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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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Bar Group Warns Against USML-CCL Transfers

The transfer of some significant military equipment from State's U.S. Munitions List (USML) to the Commerce Control List (CCL) could increase enforcement problems and create ambiguity around application of current counterterrorism and human rights rules, according to a White Paper issued by the American Bar Association (ABA) Center for Human Rights. It noted that the Foreign Assistance Act (FAA) prohibits the U.S. from transferring "defense articles" to foreign military forces that abuse human rights.

> "By transferring these items from the USML to the CCL, the proposed reforms would create ambiguity as to which items are considered 'defense articles' for the purpose of these important provisions of the FAA," the group writes. It said it is also concerned that "transferring defense articles to the CCL will exacerbate existing problems with our enforcement system."

"While the Administration has authority to determine what constitutes a defense article, the Congress clearly intended for 'significant military equipment' that has 'substantial military utility' to be subject to the special controls of the AECA [Arms Export Control Act]," the ABA group noted. "Semi-automatic rifles that can fire up to 60 rounds per min-ute clearly have substantial military utility. It is therefore inconsistent with the AECA to transfer such items from the USML where they will no longer be subject to the special controls of that statute," said the paper, which was issued in January 2013.

Ex-Im Has Small Role in Exports, But Big Role for Some Sectors

Although the Export-Import Bank (Ex-Im) provides financing for less than 2% of U.S. exports, its existence is still justified because of the help it provides to several industries and countries, Ex-Im Chairman and President Fred Hochberg told WTTL in an exclusive interview April 4. Hochberg's defense of the bank came the same day the conservative Club for Growth called on the Senate to reject his confirmation for another term as the head of the bank and a day after Delta Airlines, Hawaiian Airlines and the Airline Pilots Association filed suit in the D.C. U.S. District Court to block Ex-Im financing of exports of widebody commercial airplanes. "The way that you justify it is 60% of all satellites that are exported, we finance; we are financing 30% to 35% of locomotives; we're

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financing about 30% of commercial aircraft," he said. In addition, Ex-Im is playing a larger role in financing major projects that are joint ventures involving several companies and foreign export credit agencies (ECA), he noted. "If you talk to exporters, if you talk to the business community, company after company says, 'We can't go to market unless you are with us'," Hochberg told WTTL. While other financing sources may be available, exporters "feel more comfortable if they know the U.S. government is standing behind the financing," said Hochberg, who was renominated for the Ex-Im job by President Obama March 21 (see **WTTL**, March 25, page 9).

> Although Ex-Im's charter isn't up for reauthorization for another 17 months, it's already facing the same opposition it encountered in 2012 when it was last rechartered. Hochberg recognized that this opposition could surface during his confirmation hearing. "The drum beats are beginning," he said.

Earlier in the day, Hochberg told the bank's annual meeting: "We are halfway there and the debate about reauthorization has already begun." Despite bipartisan support in Congress and from the business community, "let's be candid, there remains a vocal minority who reject any government role in export financing," Hochberg told the meeting.

In fiscal year 2012, which ended Sept. 30, 2012, Ex-Im backed $35.8 billion in exports through loans or insurance, more than two and a half times the level in 2008. So far in the first six months of fiscal 2013, it has authorized $14.8 billion in export aid, which compares to $10.6 billion in the same period a year ago. The bank claims its default rate, which it must report to Congress every 90 days, is 0.336% (see related story page 4).

Last year Ex-Im returned $1.1 billion in "profit" or "negative subsidy" to the U.S. Treasury, Hochberg boasted. Commercial satellites represent one of the bank's fastest-growing sectors. In November 2012, the bank financed $471 million for the export of U.S. satellites to Hong Kong's Asia Broadcast Satellite Group. The satellites are being built by Boeing and launched by SpaceX.

Delta lost a previous suit against the bank in 2012 because the court said Ex-Im had properly interpreted its statutory mandate to permit it to exempt from substantive economic impact analysis any transaction that did not result in the foreign production of an "exportable good." The airline claims legislation enacted last year to reauthorize the bank provides new grounds for its suit for an injunction against aircraft financing without a full economic impact review. The Club for Growth statement opposing Hochberg's confirmation said that vote would be included in its "Congressional Scorecard" on how conservative members are. "Conservatives should oppose Hochberg's nomination until a real plan is implemented for reducing the bank's authority with the ultimate goal of ending its charter completely," the group declared.

U.S. Begins Process of Reviewing UN Arms Trade Treaty

It will probably take Obama administration officials several months to prepare a recommendation for President Obama on whether he should sign the United Nations (UN) Arms Trade Treaty (ATT) that the UN General Assembly approved April 2, Assistant Secretary of State Thomas Countryman told a program sponsored by the Stimson Center April 5. "I would say months at a minimum," he said. The treaty will be open for signature by UN members starting June 3. While not mentioned by Countryman, a

White House decision on the timing of the president's signing of the ATT and its presentation to the Senate for ratification is likely to be caught up in the administration's current push for gun control legislation. With many senators on record against the ATT, the White House will probably have to weigh how a debate on the treaty might affect that effort.

> "For any treaty that the U.S. is considering signing, there is a careful review process that involves many agencies of the U.S. government; that involves a restudy of every possible angle that concludes that there are things that the U.S. may wish to state at the time of signature or there are shifts that may or may not be necessary that could be considered; and that goes into a package to the president when he is asked to sign. For any treaty, that takes time," Countryman said. He also said that the process would include consultations with industry.

Industry is still reviewing the treaty and how it addresses industry concerns, Remy Nathan, vice president for international trade at the Aerospace Industry Association, told the program. "Our first major concern broadly speaking was making sure that there were no unintended consequences when it came to the language of the treaty," he noted. Another concern was about the ATT's impact on defense imports "because we have a global supply chain," he said. In addition, industry wanted to make sure the treaty reflected the aims of the administration's ongoing export control reforms and "to make sure that the treaty was appropriately reconciled with those goals," he said.

Countryman acknowledged that criticism of the ATT is coming from "patriotic Americans who have genuine concerns" and have been engaged in the entirely separate debate over gun regulation. "As sometimes happens in Washington, some of those have crossed the line from passionate advocacy of their position to outright misrepresentation," he said. "I do fear that there are few opponents who have actually read the treaty," Countryman added.

The UNGA vote on the treaty was 154 for the pact, three opposed and 23 abstentions. The vote came after a conference on the treaty failed to reach consensus March 28 (see **WTTL**, April 1, page 1). The three negative votes came from Iran, Syria and North Korea, which also blocked the reaching of consensus on the treaty after 10 days of negotiations. Among those abstaining was a rogues' gallery of countries, including Cuba, China, Russia, Venezuela, Sudan, Bolivia and Nicaragua. Among the main objections of those who voted no or abstained was the lack of clear prohibitions on the export of arms to non-state parties in member countries. A Syrian official noted the arms going to "terrorists" attempting to overthrow his government. An official from Nicaragua recalled arms shipments to anti-government officials in the 1980s.

Arab states that abstained from voting complained about the lack of mention of arms sales to "aggressors" and "foreign occupiers" -- provisions that would have been clearly aimed at Israel. Countryman dismissed many of those statements as an example of UN members trying to turn the treaty into "a Christmas tree" to include many irrelevant political statements. As he listened to the Syrian complaint about arms sales to rebels opposing the Assad regime, he said he wanted to laugh and hold up a sign reading "Hezbollah."

Ex-Im Risk Policies Haven't Kept up with Volume, GAO Says

The Export-Import Bank's (Ex-Im) risk-management system and its methodology for calculating default rates hasn't kept up with the expanded volume of lending and insurance it has undertaken in the last four years, complained a Government Accountability Office (GAO) Report (GAO-13-303) released March 28. Ex-Im's calculations are based on traditional financing it has done in the past, but Ex-Im doesn't know if that pattern will continue to apply to the large volume of new long-term aid that is still years from repayment, the GAO cautioned. The report, however, acknowledged that Ex-Im recognizes this shortcoming and is taking steps to address it. Under its current methodologies, Ex-Im claims its default rate is 0.336% (see story page 1).

> "Ex-Im has not maintained data needed to compare the performance of newer books of business with more seasoned books at comparable points in time, a type of analysis recommended by federal banking regulators," the GAO said. "Also, without point-in-time data showing when defaults occur, the precision of Ex-Im's loss model may be limited," it noted.

The report also said Ex-Im's staffing has not kept up with loan increases. "Ex-Im faces potential operational risks because the growth in its business volume has strained the capacity of its workforce. Ex-Im has determined that it needs more staff, but it has not formally determined the level of business it can properly manage," it said.

GAO recommended Ex-Im should: (1) assess whether it is using the best available data for adjusting the loss estimates for longer-term transactions to account for global economic risk; (2) retain point-in-time performance data to compare the performance of newer and older business and to enhance loss modeling; (3) report stress testing scenarios and results to Congress; and (4) develop benchmarks to monitor and manage workload levels. Ex-Im agreed with each of these recommendations, GAO noted.

Ex-Im Draws Divergent Views on Domestic Content Rule

Not surprisingly, the Export-Import Bank (Ex-Im) has received sharply different public comments in response to its review of its current domestic content requirements. On one side, large multinational exporters have urged the bank to loosen its policy to accept a larger percentage of foreign content in exports that are eligible for bank financing. On the other, small and medium-size firms and unions told the bank it should maintain its requirement that 85% of a bank-backed export be U.S. made.

> Congress mandated the policy review in legislation reauthorizing the bank in May 2012. Ahead of sending Congress the results of the review, which is due by May 25, Ex-Im staff has held focus groups with stakeholders and requested public comment in the March 1 Federal Register.

The Coalition for Employment Through Exports (CEE), which represents Ex-Im users, submitted a report showing that most export credit agencies (ECAs) in countries that compete with the U.S. allow a much greater percentage of foreign content in exports they back or have no restrictions. It noted that Canada has a zero percent requirement, Germany, 30-50% and Japan 30%. The bank's "domestic content policy fails to take into account globalization or reflect the extent to which 'Made in America' today involves the rest of the world," CEE said in its comments. "The policy undermines the competitive terms of Ex-Im financing, is contrary to the Charter and needs to be lowered at a minimum to 70% -- if not 50%, which would bring the level into marginal alignment with those policies of rest of the world – at the completion of this review process," it told Ex-Im. "In conversations CEE has had with its member companies, not one has ever suggested that it was prepared to compromise its global supply chain in order to obtain better financing," CEE said.

> The International Association of Machinists and Aerospace Workers said it strongly objects to any proposal to increase the allowable foreign content in Ex-Im financed exports. "If the bank were to adopt these suggestions for weakening its domestic content policies, it would be giving U.S. companies further incentive to ship more U.S jobs to other countries," the union wrote. Instead of weakening the policy, Ex-Im should consider strengthening the restriction by excluding profits, intellectual property and licensing rights and CEO compensation from its calculation.

Cliffs Natural Resources, Inc., which is the largest U.S. producer of iron ore and a significant producer of metallurgical coal, submitted comments opposing a change in the rules, which Ex-Im adopted in 1985 after having no prior restriction. "Any weakening of the domestic content standards would provide limited, incremental benefits to the companies furnishing the final product for export while simultaneously degrading the job-creating, economy-stimulating value of these Ex-Im transactions for other companies and workers further down the supply chain," the company wrote.

A group of 27 House Democrats sent the bank comments saying they were "troubled" by the way Ex-Im's request for public comments phrased the questions it was considering, implying that U.S. competitiveness is harmed by the domestic content rules. "Because the question appears to be subjective, we are concerned that the bank's review will be imbalanced," they wrote. "We urge you to carefully consider the neutrality of your review and ensure that all sides are equally represented as you conclude the study," the lawmakers urged.

Federal Reserve Paper Claims Positives from Imports

A paper published by Federal Reserve Bank of St. Louis contends that "the growth of manufacturing output is strongly correlated with goods imports and not with goods exports." The paper in the January/February issue of the bank's Review also plays down the impact of China's currency policy on U.S. manufacturing.

"From a policy perspective, the importance of intermediate materials to the U.S. manufacturing sector suggests that efforts to either restrict the flow of imports through quotas or raise the price of intermediate materials through tariffs could harm the manufacturing sector," the paper argued. "Similarly, to the extent that these intermediate materials are imported from Chinese sources, an appreciation of the renminbi could similarly increase the cost for manufacturers and thus, all else equal, reduce manufacturing output," it said. "Many industry, labor, and political leaders believe that boosting manufacturing growth will require limiting imports through favorable preferences for domestic purchasing and raw material and capital goods sourcing, perhaps through quotas, tariffs, domestic content legislation, or simply discriminatory preferences," the paper noted. "However, reliance on imports has been a strong positive influence on manufacturing output and productivity. Moreover, there is no discernible gain to manufacturing growth that could arise from new policies proposed to boost exports," said the paper, which was written by Kevin L. Kliesen, a business economist and researcher at the St. Louis Fed, and John A. Tatom, president and chief executive officer of Thoroughbred Economics.

> The paper said the importance of imports cannot be overstated. "Goods imports equal more than 100 percent of manufacturing value added, so they account for more than half of the gross output and sales of domestically produced products. Intermediate goods imports and capital goods imports are the lifeblood of U.S. output. Exports account for a much smaller share of manufacturing value added. While development of foreign markets offers an opportunity for outsized growth, the success of manufacturing has not been as critically dependent on new markets for sales as for new markets for materials and capital goods," it stated.

USTR Touts Successes in Opening Markets

While the Obama administration has been working to knock down trade barriers to U.S. exports, there are still problems, delays and restrictions in many countries, the U.S. Trade Representative's (USTR) office said in three reports released April 1 on foreign trade barriers. The reports were 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).

> Like the movie Groundhog Day, the NTE report cites the same foreign countries for the same trade barriers year after year. This time it highlighted barriers in 61 countries, but include the Philippines for the first time. Specifically in the Philippines, USTR noted corruption, restrictions on foreign investment and customs delays, among other problems.

"Both foreign and domestic investors express concern about the propensity of Philippine courts and regulators to stray beyond matters of legal interpretation into policymaking and about the lack of transparency in judicial and regulatory processes. Some also have reported cases of courts being influenced by bribery and improperly issuing temporary restraining orders to impede legitimate commerce," it stated.

In the SPS report, the USTR identified restrictive policies in 48 countries and entities, including the European Union (EU). EU measures on the importation and use of genetically engineered products (GE) have raised substantial barriers. "Restrictions on GE products can result in import prohibitions on U.S.-produced commodities and foods, as well as prohibitions on the cultivation of GE seeds," it said.

The USTR said U.S. negotiators removed SPS barriers in El Salvador, Hong Kong, Japan, and Mexico for exports of U.S. beef; worked with Taiwan to implement a maximum residue limit for beef containing ractopamine; successfully petitioned the EU to allow the use of a pathogen reduction treatment on beef; resolved barriers for U.S. rough paddy rice and poultry in Colombia; improved the import procedures for U.S. cherries entering Korea; and gained access for certain U.S. pears into China. The TBT report cited 17 countries and the EU which had been included in its 2012 report. It dropped the Central American Customs Union, Saudi Arabia and Thailand from the report. One example of a "voluntary" TBT that concerns the USTR is Korea's standards for solar panels. It said Korea's Energy Management Corporation "only certifies one type of thin film solar panel – the type that Korean producers manufacture – as meeting its version of the International Electrotechnical Commission standard." As a result, U.S. solar panel producers that make different kinds of thin film panels find themselves unable to access the Korean market, the report complained.

Report Finds Some Progress, Some Retreat in Telecom Sector

While Canada, Mexico and Israel made progress in opening their telecommunications sector to foreign competition, Brazil and Pakistan have raised new concerns about their policies, according to the U.S. Trade Representative's (USTR) annual report on its Section 1377 Review released April 3. The review outlines the key barriers that U.S. telecom service and equipment suppliers face while looking at the operation and effectiveness of multilateral and bilateral trade agreements that cover the sector.

> In the 2013 report, the USTR noted progress in its NAFTA partners, Canada and Mexico, where leaders either passed or introduced legislation removing foreign investment limits in the telecom sector. In October 2012, the U.S. and Israel signed a bilateral mutual recognition agreement that, "once implemented, will permit recognized U.S. laboratories to test telecommunications products for conformity with Israeli technical requirements, and vice versa," USTR noted (see **WTTL**, Oct. 22, page 4).

"Recent years have witnessed a growing trend among our trading partners to impose localization barriers to trade designed to protect, favor, or stimulate domestic industries, service providers, or intellectual property (IP) at the expense of imported goods, services, or foreign-owned or developed IP – and this trend is evident in the telecommunications sector," Acting USTR Demetrios Marantis in a statement releasing the report. He cited the growing use of local content requirements in countries such as Brazil, India, and Indonesia. The report also cited Pakistan's restrictive regime for "the termination of international calls into Pakistan, which, although challenged by Pakistani competition authorities, remains in force."

CIT Upholds Commerce Decision on Solar Wind Towers

Court of International Trade (CIT) Judge Leo Gordon rejected a plea March 29 for a preliminary injunction to block Commerce from terminating the suspension of liquidation and refunding cash deposits on solar wind towers from China and Vietnam based on a split 3-3 vote by the International Trade Commission (ITC) (slip op. 13-44). The Wind Tower Trade Coalition (WTTC) sought the injunction, arguing that Commerce erred in applying the "special rule" and should have followed the "general rule" of sections 1671e(b)(1) and 1673e(b)(1) of the Trade Act.

"Notwithstanding the near automaticity of preliminary injunctions in antidumping and countervailing duty cases, they are not awarded as of right," Gordon wrote. "The movant must still demonstrate at least a fair chance of success on the merits," he added. Although Gordon admitted that he had been skeptical of the WTTC's plea for a temporary restraining order (TRO) initially, he had granted it to allow the case to be argued. In rejecting the plea for the injunction, he also revoked the TRO. “Commerce’s application of the special rule to the fragmented ITC voting pattern here (3 negative, 2 material injury, 1 threat plus ‘but for’ negative) flows reasonably from the specific statutory provisions, their purposes, and the statute as a whole, as the court explained in *MBL*,” he wrote, citing an earlier precedent in which the court rejected Commerce’s decision to continue suspension of liquidation after a split ITC vote.

> “Given the reasonableness of Commerce’s application of the special rule, the court cannot direct Commerce by affirmative injunction to apply the general rule, leaving Plaintiff without a fair chance of success in this action,” he stated.

The “general rule” applies if the ITC finds material injury or threat with an affirmative “but for” finding, and duties are imposed on any provisionally suspended entries. Alternatively, the “special rule” applies if the ITC finds threat of material injury with a negative “but for” finding, or material retardation of the establishment of an industry, and any provisional cash deposits are refunded because Commerce’s orders are effective from the publication date of the ITC’s final determination, Gordon explained. “The statute does not explicitly address whether the general or special rule applies to the fragmented ITC voting pattern presented in these cases,” he noted. “It is, however, a voting pattern that the court has addressed once before in MBL (USA) Corp. v. United States. In MBL, the court applied the Chevron rule to reject Commerce’s use of the general rule after a similar split ITC vote.

* * * Briefs * * *

FLOORING: Court of Appeals for Federal Circuit upheld ruling by CIT Judge Gregory Carman that Customs properly classified certain engineered wood flooring as plywood, which has 8% tariff rate, rather than parquet paneling, which is duty free. “While Kahrs’ merchandise possesses some unique features related to its intended use as flooring, we disagree with Kahrs that these features are sufficiently significant to transform its identity. Kahrs’ flooring meets all the requirements for ‘plywood’ as we have defined that term, and we see no reason to read additional limitations into the tariff schedule,” court ruled April 3 in *Kahrs International, Inc., v. U.S.*

TEXTILES: National Textile Association (NTA) and American Manufacturing Trade Action Coalition (AMTAC) merged into National Council of Textiles Organizations (NCTO) April 1. Cass Johnson will continue to serve as NCTO president. Announcement noted that U.S. textile industry is third-largest exporter of textile products in world, with exports exceeding $17 billion in 2012, growing 36% since 2009. Total textile and apparel exports were a record $23 billion in 2012, it reported.

NAFTA: In Federal Register April 4, Federal Motor Carrier Safety Administration (FMCSA) announced two Mexican motor carriers -- Transportes Mor SA de CV and Adriana De Leon Amaro -- failed Pre-Authorization Safety Audit (PASA) to participate in agency's long-haul pilot program. Program is testing ability of Mexican carriers to operate safely in U.S. “beyond the municipalities in the United States on the United States-Mexico international border or the commercial zones of such municipalities,” notice said.

TRADE FIGURES: U.S. merchandise exports in February increased 3.1% from year ago to $132.1 billion, Commerce reported April 5. Services exports increased 3.5% to $53.8 billion from year ago. Goods imports went up 2.2% from February 2012 to $192.4 billion, as services imports gained 0.22% to $36.5 billion.