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U.S., EU Lift Sanctions on Belarus Entities

In response to the August release of six political prisoners in Belarus, the U.S. and European Union (EU) Oct. 29 lifted sanctions against more than 180 entities in that country. Treasury issued General License 2 authorizing transactions with nine blocked companies and any entities owned 50% or more by them.

“This limited reprieve from sanctions opens the door to expanded commercial ties for the Belarusian economy. We encourage the government of Belarus to take additional positive steps to improve its record with respect to human rights and democracy,” said State Spokesperson John Kirby at his daily press briefing Oct. 29.

At the same time, the EU suspended for four months the asset freeze and travel ban applying to 170 individuals and the asset freeze applying to three entities in Belarus. “Four persons involved in unresolved disappearances in Belarus remain subject to restrictive measures. The arms embargo also continues to apply,” the EU said in a statement.

At an April meeting with representatives of the U.S. fertilizer industry, State and Treasury officials promised to investigate charges that Belarus had reorganized of its potash industry to avoid sanctions (see **WTTL**, April 13, page 1). The industry had claimed Belneftekhim, a major potash producer, had spun off Belaruskali to circumvent U.S. restrictions. Belneftekhim was one of entities taken off the sanctions list.

With the changes, Treasury will now authorize U.S. transactions with Belarusian Oil Trade House, Belneftekhim, Belneftekhim USA, Inc., Belshina OAO, Grodno Azot OAO, Grodno Khimvolokno OAO, Lakokraska OAO, Naftan OAO and Polotsk Steklovolokno OAO. The department blocked four of those entities in August 2011 for being owned or controlled by Belneftekhim. Belneftekhim itself was designated in November 2007 for being owned or controlled by Belarusian President Alexander Lukashenko.

Ex-Im Renewal Still Faces More Hurdles

As the House was voting Oct. 27 on legislation (H.R. 597) to renew the Export-Import Bank (Ex-Im), Senate Majority Leader Mitch McConnell (R-Ky.) made his view on the fate of the bill clear. “Not in the Senate,” he told reporters. McConnell’s position came

as a majority (127) of House Republicans joined Democrats (186) to pass the bank measure by a vote of 313-118. McConnell has “made it pretty clear he’s not going to bring up the individual bill that passed the House,” Senate Republican Conference Chair John Thune (R-S.D.) told reporters later. If Ex-Im supporters want a vote “they should do it in a conference committee on the highway bill. I think that’s probably for Ex-Im supporters at this point the best path forward,” he added.

“I’m talking about the bigger, long-term highway bill, the three-year deal which passed the Senate,” Thune said. “If it comes out of the conference fairly intact I would guess there would be substantial support for it,” he said. A short-term extension of highway and transportation funding is set to expire Nov. 20. “Hopefully by then the House and Senate will work out the differences between the two highway bills and we can get it reported back. It’s just a function of taking it up on the floor,” Thune said.

Senator Heidi Heitkamp (D-N.D.), who sponsored separate Ex-Im legislation (S. 819) in the Senate, disagreed with the need to attach the bank’s renewal to a transportation bill. “I’ve said all along that we don’t have to attach this to anything. We’ve got the votes to pass it. When this bill comes over we anticipate it to be Rule 14, so it doesn’t get reassigned to committee, it will just stay at the desk,” she told WTTL.

“We get [the bill] off the desk by persuading people that we are losing American jobs today,” she added. “Everyone talks about a vehicle. We have a vehicle. It’s the bill. It has almost a super majority in the House supporting it. We have 64 senators who support it,” Heitkamp told WTTL in an exclusive interview.

The House vote on the measure sponsored by Rep. Stephen Fincher (R-Tenn.) drew more GOP votes than his discharge petition, which forced the House to take up his measure (see WTTL, Oct. 12, page 10). While then-Ways and Means Committee Chairman and now-Speaker Paul Ryan (R-Wis.) voted against it, half the Republicans on Ways and Mean voted for the bill, including three members vying to succeed Ryan as chairman, Reps. Kevin Brady (Texas), Devin Nunes (Calif.) and Pat Tiberi (Ohio).

“This is a profound debate we are having. It is about what kind of economy we are going to have,” Ryan said during the floor debate on the measure. “The biggest beneficiaries of this bank, two-thirds of their money goes to ten companies and 40 percent goes to one company,” he said. “The other excuse, Mr. Speaker, that I just don’t buy is that other countries do this and so should we. We shouldn’t acquire other countries’ bad habits. We should be leading by example. We should be exporting democratic capitalism, not crony capitalism,” Ryan declared.

“Getting the bill to the floor for this historic vote is about something the country also needs more of, and that is bipartisanship,” said Rep. Gwen Moore (D-Wis.), ranking member of the Financial Services Committee’s monetary policy and trade subcommittee. “I am very distressed, Mr. Speaker, to continue to hear the debate that somehow the financing of the Export-Import Bank is contributing to the welfare state and that, if we are to tackle the social welfare programs under Social Security, we have got to get rid of this corporate welfare,” she told the House. “I am distressed to continue to hear that defeating the Export-Import Bank is a backdoor approach to ending Social Security,” she added. “If you listen very carefully, colleagues, you are going to hear this over and over again,” Moore said.

Officials Resist Call to Renegotiate Wassenaar Cyber Rules

U.S. officials disagree with industry on whether to ask the Wassenaar Arrangement to revise its controversial rules on cybersecurity technology. While industry seems united in its recommendation to go back to the regime, some officials feel it would be embarrassing to renegotiate the agreement on these products, since the U.S. hasn't implemented it yet and other members, particularly in the European Union (EU), have already put the rules in place without incident.

Interagency agreement on whether to take the issue to Wassenaar would need to be ready by the week of Nov. 2 to get on the regime's 2016 agenda, one source told WTTL. Although a late submission is possible, any longer delay could keep the issue unresolved until 2017 (see **WTTL**, Aug. 17, page 1). So far there is no interagency agreement.

If the administration decides not to go back to Wassenaar, one option would be to add license exceptions to a revised implementing regulation. Such exceptions could include intra-company transfers or exports to allies, industry has suggested. The United Kingdoms (UK) allows license-free exports of these products within the EU and a streamlined licensing process for exports to Australia, Canada, Japan, New Zealand, Norway, Switzerland and the U.S. This policy could put U.S. companies that face higher export licensing barriers at a disadvantage to their EU competitors.

Complicating a decision are 250 mostly negative public comments BIS received on the May 20 proposed rule. If that weren't enough, the agency held the second of three open sessions to hear more public presentations on the topic at its Information Systems Technical Advisory Committee (ISTAC) meeting Oct. 28. Although BIS said the meeting was supposed to focus on the definition of "intrusion software" and items under Export Control Classification Numbers (ECCNs) 4A005 and 4D004, many speakers at the ISTAC meetings went off-script.

Katie Moussouris of Hacker One described scenarios where getting export licenses for the transfer of this technology would be untenable if not impossible. For example, the global Heartbleed virus "required not just a fix, but also a controlled dissemination of the fix information to multiple vendors in order to distribute the patch and apply the patch all at once to protect the Internet," she said.

"In essence, there's no way for you to know ahead of time who you might need to coordinate with and in what country they may reside when some kind of issue takes place. Unfortunately, that type of issue is happening more and more frequently," she explained. "So the interference of having to potentially navigate export controls restrictions on top of having to deal with the mechanics of a complex synchronized vulnerability disclosure that is vendor to vendor at that point... that kind of complexity is going to impede and essentially break the ability of the Internet to defend itself," Moussouris noted.

Cristin Goodwin of Microsoft questioned whether an export control regulation is the right starting place to manage the dissemination of this type of technology, rather than criminal or civil laws. She also cited the problem of deemed exports, noting the multi-national makeup of security teams at her company. In many cases, she told ISTAC, Microsoft sends mixed national teams "to create that very product or service or security response, and they're going to be dispatched to customers around the world or they're

going to go in aid of an allied government or an U.S. government customer.” Concern about export controls on cyber products also was raised at the Oct. 29 meeting of State’s Defense Trade Advisory Group (DTAG). Although State did not need to propose any changes to the U.S. Munitions List (USML) to implement the new Wassenaar controls, DTAG members said they were worried about implementation of existing controls in USML Category XI.b, which covers electronic products used for intelligence and surveillance. State officials said they were still grappling with the issue.

Azevedo to Add Legal Staff to Speed Dispute Handling

Any Washington trade lawyer who wants to work in Geneva should contract the World Trade Organization (WTO), which will be increasing its legal staff to address the heavy workload in dispute-settlement cases and complaints about the slowdown in the process. At the Oct. 28 meeting of the WTO Dispute-Settlement Body (DSB), WTO Director-General Roberto Azevedo said he will shift three lawyers working in other parts of the WTO to the dispute-settlement staff and hire 15 new lawyers for the division.

Complaints about delays in the dispute-settlement process, in creating panels and the pace of panel work, have been building for over the last year (see **WTTL**, Oct. 5, page 1). “Our dispute settlement system is highly efficient — and remains faster than other international adjudicatory systems the world over. Nevertheless, we can do better,” Azevedo told the DSB, according to his prepared statement.

He conceded it is difficult to attract lawyers to work at the WTO. “As you know, this is a specialized area of practice. People with the knowledge and experience required to lead teams supporting WTO dispute settlement panels are hard to find,” he said.

Azevedo noted that the number of disputes being handled by the WTO has increased and isn’t likely to subside. “2015 has turned out to be the busiest period on record with 30 active panels per month, on average,” he said. Currently, there are 19 panels or arbitrations in the system, including 12 dealing with trade remedies and seven in other areas. There are also three appeals underway and two arbitrations. In addition there are 11 panels being composed. “Since I spoke to the DSB last September we have received 17 new requests for consultations,” he added.

“Through our recent actions on resource reallocation and recruitment, we are likely to shorten the waiting periods for rules cases in the current queue by several months,” he promised. “My aim is to have all the cases in the current queue underway by April next year. Whether this will be possible depends on several elements. And we cannot eliminate the possibility of having a new queue of cases between now and then if many new panels are established in the meantime,” he stated.

The director-general also addressed complaints that some cases are getting preferential treatment and handled more quickly, as well as concerns that members aren’t being informed about the status of their cases. “I have said it before — but let me say it again: there has not been and there will not be any favouritism,” he asserted. “No one is permitted to jump the relevant queue. There are no exceptions,” he declared. To inform members better about the status of cases, Azevedo said the WTO secretariat will post on the WTO website two lists of panels, one with trade remedies and the other with

non-trade remedies disputes, that have been composed and set down in a queue by date of composition. “We will also post a list of panels that have been established but have not yet been composed,” he said. Information on Appellate Body cases also will be posted on the website. “To be clear, this information is already available on the website. But we are going to present it in a more organized, user-friendly manner,” he said.

In another step, Azevedo appointed Deputy Director-General Karl Brauner to consult with delegations to gather views on improving the functioning of the system. “I appreciate the thoughts that you have already shared on this issue, and I am keen to hear your ideas,” Azevedo said.

BIS Won't Give Green Light for Machine Tool Sales to China

U.S. machine tool manufacturers that want to get a piece of the business for constructing China's first commercial airliner won't get advance assurances from the Bureau of Industry and Security (BIS) that their license applications for such sales will be approved or approved quickly. “With something this complicated, with this country, with these items, we just can't give you an abstract answer. It's just not going to happen,” BIS Assistant Secretary Kevin Wolf told the agency's Material Processing Equipment Technical Advisory Committee (MPETAC) Oct. 27.

Wolf sat through a committee presentation on plans the Commercial Aircraft Corporation of China (COMEC) has for constructing the C929 commercial aircraft, a 290-seat plane that would compete with Boeing's 787. COMEC has recently requested bids for composite tape and tow placement machines for use in constructing parts of the plane, including its fuselage. MPETAC members voiced concern that they could lose out on these contracts to European competitors that can get export licenses approved more quickly than they can through BIS.

The ability to get a license and how long it will take are often the first questions the Chinese ask U.S. machine tool firms when discussing this equipment, noted MPETAC Chairman Michael Reese, sales director at Ingersoll Machine Tools. Wolf said he was aware of those questions and sympathetic about the problems U.S. firms face in China, but U.S. agencies need to know about the end-use and end-users of the equipment. “Trust me, when we review these license applications going to China, Russia or any other country and where they are in doubt or take a long time or ultimately are denied, it's generally going to be a function of an end-use or an end-user that is not appropriate,” he said.

“There will never be a situation where I can tell you that all items of X going to China or Russia or Brazil or India or going to any other country will be approved always, because that's why we have a license requirement to stop the transaction and give the government a chance to vet the end-use and end-user,” Wolf explained. “What's driving this, to be blunt, is the risk of diversion to military or missile or UAV [unmanned aerial vehicles] programs in these two countries is high,” he said about China and Russia.

Wolf advised companies to submit a license application to get a definitive answer from BIS. “There are too many parts of the government involved with interests, and there are too many related issues they're after. There's too much intel that needs to be mined,”

Wolf said. “In order to be able to force a decision, companies just need to get the damn application in and then we can have it as a pivot point that gets us on a schedule and process to review the end-use and end-user and related intel,” he added.

U.S. machine tool firms that have been hurt by past U.S. export controls are concerned that foreign competitors, particularly in Europe, will win the first contracts with COMEC for the C929 and lock them out of future sales. Germany’s MAG IAS GmbH has already received a license and shipped a gantry tape layer to COMEC.

France’s Coriolis has sold a tow placement machine to China. Other European firms likely to be in the bidding are France’s Five Forest, Germany’s Brotje, Spain’s MTorres and Macedonia’s Microsam. It may take COMEC two years to decide on the contracts for the C929 machine tools, and it may be 2023 or 2025 before the plane will be ready for the market, MPETAC members noted.

Agencies Moving to Publish Revised Export Rules

BIS and the Directorate of Defense Trade Controls (DDTC) are aiming to move three major export control changes by the end of the year or early in 2016 in an effort to have most of their export control reforms in place by the middle of next year. Final regulations or repropounded rules are in the works for U.S. Munitions List (USML) categories XII and XIV and related Commerce Control List (CCL) entries, as well as final “definition” regulations and proposed changes to Category VIII based on comments the agencies received from industry on its first year’s experience with the new rules, officials report.

While no date has been set yet, the interagency review process has begun for a repropounded version of rules covering Category XII (sensors), BIS Assistant Secretary Kevin Wolf told the agency’s Material Processing Equipment Technical Advisory Committee (MPETAC) Oct. 27. “I think it’s a much, much better proposed second draft,” he said. “I’m not sure we’ll get it out this fall; it’s sort of our goal,” he added. Work on Category XII (toxins) is “behind in the queue,” he said (see **WTTL**, Aug. 31, page 1).

The two agencies also are getting ready to issue final rules to harmonize definitions in the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). To side step the controversy that exploded over changes in the wording of the ITAR “public domain” definition and drew more than 10,000 comments from gun owners, DDTC will issue the final rule without the new public-domain wording, officials told State’s Defense Trade Advisory Group (DTAG) Oct. 29.

The definition rule is “very far along. We’re doing the last stage of clean-up,” Wolf told the MPETAC. “I should hope to have it out for formal OMB [Office of Management and Budget] led interagency clearance and straight to final in the next month or so. That one will probably be out I’m confident this year,” Wolf said.

Wolf said he does not expect any further changes in rules covering Cuba because the administration has gone as far as it can until Congress acts on the remaining trade embargo. Sanctions on Russia will remain in place as long as Russian President Putin “remains in Eastern Ukraine and occupies Crimea, basically turning Crimea into an

economic dead zone,” Wolf noted. “There has been a lot of enforcement, a lot of investigations, a lot of activity into items going to Russia that might have a military use or going to a military end-user,” he reported. He acknowledged that there has been some confusion over controls on items going to oil exploration and production facilities because the U.S. and EU have been using Tariff Schedule B as the basis for controls.

BIS will not have to revise any rules as part of the U.S. commitment to lift nuclear sanctions on Iran as part of the implementation of the Iran nuclear deal, he said. “Because the sanctions are led by Treasury, it’s one of those situations where they handle both exports and reexports. We will follow in their wake,” Wolf explained.

CAFC Rejects Motion to Review Byrd Ruling

The Court of Appeals for the Federal Circuit (CAFC) rejected without comment Oct. 30 motions for en banc rehearing or a panel rehearing of its decision to uphold the constitutionality of Byrd Amendment rules. Only Appellate Judge Evan Wallach, who had called for an en banc review in his dissent of the first ruling, issued another dissent disagreeing with his colleagues (see **WTTL**, June 1, page 2).

In its first May 19 decision, the CAFC affirmed a Court of International Trade (CIT) ruling that the retroactive application of the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) and distribution of funds to domestic firms that supported trade complaints did not violate the Due Process clause of the Fifth Amendment.

“Today, the court compounds an error that it first committed over six years ago when it held that the petition support requirement in the Byrd Amendment did not offend the First Amendment of the Constitution,” Wallach wrote in his dissent in *Schaeffler Group USA, Inc., v. U.S.* He referred to *SKF*, the first case where the constitutionality question arose. “The court should overrule *SKF*, not only because it reached the wrong result, but also because it did so only by producing an untenable savings construction,” he argued.

“Instead, we permit its error to persist as law, as well as reduce a complicated and constitutionally core inquiry about government control of protected speech into an exercise that asks only whether someone checked a particular box, with no judicial suspicion that real life might mandate a different result,” Wallach asserted. One dispute in the case was over whether a U.S. producer could be denied a share of Byrd money distributions just because it had not formally said it supported an antidumping or countervailing duty petition in response to a questionnaire issued by the International Trade Commission.

State Advisors Call for New Committee to Review Regulations

As export control reforms move closer toward their final stage and the melding of defense and commercial export controls, Commerce and State should consider creation of a new industry advisory committee that would review rules that have implications for both sides of industry, members of State’s Defense Advisory Group (DTAG) suggested at their meeting Oct. 29. Because new rules and their implementation have broader implications, the two departments would benefit from industry advice that can look at the

impact of changes for all industry sectors, DTAG members said. Currently, State gets advice on changes to International Traffic in Arms Regulations (ITAR) from the DTAG, while Commerce get advice from its Regulations and Procedures Technical Advisory Committee (RAPTAC).

Each group gives its advice formally to each department on rules under its jurisdiction but can't advise the other department on impact of rules for the other department. The new advisory group could either be a separate body formed jointly by the two departments or a subcommittee drawing from the DTAG and RAPTAC, industry representatives suggested.

The DTAG also called on the Directorate of Defense Trade Controls (DDTC) to issue new guidance on voluntary disclosures to ease the burden companies face when reporting even minor administrative violations of ITAR. Although DDTC rarely imposes penalties for such violations and normally issues only warning letters when receiving notice of them, exporters still face the cost and time to conduct detailed investigations of the incident, prepare written notifications and propose corrective actions, members noted. In addition to more guidance, such minor administrative failures could be handled electronically or through the DDTC website, members suggested.

*** * * Briefs * * ***

OFAC: Gil Tours Travel, Inc. of Philadelphia agreed Oct. 27 to pay \$43,875 to settle OFAC charges of violating Cuban sanctions between October 2009 and August 2010. Travel firm provided Cuba travel-related services for 191 individuals without OFAC authorization, agency charged. Gil Travel did not voluntarily self-disclose apparent violations.

VEU: In Oct. 28 Federal Register BIS updated authorization for Validated End Users (VEU) Advanced Micro-Fabrication Equipment, Inc., China (AMEC) and Applied Materials (China), Inc. (AMC) in China. Specifically, it said ECCN 3B001.a.2 may be exported, reexported or transferred (in country) to AMEC's eligible facilities. In addition, BIS added ECCN 3E001 and one eligible facility in Shanghai to AMC's authorization.

EXPORT ENFORCEMENT: Alexander Posobilov, Shavkat Abdullaev and Anastasia Diatlova were convicted Oct. 26 in Brooklyn U.S. District Court of conspiring to export and illegally exporting controlled microelectronics to Russian military and intelligence agencies. Defendants, who worked at Houston-based Arc Electronics, Inc., and eight others were charged in October 2012. Arc CEO Alexander Fishenko, dual citizen of U.S. and Russia, pleaded guilty Sept. 10 to more than 20 charges, including conspiracy to violate International Emergency Economic Powers Act and Arms Export Control Act, and obstructing justice (see **WTTL**, Sept. 14, page 6). Exported items included analog-to-digital converters, amplifiers, digital signal processors, microcontrollers, static random access memory chips and field programmable gate arrays.

STEEL PIPE: Bull Moose Tube Company, EXLTUBE, Wheatland Tube Company, division of JMC Steel Group, and Western Tube and Conduit filed countervailing and antidumping duty petitions Oct. 28 at ITA and ITC against circular welded carbon-quality steel pipe (CWP) from Oman, Pakistan, Philippines, UAE and Vietnam. Court of International Trade (CIT) upheld in May previous ITC negative remand determination on CWP imports from India, Oman, UAE and Vietnam (see **WTTL**, June 8, page 5).

IRON: TB Wood's Incorporated filed countervailing and antidumping duty petitions Oct. 28 at ITA and ITC against iron mechanical transfer drive components from Canada and China. Products covered by petitions include sheaves, flywheels and bushings used to transmit power within machinery and typically used in belted drive systems, company said in press release.