

Vol. 36, No. 18

May 2, 2016

Final Night-Vision Rules Will Push Cut-Off Date

Final rules on transfers of products from U.S. Munitions List (USML) Category XII (night vision) likely will not be ready until late summer or early fall, Bureau of Industry and Security (BIS) Deputy Assistant Secretary Matthew Borman told the agency's Sensors and Instruments Technical Advisory Committee (SITAC) April 26.

When asked about whether the Office of Management and Budget would allow publications of new rules so late in an election year, Borman responded, "Our sense is they will be, because ...this is something that's been inter-agency agreed. The goal is to get these out in final by the end of the year." His boss BIS Under Secretary Eric Hirschhorn previously echoed that confidence (see [WTTL](#), April 25, page 2).

The final rules had been expected in June or July. According to industry sources, the delay stems in part from a Defense effort during the inter-agency discussions on the public comments to change the provisions of the proposed rule, returning some products to the USML that might have moved. Also delaying the rule's publication is the formal and informal notification to Congress of any products moving off the USML.

While not commenting on the specifics of the talks, Borman told SITAC those discussions were "frank and productive" and came out with a positive conclusion. "The trend is in the right direction," Borman said. The comments themselves were "generally much more favorable" than the previous round of rules, which generated thousands of pages, he said.

U.S. Steel Files Complaint with ITC Against Chinese Producers

In an unusual use of traditional patent law, U.S. Steel Corporation (USS) filed a Section 337 complaint April 26 with the International Trade Commission (ITC) against dozens of Chinese steel producers and their distributors. This latest petition comes just a week after

an international meeting on the steel sector ended in disappointment when China reportedly refused to cooperate (see **WTTL**, April 25, page 4).

USS contends that the largest Chinese steel producers are employing illegal methods of competition, specifically: conspiracy to fix prices, theft of trade secrets, and skirting duties on imports via false labeling. USS wants unfairly traded Chinese steel products excluded from the U.S. market. The ITC has 30 days to review the petition for relief and decide whether to initiate a case.

“We have said that we will use every tool available to fight for fair trade,” U.S. Steel President and CEO Mario Longhi said in a statement. “With today’s filing we continue the work we have pursued through countervailing and antidumping cases and pushing for increased enforcement of existing laws,” he added.

The United Steelworkers (USW) union supports U.S. Steel’s action with USW President Leo Gerard reiterating comments that “America’s steel sector is under attack by China.” USW made its own political moves April 27 by bringing 700 members to Capitol Hill to lobby against the Trans-Pacific Partnership (TPP) trade agreement. Union members asked for support for the China Market Economy Status Congressional Review Act (H.R. 4927) introduced April 13 by Rep. Rosa DeLauro (D-Conn.). The legislation would require congressional approval to grant China market economy status.

“Our trade deficit with China has now increased to a record \$366 billion dollars. The China Market Economy Status Congressional Review Act is a critical step in ensuring that we do not short sell our economy with a trading partner that does not play by the rules,” DeLauro said in a statement.

Treasury Establishes Currency “Monitoring List” of Trading Partners

While the recently passed Customs bill requires Treasury enhance its analysis of exchange rate policies of major trading partners that fulfill three criteria, the agency stepped back from identifying any one country as meeting all three. However, in its semiannual report to Congress April 29, it did establish a new “Monitoring List,” finding that five partners—China, Japan, Korea, Taiwan and Germany – met two of the three criteria.

The Trade Facilitation and Trade Enforcement Act of 2015 requires that Treasury undertake an “enhanced analysis of exchange rates and externally-oriented policies for each major trading partner that has: (1) a significant bilateral trade surplus with the United States, (2) a material current account surplus, and (3) engaged in persistent one-sided intervention in the foreign exchange market.”

Of all partners, Treasury only identified one that intervened in its currency. “China, Japan, Germany, and Korea are identified as a result of a material current account surplus combined with a significant bilateral trade surplus with the United States. Taiwan is identified as a result of its material current account surplus and its persistent, one-sided intervention in foreign exchange markets. Treasury will closely monitor and

assess the economic trends and foreign exchange policies of these economies,” Treasury noted. “China has intervened heavily in the foreign exchange markets in recent months to support the RMB, after strong downward market pressure triggered by a surprise change in China’s foreign exchange policy last August,” the agency said. “More clarity over exchange rate goals, and that devaluation will not be used to support growth, would help stabilize the market,” it added.

Japan has not intervened in the foreign exchange market in over four years, the report noted. “Current conditions in the dollar-yen foreign exchange market are orderly, and [Treasury] reiterates the importance of all countries adhering to their G-20 and G-7 commitments regarding exchange rate policies,” it added.

“During the second half of 2015 through March 2016, the Korean authorities intervened to resist depreciation of the won during periods of financial market turbulence, selling an estimated \$26 billion in foreign exchange, including activity in the forward and swaps market. This represented a shift from several years of asymmetric intervention to resist appreciation,” Treasury said.

“Today, we learned that five countries have been identified as meeting two of three criteria requiring enhanced action, which can lead to significant enforcement costs to those countries. We will continue to watch this process closely to ensure that the President squarely addresses currency manipulation and stands up for the American people,” said House Ways and Means Committee Chairman Kevin Brady (R-Texas).

House Passes Tariff Relief Bill with Overwhelming Majority

It wasn’t even close. In a vote of 415-2, the House passed the American Manufacturing Competitiveness Act of 2016 (H.R. 4923) April 27. The bill, which includes a new Miscellaneous Tariff Bill (MTB) process for reducing or eliminating duties on imported inputs not available domestically, was received by the Senate April 28.

“While this bill is a victory for manufacturers and consumers, it’s also a victory for transparency. After all, our new MTB process upholds our strong earmark rules and also gives the American people the opportunity to offer their opinion throughout the entire process,” House Ways and Means Chairman Kevin Brady (R-Texas) said in a statement.

Under the proposed legislation, American manufacturers would petition the ITC directly for tariff relief rather than petitioning individual members of Congress, as they had in the past. “This is an important step forward that brings us closer to providing manufacturers across America with much-needed relief from unnecessary border taxes,” said National Association of Manufacturers President and CEO Jay Timmons in a statement.

“Delays in implementing a new MTB process have put us at a major disadvantage compared to global competitors who do not pay this tax, so manufacturers have been raising our voice, and leaders in Congress are now listening,” he added. MTB legislation

last passed Congress in 2010; that measure lapsed in 2012 (see **WTTL**, April 25, page 3). Since then, companies have faced an annual \$748 million tax hike on U.S. manufacturing, which NAM estimates represents a \$1.857 billion loss to the U.S. economy.

“It has been a frustrating six years since this Congress passed an MTB. And it has been even more frustrating for manufacturers across the country. But I believe we’ve reached a sufficient path forward that will ultimately be beneficial for American manufacturers and American workers. It’s more than overdue. I strongly support this bill,” Ways and Means Committee Ranking Member Sander Levin (D-Mich.) said from the House floor.

TTIP Negotiators Consolidate Texts, Avoid Sensitive Subjects

The Big Apple meeting between U.S. and European Union (EU) Transatlantic Trade and Investment Partnership (TTIP) negotiators April 25-29 yielded further consolidation of chapters, but much work remains on some of the most sensitive areas as the clock ticks down on President Obama’s term. The 14th round is tentatively scheduled for July.

EU Chief Negotiator Ignacio Garcia Bercero described the week-long meeting as a “bridging round” in an April 29 statement. The negotiating teams managed to consolidate two texts on regulatory cooperation and good regulatory practices, and made “substantial progress” on the small and medium-sized enterprises (SMEs) chapter and on the customs and trade facilitation front.

Though progress was made on 97% of tariff lines, the remaining 3% - described by Bercero as “the most sensitive” - were not addressed but will be tackled in the next round. U.S. Chief Negotiator Daniel Mullaney added that the two sides “will seek to accelerate the pace of reduction for tariff lines we have already agreed to phase out.”

Prior to the first round of negotiations, nine sectors for cooperation between EU and U.S. regulators were identified. At this latest round, the EU presented its first proposal on pharmaceuticals, details of which will be posted on the European Commission’s website. Among U.S. concerns in this area is the elimination of duplicative inspections.

“Eliminating unnecessary duplication will not only reduce costs for pharmaceutical manufacturers: it will also enable regulators on both sides to devote more attention to inspecting facilities in regions where safety concerns may be more acute, also resulting in benefits for the consumer,” said Mullaney.

On the sensitive subject of public procurement, “it is clear that we need to reach a similar level of progress in access to procurement markets as in tariffs and services in order to move the negotiations to the end game,” Bercero said.

While in Germany for Hannover Messe earlier this week, U.S. Trade Representative (USTR) Michael Froman and European Trade Commissioner Cecilia Malmstrom traded words on the issue of procurement. Malmstrom insinuated that the EU is more transparent. “We have one system for 28 countries where everything is published in one

database in English and there is no 'buy Europe,' no quotas for [SMEs]," she said. Froman responded that U.S. procurements are "completely and totally open to international participation," and though the U.S. could do more, the EU characterization of the U.S.' program is exaggerated.

Per a TTIP "State of Play" document published by the European Commission April 27, consolidation is underway in the following areas: agricultural market access, competition, cross-border trade in services, customs and trade facilitation, e-commerce, financial services, market access, procurement, regulatory coherence, regulatory cooperation, rules of origin, SMEs, state-owned enterprises, sanitary and phytosanitary measures, state-to-state dispute settlement, technical barriers to trade, telecom and trade remedies.

Both the EU and U.S. have submitted proposals regarding sectors, sustainable environment (covering labor and environment), intellectual property rights, and investment protection. The EU has submitted papers on energy and raw materials and a proposal on subsidies. The U.S. has submitted proposals on textiles and apparel, legal and institutional, and a paper on anti-corruption.

"On the EU side we are ready to work hard to conclude these negotiations in 2016, but only if the substance of the deal is right," Bercero said. The objective for the next round would be to consolidate the remaining areas so that EU and U.S. negotiators have only a limited number of "square brackets" to resolve at the political level, he said.

The timeline is supported by President Obama, who addressed the subject in Germany earlier in the week. "The time to complete TTIP is now and I'm here to say that the United States is prepared to make every effort to reach an ambitious, comprehensive and high-standard agreement this year."

Few Surprises in USTR Special 301 Report

In its annual review of the global state of intellectual property rights (IPR) protection and enforcement, the USTR's office named 34 of 73 countries reviewed to its watch lists, as detailed in the Special 301 report released April 27. Per the recently approved customs and enforcement law, the administration, in consultation with USTR, must produce action plans for each of the 11 countries on the Priority Watch List (see **WTTL**, Feb. 29, page 8).

At the unveiling of the report, USTR Michael Froman said he assured film, music and video game industry representatives recently that his office will develop action plans "with concrete benchmarks." However, a U.S. trade official declined to specify what those action plans might look like and when they'll be made public - if at all.

When repeatedly pressed to provide specific details, the trade official told reporters, "According to our statute we'll be developing action plans for Priority Watch List countries and we'll work in close consultation with our congressional colleagues." The trade official did suggest that implementation of the Trans-Pacific Partnership (TPP) presents an opportunity for Asia-Pacific countries to improve their positioning in the annual report.

“For many years we've been talking about persistent challenges of countries that are on the Priority Watch List that also happen to be TPP countries or otherwise, and we carefully crafted TPP [requirements] to cover the raft of issues that we're seeing globally that are impeding creativity and innovation, issues like insufficient protection for trade secrets... the issues that we deal with in the 301 program and in the TPP IP chapter are connected and I think that they work in harmony,” the official noted.

Countries on the Priority Watch List are: Algeria, Argentina, Chile, China, India, Indonesia, Kuwait, Russia, Thailand, Ukraine and Venezuela. All of the countries listed have been on the list for at least one year and many - Russia and China among them - for longer, typically for lack of IPR protection, online piracy, counterfeiting and other concerns.

Twenty-three trading partners were named to the Watch List, including the addition of Switzerland, which USTR described as “generally a strong partner on IP issues,” but has become an “increasingly popular host country for infringing websites.”

For taking “significant steps” to improve IPR protection and enforcement, Pakistan was moved off the Priority Watch List to the Watch List with an out-of-cycle review (OCR) to monitor progress. Ecuador was likewise moved to the Watch List after reinstating criminal procedures and penalties for counterfeiting and piracy. Tajikistan, Belarus, and Trinidad and Tobago were removed from the Watch List. USTR will conduct OCRs of Colombia, Pakistan, Spain and Tajikistan, although the latter two are not on this year's Watch Lists.

Pharmaceutical Research and Manufacturers of America (PhRMA) mostly welcomed the report, but was critical of IP violations in Canada, who remains on the Watch List. The U.S. Chamber of Commerce's Global Intellectual Property Center Executive Vice President Mark Elliot praised the report's findings and urged countries listed in the report to “choose a stronger IP model - not in reaction to a U.S. government report - but as a deliberate investment in the innovative future of their own economies.”

Criticism came from expected quarters. Jeremy Malcolm, senior global policy analyst with the Electronic Frontier Foundation, wrote a scathing piece condemning the Special 301 report as bullying. USTR's “priorities lie with appeasing the special interest groups who pre-write most of the demands that end up in the report; major entertainment companies and the pharmaceutical industry. In the USTR's calculus, the concerns of other stakeholders—such as technology users, cultural institutions, remixers, fans, patients, people with disabilities, libraries and archives, independent creators and innovators—scarcely figure at all,” Malcolm wrote in an April 28 post.

Doctors Without Borders, which has been critical of many U.S. government actions of late, issued its own statement, calling on the U.S. government to “support countries, rather than penalize them, for not bowing to the persistent efforts of the multinational pharmaceutical industry to severely restrict generic competition in India and worldwide.”

House Republicans Urge Renewed ZTE Sanctions

Two dozen House Republicans joined the debate over Chinese telecommunications company ZTE April 27, urging the Obama administration to reconsider its decision to suspend sanctions on the firm. Rep. Robert Pittenger (R-N.C.) and 22 colleagues cited “recent Iranian provocation and aggression” in their letter to Commerce Secretary Penny Pritzker, Treasury Secretary Jack Lew and Secretary of State John Kerry.

“If evidence currently exists to implicate ZTE, we believe it is appropriate for Commerce to take immediate action and re-impose ZTE’s standing on the Entity List,” they wrote. The Bureau of Industry and Security (BIS) added the company and four others to its Entity List in March then quickly suspended part of those sanctions (see **WTTL**, April 11, page 1).

“Especially in light of recent Iranian provocation and aggression, America must send a strong message that we are committed to reversing Iran’s human rights abuses. Our government must hold accountable those who violate the law and enable such abuses through the sale of embargoed technologies to Iran,” the members wrote. “We are concerned that if ZTE is not ultimately punished for its reported misconduct, American export control laws and international efforts to promote human rights in Iran will be weakened,” they wrote.

Change in Statute Comes Too Late for Dumping Decision

A change in the Trade Act to make it easier for Commerce to use adverse facts available (AFA) in antidumping cases came too late to forestall a requirement for the department to corroborate margins in an administrative review. As a result, Commerce had to cut the dumping margin for one respondent stemming from the fourth administrative review of floor-standing metal-top ironing tables and parts from China to 72.29% from 157.68% under a remand order from the Court of International Trade (CIT). Commerce was not able to corroborate the higher rate.

In sustaining the second remand determination, CIT Judge Richard Eaton noted April 28 that the requirement for Commerce to corroborate the separate dumping margin for Since Hardware was eliminated in amendments to the trade statute as part of the Trade Preferences Extension Act of 2015. Specifically, Section 502 of the Act modified the provisions pertaining to the selection and corroboration of AFA rates, he noted.

“As is relevant here, the revised corroboration requirement under Section 1677e(c) now contains an exception under which Commerce is not ‘required to corroborate any dumping margin . . . applied in a separate segment of the same proceeding’,” Eaton wrote. “In addition, the Act provides that when Commerce uses AFA, it ‘may . . . use any dumping margin from any segment of the proceeding under the applicable antidumping order . . . including the highest such rate or margin’,” he explained (slip op. 16-42). Eaton also cited a Court of Appeals for the Federal Circuit ruling in *Nan Ya Plastics Corp. v. U.S.* that said the new amendment does not apply to final determinations that Commerce made prior to

enactment of the law. Unlike the higher margin rate that the court had rejected previously, the department was able “to the extent practicable” to corroborate the 72.29% rate, he acknowledged.

Obama Administration Out in Force at Hannover Messe

For the first time in the 69-year history of the world’s largest trade fair for industrial technology, the U.S. was named the partner country at Hannover Messe. In honor of that distinction, the administration brought its top officials, including President Obama, Commerce Secretary Penny Pritzker and USTR Michael Froman, to Germany April 24-28 to promote American businesses.

More than 350 American companies, including more than 200 small and medium-sized businesses, and economic development organizations were showcased at the fair, which Commerce had hyped for weeks in near-daily emails.

In several speeches given over the course of the show, Pritzker highlighted the EU-U.S. Privacy Shield Framework and applauded Europe’s effort to create a Digital Single Market (see **WTTL**, April 18, page 6). “A well-constructed Digital Single Market with common regulations will make it easier and cheaper for European startups to access the continent’s 500 million customers,” she told the Federation of German Industry’s Economic Forum.

At the fair’s opening night, Obama characterized the completion of the TTIP negotiations as vital to U.S.-EU trade (see related story, page 4). “We trade about \$3 billion in goods and services every single day. We invest more than \$4 trillion in each other’s economies. And all that trade and investment supports around 13 million jobs across our countries. That’s good news,” Obama said. But the bad news is that “there are still too many barriers that prevent trans-Atlantic trade and investment.”

* * * Briefs * * *

HELP WANTED: State’s Directorate of Defense Trade Controls (DDTC) is hiring attorney, as advertised on its website April 22. Agency is looking for attorney with at least seven years of relevant experience related to export controls and administrative law. Previously, DDTC had no general counsel, unlike BIS and other export control agencies. Attorney will harmonize and clear rules and advisory opinions from policy, licensing and compliance divisions.

CANDLES: In 6-0 “sunset” votes April 26, ITC said revoking antidumping order on petroleum wax candles from China would renew injury to U.S. industry.

FALSE CLAIMS: Los Angeles-based Z Gallerie LLC agreed April 27 to pay \$15 million to settle government complaint in Savannah U.S. District Court under False Claims Act. Suit claimed company engaged in scheme to evade antidumping duties on wooden bedroom furniture imported from China from 2007 to 2014 by misclassifying as “grand chests” and “hall chests.” Whistleblower Kelly Wells, online furniture retailer, will receive \$2.4 million as her share of settlement. “Our intent was never to defraud the Government or evade customs duties. As a small company

navigating a complex set of import rules and trade laws, there is confusion about how the Government's antidumping order applies to certain categories" of furniture from China, Z Gallerie spokesperson wrote in email to WTTL.

CATFISH: In report (GAO-16-580T) released April 27, Government Accountability Office (GAO) again warned of potential duplication due to provisions moving regulatory responsibility for catfish import inspection to USDA Food Safety and Inspection Service (FSIS). Repealing provisions "could save \$14 million annually based on the agency's estimate," GAO noted. "With this being the tenth occasion the GAO has featured USDA catfish inspection, we can find no other single federal program that has been targeted as many times," said National Fisheries Institute Communications Manager Lynsee Fowler in statement.

AGOA: Per Trade Preferences Extension Act passed in June 2015, USTR in Federal Register final rule April 29 established petition process to review sub-Saharan African countries' eligibility for African Growth and Opportunity Act (AGOA). New process supplements annual (normal cycle) request and allows any interested party to submit petition at any time. USTR received no public comments on interim rule published in March (see **WTTL**, March 21, page 9).

TRADE SECRETS: House passed Defend Trade Secrets Act (S. 1890) April 27 in 410-2 vote. Bill amends Economic Espionage Act of 1996 "to create a private civil cause of action for trade secret misappropriation." Statute of limitations is five years from date of discovery of misappropriation. Senate passed same bill April 4 in 87-0 vote (see **WTTL**, April 11, page 12).

CHINA: Eighth session of U.S.-China Strategic and Economic Dialogue (S&ED) will take place in Beijing in early June, Treasury and State announced April 26. Secretary of State John Kerry and Treasury Secretary Jacob Lew will meet with Chinese State Councilor Yang Jiechi and Vice Premier Wang Chang. S&ED will focus on "a wide range of bilateral, regional, and global areas of immediate and long-term economic and strategic interest," State said.

BELARUS: Treasury April 29 extended authorization of transactions with nine blocked companies in Belarus and any entities owned 50% or more by them until Oct. 31 (see **WTTL**, Nov. 2, page 1).

SRI LANKA: USTR announced five-year U.S.-Sri Lanka Joint Action Plan to Boost Trade and Investment April 28. Objectives include: reforming country's trade and investment regime; improving export competitiveness; developing new markets; promoting greater interaction between business communities; greater utilization of U.S. tariff preference arrangements; strengthening of worker rights and promotion of sustainable manufacturing practices; and increased mobilization of all sectors of society, especially women, in business and trade.

NDAA: House Armed Services Committee passed FY17 National Defense Authorization Act (NDAA) in 60-2 vote April 28. Final version included language on negative impact of potential Wassenaar controls on cybersecurity items. Bill directs Defense secretary to brief full committee on "ways in which these controls could impact departmental operations, with a specific eye to international partners," said Rep. Jim Langevin (D-R.I.), who authored language, in statement.

EXPORT ENFORCEMENT: UK citizen Ahmad Feras Diri entered plea agreement April 21 in Scranton, Pa., U.S. District Court to conspiracy to export laboratory equipment, portable gas scanner, flowmeters and other items used to detect chemical warfare agents to Syria without licenses. He originally pleaded not guilty in November after extradition from UK (see **WTTL**, Nov. 16, page 9). Harold Rinko of Hallstead, Pa., pleaded guilty in September 2014 in same court to related charges and sentencing is set for May 12.