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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

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Japan Eases Rules on Exports of Defense Equipment

Japanese manufacturers will find it easier to participate in multilateral defense equipment development under new guidelines that the Japanese Cabinet approved April 1 to amend rules that have restricted defense exports for nearly 40 years. The new guidelines will also allow Japan to support disaster relief efforts with equipment that has been subject to export controls, including chemical protection equipment and heavy machinery.

> Changes to the Three Principles on Defense Equipment Transfers, which guides Tokyo's defense export control policies, "will further promote Japan's contribution to peace and international cooperation through proper transfer of defense equipment overseas in consideration of the fact that Japan's security environment is becoming progressively severe," Japanese Defense Minister Itsunori Onodera told reporters after the Cabinet meeting, according to a translation of his remarks.

The new rules will let the defense ministry strengthen its contribution to peace and international cooperation and "actively cooperate with the United States, Japan's ally, and other countries in the area of defense equipment and technologies," he said. "Given that the development and production of defense equipment are mainly carried out through international collaboration these days, this change will allow Japan to vigorously participate in joint development mostly with allied nations," Onodera said.

In the past, the Cabinet has approved 21 exemptions to Japan's prohibition on defense exports, and the new principles are intended to make that process more consistent and open. "When considering special cases of transferring defense equipment overseas, the National Security Council will decide policies for those cases. In addition, one of the principles states that all approved transfer cases must be publicized externally by means of an annual report," Onodera said.

U.S. Uses Conspiracy Charge to Extend FCPA Extraterritorially

The Justice Department is using federal money-laundering, racketeering and conspiracy laws to go after foreign individuals who allegedly violate the Foreign Corrupt Practices Act (FCPA). The extraterritorial reach was seen in an indictment unsealed April 2 in

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Chicago U.S. District Court of two Ukrainians, an Hungarian, a Sri Lankan and an Indian, as well as one permanent resident in the U.S., who were charged with a conspiracy to bribe a now-deceased chief minister of the Indian state of Andhra Pradesh to win mining rights in the state to produce titanium products for sale to a Chicago-based U.S. company identified only as "Company A."

> "Fighting global corruption is part of the fabric of the Department of Justice," said Acting Assistant Attorney General David O'Neil in a press release. "The charges against six foreign nationals announced today send the unmistakable message that we will root out and attack foreign bribery and bring to justice those who improperly influence foreign officials, wherever we find them," he said.

One defendant, Dmitry Firtash, 48, aka "Dmytro Firtash" and "DF," 48, a Ukrainian national, was arrested March 12 in Vienna, Austria. He was released March 21 after posting 125 million euros (approximately $174 million) bail and pledging to remain in Austria until the end of extradition proceedings. Five other defendants remain at large. They are Andras Knopp, 75, a Hungarian businessman; Suren Gevorgyan, 40, of Ukraine; Gajendra Lal, 50, an Indian national and permanent resident of the United States who formerly resided in Winston-Salem, N.C.; Periyasamy Sunderalingam, aka "Sunder," 60, of Sri Lanka; and K.V.P. Ramachandra Rao, aka "KVP" and "Dr. KVP," 65, a member of Parliament in India who was an Andhra Pradesh government official and advisor to now-deceased chief minister Y.S. Rajasekhara Reddy.

In addition to being charged with conspiracy to violate the FCPA with bribes to Reddy, the defendants also were charged with conspiracy to commit money laundering, racketeering, interstate travel to commit money laundering and operating a criminal enterprise. Among the claimed links to the U.S. were their alleged negotiations to sell Company A titanium products from the Indian venture and their meetings with executives of Company A in Chicago and an other unnamed company in Greensboro, N.C. They were also tied to the U.S. through transactions made through U.S. banks and financial institutions. The U.S. firms were not charged in the indictment.

The international scope of the alleged conspiracy is seen in Justice's prayer for at least $10,597,050 in forfeiture from the defendants. An attachment to the indictment lists entities they have stakes in and from which the money could come, including 14 in Austria, 18 in British Virgin Islands, 89 in Cyprus, two in German, seven in Hungary, one in the Netherlands, 18 in Seychelles, four in Switzerland and four in the United Kingdom.

USTR Froman Avoids Commitments on Trade Deals

The chances for an agreement on a Trans-Pacific Partnership (TPP) or congressional passage of fast-track Trade Promotion Authority (TPA) this year appear to be going from dim to dimmer, a House Ways and Means Committee hearing April 3 with U.S. Trade Representative (USTR) Michael Froman indicated. TPP talks are still bogged down on many key issues, Froman conceded, while TPA's fate may have been sealed by its sponsor Ways and Means Chairman Dave Camp's (R-Mich.) March 31 announcement that he will retire at the end of 2014. At the hearing, Froman repeated statements he has made before about the goal of finishing TPP this year. "In 2014, we will work to conclude negotiations on the TPP agreement," he said in his opening statement. Later,

he added, "We're focused on working around the clock to get this done as soon as possible." Dur-ing the hearing, committee members bombarded Froman with dozens of questions on a wide range of issues, including labor rights in Vietnam, Japan's and Canada's lack of concessions in TPP talks on agriculture, access to the Japanese auto market, sanitary and phytosanitary (SPS) barriers, agriculture market access, textiles, intellectual property, currency manipulation and the failure to enforce old trade deals. Among issues that Froman addressed were:

TPA and TPP: In response to questions on whether he could complete a TPP deal without TPA, Froman claimed he could. A good TPP deal will help convince Congress to approve TPA, he argued. "The only guarantee of an agreement being approved by Congress is bringing back a good agreement," he said. "I think we can work in parallel. That's the path we are on," he added later.

Transatlantic Trade and Investment Partnership (TTIP): Froman remains vague on the timing for a potential deal. "Building on last year's successful launch, we expect to make significant progress this year toward a TTIP agreement with the European Union," he said.

Jones Act: U.S. restrictions on intra-coastal shipping trade, which bar foreign ships from carrying goods between U.S. ports, are among the major irritants in U.S.-EU relations and a key target for the EU in TTIP talks. Froman wasn't ready to give away the U.S. negotiating position on the act. "Nothing we do in a trade agreement will repeal or undermine U.S. law," was all he would say.

Agriculture: Froman conceded his frustration with Japan and Canada in TPP talks and their unwillingness to open their markets to U.S. farm goods. **"**Canada is the only country in TPP that has not yet given us a market access offer on agricultural issues like dairy and poultry, and we are pressing them to do so. We're addressing their priorities in a number of ways, and we want them to come to the table as part of an overall package."

Vietnam and Labor Rights: The sleeping issue in TPP talks -- how to make a deal with a communist dictatorship with no rule of law or free labor markets – came to the fore at the hearing. Froman suggested that implementation of any accord with Vietnam might be held up until the U.S. had assurance that Hanoi had met the conditions in the agreement. "I think we have to work through what the staging of the changes are, and how it relates to when we submit it to Congress for approval, when it goes into force, etc. Vietnam is not going to transform itself overnight, but we need to make sure we've got mechanism for ensuring they meet their obligations consistent with the standards of the agreement," Froman said.

Labor and Environment: Democratic committee members raised concerns about how these issues will be treated in the trade pacts. "I can't envisage concluding an agreement that doesn't include binding labor and environment provisions," Froman declared.

Currency Manipulation: "Treasury has the lead," Froman demurred.

Footwear: Froman was caught between Rep. Richard Neal (D-Mass.), who urged him to defend the New England-based footwear industry in TPP talks, and Rep. Earl Blumenauer (D-Ore.), who has some Nike workers in his Portland district, and wants footwear tariffs cut. "This is an issue of sensitivity both in the U.S. and among our trading partners; it is a key issue in TPP," Froman said. He said he is talking to both domestic producers and importers in the industry "to develop an approach that will achieve that right balance" to allow domestic firms to continue to compete while allowing imports of good high-quality products.

Data Protection for Biologics: On the controversial issue of data protection for biological products, Froman revealed the difficulties the U.S. faces in getting other TPP countries to

accept the same 12-year protection granted in U.S. laws. "If you look around the table, five countries have zero years of protection, four countries have five years of protection, two countries have eight years of protection, and we have 12 years of protection. So consistent with our standard practice, of course, 12 years is in U.S. law and so that has been our proposal that we've put on the table in the negotiation. We are now in the midst of that negotiation to determine where we can reach a consensus," Froman told the committee.

BIS: Cameras Not "Specially Designed" for Heavy Cars

Items that are not "specially designed" and controlled for use in one commercial end-item still are not controlled even if being used in other end-items, the Bureau of Industry and Security (BIS) said in an advisory opinion dated Feb. 12 but not posted until April 1. At issue is whether infrared cameras excluded from control under Export Control Classification Number (ECCN) 6A003 for being "specially designed" for certain civilian, passenger automobiles that weigh less than 3 tonnes would be controlled if they were installed in other automobiles that weigh more than 3 tonnes.

> "If an item is decontrolled by virtue of being within the scope of 'specially designed' decontrol note, it does not become controlled under the relevant ECCN if it is later merely *used* in another item, assuming all other requirements of the note continue to be satisfied. In other words, the structure of the definition is such that an item cannot both be 'specially designed' if used in one type of item and not 'specially designed' if used in another type of item," BIS wrote (original emphasis).

"Unlike most uses of 'specially designed' in the CCL [Commerce Control List], the use of the term in this case is as part of a decontrol note. The definition is, however, applicable to both control and decontrol provisions in the CCL. The only difference between the two uses is that if an item is decontrolled by virtue of being 'specially designed' under either paragraph (a)(l) or (a)(2), then there is no need to review the release provisions of paragraph (b). There would be no need to do so because the item would not be controlled by the ECCN at issue," the agency added.

"Required" Applies to All Controlled Technology, BIS Advises

The Wassenaar Arrangement's General Technology Note (GTN) and the defined term "required" applies to all "technology" controlled under the Export Administration Regulations (EAR), whether or not the Export Control Classification Number (ECCN) specifically refers to the GTN or uses the term "required," BIS confirmed March 25 in an advisory opinion. In its advice, the agency said it has implemented the GTN based on commitments under the Wassenaar Arrangement (WA).

"The EAR does not limit its definition of technology or the GTN to only those technologies controlled in the EAR pursuant to the WA," it said. "Therefore, the GTN and the EAR's definition of 'required' apply to all references to 'technology' in all the ECCNs" on the Commerce Control List," the opinion said. "The EAR's definition of 'technology' states that '[c]ontrolled "technology" is defined in the General Technology Note ... and the GTN states that '[t]he export of "technology" that is *"required"* for the "development", "production", or "use" of items on the Commerce Control List is

controlled according to the provisions in each Category,'" BIS wrote. The GTN states, "The export of 'technology' that is 'required' for the 'development', 'production', or 'use' of items on the Commerce Control List is controlled according to the provisions in each Category. 'Technology' 'required' for the 'development', 'production', or 'use' of a controlled product remains controlled even when applicable to a product controlled at a lower level," the agency added.

Report Hits Caterpillar for Off-Shore Tax Scheme

An attempt by Sen. Carl Levin (D-Mich.) to portray Caterpillar as the poster child for the "corporate profit-shifting club" at an April 1 Senate hearing turned out instead to be an opportunity for Republicans to attack the U.S. tax code and corporate tax rates. Despite the grilling Levin gave Caterpillar officials and the firm's accountants at PriceWaterhouseCoopers (PWC), the hearing by the Senate Permanent Subcommittee on Investigations is unlikely to change the giant machinery company's tax structure or lead to any legislative changes in corporate tax rules in the near term. "We've got the wrong people on trial here; the tax code needs to be on trial," Sen. Rand Paul (R-Ky.) said at the hearing.

> The main subject of the hearing was a subcommittee report detailing how Caterpillar set up an affiliate in Switzerland through which to funnel all its foreign parts and service sales, resulting in the shifting of $8 billion in profits to the Swiss entity and the saving of $2.4 billion in U.S. taxes from 2000 to 2012. There was no accusation that Caterpillar acted illegally even if its policies were unseemly. Subcommittee members and witnesses repeatedly noted the difference between legal tax avoidance, which Caterpillar practiced, and the crime of tax evasion.

At the outset of the hearing, Levin thanked Caterpillar and PWC for cooperating with the subcommittee's investigation. The company provided the panel's staff with some 2,000 pages of internal documents and allowed interviews with current and former personnel. Some of the material provided to the subcommittee included proposals that PWC made to Caterpillar in 1999 on how to restructure its foreign operations to take advantage of transfer pricing and lower tax rates in Switzerland, which negotiated a deal with the company to impose a tax of only 4% to 6% on its Swiss earnings, Levin said.

Caterpillar's Vice President for Finance Services Julie Legacy defended the firm's tax policies, noting that the company paid an effective federal tax rate of 29%, which is less than the full corporate tax rate but above the average 26% rate paid by U.S. corporations and the average of 25% for firms in other industrial countries belonging to the Organization for Economic Cooperation and Development (OECD). She also noted that Caterpillar has paid $1.8 billion in federal taxes over the last three years, $645 million in state and local taxes, and $1.8 billion in employment taxes.

Although Levin tried to keep the focus on Caterpillar's tax policies, testimony at the hearing underscored problems with the tax code's section 482 transfer pricing rules and whether U.S. corporations are adequately booking the royalties they should receive from their foreign affiliates. Many of the internal Caterpillar documents released with the subcommittee report are not normally available to the Internal Revenue Service (IRS), which has not acted against the company's tax strategy and did not challenge its Swiss

operations for lacking enough "economic substance" to qualify for foreign tax treatment. According to Sen. Ron Johnson (R-Wis.), the IRS has assigned 12 agents full-time to work at the company. Caterpillar probably knew the public relations black eye it risked cooperating with the subcommittee, but also that it would survive the exposure. It came to the hearing with a strong legal and financial defense of its policies. The company has one of the most savvy and plugged-in corporate lobbying teams in Washington. It also has a well-connected board of directors, which includes former USTR Susan Schwab and ex-Deputy USTR, U.S. Ambassador to China and presidential candidate Jon Huntsman Jr.

USTR Touts Successes in Opening Markets

While the Obama administration is negotiating trade agreements with partners in Asia and Europe, it is still identifying problems, delays and restrictions that hinder American exports and investment in those markets and in others. The U.S. Trade Representative's (USTR) office cites those barriers in three annual reports released March 31: the National Trade Estimate (NTE) Report on Foreign Trade Barriers, the Report on Sanitary and Phytosanitary (SPS) Barriers to Trade and the Report on Technical Barriers to Trade (TBT). NTE report examines policies in 58 countries, the European Union (EU), Taiwan, Hong Kong, and the Arab League.

> Although the NTE report includes seven pages of complaints about Russian trade restrictions, the U.S. has stopped working with Moscow to resolve them. "Given Russia's ongoing violation of Ukraine's sovereignty and territorial integrity, we have suspended trade and investment engagement with Russia," says a USTR fact sheet on the report.

In the SPS report, the USTR identifies restrictive policies in 52 countries and entities, including the EU. It drops Croatia, Dominican Republic, El Salvador and New Zealand from the SPS report, but adds eight others. The reports boasts of success in 2013 in "expanding U.S. beef exports by 12 percent to reach over $6 billion by expanding access for U.S. beef to Japan, the European Union, Indonesia, Mexico, Panama, and the Dominican Republic." It also notes the EU's opening of its market to live swine and ability of U.S. firms to export peaches, nectarines and cherries to Australia and Japan.

The TBT report cites 16 countries and the EU. It drops Japan, Kenya, South Africa and Vietnam but adds Ecuador, Peru and Saudi Arabia, the last of which had been in the 2012 report but dropped last year. The report complains about a new Saudi conformity assessment program. "On January 1, 2014, the Saudi Standards, Metrology and Quality Organization (SASO), the Ministry of Commerce and Industry and the Saudi Customs Authority implemented a new conformity assessment program called 'Recognition Program on Certificates of Conformity,' without notifying the program to the WTO TBT Committee or providing stakeholders notice and the opportunity to comment," it notes.

No Sweet Talk on Trade Petitions Against Mexican Sugar

The antidumping and countervailing duty petitions that the American Sugar Coalition filed March 28 with Commerce and the International Trade Commission (ITC) against imports of sugar from Mexico got high-level attention from Cabinet members April 3 at

two House hearings. The answers showed the careful line administration officials are trying to walk between the export and import sides of the 130-year old debate over trade. One official continued to defend the U.S. sugar program while the other called the petitions "ill-timed."

> On one floor of the Longworth House Office Building, Rep. Danny Davis (D-Ill.), who represents candy manufacturers in Chicago who want cheaper imported sugar, quizzed U.S. Trade Representative (USTR) Michael Froman on the issue at a House Ways and Means hearing. "Can we count on you to oppose any effort to restrict access to adequate supplies of sugar from Mexico or anywhere else that are needed to preserve good manufacturing jobs in the confectionary industries?" Davis asked.

Froman generally punted the issue to the jurisdiction of Commerce and the ITC, but also indicated that the U.S. was continuing to defend the current tariff-rate quota on sugar imports in trade talks with the Pacific and European Union (EU). He clearly was not ready to give up this important bargaining chip in the negotiations at a hearing. "We're not going to do anything through these trade agreements that will jeopardize or undermine the sugar program," Froman declared.

Two flights up in Longworth, Agriculture Secretary Tom Vilsack also was asked about the new trade complaints at a hearing of the House Agriculture Committee on the state of the rural economy, including cane and sugar beet farmers. Answering a question from Rep. Richard Nolan (D-Minn.), Vilsack was more honest. "I've got to be candid with you representative, from my perspective it's a bit ill-timed. I'm not suggesting there isn't an issue, there is, and I think the Mexicans have identified their willingness to work on this," he said.

"We are at a very delicate circumstance and situation with Mexico on a variety of issues, and I'm sure they don't see this is a particularly friendly gesture. In a perfect world, I would have liked to see this not occur, or not occur at this time," Vilsack added. When Congress was debating approval of the North American Free Trade Agreement (NAFTA) USDA officials defended the sugar provisions in the accord and how the phase-out of restrictions on imports of sugar from Mexico would protect the U.S. sugar industry. The phase-out period ended in 2008.

* * * Briefs * * *

SENATE: Sen. Debbie Stabenow (D-Mich.) was appointed chair of Senate Finance Committee subcommittee on international trade, customs and global competitiveness April 3. She previously chaired subcommittee on energy, natural resources and infrastructure.

TRADE FIGURES: U.S. merchandise exports in February inched up 0.4% from year ago to $131.7 billion, Commerce reported April 3. Services exports jumped 5.5% to $58.7 billion from same month in 2013. Goods imports barely budged up 0.06% from February 2013 to $193.4 billion, as services imports gained 6.7% to $39.3 billion.

OFAC: Sea Tel Inc., of Concord, Calif., agreed April 2 to pay OFAC $85,113 to settle charges of violating Iran sanctions. Between November 2007 and February 2009, it invoiced and shipped to its distributor, Shindong Digitech Co. Ltd., in South Korea for 16 orders of marine antenna systems, worth $378,281, "with knowledge or reason to know that they were intended

specifically for reexportation, directly or indirectly, to Iran," OFAC noted. Sea Tel voluntarily disclosed its actions to OFAC. Cobham PLC, which bought Sea Tel in September 2003, was "satisfied that we've been able to settle this matter with the U.S. government for $85,113," wrote Greg Caires, Cobham VP external relations, in email to WTTL.

MORE OFAC: GAC Shipping (USA), Inc., of Philadelphia, Pa., on behalf of GAC Bunker Fuels (USA) LLC (GAC), of Houston, agreed March 31 to pay $157,500 to settle OFAC charge of violating Iran sanctions. In November 2008, GAC supplied bunker fuel in Paranagua, Brazil, for Iranian vessel carrying agricultural commodity, OFAC noted. Firm did not make voluntary self-disclosure, agency said. "The matter was able to be amicably resolved between OFAC and GAC due to GAC's high ethical standing in the maritime industry over many decades, the small size of the alleged violation and the full cooperation that OFAC received from GAC when the allegation was made," wrote Elita Fielder, GAC communication manager, in email to WTTL.

TRADE PEOPLE: John P. Carlin was confirmed by 99-1 in Senate vote April 1 to be assistant attorney general for national security, post he has held on acting basis since March 2013 when his predecessor, Lisa O. Monaco, was tapped to be assistant to president for homeland security.

ITC: James R. Holbein has been named director of office of tariff affairs and trade agreements, which is responsible for maintaining U.S. Harmonized Tariff Schedule (HTS). He joined ITC in 2008 as supervisor of docket services. Earlier, he served as U.S. secretary of NAFTA Secretariat at Commerce and as foreign service officer at State.

CRAWFISH TAIL MEAT: ITC on 5-0 vote April 1 made "sunset" ruling that revoking anti-dumping order on crawfish tail meat from China would cause renewed injury to U.S. industry.

UKRAINE: President Obama signed legislation (H.R. 4152) April 3 that offers economic support to Ukraine and authorizes sanctions against any person, including current or former Ukrainian officials, that "is responsible for ordering, controlling, or otherwise directing, significant acts of violence or gross human rights abuses in Ukraine" and any Russian official or a close associate or family member "responsible for, complicit in, or responsible for ordering, controlling, or otherwise directing, acts of significant corruption in Ukraine, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions."

PLASTIC BAGS: Court of Appeals for Federal Circuit (CAFC) March 31 affirmed earlier CIT determination that upheld Commerce's fifth administrative review of antidumping order on polyethylene retail carrier bags, rejecting appeal of Thai Plastic Bags Industries, Co., Ltd. (TPBI). "Because TPBI departed from its normal accounting principles and failed to base its costs on physical characteristics, Commerce relied on substantial evidence in determining the reported conversion costs were distortive and did not reasonably reflect the actual costs. Commerce was therefore not required to rely upon those records," CAFC ruled.

HARDWOOD FLOORS: CIT Chief Judge Donald Pogue March 31 remanded for second time Commerce determination in antidumping duty investigation of multilayered wood flooring from China (slip op. 14-35). "In its Redetermination, Commerce did not consider whether use of an AFA rate, let alone use of the selected transaction-specific margin, was merited in its separate rates calculation. Nor did Commerce consider its responsibility to determine a separate rate that bears some relationship to respondents' actual rates," he wrote. "It is lawful for Commerce to draw reasonable inferences from uncooperative companies' failure to submit evidence of the size, quantity, and value of their sales, and to use a method reasonably derived from the relevant statutory language. But substantial evidence asks a more specific question, and requires a more specific explanation from Commerce," he stated. "At issue is whether Commerce's determination was based on a reasonable reading of the record in context. Without further explanation, the court cannot consider it so," Pogue concluded.