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Report Gives Congress Road Map to Track Export Reforms

A Government Accountability Office (GAO) report will give Congress a road map to compare how export controls now imposed on U.S. Munitions List (USML) items will be applied when they are transferred to the Commerce Control List (CCL). The report shows the different controls and reporting requirements for the two lists but makes no judgment on them. Rep. Ileana Ros-Lehtinen's (R-Fla.) request for the report, however, reflects Congress' concerns about its ability to monitor defense exports and its potential loss of control over export policies.

> The report (GAO-13-119R), released Dec. 17, looks at the different license exceptions under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) and especially the license exemption for defense exports to Canada and License Exception Strategic Trade Authorization (STA). "According to State, between October 1, 2007, and September 30, 2008—the latest data available from State—exporters conducted roughly 35,000 transactions, worth an estimated $1.7 billion, using the Canadian exemption," the report notes.

The report reflects a major concern that lawmakers have about the proposed transfer of controls – the potential elimination of requirements under the Arms Export Control Act for advance reporting to Congress of major defense sales. "In June 2012, Commerce issued a proposed rule that would require congressional notification of pending exports of major defense equipment, such as articles under the 600 series, including those exported under the STA, that meet the same dollar thresholds as those required of State. As of November 2012, Commerce was considering how to implement its proposal," the GAO reports.

OFAC Issues Advice on Iran's Use of Exchange Houses

Now that sanctions are beginning to hurt Iran's financial sector, Treasury's Office of Foreign Assets Control (OFAC) issued an advisory Jan. 10 on Tehran's use of exchange houses and trading companies to evade U.S. economic sanctions. "As the international community has increasingly barred or restricted Iranian financial institutions from accessing the international financial system, Iran is relying more heavily on third-country exchange houses and trading companies to move funds," OFAC noted. Because Iranian institutions frequently lack their own U.S. correspondent accounts, they instead rely on their banks' correspondent accounts to access the U.S. financial system. These exchange houses and trading companies "often are located in jurisdictions considered to be high-risk for transactions implicating OFAC sanctions; and appear to process primarily commercial transactions rather than personal remittances," it said.

> OFAC identified certain evasive practices the organizations use including "omitting references to Iranian addresses; omitting the names of Iranian persons or entities in the originator or beneficiary fields; and transmitting funds from an exchange house or trading company located in a third country to or through the United States on behalf of an individual or company located in Iran or on behalf of a U.S.-designated person without referencing the involvement of Iran or the designated persons."

The advisory said it is not intended to suggest that U.S. financial institutions close accounts they hold for third-country exchange houses and/or trading companies. It "should not be interpreted to signal that third-country exchange houses and/or trading companies are necessarily facilitating illicit finance," OFAC said. Nonetheless, OFAC suggested that U.S. financial institutions take certain measures to "mitigate the risk of processing such transactions."

These include: monitoring payments involving the third-country exchange house or trading company that, given their risk profile, may be processing commercial transactions related to Iran or Iranian persons; requesting, as appropriate, additional information from correspondents on the nature of such transactions and the parties involved; conducting account and transaction reviews for individual exchange houses or trading companies that have repeatedly violated or attempted to violate U.S. sanctions against Iran; and contacting their correspondents that maintain accounts for, or facilitate transactions on behalf of, a third-country exchange house or trading company that engages in one of the above-referenced examples to request additional information and alert them to the use of these practices.

CIT's GPX Ruling Certain to Face Appeal

Court of International Trade (CIT) Judge Jane Restani's Jan. 7 ruling upholding the constitutionality of legislation applying the countervailing duty (CVD) law retroactively to imports from nonmarket economies (NME) is certain to face appeal to the Court of Appeals for the Federal Circuit (CAFC), but not immediately. Because Restani remanded portions of the case back to Commerce, attorneys expect any appeal will have to wait until Commerce responds and Restani issues a final judgment, which may not come until May.

In her ruling in *GPX International Tire*, Restani rejected arguments that the retroactive application of the CVD law by Congress in March 2012 violated the ex post facto, due process and equal protection rights of the Constitution (slip op.13-2).

At the same time, she remanded to Commerce several issues on how the department calculates subsidy rates, including on the valuation of a subsidy when there is a change of ownership and a state-owned company is acquired by a private firm (see **WTTL**, Oct. 22, page 1).

Restani disagreed with the government's argument that the new law merely clarified previous congressional intent about how the CVD law should apply to NMEs. Based on her reading of the CAFC ruling, Restani said the appellate court considered Section 2 of the CVD law to require Commerce in new CVD rulings to adjust for any antidumping (AD) duties imposed on the import, while Section 1 applied the law retrospectively to cases from 2006.

"As indicated, this is simply not clearly decided by the CAFC and the best approach for reason of judicial economy, and to make sure that the court obeys the direction of the CAFC to consider constitutional issues, is to view Section 1 of the New Law as a retrospective change in the law, and not a clarification," she stated.

On the issue of whether the new law violated the Constitution's prohibition against the *ex post facto* imposition of penalties retroactively, Restani found the law not to violate that prohibition because AD and CVD trade remedies do not penalize past behavior. "Both this court and the CAFC have consistently upheld the trade remedy laws as remedial and not punitive in nature," the judge noted.

Restani also rejected GPX's contention that the new law violates the Fifth Amendment's due process guarantees by retrospectively altering legitimate expectations of the level of duties that would be imposed on its imports. "Because, as to trade remedies, neither exporters nor importers have any real certainty as to the final rate on the imported product at the time of entry, they cannot demonstrate that a property right in a particular duty rate has vested, with which Congress may not interfere," Restani declared.

On the third leg of the constitutionality question, Restani also denied the claim of foreign tire producers that the new law violated the equal protection clause by creating a special category of importers who were the subject of remedy cases from 2006 to 2012 and not granted the same treatment as importers after 2012.

"Because approximately twenty-four CVD investigations were conducted on goods from NMEs during the interim period, Congress feared that without retroactive application of Section 1, the results of these investigations could be overturned," Restani noted. "These concerns appear to be rationally related to the government's interests in conserving limited resources and also consistent with the general statutory approach of prospective implementation of changes based on an adverse ruling in a WTO dispute," she ruled.

In a footnote in her decision, Restani leaves open the door that importers covered by the 2006-2012 cases might still have a chance to benefit from requirements in Section 2 of the law to avoid overlapping AD and CVD remedies. "As a matter of fact, there may be no significant difference in the results of these twenty-four cases and future cases. The second section of the new law requires adjustment for overlapping remedies only to the extent Commerce can make a reasonable estimate of the amount by which the countervailed subsidy is reflected in normal value," she wrote. "No one has yet demonstrated that Commerce can make such a reasonable estimate which will be significant and also survive review. Of course, the effective date of Section 2 makes the overlap adjustment applicable to new reviews, including reviews of the unfair trade remedy orders at issue here," the judge added.

> In the second part of her ruling, Restani addressed Commerce's calculation of subsidies on Chinese tires, particularly the department's methodology for determining whether a change of ownership for a state-owned company was conducted as an arm's-length transaction and at fair market value (FMV).

The finds "that Commerce's Final Determination and First Remand are not fully consistent with applicable law and at times are unsupported by substantial evidence," she ruled. Restani remanded this portion of the case to Commerce based in part on previous court rulings in *Delverde* and *Allegheny.*

Based on those rulings, the department must find facts to demonstrate that the purchaser directly or indirectly received both a financial contribution and benefit from a government. Although Commerce changed its methodology to conform to those rulings, its "current methodology for determining whether a purchasing company has received a countervailable subsidy by virtue of taking over a subsidized company has not yet been subjected to judicial scrutiny," she noted. "Accordingly, the analysis must not be perfunctory, and presumptions cannot substitute for facts. These seem to be the real teachings of *Delverde* and *Allegheny I*," Restani ruled.

"Because at least one of the bases for its conclusion appears flawed, on remand, Commerce must re-weigh the evidence related to the arm's-length nature of the sale. At this point, as a whole, Commerce's analysis of the transaction is very shaky," she wrote. Restani ordered the department on remand to explain its inflation calculations. She, however, upheld Commerce's methodology for assessing debt forgiveness. "Because this court defers to a reasonable methodology adopted by Commerce, the Department's calculations here must be upheld," she ruled.

USTR Requests WTO Consultations with Indonesia

The U.S. requested consultations with Indonesia Jan. 10 at the World Trade Organization (WTO) on its import licensing requirements on horticultural products, animals and animal products, which "have the effect of unfairly restricting U.S. exports," the U.S. Trade Representative's (USTR) office said. Through these measures, Indonesia appears to have acted inconsistently with several of its WTO obligations, the U.S. claims.

"Indonesia's opaque and complex import licensing system affects a wide range of American agricultural exports," said USTR Ron Kirk in a statement. "It has become a serious impediment to U.S. agricultural exports entering Indonesia, reducing Indonesian consumers' access to high-quality U.S. products," he said. In late 2011, Indonesia established strict non-automatic import licensing requirements for horticultural products and revised them in September 2012 to include "even more onerous requirements," a USTR release said. Horticultural products include fruits, vegetables, flowers, dried fruits and vegetables and juices. "Indonesia has long maintained a similar non-automatic import licensing and quota regime for beef and other animal product imports. Indonesia recently announced drastic reductions in quotas for beef and other animal product imports, further restricting access to the Indonesian market," the office noted.

> Consultations are the first step in the WTO dispute settlement process. Under WTO rules, if the matter is not resolved through consultations within 60 days, the U.S. may request a WTO dispute settlement panel. This is not the first WTO dispute with Indonesia.

In April 2010, Indonesia requested WTO dispute settlement consultations with the U.S. regarding the prohibition of the sale of clove cigarettes and other flavored cigarettes. The WTO Appellate Body ruled against the U.S. in April 2012 (see **WTTL**, April 9, page 3). Prior to that, in October 1996, the U.S. requested consultations with Indonesia concerning that country's National Car Program. The WTO adopted its findings in this dispute in July 1998.

Chamber of Commerce Urges Bold, Aggressive Trade Agenda

Expanding American trade is one of five top priorities of the Chamber of Commerce in 2013, said its president, Thomas J. Donohue, Jan. 10 in a speech announcing its agenda for the coming year. Donohue highlighted the ongoing negotiations toward a Trans-Pacific Partnership (TPP) and the much heralded potential trade deal with the European Union (EU) among other initiatives.

> "If there's a trade bus going by, everybody wants to get on it, which is going to lengthen the amount of time that it [the EU trade deal] takes to get something done," Donohue told reporters after the speech. "There is a high probability we will get a deal in a longer period of time than I would like, and I think there's a higher probability as we're getting the deal, we'll make some improvements along the way that will stimulate and increase trade as we're going there," he said.

On the TPP, he said, "Let's get a high-quality agreement done this year." Donohue also mentioned WTO talks on a potential services agreement and renewing President Obama's Trade Promotion Authority. "In Geneva, 50 countries have stated their intention to launch talks on an international agreement to boost trade in services, which we strongly support," he said. "To conclude any of these agreements, we must renew the president's authority to negotiate trade agreements," he stressed.

While Donohue was speaking, USTR officials down the street were holding a "remarkably uninformative briefing" on the ongoing TPP negotiations for non-industry NGOs, according to Jamie Love of Knowledge Ecology International, who attended the briefing. "As part of USTR's 'separate but ..' policy, industry lobbyists and trade associations were given separate briefings, and as a consequence of the segregation, our briefing was probably the least revealing," Love said on his blog. "Contributing to the uninformative nature of the briefing was the fact that aside from [Barbara] Weisel, none of the USTR substantive experts were in attendance," he wrote.

* * * Briefs * * *

TRADE FIGURES: U.S. merchandise exports in November increased 2.3% from year ago to $129.3 billion, Commerce reported Jan. 11. Services exports increased 5.8% to $53.2 billion from year ago. Goods imports went up 2.8% from November 2011 to $195 billion, as services imports gained 1.1% to $36.3 billion.

EXPORT ENFORCEMENT: Christopher Tappin, British citizen, was sentenced to 33 months in prison, three years' supervised release and $11,000 fine in El Paso U.S. District Court Jan. 9 for aiding and abetting illegal export of zinc/silver oxide reserve batteries for Hawk Air Defense Missile to Iran. Tappin pleaded guilty Nov. 1 after being extradited to the U.S. in February 2012 (see **WTTL**, Nov. 5, page 4).

VEU: In Federal Register Dec. 19 BIS published final rule adding requirement for shippers to send written notice to Authorization Validated End-User (VEU) of shipments to VEU within agreed timeframe. BIS proposal in April originally specified seven days for written notice. BIS also clarified that VEU conditions no longer apply when items become eligible for license exception.

ANTIBOYCOTT: International Veneer Company, Inc. (IVC) of South Hill, Va. agreed Dec. 19 to pay $12,600 to settle seven BIS charges of failing to report receipt of request to engage in restrictive trade practice or foreign boycott in transactions to Lebanon and United Arab Emirates from 2007 through 2010.

BANGLADESH: In Jan. 8 Federal Register USTR requested comments on whether duty-free treatment for imports from Bangladesh under GSP program be withdrawn, suspended, or limited on the grounds that Bangladesh is not taking steps to afford to workers in Bangladesh internationally recognized worker rights. Comments due Jan. 31.

GSP: USTR Ron Kirk Jan. 10 asked ITC for Section 332 investigation of waiver of Competitive Needs Limitations (CNLs) for current GSP beneficiaries.

DIGITAL TRADE: ITC Jan. 9 launched first of two investigations into "role of digital trade in the U.S. and global economies." Senate Finance Committee requested investigation. Report will cover U.S. trade, cross-border digital trade, barriers and impediments to digital trade; and linkages and contributions of digital trade to U.S. economy.

LAOS: Laos informed WTO Jan. 3 that it has ratified its membership agreement, which means it will officially become WTO's 158th member Feb. 2.

CUSTOMS: In report released Jan. 3, GAO noted (GAO-13-59) 144 current or former CBP employees were arrested or indicted for corruption-related activities, such as smuggling of aliens and drugs, from fiscal year 2005 through fiscal year 2012, of whom 125 have been convicted as of October 2012. GAO recommended Customs "track and maintain data on sources of information used to determine which applicants are unsuitable for hire, assess the feasibility of expanding the polygraph program to incumbent officers and agents, consistently conduct quality assurance reviews, and set timelines for completing and implementing a comprehensive integrity strategy."