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Arms Trade Treaty Talks Expected to Restart in 2013

Arms Trade Treaty talks that collapsed in July are expected to get a second chance in 2013 as a proposal to reauthorize negotiations moves toward United Nations (UN) General Assembly approval in December. Although the U.S. was among the countries that caused the talks to fail in July because of its objections to the draft treaty under discussion, a senior State Department official says the U.S. supports a new round of talks (see **WTTL**, Aug. 6, page 1).

> The process for getting the talks restarted is underway in the UN First Committee, which is the panel that deals with arms proliferations issues. On Oct. 17, seven countries (Australia, Argentina, Costa Rica, Finland, Japan, Kenya and the United Kingdom) submitted a revised draft joint resolution to the committee for introduction at the General Assembly meeting. The First Committee is expected to adopt the recommendation during meetings starting the week of Oct. 22.

After consultations with other countries, the seven revised their first draft, which was submitted Sept. 28, because "we have had to make decisions where, for example, some suggestions were mutually exclusive, in order to provide a balanced resolution representing the different interests." The new resolution calls for the renewed talks to be based on the draft treaty text offered by conference president Roberto Garcia Moritan "without prejudice to the right of Member States to put forward additional proposals on this text."

In a statement at a First Committee meeting Oct. 10, Rose E. Gottemoeller, acting under secretary of State for arms control and international security, said the U.S. backs resumption of the negotiations. "The United States is committed to improving the current draft text and supports convening a short, focused, consensus-based Conference in 2013 to continue our work. We look forward to cooperating with our partners to achieve a treaty text that can be adopted by consensus," she said in her prepared statement.

Justice Defends Constitutionality of CVD Law Changes

Legislation enacted in March to apply the countervailing duty (CVD) law to imports from nonmarket economies (NME) does not violate the Constitution because the changes merely clarified existing law and corrected the erroneous ruling of the Court of Appeals for the Federal Circuit (CAFC) in its *GPX International Tire v. U.S.* ruling, Justice argued in a brief filed Oct. 16 in the Court of International Trade (CIT). "This clarification did not change the law. The Act *does* require Commerce to adopt new procedures in all *future* antidumping

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investigations and reviews, but that is a prospective change – not a retroactive one. Because the Act did not change the law retroactively, GPX's claims that the Act somehow violates the *ex post facto* clause and the Fifth Amendment's guarantee of due process are simply inapposite," the brief contended (original emphasis) (see **WTTL,** Sept. 24, page 3).

> Justice cited Supreme Court precedents to claim the law was not retroactive because it supposedly maintains the status quo from before the CAFC ruling and did not apply to events completed before enactment of the new provisions. The new law "left in place the very same legal regime that existed before the *GPX V* decision. As we explain below, the legislation is also not penal," it asserted.

After the CVD law was amended, GPX asked the appellate court to declare it unconstitutional because it applied to cases back to 2006. The CAFC then remanded the case to the CIT for a ruling on the constitutionality issue. In a motion for summary judgment in August, GPX's lawyers at Curtis, Mallet-Prevost, Colt & Mosle argued the law's "selective retroactivity" violates three fundamental principles of the Constitution." The law violated the *ex post facto* clause of Article I, the due process rights under the Fifth Amendment and the equal protection of the laws also guaranteed by the Fifth Amendment, their brief claimed.

"GPX's assertion that these duties violate the *ex post facto* clause fails because these duties are not punitive but are, instead, proportional to the subsidy received by the foreign producers and importers," Justice's response brief stated. "Similarly, the legislation does not violate the Fifth Amendment guarantees of due process and equal protection because it is supported by a rational basis. Specifically, the effective date of section 1 was necessary to correct the results of an unexpected decision by the Federal Circuit that Congress believed to be erroneous," it added.

Even if the CIT finds the retroactive part of the law unconstitutional, it should not strike down the entire statute, Justice argued. "Here, the two parts of the Act are clearly severable because each seeks to achieve different aims consistent with Congress's intent. However, the result of severing the two portions is not, as GPX proposes, that the Federal Circuit's *GPX V* decision magically reappears," it added. "Instead, Commerce's authority under the Act to apply the CVD law to NME imports and to make an adjustment for any overlapping antidumping and countervailing duty remedies demonstrated to exist would continue to apply *prospectively* from March 13, 2012, the date of enactment of the legislation," Justice argued.

BIS Sidesteps Legal Challenge to Enforcement Powers

The Bureau of Industry and Security (BIS) avoided a legal challenge to its authority to use denial orders as penalties for violations of the Export Administration Regulations (EAR), with a settlement agreement Oct. 16 with Micei International, a Macedonian firm that had sued Commerce to overturn a civil penalty and denial order the agency imposed on it in 2009 (see **WTTL**, Jan. 3, page 4). Micei had argued that the International Emergency Economic Powers Act (IEEPA) does not give the president the power to use IEEPA by executive order to give the agency the right to impose a denial order as a civil penalty.

> The settlement drops a $126,000 fine and five-year denial order that was imposed on the firm. In place of that sanction, the agency agreed to require the firm to implement an export management and compliance program and to conduct two audits of its export compliance in 2012 and 2013.

As part of the agreement, the government and Micei filed a stipulation in the D.C. U.S. District Court withdrawing Micei's suit with prejudice and making the legal challenge to BIS' authority moot. In addition, BIS agreed that it "will not initiate any further administrative proceedings against Micei in connection with any alleged violations" cited in a BIS charging letter. The court case, which was remanded to the district court by the D.C. U.S. Court of Appeals in September 2010, had questioned whether the invocation of IEEPA could grant BIS authority to use IEEPA to impose civil penalties for violations of the Export Administration Act (EAA) that

occurred after the EAA expired. "This is not a case in which the general savings statute provides an exception to this rule," the appellate court order stated. "Here, Micei's alleged violations occurred in 2003, well *after* the EAA's expiration," it stated (original emphasis).

U.S. Firms in China Stay Course, Despite Tougher Environment

As China becomes a major issue in the presidential contest, American firms operating in China say they are facing a tougher regulatory and business environment but still consider doing business in China a top priority, with sales and profits growing. A survey of U.S. firms in China by the Shanghai American Chamber of Commerce (AmCham) evaluated business during 2011 and 2012 and found 80% of companies reporting revenue growth compared to 87% in 2010, but with margins being squeezed by higher costs. The survey also found that 62% of respondents say they import parts or finished goods from the U.S. to support their China operations.

> "U.S. companies identify rising costs as their greatest business challenge in 2011," AmCham noted. "Human resource (HR) constraints – a perennial leader in previous surveys – ranks second, while increasing competition, both Chinese and foreign, rounds out companies' top three business challenges," it added.

"Meanwhile, companies are seeing little improvement in legal and regulatory challenges they face with 71 percent of those polled responding that China's regulatory environment is either staying the same or deteriorating, notably up from 63 percent one year ago," AmCham noted. "Bureaucracy, an unclear regulatory environment and a lack of government transparency lead the list of legal/regulatory challenges," it said.

Industry Argues Against Export Restraints for Natural Resources

In the wake of an Obama administration decision to delay a permit to export liquefied natural gas (LNG), industry and congressional Republicans are arguing against export restraints for natural resources by both the U.S. and foreign nations. While the administration has taken complaints to the World Trade Organization (WTO) against Chinese restrictions on raw materials and rare earths, industry objects to barriers it has raised to LNG and coal exports. Industry's views face strong opposition from environmental groups that are concerned about the impact expanded ports and terminals will have on the environment (see **WTTL**, July 2, page 4).

> The Energy Department put on hold Oct. 5 a request from Cheniere Energy for the first license to export LNG to non-Free Trade Agreement (FTA) partners from its Sabine Pass receiving terminal in Cameron Parish, La., which had been granted a permit to proceed in 2011. Energy's stay came in response to concerns the Sierra Club raised over Cheniere's plan.

"Some members of Congress have called for these permits to be denied, claiming LNG exports will be drive up the prices American pay for natural gas. Not only are these claims exaggerated, LNG exports promise significant economic and foreign policy benefits for the United States," John Murphy, VP, International Affairs of U.S. Chamber of Commerce, told a program in Washington Oct. 16. In the Northwest, an element of the debate over port projects are the environmental review requirements of the National Environmental Policy Act (NEPA).

In a letter to the Army Corp of Engineers in April 2012 on the Port of Morrow project in Oregon, the Environmental Protection Agency (EPA) called for a "thorough and broadly-scoped cumulative impacts analysis of exporting large quantities of Wyoming and Montana-mined coal through the west coast of the United States to Asia." The NEPA is "being used as a blunt force instrument" to attack U.S. policy on coal mining," Pete Obermueller, legislative director for Rep. Cynthia Lummis (R-Wyo.) and policy director for the Congressional Western Caucus, told the program. Lummis and 57 other representatives, mostly Republicans, wrote a letter in June

to agencies handling port proposals to express their "strong opposition to the requests made by some elected officials, advocacy groups and the [EPA] to dramatically expand the scope of environmental reviews necessary for singular port projects necessary for coal exports."

BIS Finds Foreign Availability of Night-Vision Products

The thermal-imaging industry got support for further liberalization of export controls on its products from a BIS Critical Technology Assessment on Night Vision Focal Plane Arrays, Sensors and Cameras released Oct. 18. The report found "widespread availability of night vision components and equipment among Wassenaar Arrangement regime members" and outside the regime. The assessment was based on a survey of industry and examined trade in focal plane arrays (FPAs), image intensifier tubes (IITs) and low light level (LLL) sensors, and imagers incorporating FPAs, IITs and sensors for cooled and uncooled infrared or near-infrared imaging.

> BIS said it found "evidence that certain items across all types of night vision components and equipment are available from outside of regime members." These countries include Belarus, China, India, Israel, Singapore and Taiwan. "There is clear evidence that foreign availability exists outside of regime members at all size ranges for uncooled FPAs, uncooled cameras, and IIT imagers," it said.

BIS attributed a spike in exports from 2009 to 2010 to a change in controls on uncooled thermal imaging cameras – the UTIC rule – for cameras in Export Control Classification Number (ECCN) 6A003. "From 2007-2010, dual-use exports of all night vision components and equipment have increased, from 310,389 to 498,406 components and equipment," it noted. "The number of companies selling night vision components and equipment to DOD [Defense Department], along with the low levels military-use-only exports, indicates that the majority of end-users are not predominately or exclusively military," it added.

* * * Briefs * * *

GOES STEEL: WTO Appellate Body Oct. 18 upheld dispute-settlement panel ruling that found China violated trade rules in its imposition of countervailing and antidumping duties on grain oriented flat-rolled electrical steel (GOES) from U.S. (see **WTTL**, June 18, page 1).

TEXTILES: Mexico asked China for WTO consultations Oct. 15 to resolve complaints that Beijing provides WTO-illegal subsidies to support production and export of clothing and textile products.

ISRAEL: U.S. and Israel signed Mutual Recognition Agreement Oct. 15 on conformity assessment of telecommunications equipment. Under agreement, Israeli and U.S. regulatory authorities will accept tests on this equipment performed by laboratories that are duly recognized as conformity assessment bodies.

INDIA: After Court of Appeals for Federal Circuit in *Essar Steel* sent case back to CIT, Senior Judge Judith Barzilay remanded to ITA Oct. 15 CVD ruling on certain hot-rolled carbon steel flat products from India to provide corroboration of adverse facts available (AFA) finding (see **WTTL**, April 7, page 4). "Bear in mind that the court is not rejecting the notion that Commerce may have selected a reasonable AFA rate, but to sustain such a rate the court needs Commerce to explain (1) how it corroborated the AFA rate assigned to Essar, or (2) why corroboration is not practicable," Barzilay wrote (slip-op. 12-132).

EXPORT ENFORCEMENT: Mohammad Reza "Ray" Hajian of Tampa, Fla., was sentenced in Tampa U.S. District Court Oct. 18 to four years in prison for conspiracy to violate IEEPA and Iranian Transaction Regulations for exporting computer and related equipment, including Hitachi Data Systems Universal Storage Platform, to Iran without Treasury licenses from 2003 through 2011. Hajian also received one-year supervised release and must forfeit $10 million. Hajian and his three companies -- RH International LLC, Nexiant LLC and P & P Computers LLC -- pleaded guilty July 11 (see **WTTL**, Sept. 10, page 4).

IRAN: European Union Oct. 15 broadened sanctions against Iran and Syria and some five dozen entities. It banned all transactions with Iranian banks unless explicitly authorized; export to Iran of materials relevant to Iranian nuclear and ballistic programs or to industries controlled by Iranian Revolutionary Guard Corps; import of natural gas from Iran; vessels belonging to EU citizens and companies from transporting or storing Iranian oil and petrochemical products; new short-term export credits, guarantees or insurance.