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NDAA Renews President's Authority over Satellites

The renewal of the president's authority to move satellite export controls back to Commerce from State comes with new reporting requirements that will give Con-gress oversight of where transferred satellites are going. Provisions in the 2013 National Defense Authorization Act (NDAA) (H.R. 4310), which passed the House Dec. 20 by a 315-107 vote and the Senate Dec. 21 by a 81-14 margin and was signed by President Obama Jan. 3, repeals the 1999 Strom Thurmond NDAA, which moved satellite licensing jurisdiction to State (see **WTTL**, Dec. 10, page 1).

One condition in the legislation will require the administration to send Congress "a report identifying and analyzing any differences" between regulations implementing the president's new authority and the Section 1248 report that State and Defense sent to Congress in April. With the new law, State and Commerce can move ahead with the publication of proposals to transfer of items in U.S. Munitions List Category XV to the Commerce Control List.

The new law prohibits exports of satellites or related items to China, North Korea and any country identified as a supporter of terrorism. It would permit, however, the president to waive this prohibition on a case-by-case basis, if the president determines it is in the national interest and notifies congressional committees."

"Over the past two years, the administration has worked closely with Congress to normalize our satellite export controls and at the same time, ensure that all exports of satellites are held to a high level of scrutiny to protect U.S. technology and national security. This legislation will also help even the playing field for U.S. manufacturers," said Assistant Secretary of State Andrew Shapiro in a statement.

Divided Ruling Rejects ITA Adverse Facts Finding

A divided Court of Appeals for the Federal Circuit (CAFC) Dec. 17 reversed in part and upheld in part a Court of International Trade (CIT) ruling that affirmed the International Trade Administration's application of "adverse facts available"

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(AFA) to imports of a chemical, known as HEDP, from China. While granting ITA discretion in meeting the CIT's remand instructions, the appellate court, in *Changzhou Wujin Fine Chemical Factory Co., Ltd. v. U.S.*, said the agency acted arbitrarily in assigning a hypothetical dumping rate from a non-cooperating producer to a cooperating firm for the purpose of deterrence.

> "Deterrence is not relevant here, where the 'AFA rate' only impacts cooperating respondents," wrote Appellate Judge Timothy Dyk for the two-judge majority. "We find no support in our case law or the statute's plain text for the proposition that deterrence, rather than fairness or accuracy, is the 'overriding purpose' of the antidumping statue when calculating a rate for a cooperating party," he declared.

"Quite the contrary: applying an adverse rate to cooperating respondents undercuts the cooperation-promoting goal of the AFA statute," he added. "Commerce misses the point when it argues that the appellant cannot complain because it does not bear an AFA rate directly, but only a separate rate derived from the AFA rate, which is only half as adverse," Dyk wrote.

"We address the narrower question of whether Commerce acted reasonably when— by its own account—it cherry-picked the single data point that would have the most adverse effect possible on cooperating voluntary respondents, in a situation where there was no need or justification for deterrence," he said. "In this case, we think it clear that Commerce acted in an arbitrary and capricious manner," Dyk wrote.

In his dissent, Judge Jimmie Reyna said "the majority manifests a fundamental misunderstanding of the AFA statute and how AFA applies in the context of anti-dumping duty investigations." He claimed the majority applied the wrong standard of review when it used an arbitrary and capricious standard instead of a substantial evidence standard.

"The AFA statute operates both to encourage cooperation in antidumping investigations, and to prevent absurd or unjust results when parties, cooperating or not, have submitted incomplete or unusable data, such as awarding a *de minimis* or zero dumping rate to an undeserving respondent," he wrote. "In sum, the majority has created its own issue, which it hoists with non-existing terminology, it seeks to correct a wrong and sets the foundation for absurd results in the future, and it conducts its analysis under the wrong standard of review," Reyna concluded.

JCCT Talks Show Management of U.S.-China Relations

The 23rd meeting of the U.S.-China Joint Commission on Commerce and Trade (JCCT) Dec. 19 in Washington may have been important mostly because it was held at all. With political transitions in both the U.S. and China – the reelection of President Obama and the coming accession of Xi Jinping as the president of China – there were ample excuses to postpone the session. Instead, Vice Premier Wang Quishan, who is undergoing a change in posts and new responsibilities, brought a full team of Chinese officials with him for the talks. As in the past, the talks produced mainly promises for future cooperation and discussions on areas

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of contention and promises to maintain previous commitments. One key result, however, was China's agreement to postpone publication of an official automobile procurement catalogue that excluded cars made by foreign firms in China.

> "This session of the JCCT is held at an important time," said Chinese Commerce Minister Chen Deming at a closing press conference. Coming shortly after the 18th Congress of the Communist Party and the political transitions in China, "it indicates the great importance attached by China to our bilateral economic and trade relations," he said through a translator. Chen said the meeting showed that China wants to "continue a very smooth" relationship with the U.S.

The success of the meeting "was amplified even more because this is a period of transition in both of our countries," said U.S. Trade Representative (USTR) Ron Kirk at a separate press conference. "To have Wang Quishan take the time to travel to Washington and lead the delegation once again underscores the impor-tance of this unique relationship and the role that the JCCT plays in that," he said.

U.S. officials consider China's pledge to delay the publication of a catalogue of official-use vehicles one of the meeting's main achievements. "China committed to delay issuing the 2012 Party and Government Organ Official Use Vehicle Selec-tion Catalogue and to discuss U.S. concerns with regard to the draft catalogue and applicable vehicle selection rules with the United States," a factsheet said.

The agreement is "important to our industry because in its present draft form it left uncertainty as to how to treat cars of foreign companies differently," Com-merce Under Secretary Francisco Sanchez said. While the catalogue was not mandatory, "the fact that there is a catalogue; the fact that the vast majority were Chinese made automobiles not foreign made, even if it's not mandatory, it sends a potentially chilling message," he said.

Talks on China joining the World Trade Organization's (WTO) Government Pro-curement Agreement (GPA) made little progress, although the two sides agreed to continue discussions. China submitted a new offer for participating in the GPA to the WTO in Geneva a few weeks before the JCCT, but one senior U.S. official privately said the offer "was not that good."

Differences remain over how to treat procurement of services by state-owned enterprises in the "public interest" and public projects, which are not defined in Chinese law. "There are definition differences in the concept of basically what constructs a public enterprise project and the reality is that so much of China's economy is still in the hands of state-owned enterprises," Kirk said.

The U.S. again promised to promote exports of high-tech products to China, but Chen said China has not seen the results of that promise. "On multiple occasions, the U.S. side has promised to further relax high-tech export controls against China, particularly for those items for civil use," Chen said. "However, up to now we had not seen any substantive measures taken by the U.S. to implement or honor its promise," he asserted. He said there has been some progress "but we still need to wait and see and observe what specific measures the U.S. side is going to take."

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Lilly Pays $29.4 Million Penalty to Settle FCPA Charges

Giant Indianapolis-based pharmaceutical company Eli Lilly agreed to pay a $29.4 million penalty to settle Securities and Exchange Commission (SEC) charges that its foreign subsidiaries violated the Foreign Corrupt Practices Act (FCPA). Lilly's subsidiaries were accused of making improper payments to foreign government officials to win millions of dollars of business in Russia, China, Brazil and Poland from 1994 through 2009.

> "Lilly's subsidiary in Russia paid millions of dollars to off-shore entities for alleged 'services' beginning as early as 1994 and continuing through 2005 in order for pharmaceutical distributors and government entities to purchase Lilly's drugs," the SEC charged. "These off-shore entities rarely provided the contracted-for services," it continued.

The charges also said Lilly employees in China falsified expense reports to pro-vide improper gifts and cash payments to government-employed physicians. In addition, it claimed a pharmaceutical distributor hired by Lilly paid bribes to government health officials in a Brazilian state in 2007. The SEC also charged that Lilly's subsidiary in Poland allegedly made payments to "a small charitable foundation" founded and administered by the head of a regional government health authority at the same time the subsidiary was seeking the official's support for placing Lilly drugs on the government reimbursement list."

"We have cooperated with the U.S. government throughout this investigation and have strengthened our internal controls and compliance program globally, includ-ing significant investment in our global anti-corruption program," said Anne Nobles, Lilly's chief ethics and compliance officer, in a statement. Lilly neither admitted nor denied the allegations. It will pay disgorgement of $13,955,196, prejudgment interest of $6,743,538, and a penalty of $8.7 million for a total of $29,398,734. It also will hire an independent compliance consultant. The settle-ment is subject to court approval.

German Insurer Allianz Fined for FCPA Violations

Munich-based insurance and asset management company Allianz SE agreed to pay $12.4 million Dec. 17 to settle Securities and Exchange Commission (SEC) charges of violating the Foreign Corrupt Practices Act (FCPA) for improper pay-ments to government officials in Indonesia from 2001 through 2008. The SEC said its investigation uncovered 295 insurance contracts on large government projects that were obtained or retained by improper payments of $650,626 by Allianz's Indonesian majority-owned subsidiary, PT Asuransi Allianz Utama (Utama).

The money allegedly went to employees of state-owned entities. Allianz made more than $5.3 million in profits as a result of the improper payments, the SEC said. "Allianz's subsidiary created an 'off-the-books' account that served as a slush fund for bribe payments to foreign officials to win insurance contracts worth several million dollars," said Kara Brockmeyer, chief of the SEC Enforcement Division's FCPA Unit.

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"In this matter, Allianz had fully cooperated with the authorities," said an official statement from Allianz Indonesia. "In addition, Allianz is rest assured that all the people who were responsible for the incident have no longer serves for Allianz [sic]," it noted. Allianz said it is enhancing its anti-corruption policies, training to employees; enhancing due diligence processes for intermediaries and vendors; and updating anti-corruption contract clauses for third-party contracts. Without admitting or denying the charges, Allianz agreed to pay disgorgement of $5,315,649, prejudgment interest of $1,765,125, and a penalty of $5,315,649.

Nine Diverse Candidates Vie for WTO Director General Post

The tradition of male, mostly European, director-generals at the WTO might very well change this year, with nine diverse candidates officially nominated to replace outgoing Director-General Pascal Lamy. Since 1948 with the establishment of the General Agreement on Tariffs & Trade (GATT) and later with the WTO, the organizations has been led by Europeans except for the terms of New Zealander Mike Moore and Thai Supachai Panitchpakdi. The new candidates include former and current trade officials from everywhere except Europe; at least one candidate from Africa, North and South America, Asia and the Middle East. The group comprises three women and six men, including:

- Ghana's former trade minister **Alan John Kwadwo Kyerematen**
- Costa Rica's foreign trade minister and Georgetown University-educated **Anabel González**
- New Zealand's trade minister **Tim Groser**
- Kenya's former ambassador/permanent representative to the United Nations **Amina Mohamed**
- Jordan's former minister of industry and trade **Ahmad Hindawi**
- Mexico's former minister of trade and industry **Herminio Blanco**
- Indonesia's former trade minister **Mari Pangestu**
- South Korea's trade minister **Taeho Bark**
- Brazil's ambassador to the WTO **Roberto Carvalho de Azevêdo**

Kyerematen, Gonzalez, Groser and Azevedo were among the names mentioned early as expected candidates. The geographic origin of the next WTO chief is perhaps one factor that will feature more strongly than in the past, one official said (see **WTTL**, Oct. 15, page 1). The nomination period ended Dec. 31.

A formal WTO General Council meeting will be held Jan. 29, where candidates will make presentations, followed by a question and answer session. They also are expected to hold a press conference. The candidates will then campaign in Geneva and in capitals through March. The selection process will conclude with a decision by the General Council no later than May 31.

New Iran Sanctions Hit Port and Shipping Operations

As Treasury officials privately complain that they can't keep up with the new sanctions Congress keeps adopting against Iran, lawmakers added a raft of new

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restrictions on Tehran in 2013 NDAA bill (H.R. 4310) Congress passed before Christmas and President Obama signed Jan. 3. The new sanctions come less than six months after Congress passed and President Obama on Aug. 10 signed the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA), which expanded the Iran Sanctions Act and imposed sanctions related to human rights abuse in Syria (see **WTTL**, Dec. 10, page 1).

> Among the numerous provisions in the new law is language desig-nating entities that operate ports in Iran and entities in the energy, shipping and shipbuilding sectors of Iran, including the National Iranian Oil Company, the National Iranian Tanker Company, the Islamic Republic of Iran Shipping Lines, and their affiliates "as entities of proliferation concern."

"On and after the date that is 180 days after the date of the enactment of this Act, the President shall block and prohibit all transactions in all property and interests in property of any person described in paragraph (2) if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person," the law states.

The measure also provides for a presidential waiver of these restrictions. "The President may waive the imposition of sanctions under this section for a period of not more than 180 days, and may renew that waiver for additional periods of not more than 180 days, if the President— (A) determines that such a waiver is vital to the national security of the United States; and (B) submits to the appropriate congressional committees a report providing a justification for the waiver." it says.

WTO Members Criticize U.S. Financial Measures, Leadership

Although WTO members generally commend the U.S. for its recovery from the financial crisis over the last two years and its leadership in stalled multilateral negotiations, some countries criticized Washington during the Biennial Trade Policy Review of the U.S. Dec. 18 and 20. In all, the U.S. received almost 1,600 questions from other WTO members, which officials have already answered or will answer in the next month.

> "Various initiatives or policies have been undertaken in this regard, including some which, some Members feel, could have an adverse impact on trade, including financial support to certain industries, Buy American provisions, and the use of unconventional monetary policies with a consequential impact on exchange rates," Chairperson Eduardo Muñoz Gómez said at the conclusion of the review Dec. 20.

In his prepared statement to the meeting, Deputy USTR Michael Punke noted the concerns about Federal Reserve actions, particularly its quantitative easing policy. "Quantitative Easing is an accepted form of monetary policy when conventional monetary policy is not available, i.e. when interest rates are at or near 0%," Punke said. "There is no qualitative difference between a conventional monetary policy and quantitative easing in terms of its effect, or lack thereof, on emerging markets. "To

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condemn Quantitative Easing is to condemn accommodative monetary policy generally," he continued. Punke defended the U.S. role in the Doha Round. "We have always taken a very pragmatic approach to trade liberalization, pursuing it with willing partners at the multilateral, plurilateral and bilateral levels. If the level of activity at the multilateral level has fallen off, it is not for lack of interest on our part but rather, as our Ministers recognized at MC8, that Doha is at an impasse," he said.

> Other concerns that members raised include: agricultural policies, methodologies relating to non-market economies, regulations related to the zeroing case, outcomes related to the "sunset review" process, U.S. rules of origin and marking/ labelling rules, scanning require-ments, use of international standards, notification of sub-Federal measures, the application of the Food Safety Modernization Act, tariff quotas and non-ad valorem tariffs.

CIT Remands Country of Origin Ruling to Commerce

Court of International Trade Judge Timothy Stanceu Dec. 21 remanded a scope ruling that Commerce issued in an administrative review of tamper roller bearings (TRB) from China, saying it incorrectly rejected manufacturing in Thailand. "In summary, Department's finding, made under the 'Cost of Production/Value Added' criterion, that no significant value had been added to the finished TRBs as a result of the processing conducted in Thailand is not supported by substantial evidence on the record," he wrote.

> "Mere reliance on a practice developed over past administrative decisions is not reasoning justifying use of a criterion that has no apparent relevance to the circumstances of this case," he declared (slip op. 12-159). Stanceu identified three flaws in the department's analysis of the country of origin issue in this case.

"First, in applying its totality of the circumstances test, Commerce gave weight to its initial criterion, the inclusion of finished and unfinished parts of TRBs within the class or kind of merchandise defined by the scope of the Order, but it failed to supply a reason why this criterion was relevant, on the record of this case, to the country of origin determination Commerce was making," he stated.

"Second, with respect to the fourth criterion, the Department made a finding that the processing performed in Thailand did not represent a significant value added to the finished product, a finding that is not supported by substantial evidence on the record. The third flaw pertains to the sixth criterion the Department identified, the ultimate use of the bearings. Commerce found significant to its decision its finding that an unfinished TRB is intended for the same ultimate end use as a finished TRB, but that finding has no apparent relevance to the country of origin question posed by this case, which did not involve third-country processing conducted on unfinished TRBs," he wrote.

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* * * Briefs * * *

UN ARMS TRADE TREATY: U.N. General Assembly Dec. 24 approved resolution to restart negotiations on Arms Trade Treaty March 18-28 (see **WTTL**, Nov. 12, page 4).

OFAC: Ellman International, Inc., medical equipment manufacturer in Oceanside, N.Y., agreed Jan. 2 to pay $191,700 to settle OFAC charges of violating Iranian Transactions Regulations from 2005 through February 2008. After acquisition by private investors in 2008, Ellman's new owners self-reported matter to OFAC. However, submission was determined not to be voluntary disclosure under OFAC's Economic Sanctions Enforcement Guidelines, agency noted.

SENATE FINANCE COMMITTEE: New Republicans named to committee for 113th Congress are Sens. Johnny Isakson (Ga.), Rob Portman (Ohio), and Pat Toomey (Pa.) (see **WTTL,** Dec. 17, page 4). Separately, Committee Chairman Max Baucus (D-Mont.) promoted Amber Cottle to be Demo-cratic staff director from chief international trade counsel. Baucus named Bruce Hirsh, his advisor on international trade and economic matters, to replace Cottle.

SHRIMP: Coalition of Gulf Shrimp Industries Dec. 28 asked ITC and ITA to impose CVDs on certain warmwater shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand and Vietnam.

SILICA BRICKS: In 6-0 preliminary vote Dec. 28, ITC determined that U.S. industry is materially injured by dumped imports of silica bricks and shapes from China.

CIT: President Obama Jan. 3 renominated Mark A. Barnett, deputy chief counsel for import administration at Commerce, and Brooklyn Law School Professor Claire R. Kelly to be on the Court of International Trade (see **WTTL,** Nov. 19, page 4).

EXPORT ENFORCEMENT: U.S. won extradition from Singapore of two reputed principals of Corezing International, Pte, Ltd., Singapore firm allegedly at center of wide-ranging conspiracy to export U.S. military antennas used in improvised electronic devices (IEDs) in Iraq. Hia Soo Gan Benson, aka Benson Hia, and Lim Kow Seng, aka Eric Lim, both Singapore citizens, pleaded not guilty Dec. 21 in D.C. U.S. District Court and were ordered held without bond. They have been charged with conspiracy to violate the Arms Export Control Act (see **WTTL**, Nov. 26, page 4).

TRADE PREFERENCES: In Dec. 20 proclamation, President Obama revised trade preference standings and free trade rules with several countries. He dropped St. Kitts and Nevis from GSP because it has become "high-income" country. It remains CBI eligible. He made South Sudan eligible for AGOA but terminated eligiblity of Mali and Guinea-Bissau because of military coups, corruption and human rights abuses. He also revised rules on imports from Israel, Chile, Korea and Panama.

RUSSIA: Just as President Obama issued order implementing PNTR for Russia, U.S. and Moscow agreed Dec. 21 on action plan to improve Russia's IPR protection and enforcement. Plan aims to combat copyright piracy on Internet, enhance enforcement, coordinate on legislation, and address WTO pharmaceutical test data protection commitments and best practices for judges.

MISCELLANEOUS TARIFF BILL: In gesture apparently aimed at pushing Senate to act, House Ways and Means Committee Chairman Dave Camp (R-Mich.) and Ranking Member Sander Levin (D-Mich.) introduced Miscellaneous Tariff Bill (MTB) (H.R. 6727) Jan. 1 with some 2,000 changes extending existing tariff waivers or granting new ones. But measure came too late for lawmakers to act, so process will have to restart with new Congress.

CHINA: In annual report to Congress Dec. 21 on China's compliance with its WTO accession agreement, USTR's office complained that China has pursued new and more expansive industrial policies, "often designed to limit market access for imported goods, foreign manufacturers and foreign service suppliers, while offering substantial government guidance, resources and regulatory support to Chinese industries, particularly ones dominated by state-owned enterprises."

SOFTWOOD LUMBER: CIT Judge Delissa Ridgway Jan. 2 upheld Customs collection of $1,826,531.80 from Millenium Lumber Distribution Co. Ltd. and its surety, XL Specialty Insurance Company, for failing to provide export certificates from government of Canada for lumber imports as required by Softwood Lumber Agreement (slip op. 13-1). Ridgway rejected claim lumber didn't require certificates based on previous Customs ruling letters.

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