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Administration Takes Major Step Toward Export Control Reforms

The Obama administration took a major step toward implementation of its Export Control Reform Initiative March 7, sending Congress the first notifications on proposed moves of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL) and a set of regulations to put the reforms into effect. President Obama also issued a promised executive order March 8 that attempts to avoid potential double-licensing requirements after the transfers, gives Commerce authority to send Congress reports on major defense equipment licenses and consolidates in State responsibility for brokering services for temporary and permanent arms imports (see **WTTL**, Feb. 18, page 10).

The first formal notifications to Congress under Section 38(f) of the Arms Export Control Act (AECA) covered items in USML Categories VIII (aircraft) and XIX (gas turbine engines). Under the act, the administration has to wait 30 days before making the transfers and issuing final orders. To block the transfer, Congress would have to pass legislation that the president would have to sign prohibiting the transfers, a highly unlikely move.

The executive order, which replaces one issued in 1977 by President Ford, consolidates brokering requirements for temporary and permanent arms imports which previously were divided between State and Justice's Alcohol, Tobacco, Firearms and Explosives Bureau. It would also authorize State to continue licensing parts and components transferred to the CCL when they are to go with defense items still licensed by State, usually under Trade Assistance Agreements.

The order also attempts to provide legal support for giving Commerce authority to send Congress notifications of export licenses for firearms are on the U.S. Munitions Import List, as well as "Major Defense Equipment." In addition to the USML-CCL transfers, the administration sent Congress final versions of a set of regulations to implement the transfers. Known among regulators as "The Beast," the package of rule changes includes a new definitions of "specially designed."

Court Asks Tough Questions at Oral Arguments on Zeroing

During oral arguments March 7, three judges on the Court of Appeals for the Federal Circuit (CAFC) jumped in quickly with tough questions about whether Commerce has

provided an adequate explanation for why it continued to use the “zeroing” methodology in administrative reviews of antidumping cases but had stopped using it in original investigations. The panel was hearing an appeal by Union Steel, challenging a decision by the Court of International Trade (CIT) that accepted the department’s explanation of the difference. Since the CIT ruling by Judge Jane Restani, other CIT judges have also affirmed Commerce’s explanations (see **WTTL**, Feb. 18, page 10).

Commerce ended its use of zeroing in reviews to comply with a World Trade Organization (WTO) ruling that the practice was incompatible with its trade rules. In addition, the International Trade Commission (ITC) voted Feb. 15 to terminate the antidumping order on Union Steel’s imports in a “sunset” review determination. Nonetheless, several antidumping reviews remain in the limbo between the old and new policies and are awaiting a CAFC decision to find out if they can get their duty payments revised.

As soon as attorney Don Cameron, with Morris, Manning and Miller, which represents Union Steel, began explaining why Commerce’s justification was no different from its previous explanations and wasn’t adequate, Judge Alan Lourie interrupted him to say that previous rulings only said Commerce had to give a good reason for the differences. That’s “the crux of the appeal,” he said. Judge S. Jay Prager then said, “The fact that they are consistent tells us that maybe they are right.”

Later, Judge Evan Wallach pressed Cameron on whether the case depends on statutory interpretation or falls under the so-called *Chevron* rule, which gives agencies discretion to interpret their laws under certain conditions. “It’s not just a matter of statutory interpretation,” Wallach said. Cameron argued that the same provision of the trade act applied to both investigations and reviews and the Commerce had treated both types of cases the same for over 20 years until the department changed its policy after the WTO ruled zeroing impermissible in investigations and then in administrative reviews.

Misha Preheim, a Justice trial lawyer, urged the court to uphold the CIT ruling. He claimed the department’s explanation on remand was not the same as it gave in another case, *JTEKT v. U.S.*, where it explained its reasoning in two paragraphs. “Here in 20-plus pages it went into exhaustive detail as to why those two comparison methodologies matter, make a difference,” Preheim said.

Jeffrey Garrish, with Skadden Arps, which represents U.S. Steel, said the court has previously ruled “it is permissible to use different methodologies in different comparisons, but it found that was consistent with congressional intent.” Attorney Tim Brightbill with Wiley Rein, which represents Nucor, also noted past court rulings giving Commerce discretion to interpret the statute and come into compliance with WTO rulings.

Sanctions Are Hurting Iran, GAO Reports

Congress is likely to find encouragement to enact more sanctions on Iran in reaction to a Government Accountability Office (GAO) report that says existing laws and executive orders are hurting Tehran. “Experts and U.S. officials have indicated that the sanctions have created a number of difficulties for the Iranian economy and that the financial sanctions have limited Iran’s ability to conduct trade and finance,” the GAO said in a report (GAO-13-326) sent Feb. 25 to the Senate Homeland Security Committee. “Following the

enactment of sanctions beginning in 2010, Iran's oil production, oil export revenue, and gross domestic product (GDP) have declined relative to comparable countries, and inflation has increased," the GAO said. "According to our analysis of IMF data, Iranian oil export revenue is estimated to have declined by approximately 18 percent between 2010 and 2012, while peers' combined oil exports revenues are estimated to have increased by more than 50 percent over the same time period," the report said.

"Open sources report that Iran is selling oil at a discount to a number of customers, and is accepting other countries' currencies as payment, which may limit its ability to use the revenue for anything other than purchasing products in those countries," the GAO reported.

"For example, open sources reported Iran has entered into barter agreements with countries including India, exchanging oil for food, medicine, and commercial products in lieu of using traditional payment methods. According to an international energy market expert, while the barter arrangements allow Iran to continue selling oil to other countries without accessing the international financial institutions, such arrangements may also limit Iran's ability to receive the full market value of its oil," it said.

China Joins ITA Negotiations, as Progress Made on List

As WTO negotiators agreed to cut the list of products that may be covered by a new Information Technology Agreement (ITA), they also are gearing up to deal with expected proposals from China, which joined the latest round of talks (see **WTTL**, March 4, page 7). The Chinese are likely to bring forward "some of its interests" for ITA meetings planned for the week of March 18, according to one source in Geneva. The Chinese did not speak much in the latest talks, but "they showed more leg," another source reported.

Deputy USTR Michael Punke called the work on the ITA "one of the bright spots in Geneva today." Since the talks began last May, there has been "a very steady, very workmanlike progression, where an ever-expanding so-called 'core group' are getting together and negotiating on a regular basis a list of items that, if successful, will be available for trade on a duty-free basis," he told the Washington International Trade Association March 7.

China's participation was a "turning point," in the talks, one trade negotiator said. Beijing had been "waiting and watching" the talks because the list of proposed items was too large, he suggested. The shape of the deal will be much clearer after China, which is a "very big player," reveals its interests, he said. While China may propose some additional changes, negotiators say they hope the list will be cleaned up and ready to go by the end of March. Discussion in the corridors indicated concern that China will come up with a very low number of products for coverage, one negotiator told **WTTL**.

In the latest round of technical talks, negotiators cut some 70 products off the list of items proposed for inclusion in a new ITA. Some countries continue to keep products on the list as bargaining chips, one source said. Korea, for instance, has strong concerns with some medical devices and has kept some home appliances on the list, he noted. It will be "very disappointing" if China doesn't produce a list for the meeting this month, he said. Flat-panel televisions, a key demand by U.S. industry, are still on the list, one source reported. This is a sensitive sector for the European Union, it but wasn't

challenged in the meetings. The Philippines and Thailand agreed to cut some the products they had proposed. Japan removed its last home appliances.

Farm Groups Question Goals for U.S-EU Trade Talks

As expected, agriculture has arisen quickly as one of the toughest issues that will face negotiations on a U.S.-European Union (EU) free trade agreement (FTA). A coalition of 64 farm groups wrote to U.S. Trade Representative (USTR) Ron Kirk March 4, raising concerns about how agriculture issues will be handled in upcoming talks, focusing particularly on how fast changes in farm policies would be implemented, how rules on sanitary and phyto-sanitary (SPS) will be addressed and EU demands for protecting geographic indications (GIs) (see **WTTL**, Feb. 18, page 3).

The letter questioned language in the report of the High-Level Working Group (HLWG), which recommended the launch of negotiations, saying some provisions of an agreement would “evolve over time” and only “enable a further deepening of economic integration.” The farm organizations said they “are compelled to express some apprehension” over the language.

“Clearly, an agreement that is allowed to evolve to meet new demands is welcome, but the idea should not be used as a means of avoiding critical decisions in certain areas,” the groups wrote. “Accordingly, we seek your assurances that this is not the intent of this language, or of the U.S. and EU negotiators,” they added. The letter also said they “are very concerned” by recent statements by EU officials raising doubts about whether the EU has any real interest in dealing with SPS issues. While protection for some GIs is legitimate, they said the EU wants to reserve names that have been in common use for many years. The FTA “should not become the platform for the EU to gain legitimacy for its objectives on this and other such protectionist measures,” the letter said.

U.S. Businesses in China Report Second Year of Declines

As China resets its growth projection for 2013 to 7.5%, U.S. firms doing business in China report that their sales, profitability and margins declined in 2012 for the second year in a row. “Although U.S. companies in China continue to find success, a leveling off in performance reflects not only an increasingly complex and challenging domestic market but a Chinese economy slowed by China’s continued transition away from export and investment led expansion to one sustained by consumption and services,” said the American Chamber of Commerce in Shanghai’s 2012 Business Climate Survey Feb. 28.

“The reality of the new normal is U.S. managers should no longer expect China’s economy to grow at the same double-digit rates of years past. Steadily rising costs, human resource constraints and an increasingly competitive business environment – issues that continue to be top challenges for U.S. companies in 2012 – will also be the rule rather than the exception in the years ahead,” the report said. Regulations and Chinese bureaucracy are also problems. “U.S. companies continue to struggle with bureaucracy and an unclear regulatory environment, which was ranked the number one and two regulatory challenges in this year’s survey, respectively,” the report noted. “China is a tough place to do business, it always has been, and this year’s survey results quantify that,” said Kent Kedl, managing director, greater China and North Asia, for Control Risks, a

business consulting firm. “While challenges like rising costs, talent shortages and increasing domestic competition are manageable, regulatory and policy challenges that may unfairly impact the competitive environment in China have the potential to make continued investment and organic expansion a more significant challenge for U.S. companies to overcome,” he said.

U.S. Agrees to Expand Egypt-Israel QIZs

USTR Ron Kirk agreed March 2 to a request that Israel and Egypt jointly made in December to expand the number of production facilities that qualify for duty-free exports to the U.S. from Egyptian Qualifying Industrial Zones (QIZs). Under the changed policy, all production facilities in zones would be eligible if they meet modified QIZ requirements. “Egypt’s and Israel’s desire to add new features to their joint QIZ program underscores the success of the program in fostering closer ties between the people, businesses and governments of these two countries,” Kirk said in a statement.

The QIZ program, which Congress authorized in 1966, allows production in designated areas in Jordan and Egypt to qualify for the benefits of the U.S.-Israel Free Trade Agreement, if they involve certain levels of Israeli investment and components. The six QIZs in Egypt are the Greater Cairo, Alexandria, Suez Canal, Central Delta, Beni Suief and Al Minya zones.

Egypt and Israel started expressing an interest in improving the utilization of the QIZ program several years ago and formally requested the expansion in December. Under a 2004 joint protocol governing QIZ operations, Israel and Egypt require each company seeking to export under the program to apply to the Israel-Egypt QIZ Joint Committee for that privilege. The committee uses the application process to guard against customs fraud and labor abuse, among other considerations, a USTR source explained.

Republicans Press for Action on Fast-Track Authority

Republicans in Congress weren’t satisfied with the Obama administration’s two-line promise in its 2013 Trade Policy Agenda released March 1 to work with Congress to renew the president’s so-called Trade Promotion Authority (TPA), traditionally known as fast-track negotiating authority (see **WTTL**, March 4, page 6). “To facilitate the conclusion, approval, and implementation of market-opening negotiating efforts, we will also work with Congress on Trade Promotion Authority. Such authority will guide current and future negotiations, and will thus support a jobs-focused trade agenda moving forward,” was all the agenda released by the USTR’s office said.

Most of the rest of the agenda drew praise from House and Senate GOP members, who support talks with Pacific countries, the EU and World Trade Organization (WTO) negotiations on services and information technology. “I welcome the administration’s focus on ensuring that our trading partners play by the rules and that we use ongoing and new negotiations to increase exports of American-made goods and services,” said House Ways and Means Committee Chairman Dave Camp (R-Mich.) in a statement. But Camp said the statement on fast-track authority doesn’t reflect the administration’s failure to consult on an actual bill. “I am disappointed that the administration has not engaged with Congress concerning Trade Promotion Authority,” he said. “I urge the president to

demonstrate his commitment to a vigorous and productive trade policy by nominating a qualified and committed U.S. Trade Representative and by immediately beginning discussions with Congress on renewing Trade Promotion Authority,” he added.

Ways and Means trade subcommittee chairman Devin Nunes (R-Calif.) echoed Camp’s views. The president is advancing his trade agenda “without meaningful discussion of Trade Promotion Authority,” he said. Nunes said the goals for Latin America fall short. “Our bilateral relationships with Brazil and India also deserve higher-level engagement, rather than the fractured approach the Administration has used to date,” he said.

Finance Committee Ranking Member Orrin Hatch (R-Utah) joined the chorus. “While I’m pleased that the White House has finally heeded my call and is asking for its renewal, making TPA a reality requires more than talk, it demands real leadership and action from the president. Every president since FDR has sought this authority from Congress, because they’ve understood that trade is good for America,” he said.

Environmental, Labor Groups Oppose “Outdated” Fast Track

While Republicans in Congress are pressing the Obama administration to seek fast-track authority, also known as Trade Promotion Authority (TPA), 400 non-government organizations (NGOs) and unions sent an open letter to Congress March 4, urging lawmakers to reject the traditional fast-track negotiating authority (see story above). “Instead of delegating Congress’ exclusive constitutional authority to ‘regulate commerce with foreign nations’ to the executive branch through the reinstatement of outdated and extreme procedures like Fast Track ‘Trade Promotion Authority,’ we urge you to support a new American trade agreement negotiation and approval process,” the letter said.

The new approval process would require the USTR to “consult with all interested stakeholders, participate in hearings with all committees of jurisdiction over matters affected by trade agreements and provide a thorough and public assessment of what specific job creation and export expansion opportunities each prospective trade partner would provide and how a proposed agreement would impact human and labor rights, the environment, food sovereignty, access to medicine, currency manipulation and balance of trade among the countries involved,” the letter said.

Among the groups signing the letter are: American Federation of Government Employees, American Friends Service Committee, Communications Workers of America, Global Exchange, Sierra Club, Unitarian Universalist Association, California Dairy Campaign, Public Citizen and Rainforest Action Network.

SBA’s Export Promotion Efforts Are Duplicative, GAO Finds

Although there has been widespread opposition to White House proposals for consolidating trade programs and agencies, a new report from the Government Accountability Office (GAO) claims the trade promotion effort of at least one agency, the Small Business Administration (SBA), duplicates work done by other agencies. The GAO’s Jan. 30 report found SBA programs overlap with work done by the Commerce Department and the Export-Import Bank (Ex-Im). “Overlapping services may cause confusion for small

businesses and result in inefficient use of government resources,” the report said (GAO-13-217). “SBA and other agencies have not clearly defined agencies’ roles and responsibilities for export promotion, nor have they fully leveraged resources such as by regularly sharing client information, where possible,” the report stated. As part of the Obama administration’s National Export Initiative (NEI), funding for SBA’s export activities has grown from \$4 million in fiscal 2006 to \$6.4 million requested for fiscal 2012, which ended Sept. 30, 2012.

While Obama officials make much of their effort to promote exports of manufactured goods, the GAO report highlights the fact that the largest share of export promotion money goes toward promoting agriculture exports. According to the report, the Agriculture Department requested \$515 million for its trade promotion effort in 2012, which was more than the \$350 million requested by Commerce.

The report noted that export promotion counseling is often labor intensive and time consuming. “It can take a long time to prepare a company for exporting if it has never exported before. According to Commerce estimates, it can take 2 years or more from the time a company new to exporting begins to receive assistance until that business can make a successful export sale. Even companies with experience exporting may require over a year of preparation before being able to expand into a new market,” it said.

BIS Clarifies Note on Gas Turbine Engine Controls

The Bureau of Industry and Security (BIS) agrees that aero gas turbine engines of the same model and configuration shouldn’t be classified under two different Export Control Classification Numbers (ECCNs). In response to a request for advice from an unidentified company, BIS has issued an advisory opinion that said these engines should not be controlled under ECCN 9A001.a.

“This determination means that an aero gas turbine engine that incorporates - i.e., is produced or developed from - technologies controlled by ECCNs 9E003.a, 9E003.h, or 9E003.i is not controlled by ECCN 9A001.a, if the engine is the *same* model and in the *same* configuration as an engine that has met the requirements of the note to ECCN 9A001.a,” said the Jan. 18 opinion, which was recently released.

“Such engines are controlled under ECCN 9A991.c or .d, depending upon the nature of the aircraft in which they are used. Such engines will remain classified under ECCN 9A991 even if installed in other aircraft that are not referred to in the note to 9A001.a, unless the engine's configuration is changed. An engine's configuration changes when a modification to it would require that a new certification be obtained,” BIS stated.

Punke Slams India’s Farm Subsidy Proposal

Deputy U.S. Trade Representative (USTR) Michael Punke has sharply criticized a proposal by India that would allow developing countries to pay subsidies to farmers to stockpile food to aid rural development and assure food security. The proposal is a “disturbing element” that India and a group of less developed countries known as the G-

33 want to include on the agenda for the World Trade Organization's next ministerial in December in Bali, Indonesia, Punke told the Washington International Trade Association (WITA) March 7 (see **WTTL**, Nov. 26, page 2). "What the India proposal would do, in essence, is create a brand new loophole that would allow developing countries to subsidize agriculture at an unlimited degree if they say the purpose of that subsidization is to create a stockpile to promote some broad goals like poverty elimination and rural development," Punke told WITA. "The bottom line is that what the Indians have proposed is an enormously complex suggestion for what potentially would create a massive new subsidization of global agricultural markets," he added.

"The notion that this would be a good idea at all is highly suspect," Punke said. He said the U.S. has been honest in saying that the proposal "is very unlikely to be something that gains consensus in Geneva." One of the problems has been India's failure to provide a clear articulation of the problem it wants to solve, he noted. Nor has the G-33 explained why existing WTO rules don't address their problems, Punke added.

While knocking India's proposal, Punke had positive things to say about a proposal Brazil has made to improve the administration of tariff-rate quotas (TRQs) to give exporting countries more information about unused market access under existing TRQs. The proposal, which is also backed by a group of advanced developing countries known as the G-20, would be the type of "carefully calibrated, technically not-too-difficult issues that we could put together in the context of the Bali ministerial," Punke said.

WTO Aims to Reach Trade Facilitation Deal for Bali Ministerial

WTO negotiators are aiming to reach an international agreement on trade facilitation to include in a small, modest package of "deliverables" that could be adopted at the WTO's next ministerial meeting in December in Bali, Indonesia, Deputy USTR Michael Punke said March 7. Originally part of the Doha Round talks, trade facilitation has been pulled out of the larger trade talks to be a standalone agreement. Trade facilitation is "the issue" that could be a "big-ticket item that has the greatest chance of finding a meeting of the minds," Punke told the Washington International Trade Association.

The original goal of the talks was to develop mechanisms to help capacity building for developing countries, provide them with technical assistance, enhance customs cooperation and improve the clearance and transit of goods through customs at the borders. Separate talks on trade facilitation are also underway as part of the ongoing Trans-Pacific Partnership talks.

"A lot of the work that has gone on since the last ministerial meeting has been focused on trade facilitation," Punke said. "The concept behind this is to get rid of as much of the red tape that impedes trade as we can," he explained. Trade facilitation "is the Lipitor of trade medications. It is designed to allow the free flow of the lifeblood of goods and services in international economies," he said, referring to the cholesterol-lowering drug. Talks have intensified in the last four months, including at the ambassadorial level in Geneva. There are several meetings a week being held, he reported. While this activity has resulted in "more clarity" on these issues, it also is "revealing more gaps than it is bridges," Punke admitted. It has been challenging to figure out how to bridge these gaps, he said. An example of the problem was a meeting last week where

officials argued for three hours over whether countries should post their existing customs forms on their existing websites, he recounted. Nonetheless, Punke said he thinks trade facilitation “will be at the core of any package of deliverables for the Bali ministerial.”

***** BRIEFS *****

EXPORT ENFORCEMENT: In Louisville U.S. District Court March 5, Hamid Asefi, Iranian citizen and resident, was sentenced to 23 months in jail, and Behzad Karimian, also known as “Tony” Karimian, U.S. citizen living in Louisville who holds valid Iranian passport and is Mesaba Airlines pilot, was sentenced to 46 months for conspiracy to violate and violation of IEEPA for exporting aircraft and aircraft parts to Iran (see **WTTL**, Dec. 10, 2012, page 4).

IRAN: Former House Foreign Affairs Committee Chairman Ileana Ros-Lehtinen (R-Fla.), who now chairs Middle East and North Africa subcommittee, joined March 1 with Rep. Brad Sherman (D-Calif.), ranking member of terrorism and nonproliferation subcommittee, to introduce Iran, North Korea, and Syria Nonproliferation Reform and Modernization Act (H.R. 893). Their bill was previously introduced in June 2011, passed House by vote of 418 to 2 in December 2011 but received no action in Senate. Measure would authorize State to sanction firms that provide any of three countries with equipment or technology for mining or milling uranium.

OFAC: **EGL, Inc.** (now part of CEVA Logistics) of Houston, Texas, March 5 is paying \$139,650 to settle OFAC charges of violating Cuban Assets Control Regulations (CACR) and Iranian Transactions and Sanctions Regulations (ITSR). EGL allegedly provided freight forwarding services for 280 shipments to and from Cuba and acted as freight forwarder of 10 shipments of supplies to oil rig in Iranian waters and operated by Petropars, affiliate of National Iranian Oil Company. EGL voluntarily self-disclosed CACR violations, but not ITR.

TOMATOES: Commerce and more than 600 Mexican tomato growers and exporters March 4 entered into new agreement to suspend antidumping duty investigation of fresh tomatoes from Mexico (see **WTTL**, Feb. 11, page 6.). New deal covers imports of all fresh or chilled tomatoes of Mexican origin, except tomatoes that are for processing.

TRADE PEOPLE: James Wilkinson, who was executive director of Washington International Trade Association since 2003, named vice president for strategy and growth at National Foreign Trade Council. He starts April 15. In new post, he will lead NFTC’s business development efforts, including marketing, communications and membership growth.

ENTITY LIST: In March 8 Federal Register BIS added one company under three countries to its Entity List: T-Platforms will be listed under addresses in Hanover, Germany; Moscow, Russia; and Taipei, Taiwan. T-Platforms “is associated with military procurement activities, including the development of computer systems for military end-users and the production of computers for nuclear research,” notice said.

ANTIDUMPING: Court of Appeals for Federal Circuit March 7 upheld CIT ruling upholding Commerce’s scope determination in antidumping case against citric acid from China. In *Global Commodity Group LLC (GCG) v. U.S.*, court said it owed “significant deference to Commerce’s own interpretation of scope.” It also drew on Harmonized Tariff Schedule (HTSUS) to reach decision. “While we agree with GCG that HTSUS headings are not dispositive for purposes of interpreting a scope order and determining how a particular product should be treated by Commerce, they are certainly probative of whether a particular interpretation is reasonable,” it said.

POLAR BEARS: U.S. proposal to ban international trade in polar bear parts failed by vote of 38-42, with 46 abstaining, at Convention on International Trade in Endangered Species (CITES) meeting in Bangkok, Thailand, March 6. U.S. and Russia supported ban, while Canada, European Union and Norway opposed. Canada, which is only nation allowing sport hunting and export of polar bears, defends practice as vital to livelihood of native Inuit people.