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Census to Add AES Field to Track Exports of Used Electronics

The Census Bureau plans to issue a notice of proposed rulemaking early next year to add two fields to the Automated Export System (AES) to track exports of used electronics and deal with the splitting of shipments after export. The field for used electronics has been requested by the Environmental Protection Agency (EPA), which apparently is responding to many reports about hazardous practices used in some countries, especially China, to reclaim materials from discarded electronic products.

> The proposed field will be a "yes-no indicator" that will identify "that the product being exported is a used electronic or not," Omari Wooden, Census assistant director for outreach and regulations, told the Bureau of Industry and Security"s (BIS) Regulations and Procedures Tech-nical Advisory Committee (RAPTAC) Dec. 8. "This is a way for EPA to track the movement of used electronics that are going out of the country," he said.

EPA has provided Census with a definition of used electronics and that definition will be in the proposed rule change. The agency has also identified about 75 Schedule B items on the Harmonized Tariff Schedule that would be required to answer the yes-no question. These items, which also would be in the regulation, mostly are found under Chapter 84, with some in Chapter 87 and other Schedule B chapters, Wooden said.

RAPTAC members questioned how the rule would apply to used items, such as servers, that are exported and continue to be used abroad, items sent abroad for refurbishing and laptops carried for temporary use. Wooden said temporary items might come under the Tools of Trade exemption, while other concerns should be addressed in comments. The proposed new field for split shipments would be identified as "Original ITN" that could be used when shipments are split after they are exported from the U.S. and after an AES record was created. It would allow exporters to report the split without triggering a sanction for filing late or producing an error report.

Trade Ministers Head to Nairobi with No Advance Agreements

Trade ministers often come to World Trade Organization (WTO) ministerial conferences without advance agreements on agenda topics and work them out one way or another at the meeting. Ahead of the WTO's Nairobi ministerial Dec. 15-18, there are again no

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deals on the key issues that will be on the table, but this time there is a higher risk that officials will fail to reach any major accords. Also unlikely to be resolved is the future of the Doha Round (see story below). A modest package for least developed countries (LDCs) appears to be one area where members have reached agreement in Geneva. The package will likely cover services preferences, rules of origin, accessions, extension of the LDC drug patent waiver and funding for aid-for-trade (see **WTTL**, Nov. 30, page 8).

> A deal on agriculture export competition faces an uphill fight. Such an accord could include export subsidies, export credits and state-trading enterprises as well as food security stockholding. Divisions remain among the major players in farm trade. Several years ago, the European Union (EU) promised to end its export subsidies as part of an overall Doha deal, but it won't move unless other countries share the burden, sources say.

Switzerland and Norway, which subsidize domestic producers, have opposed current proposals and would be difficult "nuts" to crack, one trade official said. The U.S. uses export credits, while Australia and New Zealand rely on state-trading enterprises. The U.S. still needs to do some work on the export credit side, the official noted.

Export subsidy disciplines are "definitely worth having," Marc Vanheukelen, the EU ambassador to the WTO, told reporters Dec. 10. Disciplines were installed for industrial goods 25 years ago, and it would be good if it could be done for agriculture, he said.

Switzerland and Norway want "outcomes that are not too painful," he said. Those issues will be settled once the big pieces of the puzzle are in place, he said. "The deal will not scupper because of Norway and Switzerland," he added. "They will not determine the fate of what is on the table," he asserted.

A so-called "Room E" text on export competition has more than 100 square brackets indicating no agreement, Vanheukelen reported, referring to a room at WTO headquarters where negotiators meet. "If ministers have to work on the Room E texts, I'm afraid that that will be a recipe for disaster," he said. Ministers should be handed a maximum of eight pages, but now will get 17 pages, he said. The Room E text reflects the "maximum level of divergence," he noted; suggesting ministers may see a smaller number of brackets in Nairobi, he said.

India's demands for exemptions for food stockholding nearly sank the WTO's Bali ministerial and will be back on the agenda in Nairobi. A stockholding proposal floated Dec. 9 "looks much more reasonable" but needs a closer look, Vanheukelen said.

The issue has big political value for India because no WTO member will attack its stockholding system, another official suggested. Indian food stockholding, however, has "nothing to do with economic realities," the official said. Labeling it food security is a misnomer. "It's a corrupt, corrupt system of managing agriculture," the official declared.

WTO's Future Negotiating Role Remains Uncertain

The WTO's Nairobi ministerial will once again address the fate of the much-maligned, long-dormant Doha Round and the broader issue of how the organization can remain a forum for trade negotiations and not just dispute-settlement litigation. Ministers are not

expected to resolve either issue, sources in Geneva contend. The debate over Doha's future has weighed down efforts to reach other agreements in Nairobi because of concerns about how such accords might affect broader negotiations. Both Doha supporters and detractors oppose various proposed agreements for opposite reasons. Supporters fear such deals would be considered the end of the round and all that could be delivered, while opponents, who want to put Doha to bed, object because they think agreements will keep the round alive (see story page 1).

> Whether the ministerial will be defining for the WTO depends on what can be delivered, Marc Vanheukelen, EU ambassador to the WTO, told reporters Dec. 9. The areas where results may be found have been getting smaller since September, he said. Given the fact that the Doha agenda can't be completely finished, the question of what to do also is still open, Vanheukelen said. What to do after 2015 is "in the balance," he added.

If "absolutely nothing comes out in Nairobi, obviously those who say that Doha is terminally ill will see their hand strengthened," Vanheukelen said. "If there is no outcome on anything in Nairobi, that's clearly not the sign that we're doing fine," he said. As trade ministers head to Kenya, there is no compelling deadline or dispute forcing them to make deals at the ministerial, another official suggested.

India, Japan, the U.S. and others know that if nothing happens at the meeting, continuing negotiations will be futile, another trade official said. The U.S. has been the most vocal advocate for changing the WTO negotiating mandate, while India is the most vocal proponent of the existing mandate. China, Switzerland, the EU, many African and other countries have been more nuanced, the official added.

The WTO is moving in the direction where its judicial arm is the only legislator, the official said, referring to the dispute-settlement mechanism. When a judiciary is the only legislator, that causes "a huge problem of legitimacy," the official argued.

The underlying assumptions that prompted the Doha Round need to be reassessed, the trade official said. Too many developments with a bearing on the negotiations have occurred since Doha was launched in 2001, but they haven't been factored in, the official said. The rise of regional trade agreements such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) as well as many bilateral trade accords have changed the dynamics of international trade.

Developing and least developing countries (LDCs) that have been left out of those agreements are afraid they will lose the special preferences they have won in past pacts and laws. Bilateral and regional trade agreements are a means for gaining leverage in the remaining battle between emerging and developed countries, the official said. The WTO needs to put some order into the bilateral and free trade agreements, the official argued.

For example, previous proposals for duty-free, quota-free (DFQF) treatment of LDC exports are "hard knots" to advance, one official noted. African LDCs that benefit from the U.S. African Growth and Opportunity Act (AGOA) are afraid DFQF will erode their advantages, while Asian LDCs are concerned they will lose out to Vietnam and Malaysia, which are part of TPP. The "positive scenario" after Nairobi is that negotiations stop entirely, which starts a period of more serious reflection, one trade executive suggested. LDCs and other developing countries can't integrate into the global economy by hanging

onto preferences and special measures, he asserted. WTO exemptions for LDCs and other developing countries mean "nothing" to companies looking to invest. "Either the conditions are acceptable and I come; or they're not and I go," he explained. Market requirements and the demands of global value chains are the more important investment criteria that trade negotiators need to consider, he said.

> It took 45 years for the General Agreement on Tariffs and Trade (GATT) to become an inclusive system with the creation of the WTO, he noted. "It took us 20 years to go back to where we were before" with the rise of new trade blocs, he added.

Integrating into the world economy is not about always asking for handouts, longer implementation periods and other preferences, he said. The WTO is a mercantilistic system, which denies negotiating power using that kind of approach, he said. Countries in the WTO need to move together, he said.

The December climate conference in Paris and the WTO ministerial are the first tests for countries that have said trade can be used to end extreme poverty by the year 2030 and will be more sensitive to environmental considerations, Arancha Gonzalez, executive director of the International Trade Center, told reporters Dec 7. Both conclaves aim for "global collective action" to address failures, Gonzalez said. One is a market failure on the climate, while the second is a governmental failure in the WTO, she said.

The "big battle" now, particularly between developed and emerging countries, is who does what, she said. Debate for both was framed in the 20th century, which pinned most of the burden on developed countries, Gonzalez said. The economic and geo-political landscapes have since changed, she said.

U.S. Requests Talks with China on Aircraft Import Tax

After more than a year of informal discussions with China over its discriminatory tax policy on imported small aircraft, the U.S. Trade Representative's office (USTR) officially requested consultations with Beijing Dec. 9 at the World Trade Organization (WTO). China imposes a 17% value added tax (VAT) on imported finished aircraft under 25 metric tons by weight, which includes general aviation, regional and agricultural aircraft, while exempting aircraft made in China from the tax, the U.S. alleges.

> In the letter requesting consultation, the USTR's office claimed the measures violate China's WTO commitments "because they accord products imported into China with treatment less favorable than that accorded to like products of Chinese origin." In addition, it objected to the lack of transparency of the measures, which were not published in the official ministry journal. The measures "have not been published or made readily available to WTO Members, individuals, and enterprises," the letter noted.

Putting an exact economic effect of the tax seemed elusive. Total aerospace exports from U.S. in 2014 totaled $139 billion, a senior U.S. trade official noted, speaking on background but refusing to be specific about the impact of the Chinese rules. His figure appears to include both military and civilian aviation sales, since Census numbers put worldwide exports of civilian aircraft, engines and parts at under $113 billion in 2014.

Census reported $13.9 billion in civil aviation exports to China last year. The official also ducked questions on the names of specific U.S. companies involved in the types of aircraft affected by the VAT policy. He claimed the case "was not brought by anyone in our industry." The genesis was the office's own research, he added. American companies have been reluctant to admit complaints against Chinese practices publicly out of fear of retaliation by China if they did.

> USTR officials have been talking with China about these measures since the WTO's last Trade Policy Review of that country in 2014. The measures date back to 2000 "and several iterations since then," the trade official said. "We wanted to make sure we had this dead to rights," he responded when asked what took so long to request consultations. Under WTO rules, other countries have ten days to join the case, and Brazil and Canada are likely to join the complaint. "We expect there would be interest," the official said.

While the main producers of finished regional aircraft, including Canada's Bombardier and Brazil's Embraer, are based outside the U.S., those two companies have production and service facilities in the U.S. Even foreign manufacturers source parts from almost every state of the union, the official noted. Just the day after the case was launched, Honda announced that its light general aviation jet HondaJet received type certification from the Federal Aviation Administration (FAA). "With HondaJet FAA type certification achieved, Honda Aircraft is now ramping up production in Greensboro [N.C.] with 25 aircraft on the final assembly line," the company said in a statement.

The Chinese Ministry of Commerce objected to the request for consultations. "China has always respected WTO rules, but also to comply with WTO rules insist on ways to promote the development of the aviation industry, the Chinese side expressed regret on the U.S. request for consultations thereon, the program will be dealt with under the WTO to resolve the dispute," the ministry said in a translated statement.

The U.S. Steelworkers (USW) applauded the USTR's action. "While foreign producers have long been key suppliers, China is pursuing a classic import substitution strategy: It looks to push foreign producers and goods out of its market as it rapidly develops domestically produced aircraft, turboprops, business jets and agricultural and utility aircraft," USW President Leo Gerard said in a statement. "Despite joining and benefiting from WTO regulations, China wants to play by its own rules and shut down another key export market for American-made products," he added.

Agencies Go Back to "Specially Designed" for Night Vision Rules

Commerce and State export regulators are heeding industry complaints about proposed changes to U.S. Munitions List (USML) Category XII (sensors and lasers) and will go back to using "specially designed" for military use to define items listed in this category. Industry had strongly objected to the proposed revisions to the category and the transfer of items to the Commerce Control List (CCL) because companies claimed the changes would shift many thermal imaging products that are in commercial use to control under the International Traffic in Arms Regulations (see **WTTL**, Aug. 31, page 1).

"For a handful of entries we have defaulted down to using 'specially designed' with respect to a defense article and many other types of items because what we found from

the first proposed rule is that the objective, precise description of many of the items that were in that rule would inevitably catch things that are normal commercial use, which is not the goal," Bureau of Industry and Security (BIS) Assistant Secretary Kevin Wolf told the agency's Regulations and Procedures Technical Advisory Committee (RAPTAC) Dec. 8. The two agencies are "very, very close" to reproposing the two rules, he said.

> "This is a perfect example of how the public comment process makes for a better rule," he noted. "It turned out that unlike all the other categories, including XI for electronics, the positive, technical description approach isn't always the best one," he admitted.

"Category XII is a little different. It is more like Category XX than it is like categories VIII or VII in the sense that with Category XX the goal was not to move anything to the CCL as a matter of law. The goal was just to describe things that are military on the USML more clearly," Wolf explained.

"It's really the same goal with Category XII. The goal is not move really anything other than some very miscellaneous basic bits and bobs to the CCL. So you won't notice a large 600-series entry. The goal is really to describe more carefully what is on the USML so you don't have the opposite effect, which has historically been the problem of items in normal commercial use being caught up either as a legal matter or as a practical matter, in terms of internal government opinion, caught on the USML," he said.

"So this will not be a big transition of licenses from State to Commerce, but I do hope that it will be at least a clearer, bright line exercise that is warranted for control for Category XII, particularly in respect to night-vision items, sensors and lasers," he added.

WTO Arbitrator Approves $1 Billion in COOL Retaliation

A WTO arbitration panel ruled Dec. 7 that Canada and Mexico can retaliate against the U.S. country-of-origin labeling (COOL) law but at about a third of the total amount they had requested. Canada will be able to retaliate for C$1.054 billion ($773 million) in lost trade and Mexico will be able to retaliate for US$227.7 million. Canada had sought C$3 billion in retaliation and Mexico wanted $653 million (see **WTTL**, June 22, page 8).

> "By additionally claiming losses from domestic price suppression, Canada and Mexico go beyond the concept of market access and 'trade effects' as the measure of market access. The question, therefore, is whether, in the context of determining nullification or impairment under Article 22 of the DSU, the benefits flowing from national treatment go beyond the benefit of market access, and particularly whether they extend to price effects in the domestic market of a requesting party," the arbitration panel said.

"Canada and Mexico submit that the benefits do go beyond market access, essentially by understanding 'nullification or impairment of benefits' to refer to any adverse effects resulting from the violation of the national treatment obligations at issue. According to this logic, the determinative criterion for including or excluding losses would be the causal link between the violation and the claimed effect," it added. "Canada and Mexico recognize that the U.S. House of Representatives repealed COOL for beef and pork last June, and we renew our call on the U.S. Senate to quickly do the same in order to avoid

retaliation against U.S. exports," said Canadian Minister of International Trade Chrystia Freeland, Minister of Agriculture Lawrence MacAulay, and Ildefonso Guajardo Villarreal, Mexico's Secretary of Economy, in a joint statement. The House voted 300-131 in June to repeal the COOL requirements (H.R. 2393), but the bill has not moved in the Senate.

> Farm state senators agreed on the need for the legislation. "As I've said time and time again, whether you support or oppose COOL, the fact is retaliation is coming," said Senate Agriculture Committee Chairman Pat Roberts (R-Kan.) in a statement.

"How much longer are we going to keep pretending retaliation isn't happening? Does it happen when a cattle rancher, or even a furniture maker, is forced out of business? We must prevent retaliation, and we must do it now before these sanctions take effect. I will continue to look for all legislative opportunities to repeal COOL," Roberts said. Sen. Joni Ernst (R-Iowa) said Congress has "been putting this off for far too long and the time to act is now." The Senate "must pick-up the reigns and pass a full repeal of COOL to avoid unnecessary harm to our agricultural and manufacturing sectors," she said.

Congress Moves Quickly on Customs Enforcement Act

As expected, the House-Senate Conference Committee on the Trade Facilitation and Trade Enforcement Act of 2015 (H.R. 644) moved quickly to meld the House and Senate versions of the legislation, holding its first meeting Dec. 7, issuing its compromise bill Dec. 10 and having the House pass the conference report Dec. 11 by a 256-158 vote. House Democrats, who were mostly locked out of the seven months of staff work on a final measure, opposed the final agreement, with only 24 Democrats voting for it. Senate action is expected the week of Dec. 14 (see **WTTL**, Dec. 7, page 1).

> Large portions of House and Senate versions of the legislation were nearly identical and needed little change in the final bill. The differences, however, were what spurred Democratic opposition, including sections on currency manipulation, human rights and climate change.

Unlike the Senate version, which would have made currency manipulation subject to countervailing duty remedies, the adopted language merely adds factors that Treasury must consider and report on in its semi-annual reports on foreign exchange rate policies. It gives the president authority to place restrictions on government financing and procurement for countries that fail to adopt appropriate exchange rate policies.

The measure also goes back to the already enacted fast-track trade promotion authority (TPA) to add provisions barring trade pacts from including obligations to eliminate greenhouse gases, prohibiting changes to immigration laws and softening provisions that bar trade deals with countries that fail to curb human trafficking. Instead, the final bill only requires that trade deal partners "take concrete steps to address trafficking."

The measure formally creates Customs and Border Protection (CBP) and its structure, which has undergone several reorganizations since the Customs Bureau was moved under the Department of Homeland Security following Sept. 11, 2001. It also includes several provisions aimed at addressing congressional complaints about the circumvention of antidumping and countervailing duties and weak enforcement of trade remedy laws. The

measure directs CBP to put more focus on the commercial side of its operations, revises rules on drawbacks, clarifies requirements for imports of items advanced offshore from U.S. parts and materials, and adds some pet provisions dealing with performance outerwear and protective footwear. It also confirms TPA language that makes it a negotiating objective in trade agreements to discourage politically motivated actions to boycott, divest from or sanction Israel.

> Conferees were unable to resolve differences over provisions that Sen. Rob Portman (R-Ohio) added in the Senate bill to create a mechanism for congressional action on miscellaneous tariff bills (MTBs). Instead, they adopted a sense of Congress statement, urging the Ways and Means Committee and Senate Finance Committee to advance a proposal to deal with temporary duty reductions and suspensions.

In addition, the report gives CBP new tools and holds it accountable to act effectively "against evasion of antidumping and countervailing duties, including by targeting risky imports and establishing a new investigation process with strict deadlines and judicial review," Ways and Means Chairman Kevin Brady (R-Texas) told the House.

Brady said the bill ensures that CBP "focuses on its trade-related mission and streamlines processing of legitimate trade." He also praised language that modernizes the agency's automated systems and reduces paperwork burdens. "Basically, this bill replaces inefficiency with innovation and eliminates outdated systems," he said. The measure "significantly strengthens enforcement of U.S. trade laws." Brady said. "It creates new tools to combat currency manipulation," he added.

Compared to TPA, four fewer Democrats voted for H.R. 644. The more stark difference was the 50 Republicans who voted against TPA, but voted for the trade enforcement conference report. On the House floor prior to the vote, Ways and Means Committee Ranking Member Sander Levin (D-Mich.) urged his colleagues to reject the report.

This conference report is "very close in spirit and in language to the bill almost all of us on the Democrat side voted against," Levin said. The language of currency manipulation "includes a meaningless provision that simply calls for more talk, more deference to the Treasury Department, and no real action," he said. "These and other fundamental flaws outweigh the enforcement provisions that were included in the conference report."

Congress Needs to Address Section 337 Rules for Digital Imports

Congress needs to address the question of what constitutes an "article" under U.S. trade and patent laws that predate the Internet, trade and copyright experts say. In November, a divided Court of Appeals for the Federal Circuit (CAFC) reversed the International Trade Commission's (ITC) claim to control imports of digital technology under the unfair trade rules of Tariff Act Section 337 (see **WTTL**, November 16, page 2).

The CAFC in *ClearCorrect Operating, LLC v. ITC* said the statute gives the ITC jurisdiction only over imported "articles" and does not mention transmission of digital data. The ruling involved claims that technology patented by Align Technology, Inc., was being infringed by the transmission of teeth measurements to Pakistan where they were converted to specifications that were sent back to the U.S. for production of corrective

devices. The case was the second challenging ITC's authority over digital imports and the second heard by the same CAFC judges. Legal experts disagree on whether the original drafters of the law meant to exclude intangible objects. They say Congress should decide that.

> Sapna Kumar, associate professor at the University of Houston Law Center, told an event at the Cato Institute Dec. 9 that Congress needs to address the Patent Act for trading Internet files. "The problem is much larger than just imports, the problem is with the strength of patents overall, and the fact that the Patent Act currently doesn't have a remedy for trading 3-D blueprints that can be used to print out patented goods today. The ITC is trying to fix a problem that it's not really their job to fix. That shows the under-lying problem with the Patent Act that needs to be addressed," Kumar said.

Geoffrey Manne, founder and executive director of the International Center for Law and Economics, cited pre-1929 legal precedents on electronic transmission, showing the ITC was correct in its original ruling. *INS v. AP (1918)* held that "pre-publication news reports were property and that you could sue for misappropriation when there was an electronic transmission of such property by wire," he said. "Thus, for at least two decades before the Tariff Act, it was well established that unfair competition did not require 'tangible' goods as a predicate for enforcement actions," Manne argued.

* * * Briefs * * *

BURMA: OFAC Dec. 7 issued six-month general license authorizing transactions that are "ordinarily incident to an exportation to or from Burma of goods, technology, or non-financial services." These include "participating in trade finance transactions and paying port fees as well as shipping and handling charges associated with sending goods to or from Burma," OFAC said. License does not authorize transactions with SDNs or any other person whose property or interests in which SDNs own 50% or greater interest, agency said.

EXPORT ENFORCEMENT: GLS Solutions, Inc. and owner Gregorio L. Salazar of Aventura, Fla., agreed Dec. 10 to pay penalty to BIS to settle charges related to 2012 export of FLIR High Performance Infrared Camera to Venezuela without Commerce license. Camera was classified under ECCN 6A003, controlled for national security and regional stability reasons and worth $28,335. Salazar agreed to pay $50,000 in three installments for false or misleading statement in disclosure to BIS. GLS will pay $50,000, of which $32,500 will be suspended for one year and then waived if firm commits no further violations. Prior to selling or transferring the item for export, GLS was informed that Commerce license was required, BIS said.

MORE EXPORT ENFORCEMENT: Three Chinese nationals were arrested Dec. 10 on charges related to scheme to obtain and illegally export sophisticated Xilinx semiconductors stolen from U.S. military. Daofu Zhang, Jiang Guanghou Yan, also known as "Ben" and Xianfeng Zuo appeared in New Haven U.S. District Court and remain in custody. They were arrested in Milford, Conn., attempting to take delivery of chips from undercover agent, Justice said.

IRON TRANSFER DRIVES: In 6-0 preliminary votes Dec. 11, ITC found U.S. industry may be injured by allegedly dumped and subsidized certain iron mechanical transfer drive components from Canada and China.

STEEL PIPE: In 6-0 preliminary votes Dec. 11, ITC found U.S. industry may be injured by allegedly dumped and subsidized circular welded carbon-quality steel pipe from Oman, Pakistan, UAE and Vietnam. It found imports from Philippines were negligible by 6-0 vote.