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Canada Expands Sanctions Against Russia, Crimea

After the European Union (EU) extended its sanctions against Russia, Canada followed suit June 29, targeting more Russian entities and individuals (see **WTTL**, June 29, page 3). Ottawa also expanded restrictions on trade with Crimea to ban exports and imports with the region and to block Canadian investment there. Among individuals and entities added to the sanctions list is Joint Stock Company (JSC) United Aircraft Corporation (UAC), a holding company that controls Russia's major commercial and defense aerospace firms. On its board are several members of the Russian government.

> Sanctions related to the Crimea region of Ukraine include prohibitions on: the import and export of goods; investment; the provision or acquisition of financial or other related services and on the transfer, provision or communication of technical data or services; the provision or acquisition of financial and other services related to tourism; and the docking of cruise ships.

In addition to UAC, added to Canada's list of sanctioned parties are: Aleksandr Dugin, Pavel Kanishchev and Andrey Kovalenko, leaders of Eurasian Youth Union; separatist group Eurasian Youth Union, investment company Marshall Capital Fund and Night Wolves motorcycle club; six subsidiaries of defense company Rostec; and four energy firms OJSC Gazprom, OJSC Gazprom Neft, OJSC Surgutneftegas and Transneft OAO.

UAC was incorporated in February 2006 under a decree signed by Russian President Putin. The Russian government contributed its assets to United, including the largest state-owned Russian aircraft building companies, according to the UAC website. As a result it owns 100% of those firms or large shares. One of those holdings in Sukhoi, which is 100% owned by UAC and Russia's major aircraft holding company, employing more than 26,000 people, accordin to its website. It produces commercial airplanes and military jets such as the MiG 35 and new Su-32 and Su-35 type fighters, it states.

Russia Tries to Block Ukraine Joining WTO Procurement Pact

Russia has ignited a firestorm at the World Trade Organization (WTO) with its attempt to block Ukraine from joining the Government Procurement Agreement (GPA) by claiming Kiev has no legal right to include Crimea and Sevastopol under its proposed

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accession protocol. Moscow's move quickly drew a strong condemnation from Canada. "The stunt pulled by the Putin regime at the World Trade Organization is another desperate attempt to legitimize its illegal occupation and annexation of Crimea. Canada has been clear: whether it takes five months or 50 years, we will never recognize this annexation as being the genuine will of the Ukrainian people," said Canadian International Trade Minister Ed Fast in a July 2 statement (see story page 1).

> The confrontation has become a sensitive issue at the WTO because the GPA has been one of its success stories as other trade talks have stalled. It also has further thrust the WTO into the middle of the international opposition to Russia's invasion of Ukraine and the trade disputes that have emerged from sanctions against Russia and separatists in Eastern Ukraine.

Russia signaled its opposition to Ukraine's GPA accession in a June 16 letter, which WTTL has obtained, to the GPA committee chairman. The letter referred to Ukraine's draft final GPA accession offer, which included Crimea. "Please note that the Crimea Federal District and the Federal city of Sevastopol are integral parts of the Russian Federation. Any entity or enterprise, established in the Russian Federation, including in that District or City, cannot be subject to GPA commitment of any other Member, except the Russian Federation," wrote the Russian ambassador to the WTO.

In a July 2 letter, which WTTL has also obtained, Canada's ambassador to the WTO objected to Russia's claim. "Canada does not recognize the Russian Federation's claim in this regard and views the Russian Federation's annexation of the Autonomous Republic of Crimea and the City of Sevastopol as illegal under international law," Ambassador Jonathan T. Fried wrote to the GPA committee chairman.

The letter noted the United Nations resolution calling on members not to recognize the change in the status of Crimea and Sevastopol due to Russia's invasion and annexation of the territory. "Pursuant to this resolution, Canada urges all GPA Parties to expressly reject the Russian Federation's claim to these regions," Fried wrote. "Furthermore, as the Russian Federation is not a Party to the WTO Agreement on Government Procurement, the Russian Federation has no role in determining the terms on which any WTO Member may accede to the Agreement on Government Procurement," he declared.

Obama Praises Bipartisan Effort on Trade Legislation

President Obama surrounded himself with Republicans and Democrats at a White House ceremony June 29 where he signed bills enacting fast-track trade promotion authority (TPA) (H.R. 2146) and a combination of Trade Adjustment Assistance (TAA) and trade preferences (H.R. 1295). In his pre-signing remarks, Obama praised the bipartisan effort that got the measures passed. "I think it's fair to say that getting these bills through Congress has not been easy," he said, drawing laughter from the assembled audience.

"Although Congress is on recess, I think it's important to acknowledge Speaker John Boehner and Leader Mitch McConnell; Senators Orrin Hatch, Ron Wyden and Patty Murray; Congressmen Paul Ryan, Ron Kind and Pat Tiberi. And thanks to all the senators and representatives who took tough votes and encouraged their colleagues to do the same," he said. Among the lawmakers standing behind Obama as he signed the bills were Reps. Pat Tiberi (R-Ohio), Dave Reichert (R-Wash.), Ron Kind (D-Wis.) and John

Delaney (D-Md.). "This was a true bipartisan effort. And it's a reminder of what we can get done – even on the toughest issues -- when we work together in a spirit of compromise," he said. "Let me just make one more comment. The trade authorization that's provided here is not the actual trade agreements. So we still have some tough negotiations that are going to be taking place," Obama noting that any final trade deal will be "posted on a website for a long period of time for people to scrutinize, and take a look at, and pick apart."

> The trade debate "on the particular provisions of trade will not end with this bill signing. But I'm very confident that we're going to be able to say at the end of the day that the trade agreements that come under this authorization are going to improve the system of trade that we have right now. And that's a good thing," he stated.

Court Upholds Constitutionality of Duty Pre-Payments

The requirement for importers to pre-pay duties before challenging Customs liquidation is constitutional, the Court of Appeals for the Federal Circuit (CAFC) ruled June 30. The appellate court upheld a similar finding by Court of International Trade (CIT) then-Chief Judge Gregory Carman, agreeing that the requirement, which dates back to the earliest days of Customs law, does not violate the Fifth Amendment's Due Process Clause. In *International Custom Products (ICP), Inc. v. U.S.,* the CAFC acknowledged that the importer faced having to pay a very high duty on the sauces it was importing. ICP challenged the Customs notice at the CIT before paying the duty.

> "Requiring pre-payment of duties owed undoubtedly burdens an importer, and we appreciate the harsh reality that requirement imposes here, as ICP must pay almost $28 million before it can commence suit in the Trade Court. But we nonetheless hold that the pre-payment requirement does not deny ICP the fundamental processes of fairness required by the Fifth Amendment," wrote Circuit Judge Alan Lourie for the three-judge panel.

ICP's underlying suit dates back to 2005 when it protested a Customs notice changing an earlier ruling letter on the classification of a "white sauce" it was importing. The initial ruling classified the product as white sauce but a later notice reclassified it as a dairy sauce with a higher duty rate. The suit has gone through several rulings and appeals over the decade (see **WTTL**, June 30, 2014, page 10).

"The pre-payment requirement at issue simply conditions the government's waiver of sovereign immunity in suits over the denial of a protest," Lourie noted. "The Supreme Court has also held that pre-payment of monies owed similarly conditions the government's waiver of immunity," he added, citing *Cheatham v. United States*, in which the high court said "the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts."

Other federal court rulings have reached a similar conclusion. "Even when the government waives its immunity, a plaintiff lacks carte blanche to file suit," he wrote. Any waiver is subject to the terms and conditions under which the government consents to be sued, he said, citing *NEC Corp. v. U.S.* Lourie argued that the pre-payment requirement has been a fixture of Customs laws since the founding of the republic. "The first tariff

statutes lacked any mechanism for importers to directly challenge a duty rate," he noted, citing the Act of July 4, 1789. "Thus, an importer wanting to challenge a rate had to pay the duty and then sue the customs collector for a refund in a common law court," he wrote. That requirement was codified in 1845, and now resides in 28 U.S.C. Section 2637(a), Lourie noted.

> ICP won some consolation with a June 24 ruling from Carman, who awarded the firm an unspecified amount of legal fees for its long fight against the failure of Customs to follow legal requirements when it changed the ruling letter's classification of ICP's sauce through a notice. Carman waived the customary fee limits authorized under the Equal Access to Justice Act, accepting the argument that ICP's lawyers in the case required special skills. Nonetheless, he cut the total requested payment by 33% "to reimburse Plaintiff's appropriate expenses without exceeding what is permissible."

In granting the fees to ICP, Carman harshly criticized the way Customs handled the classification change. "The record, considered as a whole, establishes that the government position was rooted in a desire to avoid the timely revocation process. At least in part, this was intended to clear a path for a fraud or criminal investigation that never bore fruit. CBP knew at the time that revocation could not properly be avoided, and yet CBP chose to proceed without revocation," Carman wrote (slip op. 15-68).

"The multiple attacks on the Ruling Letter's validity and applicability stem from this effort. The government position can thus best be summarized as an attempt to promote various post-hoc justifications for taking action CBP knew to be improper," he added. The government's position was not founded on a reasonable basis both in law and fact, nor justified to a degree that could satisfy a reasonable person, he concluded.

BIS Responds to Concerns About Cybersecurity Proposal

The Bureau of Industry and Security (BIS) has responded to some negative reaction it has received to its proposed rules on cybersecurity products with an extensive set of frequently asked questions (FAQs) on its website. The explanations attempt to answer concerns that research into network vulnerability might get caught under changes proposed in May (see **WTTL,** May 25, page 8).

> "It is BIS's understanding that there is no technical basis to distinguish defensive products from offensive products (i.e., a defensive product may be used offensively)," one FAQ noted. It acknowledged that some testing products might be caught under controls implementing changes that the Wassenaar Agreement had adopted in 2013.

"As noted in the preamble to the proposed rule, some penetration testing products marketed as defensive products meet the technical description of such command and delivery platforms in the new control list entries. BIS is not aware of other defensive products that would be caught by the proposed rule, but would welcome comments on this," it said. In general, BIS confirmed that research itself would not be controlled.

"A license would not be required simply to conduct research, unless there was an associated transfer or deemed export of controlled technology, software, or source code,"

it said. In addition, published research is not controlled. "Information that is published, or released at an open conference, is not subject to the EAR. That section also specifies that it would not be an export to transfer the technical data to conference organizers with the intent that it will be published at the conference," BIS added.

> A new control in the proposed rule involves "carrier class IP network," which is not defined in the proposal "because it was difficult to put precise technical parameters around this concept," BIS noted in the FAQ. The term "is meant to specify systems that sit at a national level (or large regional) IP backbone and handle data from an entire city or country," it said.

"In terms of IP network surveillance systems, this is meant to exclude systems that can only handle smaller data streams or networks, such as those for a campus or a neighborhood. This control does not capture systems that can only analyze data from one person or a small group of people at a time," BIS added.

White House Steps into Fight for Ex-Im Bank

As the charter of the Export-Import Bank (Ex-Im) expired June 30, the White House stepped into the battle for its reauthorization, blaming a "vocal minority" for blocking legislation to renew the charter. A White House fact sheet posted June 30 listed on a state-by-state basis Ex-Im financing for firms in all 50 states and the District of Columbia from 2009 to 2014 (see **WTTL**, June 29, page 4).

> "Despite the strong bipartisan support for reauthorization, the Republican-controlled Congress has gone into recess without holding a meaningful vote on Ex-Im, allowing Ex-Im to lapse on July 1 for the first time in history — after 16 reauthorizations, 81 years of continuous operation, and a record of supporting a level playing field for American businesses and American workers," the fact sheet declared.

"Unfortunately, a vocal minority in Washington is putting ideology ahead of American workers. That puts real American jobs at risk — at businesses small and large — and harms our global leadership," it continued, repeating arguments made by Ex-Im officials and bank supporters for the last year. "When Ex-Im lapses, China and other foreign rivals will pick up the slack, putting American businesses and American workers at a disadvantage," it said.

Meanwhile, Ex-Im moved into its uncharted mode by revamping its website. Instead of the usual variety of click options, the page contains a plain message. "Ex-Im Bank has received numerous questions about what will happen if its authorization is not extended. Naturally, we understand that this uncertainty is causing serious concern among businesses and their workers across the country as thousands of entrepreneurs try to make long-term plans to grow, hire, and invest in innovation," it said.

"A lapse in authority beginning on July 1, 2015, will mean the Bank and any of its delegated authority lenders cannot authorize any new transactions. All preexisting loans, guarantees, and insurance policies will continue in full force and effect. We will process and close all previously approved transactions, which will also continue in full force and effect according to their terms," it added. "The Bank will continue to manage all

transactions in its portfolio until maturity, including issuing waivers and amendments (other than those which increase the Bank's exposure). We are fully appropriated through FY2015 and will be able to continue operating after July 1, 2015. If you have any questions, please call your Ex-Im business representative or call 1-800-565-EXIM, or 202-565-EXIM," it advised.

> Separately, six Senate opponents of the bank wrote to Ex-Im President and Chairman Fred Hochberg, asking him to provide them by July 15 "a timeline for completion of orderly liquidation" of the bank. The July 1 letter, first reported by Politico, from Sens. Ted Cruz (R-Texas), Mike Lee (R-Utah), Rand Paul (R-Ky.), Mario Rubio (R-Fla.), Ben Sasse (R-Neb.) and Pat Toomey (R-Pa.), also asked Hochberg to tell them how the bank plans to dissolve its board of directors, return its property to the General Services Administration and close down its website.

U.S., Brazil Seek Closer Trade and Investment Ties

The U.S. and Brazil tried to use the visit of Brazilian President Dilma Rousseff to Washington June 30 to overcome some recent and long-term disagreements, including over U.S. spying on Rousseff. After her talks with President Obama, the two leaders issued a communique calling for closer trade and investment ties, including in the defense area and on taxes. For Brazil, the most important achievement that preceded the meeting was the lifting of U.S. ban on Brazilian beef.

> The Agriculture Department amended its regulations June 29 to allow imports of fresh (chilled or frozen) beef from two regions in South America, including certain Brazilian states, under "specific conditions that mitigate the risk of foot-and-mouth disease." A White House fact sheet also said the U.S. and Brazil "are working to ensure that any Brazilian meat imported into the United States for human consumption complies with U.S. public health and food safety regulations."

"Both Presidents, therefore, welcomed the imminent opening of fresh beef trade between the two countries. President Dilma Rousseff expressed her satisfaction with the publication of the American final rule. Brazil is also taking action to expand U.S. beef access in the near future," the communique said.

The wide-ranging communique, which mostly talked about future cooperation rather than specific actions, said Brazil has agreed to participate in Customs' Global Entry program for international travelers, while the U.S. committed to working toward extending the Visa Waiver Program to Brazilian visitors to U.S.

The two countries agreed to recognize the social security payments their citizen pay in the other country. "This agreement will eliminate dual Social Security contributions, which occur when a worker from one country works in another country. It will also close the gaps in benefit protections for workers who divide their careers between the United States and Brazil," the White House fact sheet noted.

The two leaders said they welcomed the entry into force of an agreement to implement the Foreign Account Tax Compliance Act (FATCA). "The FATCA agreement will

improve international tax compliance and combat offshore tax evasion by facilitating an annual automatic exchange, on a reciprocal basis, of specific account holder information that financial institutions in each country will report to their own governments as required under local law. The first exchange of information is scheduled to occur in September 2015," the White House fact sheet explained.

> The two presidents also welcomed a Defense Cooperation Agreement (DCA), which provides a framework for defense cooperation, as well as the General Security of Military Information Agreement (GSOMIA).

"Defense and Commerce together with the Brazilian Ministry of Defense announced their endorsement of industry efforts to launch a bilateral Defense Industry Dialogue later this year. This dialogue will institutionalize engagement between the U.S. and Brazilian private sectors to enable governments and industry to exchange information and ideas; increase technology cooperation and collaboration in the defense sector; deepen mutual understanding of our defense industries; and discuss long-term defense priorities," the fact sheet said.

Wikileaks Unveils More Texts from Services Talks

They're at it again. In time for the next round of talks, Wikileaks, the Internet source of purloined information, released nine more secret documents July 1 and 2 from previous rounds of talks on a Trade in Services Agreement (TISA). The next round of talks, which the U.S. is currently negotiating with the European Union and 23 other partners, will be held July 6-10. While the release is intended to inflame opposition to TISA, it is likely to please industry, which favors many of the provisions in the released documents.

> One batch contains updated drafts and annexes on electronic commerce, telecommunications services, financial services and maritime transport services. The other includes the draft "core" text for the talks, along with updated annexes on the movement of natural persons, domestic regulation and transparency. The draft annex on government procurement had not been published previously, it said (see **WTTL**, June 8, page 7).

The two-page government procurement (GP) draft chapter from April 2015 contains a bracketed proposal by the European Union (EU), Norway, Israel and Liechtenstein. "Each Party shall ensure that the service suppliers of any other Party that have established a commercial presence in its territory through the constitution, acquisition or maintenance of a juridical person are accorded national treatment … as regards government procurement of services of the Party in its territory," it reads.

It says each party "shall ensure that the government procurement of services is conducted in a transparent and impartial manner that: (a) ensures that the service market is opened up to competition; (b) avoids conflicts of interest; and (c) prevents corruptive practices." As in previous leaks, Wikileaks also released its own analysis along with the draft texts.

On the "core" text, the organization pointed out three features that go beyond the existing General Agreement on Trade in Services. "First, the core rules are supplemented by new substantive restrictions on what governments can do. Second, there are new or more extensive criteria for decision-making and rights for commercial firms, including foreign

firms, to pressure governments to protect their interests," it wrote. "Third, changes to scheduling bring more services under the two main rules on non-discrimination in favor of locals (national treatment) and not restricting the size and shape of, and foreign presence in, the market (market access)," it said.

> The TISA text also anticipates much greater use of "additional commitments" that will bound governments "to a range of new restrictions on certain activities or sectors, which may or may not be linked to the schedules," it added. In government procurement, Wikileaks warned the agreement would hurt policies for small and medium-sized enterprises.

"This extreme liberalisation of GP would undermine the deliberate government policies of a number of developed and developing TISA countries which try to promote their domestic services companies and hence local employment including for indigenous peoples. etc., through GP laws and policies. It is also likely to undermine widespread policies to support domestic micro, small and medium enterprises. The limited exceptions available for this proposed AGP would not save these and other programs in TISA countries from being severely undermined by this proposal if it is agreed to," Wikileaks noted in its analysis.

* * * Briefs * * *

CONSOLIDATED SCREENING LIST: Commerce July 2 added "Fuzzy Name Search" to Consolidated Screening List (CSL) search engine, along with modifications to downloadable files. "Fuzzy Name Search means that you can search the CSL without knowing the exact spelling of an entity's name. By setting Fuzzy Name to On, the CSL returns a 'score' for all results that exactly match or nearly match the name that is searched," Commerce email announced.

ELECTRONICS: In Federal Register July 2 DDTC clarified controls on certain intelligence analytics software under USML Category XI by reinserting words "analyze and produce information from" to paragraph (b). Changes will be effective until Dec. 29, 2015, "while a long term solution is developed," notice said. Department will publish any permanent revision as proposed rule for public comment, it noted.

COTTON: USTR Michael Froman June 30 asked ITC to conduct Section 332 investigation on U.S. production, imports, exports, and consumption for five cotton articles from 2012-2014.

MAGNESIA CARBON BRICKS: Customs was not justified in requiring 260.24% bond on entry of magnesia carbon brick from Vietnam because it feared imports actually came from China, CIT Chief Judge Timothy Stanceu ruled June 26 (slip op. 15-69). Duty was combination of 236% antidumping order and 24.24% countervailing duty on Chinese imports. "In summary, the court concludes that the decision to require a single transaction bond as a condition of release of the December 2 entry was 'arbitrary and capricious' within the meaning of the APA," Stanceu wrote. The decision was not supported by satisfactory explanation and did not rest on rational connection to facts found. Government "raises various arguments as to why the court must sustain the decision to require the additional security for the December 2 entry. None of these arguments convinces the court," he ruled.

TARGETED DUMPING: Court of Appeals for Federal Circuit (CAFC) June 24 affirmed CIT ruling upholding Commerce's use of targeted dumping methodology in administrative review of antidumping order on polyethylene terephthalate film (PET) from United Arab Emirates (UAE). At CIT, JBF RAK challenged Commerce's targeted dumping analysis and disputed department's authority to apply average-to-transaction comparison method in administrative reviews. CIT

held that 19 U.S.C. Section 1677f-1(d)(1)(B) defines "targeted dumping" in terms of pattern of export prices and its *Nails* Test reasonably determines when such pattern exists. "Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews," wrote CAFC Judge Evan Wallach for three-judge panel. CAFC agreed with CIT that requiring Commerce to determine intent of targeted dumping respondent would create tremendous burden on Commerce that is not required or suggested by statute.

LIQUIDATION: Customs incorrectly liquidated entries of activated carbon despite instructions from Commerce not to, but Carbon Activated Corp. (Carbon) waited too long to protest liquidation, Court of Appeals for Federal Circuit (CAFC) ruled June 26, upholding earlier CIT decision. After Commerce told Customs to suspend liquidation while administrative review continued, Custom went ahead and liquidated three entries at original 67.14% rate in 2008. Commerce later issued new liquidation instructions, which should have applied to those entries, in January 2012, setting the rate at 16.35%. Carbon allegedly did not learn about erroneous liquidations until June 2012 and filed protest. CAFC Judge Timothy Dyk noted court's previous ruling in *Juice Farms, Inc. v. U.S.*, which addressed similar circumstances where appellate court rejected late protest and cited lack of due diligence by plaintiff. "Because Section 1581(a) was an available avenue of jurisdiction had Carbon timely protested Customs' alleged erroneous liquidation, Carbon cannot rely on Section 1581(i) to secure Trade Court jurisdiction," he wrote for three-judge panel in *Carbon Activated Corporation v. U.S.*

BAHRAIN: State announced June 29 that it has lifted hold on security assistance to the Bahrain Defense Force and National Guard that were implemented following Bahrain's crackdown on demonstrations in 2011. "Bahrain is an important and long-standing ally on regional security issues, working closely with us on the counter-ISIL campaign and providing logistical and operational support for countering terrorism and maintaining freedom of navigation," said State Spokeperson John Kirby. "All arms transfers to Bahrain will continue to undergo review under the U.S. Conventional Arms Transfer Policy, as do arms transfers to any country," he added. AFL-CIO President Richard Trumka said he was "deeply concerned" about changed policy and Bahrain's failure to protect workers rights. "The Bahraini government has failed to keep its promises to the American government to improve the administration of labor rights including eliminating widespread workplace discrimination based on religion and political belief. This is why the AFL-CIO filed a case under labor rights provisions of the U.S. Bahrain Free Trade Agreement regarding Bahrain's failure to live up to its commitments with respect to workers' rights," he said in statement.

AUTOS: Customs and Border Protection (CBP) signed letter of intent (LOI) June 29 with UK's National Police Chief's Council, National Vehicle Crime Intelligence Service (NaVCIS) and the United Kingdom Border to share law enforcement information to intercept illegal vehicles imports. Agreement was signed in London at start of working sessions of Operation Atlantic, joint trade enforcement operation that targets illegal vehicle imports to Europe.

SUGAR: As fight among sugar growers, sugar consumers and corn growers heats up, Coalition for Sugar Reform, which comprises groups opposed to current sugar import restrictions and sugar subsidies, wrote to USTR Michael Froman July 2, urging him to include increased access to U.S. sugar market for countries participating in TPP. "Consumers and food companies currently face severe restrictions on both domestic sugar production and imports that insulate U.S. sugar producers almost entirely from normal market pressures," said letter signed by coalition and 13 other organizations. "Tight domestic sugar supplies can be expected for the next several years, unless we allow commercially meaningful access to TPP countries that have the ability to supply the U.S. market," letter added.