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## BIS Waiting for State on Definitions Rule

Bureau of Industry and Security (BIS) is waiting on State to go through its intra-agency clearance process before the agencies can issue another pass at a harmonized set of export control definitions, BIS Assistant Secretary Kevin Wolf told his agency's Emerging Technology and Research Advisory Committee (ETRAC) March 10.

"The Commerce part of it is all done, so I don't have an estimated time for arrival on that," Wolf told ETRAC. Wolf also didn't know whether there would be another proposed rule, or it would go straight to final. "Call State; ask them," he said.

State's Directorate of Defense Trade Controls (DDTC) had gotten almost 12,000 comments from gun owners protesting what they call the "prior restraint" provision of the proposed changes to the International Traffic in Arms Regulations' (ITAR) definition of "public domain" (see **WTTL**, July 27, 2015, page 2).

As far as other rules in the queue, the agencies are also working through public comments on transfers of products from U.S. Munitions List Category XIV (toxins). "We got comments back; they're all relatively mild and easy to implement. That will be going into a final rule in the next couple of months, after Congressional notification," Wolf said. "That's pretty much all we can really expect to get done before the election, before the usual slowdown in an election year of regulations. The rest is all up to whoever's in charge next term," he added.

## WTO Panel Airs Dirty Laundry in Washer Dispute

A World Trade Organization (WTO) dispute-settlement panel upheld March 11 some claims and rejected some claims by Seoul about Commerce's use of "zeroing" in anti-dumping and countervailing duty determinations against imports of large residential washers from South Korea. Korea originally asked the U.S. for WTO consultations in

August 2013, and the U.S. blocked Korea's first try in December 2013 to get WTO to create a panel (see **WTTL**, Dec. 23, 2013, page 11). The panel was created in June 2014, but was "delayed as a result of a lack of available experienced lawyers in the Secretariat" in December 2014, the WTO said. The U.S. and Korea now have 60 days to decide whether to appeal any of the panel's findings.

This is the first WTO case dealing directly with Commerce's use of "targeted dumping" methodologies in antidumping investigations. Targeted dumping involves patterns of export prices that differ significantly among purchasers, regions or periods of time and which could be used to conceal dumping that cannot be appropriately taken into account under the standard "average-to-average" methodology for price comparison.

Specifically, the panel upheld Korea's claim concerning the disproportionality finding in both the original determination and redetermination because Commerce "did not conduct the required relational analysis of the amount of subsidy received by Samsung," WTO said in its findings. The panel also upheld Korea's claim that Commerce "failed to take account of the two mandatory factors in its determination of *de facto* specificity," it noted.

In addition, Korea challenged Commerce's determination that the tax credit subsidies are not tied to any particular product. "Korea argued that the subsidies are R&D subsidies tied to Digital Appliance products. The panel rejected this claim because Samsung was free to spend its tax credit cash as it saw fit, irrespective of the particular products for which the eligible R&D expenditure giving rise to the tax credits were undertaken," the WTO said.

Appliance manufacturer Whirlpool filed countervailing and antidumping duty petitions in December 2015 against large residential washers from China. After Whirlpool won the 2013 antidumping order on washers from Korea, Samsung and LG "replaced their dumped washers from Korea and Mexico with dumped washers from China," said Marc Bitzer, Whirlpool president and COO, in a statement.

## **Ms. Malmstrom Goes to Washington**

The tenor of the U.S. presidential election is not influencing the ongoing negotiations of the Transatlantic Trade and Investment Partnership (TTIP), European Union (EU) Trade Commissioner Cecilia Malmstrom repeated frequently during her two-day visit to Washington. If anything, talks between the EU and U.S. negotiators have accelerated to hopefully conclude before Obama leaves office, Malmstrom told reporters March 9.

"Just because there is an election, we can't just stop our activities," Malmstrom said. She later added that "the right kind of trade policy will, I am convinced, be supported by broad majorities in both our systems." The EU is eager to conclude talks by this summer, Malmstrom told reporters. Malmstrom sat down with USTR Michael Froman March 11 to discuss progress made during the 12th round of negotiations in Brussels, particularly on

regulatory practices (see **WTTL**, Feb. 29, page 2). Over the course of her visit, Malmstrom met with Robert Califf, commissioner of the Food and Drug Administration; AFL-CIO President Richard Trumka; Sens. Orrin Hatch (R-Utah) and Ron Wyden (D-Ore.); and delivered a speech at the Peterson Institute for International Economics (PIIE).

In her remarks before a packed audience at PIIE, Malmstrom said that during the 12th round, the two sides had gotten into “detail on sustainable development and labor and environmental rights. We also made significant progress on regulatory issues, in different sectors like cars and medicines for instance, where we try to eliminate unnecessary duplication and so on without lowering standards. And this week negotiators have been discussing our first offers on public procurement.”

“We are not there yet, but we are moving forward,” Malmstrom said. “I remain confident that we can come to an agreement by the end of the year; if we continue the hard work and if we get the substance right. There is no point in agreeing to a ‘TTIP light,’ as some have called it. It’s not on the agenda,” she added.

While Malmstrom expressed confidence in TTIP, the trade negotiations have been the source of protests from labor, healthcare, and environmental workers here and especially in Europe. Trumka and his European counterpart, Luca Visentini, General Secretary of the European Trade Union Confederation, also met in Washington during Malmstrom’s visit. Though Trumka and Visentini called the investment court system proposed by the EU an “improvement over” the traditional investor-state dispute settlement (ISDS) mechanism, both organization heads find it “enormously problematic.”

“There have been massive investment flows in both directions for decades without any such discriminatory provisions, and they are still unnecessary. Investors should act responsibly and respect international guidelines such as those set down by the OECD and the UN,” the two labor leaders said in a statement.

Malmstrom told reporters that the negotiating teams have not negotiated the investor court system yet. She said that she doesn’t expect the proposal to “pass smoothly,” but argued that there is strong support for reform of ISDS in the EU, and it is part of her mandate to push for that solution.

The next round of TTIP negotiations will take place in New York in mid-April. Froman and Malmstrom will meet the week of March 14 in Brussels, in Germany in April and hopefully in May and June, Malmstrom told reporters.

## **Oh Canada! Obama, Trudeau Discuss Trade, Lumber**

President Obama exchanged warm pleasantries and playful banter over the whereabouts of the Stanley Cup with Canadian Prime Minister Justin Trudeau during his visit to Washington March 10. As Canada is a significant trading partner with nearly \$2 billion

worth of goods and services and 400,000 people crossing the border daily, trade was certainly on the agenda with the two world leaders pledging to solve a thorny softwood lumber issue. But three senators had hoped raising the de minimis level also would be part of the trade conversation.

Sens. Richard Blumenthal (D-Conn.), Christopher Murphy (D-Conn.), and Ron Wyden (D-Ore.) wrote to U.S. Trade Representative (USTR) Michael Froman March 4 to highlight the discrepancies between the U.S. and Canadian de minimis threshold. The U.S. threshold to assess tax and/or custom duties on Canadian imports is set to rise from \$200 to \$800 per the Trade Facilitation and Trade Enforcement Act. However, the current Canadian customs de minimis level for online purchases is C\$20 (or C\$200 for Canadian citizens bringing back goods on short trips abroad; C\$800 for lengthier trips).

Since most U.S. goods qualify to enter Canada duty-free per NAFTA, “the low de minimis level is a distinct disadvantage to American companies trying to export to Canada, particularly relatively low value items where either the duty or costs associated with formal entry can effectively kill the sale,” the senators wrote.

They asked Froman to urge Trudeau to increase Canada’s de minimis threshold to match the U.S. level, but at the bare minimum to C\$200. Senators from states that border Canada raised the issue last year in a letter to then-Canadian Ambassador to the U.S. Gary Doer. The senators called the low de minimis threshold “an unnecessary trade barrier” between the two countries.

At a trade event in Washington March 9, UPS President for Global Public Affairs Laura Lane noted her company tried to “advance a minimum standard of getting all the countries to go up to \$200 de minimis” in the context of the TPP negotiations. “You better believe we’re pushing on this issue,” she said. “The perceived loss of duties that they calculate are going to be far overwhelmed by the increased volume in trade they’re going to see, by virtue of just raising their de minimis standard,” she added.

In January 2016, online auction site eBay urged U.S. Ambassador to Canada Bruce Heyman to work with the Canadian government to raise its de minimis threshold to C\$80. Raising the threshold “would bring immediate benefits for U.S. small business exporters,” eBay’s Senior VP for North America Hal Lawton wrote in the letter. Neither Trudeau nor Obama discussed raising de minimis in their White House remarks.

On softwood lumber, Trudeau said he was “totally confident” that the issue would be resolved in the coming months. President Obama echoed the Canadian prime minister. “Our teams are already making progress on it. It’s been a longstanding bilateral irritant, but hardly defines the nature of the U.S.-Canadian relationship,” he said. USTR Michael Froman and Canadian Trade Minister Chrystia Freeland have been ordered by their respective leaders to “intensively explore all options” related to a softwood lumber agreement and reveal their findings within 100 days.

## EU Still Deciding on China's Market-Economy Status

European Union (EU) Trade Minister Cecilia Malmstrom in Washington March 9 denied that the EU is mulling giving China market economy status in exchange for China agreeing to stop flooding European markets with steel.

Article 15 of China's Accession Protocol to the World Trade Organization (WTO) is set to expire Dec. 11, and when it does, China and its supporters believe that the communist country will automatically be granted market economy status (see **WTTL**, Feb. 29, page 4). "It is clear that some of the protocols of WTO expire in December this year so some change needs to be made," Malmstrom told reporters. She explained that any change in China's economy status will go through a "formal, legal process."

"We are analyzing the consequences of doing it or not doing it. We are analyzing whether we can do it partly or whether we can do it with a different [strategy] while maintaining a strong trade defense policy because right here now and in Europe we have a huge steel crisis," Malmstrom said.

Indeed, Commerce slapped duties on cold-rolled steel imported from China. The duties, set at 265.79%, are aimed at punishing China for dumping. Brazil, India, Japan, South Korea, Russia and the U.K. are also subject to duties. AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, Steel Dynamics Inc. and U.S. Steel Corporation were the petitioners for the investigations.

"Granting China market economy status this year would not reflect current economic reality and is the wrong choice for the millions of American and European workers and their families who are facing unfair trade from China. It is critical that the United States and Europe continue to stand together for strong trade enforcement," Sen. Ron Wyden (D-Ore.) said after meeting with Malmstrom.

The steel crisis is related "partly" to overproduction in China, so "with its market economy status, China needs to behave more responsibly to make sure that its over production of steel is not dumped into the global market," Malmstrom said. She declined to give insight into internal discussions on China's status, though said the EU is having "parallel" dialogue with China on antidumping measures.

In response to Malmstrom's comments, China's Foreign Ministry Spokesperson Hong Lei said, "I want to point out that China has been working faithfully to fulfill its obligations as a WTO member since its accession. And as a WTO member, China has every reason to enjoy WTO rights. We hope that the EU, as an important WTO member and a major strength supporting the international rule of law and multilateral trade system, would observe WTO rules, honor its commitment concerning China's accession to the WTO and stop acting unfairly against China."

## BIS Adds ZTE to Entity List for Sanctions Violations

Four years after a senior executive of the firm confirmed it was under investigation for violating Iran sanctions, Bureau of Industry and Security (BIS) March 8 added Chinese telecommunications company ZTE Corporation and three affiliates to its Entity List.

In its Federal Register notice, BIS cited two ZTE documents, one dated August 2011 and one not dated, that “outline a ZTE-developed scheme to violate U.S. export control laws by establishing, controlling, and using a series of ‘detached’ (e.g., shell or front) companies to illicitly reexport controlled items to sanctioned countries without authorization,” it said.

At a House Intelligence Committee hearing in September 2012, ZTE’s senior vice president admitted the long-rumored fact that the company is being investigated for violating U.S. sanctions by selling to Iran (see **WTTL**, Sept. 17, 2012, page 3).

ZTE claimed about 8% of North America’s smartphone market in the fourth quarter of 2015, noted Counterpoint Research. That ranks the company fourth among smartphone makers overall, behind Apple, Samsung and LG. Presence on the Entity List does not preclude selling phones in the U.S., but blocks U.S. manufacturers from selling and exporting parts to ZTE.

“Every listed entity is entitled to appeal their listing,” a Commerce official told **WTTL**, while not commenting on specific requirements for getting removed from the Entity List.

“ZTE is fully committed to compliance with the laws and regulations in the jurisdictions in which it operates. ZTE has been cooperating, will continue to cooperate and communicate with all U.S. agencies as required. The company is working expeditiously towards resolution of this issue,” the company said in a statement.

Specific language in the documents triggered the BIS listing. “[C]urrently our company has on-going projects in all five major embargoed countries – Iran, Sudan, North Korea, Syria and Cuba. All of these projects depend on U.S.-procured items to some extent, so export control obstacles have arisen,” the company wrote in the August 2011 report titled “Report Regarding Comprehensive Reorganization and the Standardization of the Company Export Control Related Matters.”

“At the end of 2010, our company signed a four-party project contract with Iran customer(s), adopting semi cut-off method, i.e., our company provides our self-manufactured equipment to the customer(s) and our company’s cooperating company provides sensitive U.S. procured items to the customer(s),” that document said.

“Once our company violates the relevant US export control provisions [the USG] might carry out civil and criminal punishments against US suppliers, which will lead to increased difficulty for our company to obtain the relevant US technologies and components later,” the undated document noted, which was called “Proposal for Import and Export Control Risk Avoidance.” One affiliate, ZTE Kangxun Telecommunications

Ltd., “was designated by ZTE Corporation to purchase controlled items and provide them to a Chinese intermediary trading company for reexport to Iran,” BIS noted. Beijing 8-Star was assigned “to sign contracts with Iranian clients, make purchases of controlled items, and reexport the items from China to Iran,” the notice said.

Iranian firm ZTE Parsian, which is identified as “ZTE YL” in one of the documents, facilitated “the illicit reexport scheme by providing contracted engineering services to ZTE client(s) in Iran receiving the controlled items,” BIS wrote.

## **Selig Urges Services Firms to Focus on TPP Benefits**

While promoting the general benefits of the Trans-Pacific Partnership (TPP) for services firms, Commerce Under Secretary Stefan Selig addressed industry concerns about the carve-out from TPP’s data localization requirements for financial services.

“What we are trying to most deftly approach is a balancing act, to fulfill our domestic regulatory objectives while advancing our shared goal with industry of supporting a free flow of data,” he said. “That balance is something we are continuing to talk about,” Selig told an event in Washington March 9.

A bipartisan group of 14 senators March 7 wrote to Commerce Secretary Penny Pritzker, Treasury Secretary Jacob Lew and USTR Michael Froman, urging them to “address the gaps in the current approach and adopt a single approach going forward to ensure that we can increase data security and ensure that all U.S. companies benefit from strong rules on cross-border data flows, including a prohibition on data localization requirements.” Industry groups, including the Software & Information Industry Association (SIIA), previously expressed concern about the carve-out for financial services (see **WTTL**, Jan. 18, page 4).

Selig urged firms in attendance to focus on the agreement’s benefits. “I would not lose the light for the candle. The fact is, this is complicated, 12-handed agreement with countries of wildly different sizes and wildly different levels of economic development,” Selig noted. “It is unequivocal that TPP represents an unquestionable win for the American financial services industry. I would try and avoid the nitpicking of trying to imagine by each industry sector, what one particular provision might have been better in the context of a potential negotiation, without the realism of what a 12-handed complicated negotiation really is,” he added.

## **Environmental Policies Have Little Effect on Trade, OECD Says**

While industry, especially in the manufacturing sector, has long criticized environmental regulations for impeding trade and innovation, a new report by the Organisation for Economic Co-operation and Development (OECD) shows that stringent green policies have

had very small effects on exports. “Increasing the stringency of domestic environmental policies does not have a significant effect on overall trade in manufactured goods, but tilts the comparative advantage away from pollution intensive industries. It provides a corresponding advantage in ‘cleaner’ industries,” the OECD noted.

“We find no evidence that a large gap between the environmental policies of two given countries significantly affects their overall trade in manufactured goods. Governments should stop working on the assumption that tighter regulations will hurt their export share and focus on the edge they can get from innovation,” said OECD Chief Economist Catherine L. Mann in presenting the report.

A perfect example could be seen during Canadian Prime Minister Justin Trudeau’s his visit to Washington March 10 (see related story, page 3). Trudeau and President Obama pledged to combat climate change by coordinating on the reduction of methane emissions from the oil and gas sector to 40-45% below 2012 levels by 2025. To that end, the Environmental Protection Agency (EPA) will develop regulations for methane emissions from existing oil and gas sources. Environment and Climate Change Canada expects to publish its proposed regulations by early 2017.

As expected, National Association of Manufacturers Vice President of Energy and Resources Policy Ross Eisenberg criticized the EPA’s regulation plans. “Manufacturers have reduced greenhouse gas emissions by 10 percent since 2005, while our value to the economy has increased by 19 percent over the same time period. Our ability to produce more and grow the economy while lowering emissions is dependent on access to reliable and affordable energy,” he said in a statement.

Not so fast. “Countries with stringent environmental laws suffer a very small disadvantage in pollution-intensive sectors such as steel-making, chemicals, plastics and fuel products. This is compensated by an edge gained in cleaner industries like machinery or electronics. Both effects are tiny compared to factors including market size, the lifting of trade tariffs, globalization and a country’s intrinsic assets,” the OECD noted.

## **On International Women’s Day, Labor Says TPP Hurts Women**

Organized labor believes that the Trans-Pacific Partnership (TPP) will cause women harm globally, AFL-CIO Deputy Chief of Staff Thea Lee and Secretary Treasurer Liz Shuler said on a call with reporters on International Women’s Day, March 8.

Women are more negatively impacted when workers’ bargaining power is undermined, as women tend to be less economically mobile and more reliant on jobs in the apparel sector and in call centers -- jobs that are frequently outsourced, Lee and Shuler said. Women make up two-thirds of minimum-wage workers who will be forced to compete more directly with Vietnamese workers “making less than 65 cents an hour” under TPP. “The vulnerability of women in the global marketplace necessitates that we look at them differently,”

said Lee. Despite protests, TPP trading partners are moving forward with their obligations. The Cabinet of Japanese Prime Minister Shinzo Abe March 8 approved a package of bills that will bring TPP into effect. The Japanese government will begin debating the bills that are needed to change 11 existing laws to bring Japan into compliance with the trade agreement.

The U.S. should not be doing business with countries that are anti-Democratic, lack enforcement capabilities or willpower, and are hostile to women's rights, Lee said. An AFL-CIO report found it "problematic" that the U.S. would enter into free trade agreements (FTAs) with countries like Brunei, which recently passed anti-women legislation calling for the imprisonment of women who have abortions or a child out of wedlock, and Malaysia and Vietnam, which have notoriously bad records on forced labor and human trafficking.

The Labor Department separately found 10 countries with FTAs with the U.S. that use child labor and forced labor in goods production, in violation of international law. "The bad policies of the TPP are another corporate attack on women, and we will continue to fight for policies that lift all women up and recognize the immense contributions we make to the economy," said Shuler.

Lee said that while labor is buoyed by the fact that no leading presidential contender supports TPP, gender lines have not been prevalent. "I think that's one of the frustrations we have here is that working women tend to take a backseat to a lot of the issues and are lumped in with the broader themes," she said.

## **BIS Urges Caution if Exporting to Iraq, Syria**

In case exporters were confused, Bureau of Industry and Security (BIS) posted guidance on licensing requirements for exports to ISIL: In essence, don't do it. BIS noted that Treasury's Office of Foreign Assets Control (OFAC) designated ISIL as a Specially Designated Global Terrorist (SDGT).

"BIS will generally review license applications for exports or reexports to SDGTs under a policy of denial. No license exceptions or other BIS authorizations are available for the export or reexport to an SDGT of an item subject to the EAR. Additionally, the EAR does not make contract sanctity available for export or reexport license applications to SDGTs," the agency wrote in guidance posted March 9.

Along with the guidance, BIS attached a list of ISIL-controlled facilities in Iraq. "BIS advises persons exporting or reexporting U.S.-origin items to Iraq to review Attachment A on a regular basis; it will be updated as necessary. BIS also reminds persons exporting or reexporting U.S.-origin items to Syria of the existing license requirements for all items subject to the EAR, other than food or medicine classified as EAR99," the agency wrote. BIS also noted "that an export, reexport, or transfer (in-country) to geographic areas controlled by ISIL carries a 'red flag' and suggests that you exercise caution and strong

oversight if you opt to engage in an EAR transaction within these areas,” it wrote. BIS “is committed to preventing ISIL from procuring U.S.-origin items, like oilfield equipment, that generate wealth as well as components useful for improvised explosive devices to support terrorist activities,” it noted.

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

OFAC: After almost full year since nomination, Senate Banking Committee in 14-8 vote March 10 confirmed Adam J. Szubin to be Treasury under secretary for terrorism and financial crimes, replacing David Cohen. President Obama nominated Szubin in April 2015 (see **WTTL**, April 20, 2015, page 8). Committee Chair Richard Shelby (R-Ala.) voted no, citing Iran nuclear agreement. “I could not support his nomination today because of his participation in facilitating a deal that I believe is crippling to our national security,” he said in statement. Szubin’s nomination now goes to full Senate for vote. Committee did not vote on any presidential nominees in 2015.

COPPER: Metallurgical Products Company filed antidumping duty petitions March 9 at ITA and ITC against imports of phosphor copper from Korea.

TRADE PEOPLE: Former WTO Deputy Director General Rufus Yerxa will become president of National Foreign Trade Council May 9, replacing Bill Reinsch, who is retiring. He is currently independent consultant and visiting professor at Middlebury Institute of International Studies at Monterey. Yerxa served as deputy director general of WTO from 2002 to 2013. Previously, Yerxa was deputy USTR and staff director of House Ways and Means trade subcommittee.

SDN LIST: OFAC March 8 added Chemplex Corporation Limited and Zimbabwe Fertiliser Company (ZFC Limited) to Specially Designated Nationals (SDN) list. One day later, OFAC removed Atbara Cement Company Limited in Sudan from list.

PERU: Deputy Commerce Secretary Bruce Andrews led delegation of 19 American companies to Peru on healthcare trade and investment mission March 7-9. Focus was on pharmaceutical producers, eHealth solutions, hospital design, construction, operation, management services and information systems.

SOUTH AMERICA: Agriculture Secretary Tom Vilsack will head trade mission to Peru and Chile March 14-18. U.S.-Peru trade agreement from 2009 cut tariffs. Farm and food exports to Peru reached \$1.25 billion in FY2015. U.S.-Chile FTA enacted in 2004 gives U.S. products duty-free access. Exports to Chile reached \$803 million in FY2015.

INDIA: Assistant Secretary of State for Economic and Business Affairs Charles Rivkin leading U.S. delegation of "American Innovation Roadshow" to India with stops in New Delhi, Gurgaon, Ahmedabad and Hyderabad March 14-18. U.S. energy and infrastructure companies will join Rivkin in meetings with local government officials and clean energy entrepreneurs.

CUBA: White House March 11 announced those accompanying President Obama to Cuba March 21-22 will include Commerce Secretary Penny Pritzker, Secretary of State John Kerry, Agriculture Secretary Tom Vilsack and Small Business Administration chief Maria Contreras-Sweet.