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Export Agencies to Publish Final Satellites Rules

As predicted, export agencies are set to publish one more set of final rules before the end of the Obama administration. Bureau of Industry and Security (BIS) and State's Directorate of Defense Trade Controls (DDTC) Jan. 5 posted unofficial final rules on transfers from U.S. Munitions List (USML) Category XV (satellites) that will go into effect Jan. 15.

While neither rule has been published in the Federal Register, the final BIS rule is grouped into four types of changes: changes in aperture size for spacecraft that warrant control on the USML; the movement of the James Webb Space Telescope (JWST) from the USML to Export Control Classification Number (ECCN) 9A004; other corrections and clarifications; and addition of .y items to ECCN 9A515, BIS noted.

Most of the changes included in the May 2014 interim final rule have been implemented as published and are not republished in this final rule, BIS noted (see **WTTL**, May 19, 2014, page 4). The DDTC rule also addresses the change in aperture dimension of specific electro-optical remote sensing capabilities and space qualified optics. In addition, the agency clarified that paragraph (a)(2) "applies to spacecraft that perform real-time autonomous detection and tracking of moving objects, other than celestial bodies."

"The control does not include systems that can track fixed points to determine their own movement based on the relative position of the fixed points over time," the notice said. DDTC revised other paragraphs to control "spacecraft that autonomously perform collision avoidance" and "sub-orbital craft that incorporate a propulsion system… and are specially designed for atmospheric entry or re-entry."

CAFC Upholds Commerce Use of "Considerable Discretion"

The Court of Appeals for the Federal Circuit (CAFC) ruled Dec. 16 that "Commerce permissibly exercised its considerable discretion" in using adverse facts available in

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assigning a high dumping margin on a German paper manufacturer. At issue was the omission of German-market sales seemingly due to employees misreporting sales and commission data.

"Commerce discovered midway through the review that Koehler had engaged in a scheme resulting in the omission of some German-market sales from the information Koehler had supplied to Commerce, thereby altering the home-market prices that are compared to U.S. prices to measure the dumping margin. Because of that misconduct, Commerce deemed Koehler's data unreliable and made adverse inferences against Koehler," CAFC Judge Richard Taranto wrote in *Papierfabrik August Koehler SE v U.S.*

> "We see no reversible error in Commerce's determination to draw adverse inferences as to Koehler without relying on Koehler's original, incorrect home-sales data," Taranto wrote. "Where 'an interested party. . . withholds information that has been requested,' 'fails to provide such information by the deadlines for submission of the information,' 'significantly impedes a proceeding,' or 'provides such information but the information cannot be verified,' Commerce may use the facts that are 'otherwise available' to it," he added.

The Court of International Trade (CIT) upheld Commerce's decision in July. Although the department erred in how it corroborated its dumping rate for German papermaker Koehler, it was justified in using adverse facts available based on finding that Koehler submitted fraudulent data, CIT found (see **WTTL**, July 11, page 7).

"There is substantial evidence that Koehler engaged in an intentional trans-shipment scheme that caused it to withhold certain home-sales information from its responses to Commerce, an omission that impeded the investigation, and that it offered updated information only after the deadline for submitting data," Taranto wrote.

Sources close to the company disagree with the court's decision. CAFC appears to be "greenlighting the Commerce Department to exercise extraordinary almost unfettered discretion," one told WTTL. In this case, low-level employees hoping to increase their sales commissions misreported data, and when senior management learned of the situation, they immediately corrected the data, the source said. The 75% rate is "clearly punitive and a miscarriage of justice," she said. Koehler is seriously considering whether to request an en banc review, which it has until Jan. 30 to do.

Lighthizer Named as Trump's Choice for USTR

In what may be the least controversial of the president-elect's nominees, veteran trade attorney Robert Lighthizer Jan. 3 was tapped to be the U.S. Trade Representative (USTR) in the new administration. Even progressive anti-trade groups seemed to be on-board with the choice.

Lighthizer currently is a partner at Skadden, Arps, Slate, Meagher & Flom, where he specializes in international trade. In that capacity, he has represented firms such as U.S.

Steel in hundreds of antidumping and countervailing duty cases on behalf of the steel industry. Prior to that, Lighthizer served as deputy USTR under President Reagan and was nominated to chair the World Trade Organization Appellate Body in 2003 (see **WTTL**, Sept. 29, 2003, page 3). He has long ties to the Republican Party, having served as national treasurer for former Sen. Bob Dole's 1996 presidential campaign.

"He has extensive experience striking agreements that protect some of the most important sectors of our economy, and has repeatedly fought in the private sector to prevent bad deals from hurting Americans," Trump said in a press release. In his new role, Lighthizer is expected to work closely with Commerce secretary nominee Wilbur Ross and Peter Navarro, who was tapped to head the new White House National Trade Council. In contrast to Ross and Navarro, Lighthizer is viewed by some as an anti-Trans-Pacific Partnership (TPP) protectionist.

Lori Wallach, director of Public Citizen's Global Trade Watch, said Lighthizer's appointment signals a chance for a new approach to trade policy. "Lighthizer is very knowledgeable about both technical trade policy and the ways of Washington, but what sets him apart among high-level Republican trade experts is that for decades his views seemed to be shaped by the pragmatic outcomes of trade agreements and policies rather than fealty to any particular ideology or theory," Wallach said in a statement.

> "I don't know that he would agree with progressive critics of our status quo trade policies about alternative approaches, but he also has had quite a different perspective on trade policy than the Republican congressional leaders and most of Trump's other cabinet nominees who have supported the TPP and every past trade deal," she added.

Sierra Club Executive Director Michael Brune, however, used forceful words to criticize the president-elect's proposed cabinet. Lighthizer's appointment "is eclipsed by the hypocrisy of selecting a cabinet stocked with TPP supporters. Why is Trump packing his cabinet with backers of the TPP and corporate trade after spending his campaign bashing the same deals? The answer is simple: Trump has no intention of overhauling our trade policies to support workers, communities, and our environment," Brune said.

Dan Ikenson, director of Cato's Herbert A. Stiefel Center for Trade Policy Studies, likewise blasted Trump's nominee, albeit for different reasons. "Lighthizer's selection seems to confirm fears that U.S. trade policy is descending into darkness. At the very least, it is reasonable to assume that for the foreseeable future trade policy will be overwhelmingly enforcement-oriented, while trade agreements and other forms of liberalization will be relegated to the doghouse," Ikenson wrote on the Libertarian think-tank's blog.

House Ways & Means Committee Chair Kevin Brady (R-Texas) congratulated Lighthizer on his nomination. "His extensive experience and service at USTR and his strong representation of American industries will be instrumental in this new role. I look forward to working with Ambassador Lighthizer and President-elect Trump on developing strong, beneficial, and strictly enforceable trade agreements that create jobs, grow our economy, and improve the lives of all Americans. In addition, I know we can rely on Ambassador Lighthizer to hold other countries accountable to us," Brady said.

"It is a very high honor to represent our nation and to serve in President-elect Trump's administration as the U.S. Trade Representative. I am fully committed to President-elect Trump's mission to level the playing field for American workers and forge better trade policies which will benefit all Americans," Lighthizer said in a statement.

Outlook Grim for Ex-Im Bank

There's no sugar-coating it: The Export-Import Bank (Ex-Im) had one of its worst years ever in 2016. According to the bank's 2016 annual report released Jan. 4, Ex-Im authorized $5 billion in financing – the lowest level in 40 years. And the future is not looking up as the president-elect has said he opposes the bank, though has not announced if he will close it.

> Ex-Im Chairman Fred Hochberg called the past two years "somewhat disheartening." In 2015, Congress allowed the bank's charter to collapse and though it was reauthorized by the end of 2015, without a board quorum Ex-Im remains unable to function at full capacity.

"As a result, Ex-Im supported 52,000 jobs and generated $284 million for taxpayers. By comparison, in 2014—our last fully operational year—the Bank authorized more than $20 billion in financing, supported nearly 165,000 American jobs, and generated $675 million for taxpayers," wrote Hochberg. Perhaps in a move to appease the incoming administration, Ex-Im also highlighted that small business authorizations make up 90% of all Ex-Im authorizations.

Separately, Hochberg said he will not ask for an extension past inauguration day to serve in the role he has held since May 2009. Despite the refusal of Senate Banking Committee Chairman Richard Shelby (R-Ala.) to hold confirmation hearings for board nominees, President Obama Jan. 5 renominated Claudia Slacik to be Ex-Im Bank board member, replacing Patricia Loui. Slacik was the bank's senior VP for export finance from 2013 to May 2016. Obama previously named Slacik in September (see **WTTL**, Sept. 26, page 8).

Cabinet Members Reflect on Accomplishments

As the Obama administration enters its final days, trade and economic cabinet members reveled in their roles bringing the U.S. out of the recession and laid out their visions for the future of their departments. In their customary exit memos Jan. 5, USTR, Commerce, Treasury and State leadership also urged caution and pragmatism to their successors.

USTR Michael Froman highlighted four key areas of progress: negotiating and concluding "high-standard trade agreements" to expand the export of American made goods; doubling down on trade enforcement through 24 trade cases – 15 against China – at the WTO; sustainable and inclusive growth; and engagement with other countries.

"From pursuing high-standard trade agreements like the Trans-Pacific Partnership [TPP] to executing a robust program to enforce our existing trade deals, we have raised standards; created export opportunities for workers, farmers and businesses; defended American rights; and helped to level the playing field for American workers," wrote Froman.

Commerce Secretary Penny Pritzker also touted a record of progress for trade and investment, particularly the record enforcement of trade laws and expanded relationships with China, Mexico, India, Africa and Cuba. She noted her department's commitment to "comprehensive reform of the export control system," the end result of which has been "stronger military interoperability with our allies; reduced incentives for those allies' products to avoid U.S. content; government's resources focused on transactions of greatest concern; and improved regulatory reliability and predictability."

> Looking ahead, Pritzker called for the completion of the TPP as "essential to America's economic strength" and influence in the Asia-Pacific. In a nod to the role trade played in the presidential election, she suggested that the government reconsider its approach to delivering benefits of completed trade deals.

Concluding her memo, Pritzker advocated for trade reorganization into a streamlined 'Department of Business,' similar to what President Obama had proposed in 2012 (see **WTTL**, Nov. 12, 2012, page 1). "A reorganized Department with a unified strategic plan for trade negotiations and enforcement, economic development, export financing, production of economic statistics and data, technology, and other business-focused services would provide stronger customer service to American businesses competing in a global economy," she wrote.

Treasury Secretary Jacob Lew began his memo by rehashing the housing crisis and contracted economy Obama inherited eight years ago, as a means to show the economic growth Treasury had a hand in. In Lew's vision of the future, infrastructure spending, business tax reform, housing finance reform, global economic integration, and continued engagement with "challenging partners" are the blueprint for the way forward, he wrote.

"I am proud of the record we have built over the past eight years. But during calmer economic times, policy makers are often tempted to roll back regulations, weaken reforms, and reduce oversight. I hope that future policymakers will take careful stock of the successes of this Administration as they consider the next steps forward," concluded Lew.

Lew also highlighted his department's targeted use of future sanctions and cautioned against their overuse. "We should continue to use these tools judiciously to maintain pressure on those countries that take aggressive and destabilizing actions, such as Russia and North Korea, and provide sanctions relief when the targeted malign behavior changes, as with Iran and Burma. And, as we chart new courses with other countries, such as

Cuba, we should be mindful of how we can use our economic tools to create the conditions for a changed relationship," Lew said.

"We must always take care to avoid the overuse of sanctions, particularly our most unilateral tools like secondary sanctions that extend to non-U.S. persons. If we overuse these powerful tools, we risk lessening their impact when they are most needed and ultimately threaten our central role in the global financial system," he noted.

Secretary of State John Kerry also highlighted the importance of trade in the international economy. "I know that a lot of people question the value of trade or point to trade as a reason for slow and unequal growth. Yet these claims are simply inaccurate; trade is not responsible for the complex economic challenges we face today," he wrote. "No one is promising that TPP and TTIP [Transatlantic Trade and Investment Partnership] will solve all of our social and economic challenges. But we can promise that by rejecting such agreements – by refusing to participate in them – our competitiveness will suffer, our economy will fall a step behind, and we will miss out on opportunities in some of the fast-growing markets on the planet," Kerry said.

Future of Trade Under Trump

Though the president-elect has let some campaign promises fall to the wayside since the election, expect him to follow up on his trade campaign promises, policy experts said on a call Jan. 5. "While personnel decisions are not synonymous with policy prescriptions, it's now clear that Trump is eager to adhere to campaign promises on challenging the status quo on U.S. trade," said Shihoko Goto, senior associate at the Wilson Center.

> Shawn Donnan, Financial Times world trade editor, concurred. "The one fundamental change we can't avoid is things will be very different when it comes to trade policy," he said. "We are going from an Obama administration that really wanted to reshape to global trading system with an emphasis on mega-regional trade deals to a new administration that is more about restoring what they perceive to be the past greatness of the U.S. economy, particularly manufacturing," Donnan noted

Rather than multilateral trade deals, expect to see an emphasis on enforcement, especially when it comes to China. One need look no further than Peter Navarro, Trump's pick to head up the new White House National Trade Council, and the movie he produced (available online) "Death By China," to get a sense of the administration's stance. Substantively, there might not be a huge uptick in the number of trade enforcement cases filed, but expect Trump to personally announce enforcement cases in splashy press conferences in the Rose Garden, Donnan predicted, in contrast to Obama, who was content to allow USTR Michael Froman to handle the announcements with little fanfare.

Expect to see action during the early days of the administration on currency manipulation, speculated Wilson Center's Public Policy Fellow Meg Lundsager. The president has wide latitude to name manipulators, she explained. The U.S. does have a list of countries it keeps an eye on for currency manipulation, but so far none have met all the criteria needed to be labeled a manipulator. She further predicted that the U.S. trade deficit will grow and said the U.S. should take a proactive role in encouraging global growth. "With European growth very slow, Japanese growth increasing but still low, China slowing down, and hits on emerging market economies, the focus has to be on getting more countries to contribute more to global growth," Lundsager said.

As for the future of multilateral trade deals? Most experts agreed that the outlook is grim for the TPP – despite one expert from Japan declaring that his country "has no plan B" – but the same vitriol has not been expressed stateside with regard to the Transatlantic Trade and Investment Partnership (TTIP). The future of TTIP may be out of Trump's hands anyway, as the deal is deeply unpopular in Europe. It may be a tall hurdle to clear for every European government to ratify the trade deal that is currently in a deep freeze.

* * * Briefs * * *

ENTITY LIST: In Federal Register Jan. 4, BIS added five Russian entities to Entity List related to Russia's hacking of presidential election (see **WTTL**, Jan. 2, page 1). Blocked entities include: Main Intelligence Directorate (GRU) and Federal Security Service (FSB); and three companies that support GRU's cyber operations. GRU is "involved in external collection using human intelligence officers and a variety of technical tools, and is designated for tampering, altering, or causing a misappropriation of information with the purpose or effect of interfering with the 2016 U.S. election processes," notice said. FSB assisted GRU in conducting these activities. In addition, Special Technology Center, (aka STLC, Ltd.) assisted GRU in conducting signals intelligence operations; Zorsecurity Center (aka Esage Lab) provided GRU with technical research and development; and Autonomous Noncommercial Organization Professional Association of Designers of Data Processing Systems (aka ANO PO KSI) provided specialized training to GRU, BIS noted.

TRADE FIGURES: Merchandise exports in November inched up 0.88% from year ago to $122.3 billion, Commerce reported Jan. 6. Services exports gained 1.9% to record-high $63.5 billion from November 2015. Goods imports increased 2.8% from November 2015 to $188.9 billion, as services imports gained 2.9% to $42.1 billion.

HAPPY BIRTHDAY: On Jan. 1, WTO marked 22 years of existence and NAFTA marked 23 years.

NEW CONGRESS: Sen. Orrin Hatch (R-Utah) confirmed Jan. 5 as Senate Finance Committee chairman for 115th Congress. Hatch served as committee's chair since January 2015 and became top Republican on committee in 2011. Joining the Republicans on committee is Sen. Bill Cassidy (R-La.). Democratic Ranking Member remains Sen. Ron Wyden (Ore.)…. Six new members recommended to House Ways & Means Committee. GOP Chair Kevin Brady (Texas) Jan. 4 welcomed Reps. David Schweikert (Ariz.), Jackie Walorski (Ind.) and Carlos Curbelo (Fla.). "Each of our new Members has the perfect mix of policy expertise and real world experience. Most importantly, they understand exactly how the decisions we make at our Committee impact the lives of people across our country," Brady said in statement. Democratic Ranking Member Richard Neal (Mass.) Jan. 5 welcomed recommended members Reps. Brian Higgins (N.Y.), Terri Sewell (Ala.) and Suzan DelBene (Wash.). DelBene was member of President's Export Council. … Neal's legislative director Brandon Casey to take over as Democratic chief of staff for committee. Casey replaces Nick Gwyn who is moving to Rep. Sander Levin's (D-Mich.) office.

MORE NOMINATIONS: President-elect said Jan. 4 he intends to nominate Wall Street lawyer Jay Clayton to chair Securities and Exchange Commission (SEC). "Jay Clayton is a highly talented expert on many aspects of financial and regulatory law, and he will ensure our financial institutions can thrive and create jobs while playing by the rules at the same time," Trump said in statement. Clayton is partner at Sullivan & Cromwell and is known for advising Alibaba in its $21.8 billion initial public offering. He has represented Wall Street firms like Goldman Sachs and Barclays. In 2011, Clayton led drafting committee for critical paper on Foreign Corrupt Practices Act enforcement, part of which SEC oversees.

NATIONAL TRADE COUNCIL: President-elect named two new staffers to National Trade Council (NTC). Alexander Gray will serve as NTC Deputy Director for Defense Industrial Base. He's currently member of State landing team on Asia-Pacific issues. Prior to serving on Trump-Pence campaign, Gray served as senior advisor to former Rep. J. Randy Forbes (R-Va.). Rolf Lundberg named NTC Deputy Director for "Buy American, Hire American." Prior to campaign, Lundberg was senior VP for congressional and public affairs at U.S. Chamber of Commerce.

ALIBABA: E-commerce juggernaut Alibaba Group filed $201,320 lawsuit in Shenzhen Longgang People's District Court against Liu Huajun and Wang Shenyi, two vendors who allegedly sold fake Swarovski watches through Alibaba's website Taobao. Not coincidentally, Taobao was added to USTR's Notorious Markets List Dec. 21 (see **WTTL**, Jan.2, page 3). "Selling counterfeits not only violates our service agreement, it also infringes on the intellectual property rights of the brand owner, puts inferior products in the hands of consumers and ruins the hard-earned trust and reputation Alibaba has with our customers," said Jessie Zheng, Alibaba Group's chief platform governance officer in statement posted to Alibaba's Alizila news site.

SOLAR MODULES: Court of Appeals for Federal Circuit (CAFC) Dec. 15 upheld Commerce determination that solar modules that Kyocera claims are "from Mexico" are Taiwanese in origin. Solar modules at issue were ultimately assembled in and imported from Mexico but incorporated Taiwanese crystalline silicon photovoltaic (CSPV) cells and were thus subject to antidumping duty investigation into CSPV products from China and Taiwan. "The statute does not support Kyocera's proposed distinction between Commerce's determination of origin and the origin of goods referred to in the negligibility statute," CAFC Judge Kara Stoll wrote in *Kyocera Solar, Inc. v. ITC*. "Following the statutory structure, the Commission properly treated the cells as Taiwanese in origin, and thus correctly refused to conduct a separate negligibility determination for Kyocera's solar cells," she added.

ATTORNEY FEES: Court of Appeals for Federal Circuit (CAFC) Dec. 15 affirmed Court of International Trade (CIT) awarding attorney fees to International Custom Products, Inc. (ICP) in litigation over classification of certain white sauce imports. In granting fees to ICP in June 2015, CIT harshly criticized way Customs handled classification change (see **WTTL**, July 6, 2015, page 3). At CAFC, government argued that "CIT misapplied the 'substantially justified' standard when it stated that 'the substantial justification standard is "slightly more stringent than a simple reasonableness standard," and requires that the Government show that its position 'was clearly reasonable,''" CAFC Judge Evan Wallach wrote. "There are no instances where the CIT actually applied the 'slightly more' and 'clearly' standards, as the Government acknowledged during oral argument," he noted.

CUBA: OFAC Jan. 6 removed 28 entities from Specially Designated Nationals (SDN) list related to Cuba, including companies and individuals in Argentina, Belize, Japan, Netherlands and Panama. At same time, OFAC added five new FAQs regarding vessel transactions with Cuba, specifically on requirements and exceptions under 180-day and goods/passengers-on-board rules.

MORE CUBA: Reps. Mark Sanford (R-S.C.) and Jim McGovern (D-Mass.) Jan. 6 introduced Freedom to Travel to Cuba Act of 2017 (H.R. 351), which removes current travel restrictions to island. Ban "is both outdated and an unjust limitation on American freedom," Sanford said in statement. Sarah Stephens, executive director of Center for Democracy in Americas, welcomed bill. "Over the past two years, new rules relaxing restrictions on travel, trade, and remittances to Cuba have achieved positive results by allowing greater numbers of U.S. visitors and Cubans to engage with each other, providing support for Cuban entrepreneurs, and opening opportunities for commerce," she said.

EVEN MORE CUBA: First deal in 50 years to import Cuban product into U.S. has been reached, Reneo Consulting LLC announced Jan. 5. Reneo subsidiary Coabana Trading LLC has finalized agreement with Cuba Export to import Cuban-produced Marabu (sicklebush) charcoal, company said. "Marabu charcoal is cut and produced by private Cuban cooperatives, providing them with a growing market less than 100 miles away. This is but the first step in what should be a blossoming trade relationship involving many different products," said Reneo Chairman Scott Gilbert in statement. Attorney Gilbert represented government contractor Alan Gross in 2014 release from Cuba.

GSP: USTR Michael Froman Jan. 5 asked ITC to conduct Section 332 investigation on "probable economic effect on total U.S. imports, as well as on consumers, of the requested waivers."

STEEL PLATE: In 6-0 final vote Jan. 6, ITC found U.S. industry is materially injured by dumped imports of carbon and alloy steel cut-to-length plate from Brazil, South Africa and Turkey. Commission also made negative findings for critical circumstances on imports from Brazil and Turkey.

SOFTWOOD LUMBER: In 5-0 preliminary vote Jan. 6, ITC found U.S. industry may be injured by allegedly dumped and subsidized imports of softwood lumber products from Canada. Commissioner Dean A. Pinkert did not participate in these investigations. Lumber standstill agreement expired in October (see **WTTL**, Nov. 28, page 7).

AGRICULTURE: In letter Jan. 6, 16 U.S. agricultural industry groups, including National Pork Producers Council and American Soybean Association, urged new administration to maintain trade relationships with top three foreign customers: China, Canada and Mexico. "Disrupting U.S. agricultural exports to these nations would have devastating consequences for our farmers and the many American processing and transportation industries and workers supported by these exports," groups said. Three partners accounted for $70 billion in exports in FY2016, letter noted. President-elect has not yet picked nominee for Agriculture secretary.