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Europe Set to Publish Changes to Dual-Use Control Lists

After three years of meetings and agreements but no official update to its dual-use export control lists, the European Commission (EC), the EU's administrative branch, finally proposed some 400 changes Oct. 22 to its lists to reflect revisions adopted by the Wassenaar Arrangement, Missile Technology Control Regime (MTCR), Australia Group (AG) and Nuclear Suppliers Group. The updated list "reflects growing security concerns regarding the use of surveillance technology and cybertools that could be misused in violation of human rights or against the EU's security: controls are introduced on new categories of items such as IT intrusion software (spyware) and telecommunication and internet surveillance equipment," the EU said.

> "The new Regulation also removes from the list certain items and technologies which have become more widely available and represent a lower security risk, and therefore do not need to be subject to control any longer," it added. Changes include agreements from the four multilateral regimes over the course of 2011, 2012 and 2013.

The new regulation affects nuclear reactor parts and components, such as frequency changers; new controls on certain chemicals, such as plant pathogens; and new controls on special materials, electronics and computers, telecommunications and information security equipment, sensors and lasers, aerospace and propulsion, underwater survey equipment, carbon monoxide lasers and hydro-acoustic sensors. The changes have been transmitted to the European Parliament and European Council, and will enter into force only if there are no objections from those bodies within two months, the EC noted.

For many years, U.S. exporters complained about the how slow BIS was in publishing list updates to reflect regime changes, claiming EU exporters were gaining an advantage because the EU issued those rules faster. In the last three years, however, the tables turned and U.S. exporters were able to benefit from the liberalizations of several Wassenaar controls while EU firms still lived under the old rules.

Netherlands Proposes Changes to ISDS Agreements

While supporting the inclusion of investor-state dispute settlement (ISDS) provisions in a Transatlantic Trade and Investment Partnership (TTIP), the Netherlands has proposed

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extensive new conditions for any agreement to limit the potential for frivolous challenges of domestic laws and regulations and prevent investors from seeking parallel remedies in a country's courts as well as through ISDS arbitration. Netherlands Trade Minister Lilianne Ploumen told WTTL that she has submitted the proposals to outgoing EU Trade Commissioner Karel De Gucht (see story page 3).

> The proposal, obtained by WTTL, attempts to address concerns that ISDS critics have raised about the potential for ISDS arbitration panels to issue rulings that interpret trade agreements differently than TTIP partners intended. It also calls for the inclusion of an appeals process that would give governments the chance to override an arbitration panel's ruling. The proposal is based on the examination of ISDS rules by Dutch researchers.

The proposal calls for the adoption of a "fork-in-the-road" clause that would prevent investors from taking cases to a domestic court as well as an ISDS panel. "The aim of such a clause is to prohibit investors from engaging in forum shopping by submitting parallel investment claims to both the domestic courts and an international tribunal in respect of the same measure or government act," the proposal states.

The proposal also supports the inclusion of options for either voluntary or mandatory mediation before the filing of a formal complaint. "Given the time and costs involved in ISDS, I consider the possibility of mediation to be a desirable addition," Ploumen said in the proposal. Another suggestion would limit the ability of so-called "mailbox companies," also known as Special Financial Institutions, from filing ISDS complaints. "This possibility can be excluded by incorporating a denial-of-benefits clause for certain categories of investor. Such a clause would mainly seek to exclude investors that do not have substantial business activities in the country concerned or an economic relationship with the contracting parties," the proposal notes.

Similarly, the Dutch proposal would limit ISDS protection to investors already in business in one of the contracting parties, a condition under existing Dutch investment agreements. Other ISDS proposals have sought pre-establishment protection for investors. "There is therefore a risk that an investor may be able – even before actually making a substantial investment in the Netherlands – to invoke ISDS if its access to our market is obstructed. I will press for the scope of ISDS to be limited to the post-establishment phase," Ploumen said.

Other parts of the Dutch proposal would require more transparency in ISDS proceedings, adopt a code of conduct for ISDS arbitrators to avoid conflicts of interest, and allow contracting parties to issue binding interpretations of the agreement for arbitration panels to follow. To reduce the potential for frivolous claims that have no legal merit, the proposal suggests creation of an extra mechanism to review cases at an early stage to determine their merits. "If claims are to be filtered effectively, the entire cost of proceedings should be borne by the investor if a claim is held to be frivolous (the loser-pays-all principle)," it urges.

"A recurrent theme of the public debate is that ISDS restricts the discretionary powers of government authorities to act in the public interest," the paper says, noting that disputes about legislative measures have always been won by government authorities but also citing recent cases that have tested that record. "I share the public concern expressed about them," Ploumen said. "In the TTIP negotiations I will therefore press for the

inclusion of a clear provision granting the contracting parties sufficient discretionary powers to take non-discriminatory legislative measures designed to protect such public interests as health, the environment, animal welfare, employment rights and so forth without running the risk of exposure to ISDS claims," Ploumen stated.

Incoming EC Head Promises Role for Courts in ISDS Cases

In response to strong concerns in the European Union (EU) about potential agreements on investor-state dispute settlement (ISDS) rules, the president-elect of the European Commission (EC) Jean-Claude Juncker promised the European Parliament Oct. 22 that his administration "will not accept that the jurisdiction of courts in the EU Member States be limited by special regimes for investor-to-state disputes." The pledge was among several Juncker was forced to make to win the parliament's agreement on the same day to approve his candidates for EC commission posts, including trade commission nominee Cecilia Malmström (see **WTTL**, Oct. 6, page 2).

> "I took note of the intense debates around investor-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) negotiations," Juncker told the parliament, restating his earlier promise on the jurisdiction of EU courts. "The rule of law and the principle of equality before the law must also apply in this context," he stated (see story page 1).

"The negotiating mandate foresees a number of conditions that have to be respected by such a regime as well as an assessment of its relationship with domestic courts. There is thus no obligation in this regard: the mandate leaves it open and serves as a guide," he said. In any agreement submitted to Parliament, "there will be nothing that limits for the parties the access to national courts or that will allow secret courts to have the final say in disputes between investors and States," he declared.

Juncker said he has asked incoming EC first vice president Frans Timmermans to advise him on the matter. "There will be no investor-to-state dispute clause in TTIP if Frans does not agree with it too." he asserted. "I am confident that – with your support – we can negotiate an ambitious trade agreement with the U.S. along these lines, with full respect of European interests and the rule of law," he said.

The parliament approved Juncker's picks for 27 commissioner posts by a vote of 423 votes to 209 and 67 abstentions. The new commissioners will start work Nov. 1. Ahead of the vote, some members of parliament who have criticized ISDS proposals continued to voice their objections to the inclusion of those rules in a trade deal along with other concerns about EU trade policies.

Separately, trade officials from 14 EU member states wrote to Malmström Oct. 21 to support TTIP negotiations and raise concerns about the "misconceptions" that have been circulated about the talks, particularly about ISDS. "The response to those criticisms - as some are calling for and tempting as it may be - should not be to jettison the difficult issues. That will lead to a lowest common denominator deal at best or no deal at all. Europe needs to think big and demonstrate clear leadership if we are to generate the growth that we badly need and if we are to keep our place on the world stage. That means the Commission and governments across the EU working with businesses and consumer associations to tackle those myths head on," they wrote.

ETRAC to Look for Outdated Technology on Control List

The Bureau of Industry and Security's (BIS) Emerging Technology and Research Advisory Committee (ETRAC) is reviewing every Export Control Classification Number (ECCN) on the Commerce Control List (CCL) to propose removing outdated technology, the committee announced Oct. 24. Its preliminary recommendations will be sent to BIS in December. This is the second TAC doing a CCL review. Transportation TAC members also are examining the CCL for updating (see **WTTL**, Oct. 6, page 6).

> ETRAC will identify products that are "somewhat difficult to regulate as a deemed export…as well as ones that have fallen into the state of being outdated by either emerging technology that has already emerged or…by the evolution of that specific," ETRAC Co-Chair Tom Tierney, a senior project leader at Los Alamos National Laboratory, said.

In the electronics category, the group "found that there are ECCNs that haven't been updated in the past 10 years, probably haven't been updated in even longer than that, and the technology is almost universally available," Tierney said. "We're trying to evaluate how relevant it is in today's time. Are there technologies that are much more advanced, that have superseded the relevancy of that specific technology?" he added.

BIS Assistant Secretary Kevin Wolf gave the committee an update on ongoing export control reform efforts. As the transition of aircraft items from the U.S. Munitions List (USML) to the CCL passed its first anniversary of implementation Oct. 15, $2.5 billion of transferred products have been exported under BIS jurisdiction and $7 billion in licenses have been approved, he reported. "The rate of growth of the use of license exceptions is exponential," he said. At the same time, the rate at which State is returning without action (RWA) licenses for transferred items is "going down as people start getting more used to the new system and stop applying to State for licenses," Wolf said via teleconference call to ETRAC, which was meeting in San Diego.

The ETRAC list review is part of its renewed charter submitted on its fifth birthday. Under its new charter, ETRAC will (a) BIS-related emerging technologies and research and development; (b) examine the impact of export controls on research; and (c) review technical and policy issues resulting from the Export Control Reform Initiative.

U.S. Likely to Challenge WTO's Latest COOL Ruling

Vegans say the solution to the U.S. dispute with Canada and Mexico over imported beef labeling is to stop eating meat. Short of that, the U.S. is expected to appeal a World Trade Organization (WTO) panel ruling Oct. 20 that said changes made to country-of-origin labeling (COOL) regulations still don't comply with previous WTO decisions against the labeling rules (see **WTTL**, Oct. 20, page 2). Based on previous WTO panel and Appellate Body rulings on COOL rules, a U.S. appeal is not likely to succeed.

"While the WTO continues to affirm the right of the United States to require country of origin labeling for meat products, we are disappointed that the compliance panels have found that the country of origin labeling requirements for beef and pork continue to discriminate against Canadian and Mexican livestock exports," a spokesman for the U.S. Trade Representative's office said in an email to WTTL. "We are considering all

options, including appealing the panels' reports," he said. Canada and Mexico continue to threaten retaliation against the U.S. for its failure to comply with past WTO rulings. In a joint statement, Canadian and Mexican trade and agriculture ministers said they were disappointed that Washington is defending the COOL rules.

> "Canada and Mexico will remain vigilant to ensure the harm generated by the protectionist COOL policy is brought to an end and that international trade commitments are respected," they said. "We remain committed to using the WTO process to reach a satisfactory resolution to our concern, including if and as necessary, seeking authorization to implement retaliatory measures on U.S. agricultural and non-agricultural products," they added.

The WTO panel was asked to review changes the U.S. Agriculture Department (USDA) made to COOL rules in 2013 to come into compliance with a previous WTO decision against the labeling requirements. The panel sided with Canada and Mexico on most of the complaints, agreeing that the regulation falls under the WTO Agreement on Technical Barriers to Trade, gives less favorable treatment to imported livestock than to like products of U.S. origin, and nullifies or impairs benefits to which Canada and Mexico were entitled under Uruguay Round agreements.

The panel tried to deflect complaints that it interfered with a country's right to protect consumers, recalling earlier panel decisions that said providing consumer information on origin is a legitimate objective. "A Member is therefore free to adopt technical regulations consistent with its WTO obligations to pursue this objective," the panel found.

"Further, in making our findings, we do not mean to imply that there is no practical, WTO-consistent way for Members to pursue the above legitimate objective," it added. While not ruling on alternative ways to apply COOL requirements, it said "some form of trace-back could require the provision of consumer information on the country(ies) where livestock were born, raised, and slaughtered, or of even more detailed information, such as the specific location of individual production steps within a country."

The panel rejected U.S. arguments that country-of-origin labeling has been required since the Trade Act of 1930 (the Smoot-Hawley Act) and the Agricultural Marketing Act of 1946. "We observe, however, that there are notable differences in the nature and extent of the obligations imposed by the Tariff Act of 1930 and the amended COOL measure," the panel stated. It noted that the 1930 act did not apply to many of the products covered by the amended COOL measure, including meat derived from animals slaughtered in the United States.

The panel agreed with Canada and Mexico that COOL requirements for labeling the place of birth, raising and slaughter of beef and pork put imports from those two countries at a competitive disadvantage because the added cost of tracing and segregating imported animals causes slaughterhouses to avoid those imports. "We have found that the amended COOL measure has increased the original COOL measure's detrimental impact on the competitive opportunities of imported livestock, and that this impact does not stem exclusively from legitimate regulatory distinctions," the panel ruled.

Although major trade and agriculture groups have called for revisions to COOL legislation to allow USDA to come into compliance with WTO rulings, the National Farmers Union (NFU), which represents smaller family farms, urged the USTR's office to appeal

the latest ruling. "The ruling gives USDA and USTR the opportunity to redefine the rule without the need for Congress to get involved," said NFU President Roger Johnson in an NFU release. "There may well be a more clear way to define 'born, raised, slaughtered' such that it cleans up the confusion which was in the decision," he added. "This decision, as it has been issued, will likely be modified on appeal and NFU strongly urges USTR to appeal the ruling," Johnson said.

Sugar Users Worry about Suspension Agreement with Mexico

As the U.S. sugar industry awaits Commerce's preliminary decision on the antidumping case against Mexican sugar imports, which was due after our deadline Oct. 24, sweetener users are concerned a potential suspension agreement to settle the dispute will disrupt supplies and cause uncertainty in a market that has already seen a double-digit price increase. At press time there was speculation that Commerce and Mexico would reach an agreement over the weekend to forestall issuance of a decision. Some sources, however, say that is unlikely, although both sides will keep talking.

> If a suspension agreement is reached, the Sweetener Users Association (SUA) wants the department to allow the investigation to continue through the International Trade Commission's (ITC) injury phase in the hope the ITC won't find the imports hurting U.S. producers. Such a provision would allow "the case to continue to final determinations before any suspension agreement goes into effect," John Herrmann, partner at Kelley Drye and counsel for SUA, told a call with reporters Oct. 23. "The domestic industry would not be very enthusiastic or supportive about the inclusion of such a provision, so we'll have to see how those discussions unfold," he added.

The American Sugar Coalition filed antidumping and countervailing duty (CVD) petitions with Commerce and the ITC in March against Mexican sugar (see **WTTL**, April 7, page 6). The ITC made an affirmative preliminary injury finding on the cases May 9. Commerce issued its preliminary CVD decision Aug. 26. As a result of ruling, Commerce instructed Customs to require cash CVD deposits of 17.01% on imports from mandatory respondent Fondo de Empresas Expropiadas del Sector Azucarero, 2.99% from mandatory respondent Ingenio Tala and certain other cross-owned companies of Grupo Azucarero Mexico. All other suppliers were assigned a 14.87% rate.

An 11 cent per pound increase in prices between March and September is "directly attributable" to the ongoing trade cases, said Tom Earley, vice president of Agralytica Consulting and an SUA consultant, on the press call. "Filing of the trade cases has driven refined sugar prices up by more than 40 percent -- from 26.5 cents per pound in March to 37.5 cents in September. If prices remain at 37.5 cents, that extra 11 cents per pound will cost consumers an additional $2.4 billion over the course of the fiscal year that just started on October 1," noted a white paper SUA released with the media call.

"The combination of antidumping and countervailing duties could put further upward pressure on U.S. sugar prices," the paper said. "Even if the United States and Mexico work out some agreement to restrict Mexico's sugar exports to the United States in the coming months, the implicit shorting of the market and uncertainty about how our supply deficit will be met is expected to keep U.S. sugar prices much higher than they would have been otherwise," it continued.

Commerce Opens Talks with Japan on Medical Products

While U.S.-Japan talks on autos and agriculture trade have taken the spotlight in recent months, Commerce has opened separate talks with Tokyo on barriers to U.S. exports of pharmaceuticals, medical devices and health services. Japanese regulatory barriers to foreign imports, including in the market approval process and in insurance reimbursement, have been the subject of bilateral dispute for more than two decades.

> "I am pleased to report that the Department of Commerce and Japan's Ministry of Health, Labor, and Welfare are engaged in discussions to remove regulatory hurdles in the health care sector," Commerce Secretary Penny Pritzker told the American Chamber of Commerce in Tokyo Oct. 21. "Our cutting-edge, life-saving technologies can benefit Japan, but too often, obstacles stand in the way," she said in her prepared remarks.

Pritzker noted that Japan's $153 billion medical and health products market is second in the world after the U.S. "Japan is looking for ways to care for a rapidly-aging population with state-of-the-art technologies in a cost effective manner – and American firms want to be more present in this market," she said. "U.S. companies are prepared to help Japan improve its health IT, health treatments, health maintenance, and overall health outcomes, but we must address the market access challenges," Pritzker continued. The Commerce secretary was in Japan and Korea leading a trade mission of 20 U.S. companies, including several health firms such as Abbott, Amerisource Bergen, Cytori Therapeutics, Eli Lilly, Merck, Intuitive Surgical, Medidata and Varian Medical.

The day before her speech, she and the U.S. executives met with Japanese Prime Minister Shinzo Abe. Pritzker "praised Prime Minister Abe for his vision in entering the Trans-Pacific Partnership negotiations, and she discussed the need for the U.S. and Japan to be creative and bold as the countries enter the final stages of the negotiations," a Commerce press release reported. "Prime Minister Abe also expressed his desire to complete an ambitious, high-standard agreement as soon as possible," it added.

* * * Briefs * * *

EXPORT ENFORCEMENT: Two Dallas businessmen pleaded guilty Oct. 16 in Dallas U.S. District Court to reduced charges of false statement to federal agency. At same time, Borna Faizy, aka "Brad," of Frisco, Texas, Touraj Ghavidel, aka "Brent Dell," of Plano, Texas, and company -- Signal Microsystems in Addison, Texas, which operated as "Techonweb.com," -- agreed to 10-year export denial order settling BIS charges of conspiracy for exporting computers to Iran via UAE without authorization. Business exported over 1,000 computers classified under ECCN 5A992 valued at $1,015,757 from December 2009 through March 2011.

MORE EXPORT ENFORCEMENT: Robert J. Shubert Sr., from Warner Robins, Georgia, was sentenced Oct. 15 in Macon, Georgia, U.S. District Court to 78 months in prison for exporting USML night-vision goggles to Japan without licenses between June 2006 and December 2011. Shubert pleaded guilty in November 2013 to conspiracy to violate and violation of Arms Export Control Act (AECA) as well as one count of possession of unregistered firearm. From December 2006 through December 2011, Shubert was defense contractor stationed in Iraq.

TRANS-BORDER DATA FLOW: In letter to USTR Michael Froman Oct. 24, Senate Finance Committee Chairman Ron Wyden (D-Ore.) and Ranking Member Orrin Hatch (R-Utah), with

Sens. Jay Rockefeller (D-W.Va.) and John Thune (R-S.D.) chairman and ranking member of Senate Commerce Committee, called for protection of data flow in TPP. "It is clear that a TPP agreement must include meaningful, clear obligations, enforceable through a strong and effec-tive dispute settlement mechanism, that prohibit unnecessary limitations on the cross-border transfer, storage and processing of data or the physical location of computing infrastructure. In addition, we urge you to stand firm against efforts by other countries to seek reservations and overly broad exceptions that would undermine these obligations and provide lower levels of protection for trade in digital goods and services as compared to other areas of trade," they wrote.

FROZEN FISH FILLETS: In 6-0 "sunset" vote Oct. 22, ITC determined revoking antidumping duty order on frozen fish fillets from Vietnam would cause renewed injury to U.S. industry.

MONOSODIUM GLUTAMATE: In 5-0 final votes Oct. 23, ITC determined that U.S. industry is materially injured by dumped imports of monosodium glutamate from China and Indonesia. Commissioner F. Scott Kieff did not participate in these investigations.

GRAIN-ORIENTED ELECTRICAL STEEL: In 5-1 final votes Oct. 23, ITC determined that U.S. industry is not materially injured by dumped imports of grain-oriented electrical steel from China, Czech Republic, Korea and Russia and subsidized imports from China. Commissioner Rhonda K. Schmidtlein was only yes vote.

ONSHORING: Majority of respondents to online survey conducted by Boston Consulting Group said they are considering bringing jobs and production back to U.S. from offshore. Of 252 companies responding, 54% said they are considering move and 16% said they are in process of making move, BCG's Made in America, Again report said Oct. 21. Among reasons for return are access to skilled workers, local control of production, improved quality and shorter supply chain. Surveyed firms also expect production capacity in U.S. to grow faster than China, Western Europe and Mexico.

WTO: Director-General Roberto Azevêdo began consultations Oct. 22 on Bali decisions and post-Bali work program, even though there has been no progress in breaking deadlock over implementation of trade facilitation agreement. In his report to WTO General Council Oct. 21, Azevêdo said he heard different views from members at Trade Negotiations Committee meeting week before (see **WTTL**, Oct. 20, page 1). "But I think there was, at the very least, a willing-ness to engage in this conversation, and to do all we can to find a way forward," he said.