

Vol. 32, No. 48

December 3, 2012

## Staff Objections Delaying Deal on Satellite Jurisdiction

A deal on legislation to let the president move satellite export controls to Commerce from State is reportedly being held up by the Republican staff of the Senate Foreign Relations Committee who have concerns about the transfer of satellites that may have military uses, according to industry sources. Talks on satellite controls are part of broader negotiations between the House and Senate on a compromise National Defense Authorization Act (NDAA) during the current lame-duck session of Congress (see **WTTL**, Oct. 29, page 1). The House passed its NDAA bill in May, but the Senate only began consideration of its NDAA measure (S. 3254) Nov. 28.

A pending amendment by Sen. Michael Bennet (D-Colo.) would give the president authority to move “satellites” to the Export Administration Regulations (EAR) from the International Traffic in Arms Regulations (ITAR). Republican staffers, particularly GOP aide Tom Moore, reportedly consider this term too broad because it could include remote sensing satellites that have military uses.

In their Section 1248 report on satellite controls, State and Defense recommended the transfer to Commerce of “communications satellites” as well as “remote sensing satellites with performance parameters below certain thresholds.” The report included draft changes to U.S. Munitions List (USML) Category XV, which now controls satellites, including specifications for what will remain as military items. The legislation does not include those conditions, which reportedly concerns the staffers. If a deal on the language isn’t reached before the Senate completes action on its NDAA bill, the discussion will continue as part of the House-Senate Conference Committee that will resolve differences between the two chambers. The White House has threatened a veto of the NDAA for issues not related to satellite controls.

## Court Rejects Commerce Choice of China Surrogate

In a ruling that might significantly change antidumping cases against imports from China, Court of International Trade (CIT) Chief Judge Donald Pogue Nov. 30 remanded to Commerce its administrative review of shrimp imports from China because the department failed to justify using India as a surrogate country instead of Thailand. Pogue said Commerce’s claim that data from India was better than from Thailand was “insubstantial, if not illusory.” He also rejected the argument that the “difference in data quality necessarily outweighed the concern that India’s per capita GNI [gross national income] was nearly a third of China’s, whereas Thailand’s per capita GNI was nearly identical thereto.” The department’s policy of “disregarding relative GNI differences among potential surrogates for whom quality data is available and who are



significant producers of comparable merchandise is not reasonable, because it arbitrarily discounts the value of economic comparability relative to the remaining eligibility criteria (i.e., significant production of comparable merchandise and quality of data),” Pogue wrote. “Because none of Commerce’s three surrogate country eligibility criteria is pre-eminent, it follows that relative strengths and weaknesses among potential surrogates must be weighed by evaluating the extent to which the potential surrogates satisfy each of the three criteria,” he ruled.

## **EU, Japan and U.S. Raise Complaints Against Russia at WTO**

As the granting of permanent-normal-trade relations (PNTR) status to Russia awaits Senate action, the European Union (EU), with support from Japan and the U.S., raised their first complaints against Moscow’s compliance with its World Trade Organization (WTO) accession commitments at a Nov. 26 meeting of the WTO Council on Trade in Goods. The EU said a Russian recycling fee for imported vehicles may unfairly discriminate against foreign car companies or pose other problems to international trade. It also criticized a measure, imposed in March, banning importation of live animals, especially pigs, for slaughter.

The EU said “a surge of protectionist measures” were undermining the positive effects of Russia’s WTO accession, according to EU talking points obtained by WTTL. The EU said it was “particularly concerned” about the applied recycling fee legislation and sanitary-phytosanitary (SPS) “related issues like the import ban on live animals from the EU,” the paper said (see WTTL, Nov. 19, page 4).

According to the EU, Moscow has claimed inspections in two EU countries found deficiencies that raised doubts about the reliability of the EU safety control system and justified the measures. Russia, however, hasn’t fully disclosed its risk assessment as required under the SPS agreement and “refused to make progress” during several meetings despite concrete proposals by EU governments to alleviate concerns, it added. “We think this measure is disproportionate and we also have doubts concerning the justification supposedly based on risk of this measure, noting that it applies to pigs for slaughter but not to breeding and fattening pigs,” it said. The EU said a recycling measure imposed a €420 fee on imported small cars and up to €150,000 for heavy construction vehicles if they are certified that they would be recycled but not on domestic vehicles. An EU spokesman said the fee goes to up to €17,600 for large cars.

## **Draft Revisions to State Brokering Proposal Draw Praise**

Industry executives who reviewed a draft of changes the Directorate of Defense Trade Controls (DDTC) wants to make to a proposal it published for revising the brokering rules in the International Traffic in Arms Regulations (ITAR) praised the changes for limiting who would be considered a broker, what activities are considered brokering under the rule and eliminating the extraterritoriality implications of the proposal. The draft changes are “really, really, really good,” said Debbie Shaffer of [Southwest Research Institute](#), who co-chaired a Defense Trade Advisory Group (DTAG) working group that reviewed the text. DTAG Nov. 28 approved the working group’s report on the draft along with additional changes it recommended. DDTC’s originally proposed changes to the brokering section in ITAR in December 2011 drew strong objections from industry (see WTTL, July 30, page 1).

The new language is “a significant improvement...and changes dramatically from what was previously proposed,” said Greg Hill of [DRS Technologies](#), the other working group co-chair. Hill described the draft as a form of “catch and release,” defining who is a broker but also what persons are excluded from the regulation. In the current draft, ITAR Section 129.2(a) more clearly defines who could be considered a broker – the catch part of the rule. This would include any U.S. person worldwide, a foreign person in the U.S., a foreign person or entity outside the U.S. who works for a company owned or controlled by a U.S. person, or a foreign person performing functions involving the temporary import into the U.S. While brokering activities would include financing, insuring, transporting, freight forwarding or promoting arms

manufacturing, importing or exporting, there are specific exclusions – the release part. Excluded from the definition would be U.S. persons involved exclusively in domestic sales in the U.S., U.S. government employees in an official capacity, persons involved in purely administrative functions, including lawyers who only provide legal advices, and a foreign affiliate working for or on behalf of another affiliate that is a registered defense firm. DDTC Managing Director Bob Kovac said publishing a revised brokering rule is his agency's number one priority. Before publishing a new rule, however, DDTC's enforcement and compliance staff will test the new wording against actual brokering prosecutions in the past to see if the new definitions would have applied to those cases. He also said his staff would consider the DTAG recommendations. "There may be a little more work here," he said.

## **State Advisors Propose New ITAR Exemption for Repairs**

DTAG presented State Nov. 28 with a proposal to create a new ITAR license exemption for the export of controlled items back to their foreign original equipment manufacturer (OEM) for repair and return to the U.S. The advisors recommended creating a new ITAR Section 123.4(c) which would provide for the temporary export of an item needing repair to the OEM or to a qualified end-user that had been previously approved to receive controlled U.S. items. The exemption would apply only to hardware. DTAG members said the license exemption would lessen the licensing burden for defense items that have become inoperable and would pose no significant risk, since the item would be going to the company that originally made it and has the technology to produce the product.

## **Egyptian Officials Try to Give Assurances to U.S. Investors**

Egypt's new government is trying to assure U.S. businesses that Cairo will continue to invite trade and investment and offer protection to U.S. investors in Egypt. "Just this morning on television the parliament was discussing the new constitution and one of the articles that everyone agreed on was the article relating to private property and the preservation of private property and the protection of private property," Egypt's new ambassador to the U.S., Mohamed Tawfik, told WTTL following his address Nov. 29 to a luncheon in Washington. "This is going into the constitution and will apply to foreign investors," he added. The constitutional assembly completed its work Nov. 30 amid controversy over Islamist domination of its drafting.

Before Tawfik spoke, the luncheon watched a video presentation by Egyptian Prime Minister Hesham Kandil, who also offered assurances about his country's continued commitment to trade and investment. "I will like to assure you of Egypt's commitment to all previous signed agreements, treaties and current active investment," he said. "It's important to stress that we are reshaping a new Egypt based on upholding the rule of law and adopting policies which will not be obstacles to trade and investment," he said.

## **Australia Opposes Investor-State Rules in TPP**

Australia is taking a strong stand against including investor-state dispute settlement provisions in any Trans-Pacific Partnership (TPP) agreement, arguing that its current legal system provides protection for foreign investors, according to Kim Beazley, Australia's ambassador to the U.S. Foreign investment in Australia is already protected by the Productivity Commission, which he described as the "high priests of sea green incorruptible, unfettered capitalism in Australia." The U.S. has pushed for investor-state rules in the TPP talks, especially because of concerns about protections in such TPP countries as Vietnam, Malaysia and Brunei. Australia has "a decent set of rules with a judicial system and you don't want to give an advantage to a foreign company by giving them more sources of opportunity, more legal opportunities than are available to their domestic competitors," Beazley told reporters Nov. 28. Australia has included

investor-state provisions in some trade accords but not as part of the U.S.-Australia Free Trade Agreement, he noted. “If you’re dealing with a country where foreign interests don’t have that [legal protection], absolutely. But if you’re dealing with one where they do have that – to wit Australia – where you have an absolutely pristine legal system into which you are operating, free of corruption, free of influence, then you are basically giving your investors in Australia an opportunity to shop judicial locations that Australian companies can’t,” Beazley explained.

## Agencies Propose Transfers for Electronics in USML Category XI

BIS and DDTC ended the hiatus in the process of transferring items from the USML to the CCL Nov. 28 with parallel Federal Register proposals to transfer some military electronics in USML Category XI to the CCL. While DDTC clarified controls for items remaining in the category, BIS created several new Export Control Classification Numbers (ECCNs) in the 600 series. The DDTC proposal includes a new definition for “equipment,” which it describes as “a combination of parts, components, accessories, attachments, firmware, or software that operate together to perform a specialized function of an end-item or a system.” The new ECCNs would cover: electronic “equipment,” “end items,” and “systems” “specially designed” for military use; microwave monolithic integrated circuit power amplifiers; discrete radio frequency transistors; high-frequency surface wave radar capable of “tracking” surface targets on oceans; and micro-electronic devices and printed circuit boards that are certified to be a ‘trusted device’ from a defense microelectronics activity accredited supplier.

## BIS Proposes “Clean Up” of Commerce Control List

BIS in the Federal Register Nov. 29 proposed extensive non-substantive changes to the CCL to address industry complaints about inconsistencies and confusion in the list (see **WTTL**, Nov. 19, page 1). “This rule focuses on implementing a large number of changes that would make the CCL clearer,” the notice said. “The significance of any particular change, when taken by itself, may not appear to make a dramatic improvement to the clarity of the CCL, but the cumulative impact of these various proposed changes would make a significant improvement to the CCL,” BIS said. The proposal would clarify existing CCL controls, including the use of the terms “parts” and “components” on the CCL; conform the CCL to the multilateral export control regime lists and previous EAR amendments; improve the clarity of the CCL; and remove 14 ECCNs subject to the exclusive jurisdiction of the Nuclear Regulatory Commission.

### \* \* \* Briefs \* \* \*

**GIFT BOXES:** In 6-0 vote Nov. 27 in “sunset” review, ITC determined that ending antidumping duty order on folding gift boxes from China would likely cause renewed injury to U.S. industry.

**ENTITY LIST:** In Federal Register Nov. 29 BIS added two entries under Pakistan: Mohammad Azam and his company, Azam Electronics, which were tied to organizations that build Improvised Explosive Devices. BIS also added two aliases for Infotec, entity listed in UAE: Info Tech and I. Tec Trading FZE.

**CHINA:** Despite encouraging developments, exchange rate of China’s RMB remains significantly undervalued, and more progress is needed, Treasury said in report to Congress on international exchange rates Nov. 27. Nonetheless, it didn’t declare China currency manipulator (see **WTTL**, Oct. 29, page 1).

**REMANUFACTURING:** In report released Nov. 28, ITC found U.S. production of remanufactured goods grew 15% to at least \$43 billion from 2009-2011, supporting 180,000 full-time jobs. Of that total, exports comprised 27% or \$11.7 billion in 2011. About 40% of exports went to FTA partners, it said.

**EX-IM BANK:** Investigations into fraudulent exports to Mexico have led to sentencing of two Mexican pecan brokerages in separate schemes to defraud Ex-Im Bank. Leopoldo Valencia-Urrea of Ciudad Juarez was sentenced Nov. 7 in El Paso U.S. District Court to 48 months in prison. Eduardo Rodriguez-Davalos, owner of Procesadora La Nogalera S.A. de C.V. in Ciudad Juarez, was sentenced Oct. 31 in same court to six months’ home confinement for making false statement in separate scheme. Both men pleaded guilty.