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Remaining USML-CCL Transfers to be Proposed by End of 2014

Export control agencies have set an end-of-year deadline for proposing the still-remaining transitions of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL). In their semi-annual agenda of regulation posted by the Office of Management and Budget (OMB) May 29, the Bureau of Industry and Security (BIS) and State listed estimated dates for proposed revisions of the six remaining USML categories.

> State said it expects in June to propose revisions to USML categories XII (fire control, range finder, optical, and guidance and control equipment), XIV (toxicological agents) and XVIII (directed energy weapons). The most significant change for Category XIV would move riot control agents to the CCL. BIS plans to publish its parallel rule creating CCL controls for transferred Category XIV items in July covering items for dissemination, detection and protection equipment (see **WTTL**, April 28, page 5).

In December 2014, parallel proposals will be published for categories I (firearms), II (guns) and III (ammunition). These proposals were ready for publication in December 2012 but were set aside after the Newtown, Conn., school shooting because of White House concern that the transfer of any of these items to BIS might be criticized as a weakening of controls at a time it was pushing for tougher gun control laws. Also in December 2014, BIS said it plans to propose an amendment to licensing requirements for exports to Canada of shotguns, shotgun shells and optical sighting devices.

By December, BIS said it will propose a rule on the feasibility of enumerating "specially designed" components. BIS “is evaluating whether it is feasible to create exhaustive lists of the specially designed components referred to in certain Export Control Classification Numbers on the CCL that currently use specially designed catch-all paragraphs, and seeks public input to assist in this evaluation,” it said. “If BIS ultimately determines that such lists might be beneficial, it intends to submit these findings to the appropriate multi-lateral export control regimes in the normal course of list proposal changes,” BIS added.

African Objections Put WTO Trade Facilitation Deal at Risk

One of the most highly touted results of the World Trade Organization’s (WTO) ministerial meeting in Bali in December – the agreement on trade facilitation – has hit an

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early stonewall due to demands from African and less developed countries (LDC) that the deal be adopted only on a "provisional" basis until a final Doha Round accord is reached. As a result, the chairman of the Preparatory Committee on Trade Facilitation (PCTF), Ambassador Esteban Conejos of the Philippines, said May 28 that he is postponing work on the drafting of a protocol to implement the trade facilitation (TF) agreement. Work on the protocol has been going on for several weeks as part of the WTO's "post-Bali" agenda.

> At a May 26 PCTF meeting, speakers on behalf of the African Group said African countries and LDCs want the protocol adopted on a provisional basis and not integrated as a final amendment to the Marrakesh Agreement, which amended the General Agreement on Tariffs and Trade (GATT) to implement the Uruguay Round and create the WTO.

Many developed countries, including the U.S., and advanced developing countries argued that the Bali deal calls for amending current WTO rules and implementing the TF agreement without waiting for the round to be finished.

According to sources in Geneva, the Africans are concerned they may have to adopt new trade rules and improve their infrastructure as part of a TF deal without firm commitments that they will get the supporting funds they were promised in Bali. They want the TF to be part of the "single undertaking" that requires all of the Doha Round to be adopted before any single part is final. Provisional adoption of the TF deal would give them leverage at the end of the round – if it's ever reached – to block a final pact if the aid doesn't materialize. African and LDC representatives also voiced concern about the lack of clarity from developed countries on what sort of technical assistance will be provided.

At the May 26 meeting, a representative from Tanzania reportedly said provisional adoption of the protocol won't have an impact on implementation of the TF agreement, unless members consider the single undertaking hasn't been fulfilled. As long as the post-Bali discussions are being pursued in good faith, no one intends to be obstructive, he reportedly argued, saying the African proposal is a defensive posture.

Conejos said consultations among members should continue before the PCTF's next meeting set for June 24-26. He said he would make a report on progress at that meeting. He also announced that the first notifications of so-called "Category A" commitments have been received, with Hong Kong, Mexico and Costa Rica having outlined which TF commitments they intend to implement upon entry into force of the agreement. Korea is also expected to submit its notification shortly, he reported, with more to come in the weeks ahead. Once drafted, the protocol will only enter into force once it has been accepted by two-thirds of the WTO's membership.

With New Government in India, Old Fears of Protectionism

The swearing in of a new Indian government May 27 has raised U.S. industry hopes that the incoming administration of reportedly pro-business Prime Minister Narendra Modi will ease the bilateral trade frictions between the two countries and alter India's hardline approach to WTO negotiations. Early reports from India, however, suggest those hopes might not be realized. India's caps on foreign direct investment (FDI) and weak intellectual property protection have long topped the list of U.S. concerns, but newly installed Minister of Commerce and Industry Nirmala Sitharaman revealed little movement on those

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issues speaking to reporters after she was sworn in. Regarding FDI, there will not be a "blanket approach" for every sector, and each and every sector would be looked in a "very, very calibrated fashion," she said, according to a press statement from the ministry.

> She said multi-brand retail access to the Indian market is "not best opened up now because...medium and small sized traders or small farmers have not been adequately empowered…that immediately if you open up the floodgates of FDI in multi-brand retail, it may affect them," according to the ministry.

Sitharaman said she will work to "improve on Indian exports, and ensure that job opportunities emerge because that's a very important plank on which we have contested the recent elections." The economic situation in India "demands that more jobs be provided for the young, talented, well-educated and even the semi-skilled and unskilled people of India," she said. In a May 30 tweet, Sitharaman wrote: "Held discussions with senior officers on draft Foreign Trade Policy. Will work to stimulate exports."

Before becoming minister, Sitharaman was national spokesperson for Modi's Bharatiya Janata Party. Prior to that, she was a member of India's National Commission for Women. Earlier in her career, she was an analyst at Pricewaterhouse Coopers in London and briefly worked for the BBC World Service.

For over a decade, U.S. negotiators have faced tough negotiations with Sitharaman's immediate predecessors, including Kamal Nath and Anand Sharma. Some historians also have noted India's resistance to a deal on the original General Agreement on Tariffs & Trade (GATT) in 1948. It also opposed the launch of the Uruguay Round. Most recently, India's demands for a "peace clause" so it could increase subsidies for its farmers almost scuttled the WTO ministerial in Bali in December (see **WTTL**, Dec. 9, page 3).

After the election May 16, a statement from U.S.-India Business Council (USIBC) Chairman Ajay Banga, president and CEO of MasterCard, said USIBC member companies "stand ready to roll up their sleeves and get to work with the new government to advance the U.S.-India partnership and deepen bilateral economic ties." He noted that bilateral trade currently stands at $100 billion. "Increasing trade five-fold is achievable if we work together as partners and avoid protectionist tendencies," he added.

Supreme Court Urged to Defer to CIT Expertise

In their latest brief for a writ of certiorari to the Supreme Court, lawyers for ball bearing importers urged the high court to affirm what they contend is congressional intent to give deference to the Court of International Trade (CIT) in trade remedy cases. "Because of the complexity of trade cases and their exceptional importance to international commerce, Congress channeled review of agency action in this area—and none other—through a specialized Article III trial court," wrote attorneys from Crowell & Moring and Sidley Austin, who represent petitioners NSK Corporation and JTEKT Corporation, respectively.

The petition is seeking to overturn a divided ruling by the Court of Appeals for the Federal Circuit (CAFC) that said the appellate court owed no deference to the CIT and can conduct *de novo* review of trade cases appealed to it. Government briefs, including from the Solicitor General, opposing the petition argued that the CAFC correctly rejected claims that CIT rulings should receive deference because of its specialized expertise and the

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Supreme Court should not review that decision (see **WTTL**, May 5, page 1). The idea that the CAFC has the authority to conduct the same review as the CIT without deference to the CIT "is unmoored from the statute's text and lacks any historical tradition, which places on the Federal Circuit the burden to demonstrate that its approach is justified as a matter of prudent judicial administration," the May 14 brief from the law firms argued.

> "As dissenting Federal Circuit judges have repeatedly noted, the current approach squanders judicial resources by forcing non-experts to duplicate complex, record-intensive work that Congress entrusted to the only specialized Article III trial court in existence," they added.

"There is no other context that utilizes the same bifurcated standard, and respondents' suggestion that Congress intended duplicative appellate review is belied not only by Congress's overarching intent to *streamline* judicial proceedings, but also by features that make substantial evidence review in this context particularly ill-suited to duplication," the brief stated. Supreme Court review "is warranted to repair a judicial review process that is obviously broken and that has long divided judges on the Federal Circuit. Contrary to The Timken's Company's suggestion that disputes involving standards of appellate review in the Federal Circuit do not merit this Court's attention, this Court routinely grants review in such cases. It should do the same here," it argued.

"Congress would not have expected historical practices in trade cases to supply the appellate review standard. In 1979, when Congress first directed the Trade Court (then the Customs Court) to review agency determinations on the record for substantial evidence, it sought to *abandon* prior review practices, not to codify them," the brief continued. Before the 1979 law, the Customs Court had always conducted *de novo* reviews, it pointed out.

"This is the paradigmatic case for deferential appellate review. Indeed, the factors this Court considers when ascertaining appellate review standards cry out for deference," the brief contended. "Respondents make no attempt to defend the Federal Circuit's approach as a prudent use of judicial resources, nor do they suggest that *de novo* appellate review is more likely, as a practical matter, to yield correct results. To the extent they address the relevant factors at all, their assertions are incorrect," it asserted.

Major U.S. Farm Groups Want Japan Dropped from TPP Deal

Five major U.S. farm organizations are fed up with Tokyo's refusal to open its market for several key agriculture commodities and called May 28 for the U.S. to conclude a Trans-Pacific Partnership (TPP) without Japan. A joint statement from the groups came in reaction to reports that after TPP ministers met in Singapore in May, Japanese Economic Minister Akira Amari had said Japan will not abolish tariffs in the agricultural sectors it considers "sacred" – dairy, sugar, rice, beef, pork, wheat and barley.

Japan's demands for protection for its agriculture and auto sectors have long frustrated U.S. negotiators. USTR Michael Froman and other USTR officials have made no secret about their frustration with Japan in bilateral talks going on parallel to TPP negotiations. After the last round in Singapore, Froman suggested that total elimination of Japanese farm tariffs might not be achieved (see **WTTL**, May 26, page 6). "The broad exemption that Japan is demanding will encourage other partner countries to withhold their sensitive sectors as well. The result would fall far short of a truly comprehensive agreement that

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would set a new standard for future trade agreements," said a statement from U.S. Wheat Associates, the National Association of Wheat Growers, USA Rice Federation, the National Pork Producers Council (NPPC) and the International Dairy Foods Association.

> "A country can't shield its primary agricultural products from competition and still claim to be committed to a high-standard agreement that liberalizes essentially all goods," said NPPC President Howard Hill in announcing the joint statement. Compared to the 17 other U.S. free trade agreements since 2002, where the most tariff-line exclusions was 45, Tokyo is asking to exclude 586 tariff lines. In those 17 other deals, only 233 tariff lines combined have been exempted from having tariff elimination, the NPPC noted.

Democrats Criticize Plans for Vietnam Side Deal on Labor

Amid reports that the U.S. is negotiating a labor action plan with Vietnam in parallel with the Trans-Pacific Partnership (TPP), House Democrats again urged negotiators May 29 to include enforceable provisions for labor rights in the body of a TPP deal and not just in a side agreement. Three years after a similar plan was signed as part of the U.S.-Colombia Free Trade Agreement (FTA), Democrats and their union allies claim the same approach with Vietnam is a failed model (see **WTTL**, April 14, page 4).

> "We've all seen this show before," said Rep. George Miller (D-Calif.) on a call with reporters. "Our history has shown us that that may be one of the levels of hell, to be placed in a side agreement, when the issues are so critically important," Miller said.

After the Colombia FTA was signed, Cathy Feingold, the AFL-CIO's international department director said, there was less political will to do anything meaningful for worker rights in Colombia. "We need benchmarks or mechanisms for measuring the sustained and meaningful enforcement. We need to make sure there is political will," she said on the call. "We need to make sure that for noncompliant countries, they need to show measurable improvements in their worker rights situations before these deals are signed," she said.

More than 150 House Democrats, including Miller, also voiced their complaints in a letter May 29 to U.S. Trade Representative (USTR) Michael Froman. "In countries like Vietnam in which workers have faced extraordinary abuses, there must be binding and enforceable plans to bring those countries' laws and practices into compliance with TPP labor requirements. Those plans must be made public and fully implemented before Congress takes up TPP for consideration, while trade benefits granted by the agreement must be contingent on the plans' continued implementation," they wrote. "The Administration must refrain from validating such woefully inadequate labor norms and the final agreement should be withheld until these countries embrace the need to reform their labor laws and move aggressively to implement them," the letter said.

CAFC Orders Recalculation of Dumping Margins on Alloy Pipe

The Court of Appeals for the Federal Circuit (CAFC) issued a mixed ruling May 29 on how Commerce applies "adverse facts available" and "adverse inference" in antidumping

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cases and ordered the department to recalculate the margin in an administrative review of certain circular welded nonalloy steel pipe from Mexico. While vacating and remanding Commerce's decision because the way it measured normal values in the case was arbitrary and capricious, the appellate court agreed the department could use adverse inference to put pressure on respondents to induce their suppliers to provide requested cost data.

> In *Mueller Comercial v. U.S.*, the CAFC examined how Commerce applied Section 1677 (a) "adverse facts available" and (b) "adverse inferences" and determined both subsections could be applied even against a cooperating respondent. In taking this path, however, the department selected data that was not representative, prompting the court to vacate the review determination and order the department to select better data.

Mueller and one of its suppliers, Tuberia Nacional (TUNA) had cooperated with the Commerce review but another supplier, Ternium Mexico (Ternium), had not. Without obtaining information from Ternium to calculate the normal value for the subject pipe, Commerce instead selected three deeply discounted sales from TUNA to Mueller.

"There is no support for Commerce's claim that using the three least-favorable TUNA transactions would produce the most accurate dumping margin for Mueller," wrote Circuit Judge Timothy Dyk for the three-judge panel. "Because Commerce's calculation of Mueller's rate relied in part on this accuracy rationale, this decision must be set aside. There is no contention that the use of the particular TUNA data relied on by Commerce was somehow required by the antidumping statute," he wrote.

The court was more favorable about a second Commerce argument that it could apply an adverse inference to force Mueller to get Ternium to supply the needed cost data. "There is potentially greater support for Commerce's use of an evasion or inducement rationale in this case than in *Changzhou*," he wrote, citing a previous ruling.

"We conclude that Commerce may rely on such policies as part of a margin determination for a cooperating party like Mueller, as long as the application of those policies is reasonable on the particular facts and the predominant interest in accuracy is properly taken into account as well," he stated. He said the court was not ruling on whether Commerce's calculations were reasonable. "We only hold that the statute does not preclude reliance on inducement or evasion considerations in calculating Mueller's rate," Dyk wrote.

"Finally, we wish to be clear that under subsection (b) we do not bar Commerce from drawing adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party," Dyk wrote. It was permissible to draw an adverse inference in calculating Ternium's dumping margin and a second adverse inference in calculating Mueller's, he explained.

EU to Issue New Guidelines for Investigating Trade Cases

The European Commission (EC), the executive branch of the European Union (EU), intends to go ahead with issuing new guidelines for investigating antidumping and countervailing cases and imposing remedies despite opposition from several members states, including France, a commission trade spokesman said May 26. The decision to move ahead came after the EU Competitiveness Council could not reach agreement on the

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proposed implementing legislation and guidelines. "Today, Commissioner De Gucht announced to the Competitiveness Council his intention to bring four draft Guidelines on Trade Defence Matters to the College for adoption before the summer break," John Clancy, a spokesman for Trade Commissioner Karel De Gucht, said in a statement. The guidelines and legislation have been under development for several years, and the commission sent the EU Parliament and Council proposed implementing legislation a year ago.

> Clancy said French Minister of Industrial Renewal Arnaud Montebourg and other Southern EU members, including Spain and Italy, have argued that the adoption of the guidelines would weaken the protection of EU industry from unfair imports. The proposed legislation and guidelines were criticized in public comments the EC received, especially from European unions, when they were first released (see **WTTL**, April 15, 2013, page 2).

Among the many changes the legislation and implementing guidelines would make to what are called "trade defence instruments" in EU parlance for antidumping and countervailing duty regulations are new procedures to increase transparency in investigations and imposition of penalties; give the EC the authority to self-initiate cases when European companies won't because of fear of retaliation; revise methods for calculating injury margins; open procedures to non-petitioning companies and groups; adopt changes to implement WTO rulings against the EU; and revise duration and expiration of orders.

"Over the past four years, the European Commission has adopted a very firm stance against unfair competition," Clancy argued in the statement. "To state that codifying Commission practice would weaken EU industry is simply ignoring the Commission' strong record under the tenure of EU Trade Commissioner De Gucht," he declared.

After the legislation and guidelines went to parliament and the EU Council last year, they were revised to reflect consultations with senior officials and parliamentarians, he said. A revised version of the guidelines was sent to lawmakers in December and a French delegate commented on the texts as recently as May in a Council working party, he noted.

"The European Commission has the constitutional task to carry out trade policy on behalf of the European Union for the benefit of European citizens," Clancy asserted. "Of course, we will continue to investigate trade defence cases and take appropriate measures to defend EU industry against unfair trade. Asking to suspend our trade action now blatantly disregards the role of the Commission which has been invested by the previous Parliament until the end of October," he added.

* * * Briefs * * *

VEU: In Federal Register May 29, BIS updated validated end-users (VEUs) listings in China for Samsung China Semiconductor Co. Ltd. (Samsung China) and Semiconductor Manufacturing International Corporation (SMIC). Specifically, BIS changed address of facility used by Samsung China. Facility, which is located in area being newly developed for corporate use, has not moved, notice said. In addition, it added Beijing facility to list of eligible destinations and added ECCN 3A233 (certain types of mass spectrometers) to list of eligible items for SMIC.

EXPORT ENFORCMENT: Aramex Emirates, LLC, freight forwarder in Dubai, UAE, agreed to pay BIS $125,000 civil penalty for facilitating export of network devices and software to Syria without required BIS licenses in December 2010 and February 2011, BIS announced May 20.

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Exporting company ComputerLinks paid $2.8 million civil penalty in April 2013 for some of same transactions (see **WTTL**, April 29, 2013, page 1**).**

PANAMA: At meeting of U.S.-Panama Free Trade Commission May 28, two nations agreed 19 months after FTA's entry into force, "implementation is proceeding well and smoothly," said joint statement from Diana Salazar, vice minister of Panama's Ministry of Commerce and Industry, and John Melle, assistant USTR for Western Hemisphere. They said work will continue on obligations on goods, services, intellectual property rights, labor and environment.

SILICON METAL**:** In 5-0 sunset vote May 28, ITC determined that revoking antidumping duty order on silicon metal from Russia would cause renewed injury to U.S. industry. Commissioner Rhonda Schmidtlein did not participate in review.

SHRIMP: CIT Chief Judge Donald Pogue May 29 upheld Commerce's determination in sixth administrative review of antidumping order on frozen warmwater shrimp from Vietnam. "Because Commerce's well-reasoned selection of Bangladesh as an appropriate market economy surrogate for Vietnam was supported by a reasonable reading of the record evidence, Commerce's reliance on data from Bangladesh to construct normal values in this review is affirmed," he ruled. "Commerce's New Labor Rate Policy is generally reasonable, and no evidence suggests that it was unreasonably applied on the record of this review," Pogue decided.

NATIONAL FOREIGN TRADE COUNCIL: At reception May 28 marking NFTC's 100th anniversary, former USTR William Brock bemoaned lack of progress in getting fast-track trade promotion authority approved in Congress and weak support from White House. Trouble with trade today is "there is no sense of excitement," he said. Brock noted comment he heard from White House official who told him "this is not a politically opportune time" for fast track.

COURT OF APPEALS FOR FEDERAL CIRCUIT: Chief Judge Randall Rader stepped down from position May 30 and was replaced by Judge Sharon Randall. Rader, who will remain on court, sent letter to his colleagues on bench May 23 apologizing for engaging in "conduct that crossed the lines established for the purpose of maintaining a judicial process whose integrity must remain beyond question." He admitted that he had sent email with certain inaccuracies to attorney who had argued before CAFC reporting comments from another judge praising attorney's performance. He said he expected email to remain private, but it was circulated around bar.

VENEZUELA: House May 28 passed by voice vote "Venezuelan Human Rights and Democracy Protection Act," (H.R. 4587) which directs president to block assets of any person who has "perpetrated or is responsible for directing acts of violence or human rights abuses against individuals participating in protests in Venezuela" in February 2014. Similar bill (S. 2142) has passed Senate Foreign Relations Committee. Administration officials have said it's too soon for sanctions.

STEEL WIRE ROD: In "sunset" votes May 30, ITC determined that revoking countervailing duty order on carbon and certain alloy steel wire rod from Brazil and antidumping duty orders on product from Brazil, Indonesia, Mexico, Moldova and Trinidad and Tobago would cause renewed injury to U.S. industry. Vote on Mexico case was 4-1 with Commissioner David Johanson sole negative vote; other votes were 5-0. In 3-2 negative vote, ITC found revoking antidumping order on product from Ukraine would not cause renewed injury to U.S. industry. Commissioner Rhonda Schmidtlein did not participate in reviews.

STEEL NAILS: Mid Continent Steel & Wire Inc. filed antidumping and countervailing duty petitions May 29 with ITA and ITC against imports of steel nails from India, Korea, Malaysia, Oman, Taiwan, Turkey and Vietnam.

EX-IM BANK: Export-Import Bank May 30 named Brad Carroll senior vice president for communications and Dolline Hatchett vice president of communications. Carroll was communications director for the White House Domestic Policy Council. Hatchett managed North American media operations for U.S. branch of French nuclear energy provider AREVA.

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