STEEL: ITC made final determination on 5-0 vote May 2 that U.S. industry is being injured due to dumped imports of diffusion-annealed, nickel-plated flat-rolled steel products from Japan.

EX-IM BANK: Export-Import Bank May 1 named Catrell Brown vice president for public affairs and Matt Bevens as senior communications advisor. Brown was director of communications at Executive Leadership Council. She earned bachelor's degree from Columbia. Bevens

previously was at Treasury. He graduated from George Washington University. Also at ExIm, Senior Vice President of Communications Daniel Reilly has left to join Edward M. Kennedy Institute for U.S. Senate May 1 as director of communications. Prior to bank, Reilly was national press secretary for House Majority Leader Rep. Steny Hoyer (D-Md.).

RUSSIA v. EU: In WTO battle between Russia and European Union (EU), Moscow struck latest blow April 30, requesting WTO consultations with EU to address complaints that EU's "Third Energy Package" violates General Agreement on Trade in Services. Russians claim program's certification requirements for production, supply and transmission of natural gas or electricity, discriminates against third countries in this sector by restricting access to natural gas and electricity network capacity by transmission service operators (see **WTTL**, April 14, page 9).

FCPA: Avon Products in 10-Q filing with SEC May 1 announced it has "reached an understanding with respect to terms of settlement" with Justice and SEC on charges that it violated FCPA as part of its business in China and other countries (see **WTTL**, Feb. 17, page 5). Based on understanding, company would pay aggregate fines, disgorgement and prejudgment interest of \$135 million, enter into three-year deferred prosecution agreement with Justice and agree to have compliance monitor for 18 months, filing reported. In addition, Avon subsidiary in China would plead guilty to charges.

ITC: Rhonda Schnare Schmidlein was sworn in April 28 as new ITC commissioner for term expiring Dec. 16, 2021. Senate confirmed her March 6 (see **WTTL**, March 10, page 8).

SUGAR: After Congressional Budget Office issued cost estimates for 2014 Farm Bill, which it said would result in \$629 million in spending to support sugar program from 2014 to 2024, Coalition for Sugar Reform said report shows that sugar industry claims that program operates at no net cost to taxpayers is clearly false. "Even as the sugar lobby is pressing for new and unfair import limits on Mexican sugar, the industry is poised to receive taxpayer dollars every single year over the next decade, in flat contradiction to their false claims," group said in statement. "These new CBO projections underscore the need to reform a program that has created a cartel of 14 big sugar companies who are already quite profitable and whose industry is not in need of any more government handouts," it added.

SYRIA: In May 2 Federal Register, OFAC published final rule "amending and reissuing in their entirety" Syrian Sanctions Regulations (SSR) to implement six executive orders issued since 2006. Also included in new SSR is general license authorizing provision of nonscheduled emergency medical services in U.S. to persons whose property or interests in property are blocked.

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