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Personality Clash Blocks Progress on Export Control Reforms

The Obama administration's export control reform initiative has become blocked because of congressional anger over the way lawmakers and staff have been treated by one administration official – Andrew Shapiro, the assistant secretary of State for political and military affairs, according to sources. In an unusual clash of personalities, sources claim Shapiro has been behind the administration's approach to Congress and is responsible for its failure to come to an agreement with lawmakers on how to handle the process for providing Congress advance notification of proposed moves of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL) under Section 38(f) of the Arms Export Control Act.

“It's both a personality issue with Shapiro and his personal agenda, trying to make a name for himself by upsetting the committees of jurisdiction,” one source said. In particular, sources say the administration hasn't responded to proposals on the 38(f) process from House Foreign Affairs Committee Chairman Ileana Ros-Lehtinen (R-Fla.) and Ranking Member Howard Berman (D-Calif.). “They are literally trying to just marginalize the Congress and the committees of jurisdiction from having any input, any role, in the 38(f) process,” the source added.

Sources say lawmakers have gotten better cooperation from Commerce, including from Bureau of Industry and Security Assistant Secretary Kevin Wolf. “If we were just dealing with the Commerce part, we would probably be further along,” the source said. But “Commerce has been kept on a very short leash,” the source added. Lawmakers have also worked well in the past with Beth McCormick, State's deputy assistant secretary for trade and regional security, and with the staff of the Directorate of Defense Trade Controls (DDTC), sources said.

Shapiro worked from 2001 to 2009 for then-Sen. Hillary Clinton (D-N.Y.) on defense and foreign policy issues and appears to have her backing on export reforms. Meanwhile, House sources say they are hearing concerns from some senators about the proposed changes, especially about how future controls on transferred items will address foreign policy concerns, human rights and economic issues. Particular concern has focused on arms sales to Bahrain and Egypt.

Customs Officials Defend Progress Against Bipartisan Criticism

Customs and Border Protection (CBP) officials faced tough criticism May 17 from House Ways and Means Committee trade subcommittee members at a hearing that highlighted problems lawmakers may want to address in long-delayed legislation to reauthorize the agency. Committee



questions focused on such issues as the slow progress toward full automation of customs operations, metrics, the efficiency of U.S. ports, interagency integration, import duty evasion, help for companies wanting to file antidumping complaints and stalled trusted trader programs.

“To develop better tools and measurements, I intend to move forward on a bipartisan basis to pass Customs reauthorization legislation this year,” said subcommittee chairman Kevin Brady (R-Texas). “The last time this committee last passed a Customs bill was in 2004, and it is long overdue,” he said.

Acting CBP Commissioner David Aguilar tried to defend the several-year delay in implementing the Automated Commercial Environment (ACE). He cited recently begun pilot programs on simplified entry/cargo release, rail and sea manifests, document imaging system and export manifests, saying this is an “exciting time of innovation and implementation.”

Members also expressed concern over evasion of antidumping and countervailing duties (AD/CVD). “On evasion of trade remedy laws, CBP’s failure to act even when affected U.S. industries provide CBP with very specific information about evasion is unacceptable,” said Rep. Jim McDermott (D-Wash.). The hearing highlighted a Government Accountability Office (GAO) report (GAO-12-551) released May 17 that said CBP needs to improve its efforts to detect and deter evasion of trade remedy duties.

“While CBP has made some performance management improvements, it does not systematically track or report key outcome information that CBP leadership and Congress could use to assess and improve CBP’s efforts to deter and detect AD/CV duty evasion,” the GAO report said. “First, CBP cannot readily produce key data, such as the number of confirmed cases of evasion, which it could use to better inform and manage its efforts. Second, CBP does not consistently track or report on the outcomes of allegations of evasion it receives from third parties,” it noted.

A separate CBP report on its 2011 activities said it had collected \$37.2 billion in duties and fees in fiscal 2011, which ended Sept. 30, 2011. It estimated that uncollected fees and duties that year due to noncompliance with U.S. trade laws were \$342 million, just 0.9% of all duties and fees. CBP also said the overall compliance rate for “material discrepancies” was 96.7%.

Industry Concerned about “Overloading” U.S.-China BIT

U.S. business is concerned that future U.S.-China talks on a Bilateral Investment Treaty (BIT) could become “overloaded” with non-investment issues, such as labor and environment, but also lead to new U.S. restrictions on foreign investment. American and Chinese officials signaled their interest in resuming BIT negotiations during their Strategic and Economic Dialogue meeting May 3-4 in Beijing (see **WTTL**, May 7, page 3). The U.S. is expected to use its newly revised Model BIT as the template for those talks.

“Given that it’s China, there will, no doubt, be an effort to address a broad myriad of other issues in the BIT context, as this is a binding legal agreement that’s moving forward,” Linda Menghetti, vice president of the Emergency Committee for American Trade (ECAT), told a Global Business Dialogue program May 16. “I think there is going to be a tendency to overload the BIT negotiations with issues that go well beyond the scope of investment,” she said.

“I am concerned that there might be additional conditionalities that folks would try to put on labor and environment provisions when it comes to China,” Menghetti said. She also said she is worried about provisions dealing with state-owned enterprises and Beijing’s likely demands for more access for investment in the U.S. market. There may be some who will try to add restrictions on foreign investment in the U.S. that go well beyond national security, she noted. Scott Miller, Procter & Gamble’s global trade policy director, said China has some high-standard BITs with several major trading countries, but those agreements don’t cover pre-establishment investment rules. “The U.S. Bilateral Investment Treaty is somewhat unique in that it has

pre-establishment disciplines,” he said. “Pre-establishment will be a very challenging part of the negotiations,” he added. The issue is important because it would create new market access opportunities and assure nondiscrimination, Miller explained.

State, BIS Propose Moving Auxiliary Military Equipment

In parallel Federal Register notices May 18, State and BIS proposed rules to revise Category XIII (materials and miscellaneous articles) of the U.S. Munitions List (USML) and create five new Export Control Classification Numbers (ECCNs) – 0A617, 0B617, 0C617, 0D617, and 0E617 -- as part of the proposed new “600 series” on the Commerce Control List (CCL). In addition to creating the new ECCNs, the BIS rule would move some items now classified under ECCNs 0A018, 0A918 and 0E018 to new ECCNs 0A617 and 0E617.

Products classified under the new ECCNs include crew protection kits, concealment and deception equipment, test models, photointerpretation, stereoscopic plotting and photogrammetry equipment, and “metal embrittlement agents.”

Unlike previously proposed rules, the new ECCNs would not feature a catch-all control for parts and components “specially designed” for items in that category “because neither USML Category XIII nor WAML [Wassenaar Munitions List] Category 17 contain such a catch-all for auxiliary or miscellaneous military equipment,” BIS explained. “To the extent a part or component is controlled in this ECCN, it is described in the applicable subparagraphs,” it noted.

Court Ruling Keeps CVD Law Change Up in Air for Another Year

Despite a change in the law, the final story on whether Commerce can retroactively impose countervailing duties (CVDs) on imports from nonmarket economies that were the subject of some 24 old cases may not be settled for a year or more and could end up being appealed to the Supreme Court. In its May 9 ruling in *GPX International*, the Court of Appeals for the Federal Circuit (CAFC) said the constitutional question of whether Congress can change the trade law retroactively to apply CVDs to those pre-legislation cases is “a question of first impression” that should be addressed initially by the Court of International Trade (CIT).

While Congress often applies laws retroactively, the CIT will have to address the legal dispute over whether such laws can be applied backward only for short periods or longer periods. Many retroactive laws involve situations where an act has lapsed – such as duty-free treatment for imports under the Generalized System of Preferences – but such measures usually cover periods of less than a year.

The CIT also will have to consider past Supreme Court rulings that have said retroactive application of a law has to have a legitimate legislative purpose and a rational basis. Because Congress acted swiftly in amending the law to deal with the GPX ruling, there were no hearings on the bill and little legislative history. Based on CIT rules, the hearing on the new law’s constitutionality may be assigned to a three-judge panel (see **WTTL**, April 9, page 3).

Auto Production in Iran Targeted for Possible Sanctions

European carmakers have become the target of a new campaign to end their operations and sales in Iran, according to witnesses at a House Foreign Affairs Committee hearing May 17 on the implementation of current sanctions on Tehran. General Motors has particularly become the focus of attention because it owns a share of Peugeot, the French auto company, which continues to have production in Iran. Nissan also was criticized for its manufacturing there. Both Peugeot and Nissan reportedly partner with the Iranian Republican Guard Corps, which is subject to U.S. trade sanctions. Iran is the world’s 13th largest auto producer and car production

is 20% of its economy, Mark Wallace, chief executive of United Against Nuclear Iran, told the committee. “There are some real gaping holes” in U.S. sanctions, he testified. He cited success in getting Hyundai and Porsche to end sales in Iran. Peugeot has agreed to suspend sending build kits to Iran for five months. “That should be permanent,” he said. Wallace urged New York City to cancel a \$1 billion deal with Nissan to build the city’s next taxicab.

Mark Dubowitz, executive director of the Foundation for Defense of Democracies, also voiced concern that the Obama administration might waive sanctions against China, India and Turkey for continuing to buy oil from Iran before a June 28 deadline based on a finding that they have made “significant reductions” in purchases. He complained that the administration has never defined what “significant” means and may consider just a 3-5% decline enough rather than the 18% reduction Congress wants.

He also urged the Society for Worldwide Interbank Financial Telecommunications (SWIFT), which dropped 20 Iranian institutions from its system in March, to drop the remaining 14 banks still participating (see **WTTL**, March 26, page 3).

WTO Aims to Ramp Up ITA Talks to Spur Trade

World Trade Organization (WTO) members have signaled their interest in opening negotiations to update the 1996 Information Technology Agreement (ITA), but want the talks to take two separate tracks: one dealing with information technology (IT) equipment and one addressing nontariff measures (NTMs). Support for new talks was indicated at a May 14-15 symposium in Geneva marking the 15th anniversary of the ITA and a May 15 meeting of the WTO ITA Committee. On both tracks, the goal would be to increase the number of countries participating in the ITA and expanding the coverage of the accord to new products that have come to market in the last 15 years (see **WTTL**, March 19, page 3).

A “concept paper,” co-sponsored by the U.S., Canada, Japan, South Korea, Taiwan, Singapore, Costa Rica and Malaysia, drew support at the ITA committee meeting from about four dozen countries, including European Union (EU) members. The paper proposed talks to expand the ITA’s membership and coverage. “Separately, the ITA Committee should take concrete steps to advance the important ongoing work under the Non-Tariff Measures (NTMs) Work Programme, to further facilitate international trade in this important sector,” it said.

Trade officials and industry executives have been discussing a potential framework for new ITA talks, seeking a format that would have the greatest likelihood of success, one trade official said. Work hasn’t concluded on the list of products that might be included in negotiations.

The two-track path on ITA talks could narrow the conflict between the U.S., which wants NTMs dealt with separately from IT products, and the EU, which wants them addressed together. Former U.S. Trade Representative (USTR) Charlene Barshefsky told the symposium that talks should avoid issues that have contributed to deadlock in the Doha Round. U.S. industry panned a 2008 EU proposal on NTMs, claiming it was a negotiating tactic to avoid complying with a WTO ruling against EU tariffs on a number of IT products. India, which is a major player in IT services but not an ITA participant, also wants to include NTMs in any ITA talks. Other countries have expressed fear that discussing NTMs would take too long.

Any ITA talks are likely to see countries taking offensive and defensive positions over the classification of new ITA products and the transposition of products to tariff schedules. Difficult talks on classification are already underway in the World Customs Organization. During the meetings in Geneva, India, Egypt, El Salvador, Guatemala, Honduras and the Dominican Republic called for flexibility for developing countries, including longer implementation periods for cutting tariffs. Brazil, which isn’t an ITA member, reportedly was prepared to join the pact in 1996, but decided not to, because it wanted to exclude around 40%

of its IT products from coverage and also was seeking compensation in the form of lower tariffs on its farm exports. With about 95% of its current IT tariffs ranging from zero to 2%, Brazil sees no reason to join now, one source said. For remaining IT products, which have tariffs up to 20%, it wants those tariffs addressed in the Doha Round.

Satellite Amendment Likely Model for Reform Legislation

A House-approved amendment to the 2013 National Defense Authorization Act (NDAA) May 17 to authorize the president to move commercial satellites from the USML to the CCL included additional conditions that Congress may insist on attaching to any future legislation approving implementation of the Obama administration's export control reform initiative. The bipartisan amendment was co-sponsored by House Armed Services Committee Chairman Buck McKeon (R-Calif.) and Ranking Member Adam Smith (D-Wash.), but it drew objections from the Obama administration because of the requirements it would impose on Commerce.

The House passed the final NDAA bill after midnight on May 18, and the next step will be Senate action on its version of the legislation. Congressional sources concede that the measure faces many changes in the Senate and in any House-Senate Conference Committee before final passage.

Part of the House amendment was based on legislation (H.R. 3288) co-sponsored by Reps. Howard Berman (D-Calif.) and Don Manzullo (R-Ill.). Armed Services Committee members insisted on attaching conditions on the president's discretion to move licensing jurisdiction for satellites. One provision would amend Section 38(f) of the Arms Export Control Act to require the president, when sending Congress advance notice of a move of any product from the USML to the CCL, to include "to the extent practicable, an enumeration of the item or items to be removed and describe the nature of any controls to be imposed on the item or items under any other provision of law." The provision addresses congressional complaints that the administration is not providing adequate information on proposed transfers (see story, page 1).

Other provisions deal with congressional concerns about how transferred items will be treated under License Exemption Strategic Trade Authorization (STA) or any other exemption. It would require Justice and the Department of Homeland Security to report on how license exemptions affect enforcement of the Export Administration Regulations. It also would require Commerce to send Congress an unclassified quarterly report on all commercial satellites it licenses. The amendment would mandate establishment of an end-user monitoring program for all items placed on the Commerce Munitions List. In addition, it would require interagency agreement on any future modifications to USML Category XV covering spacecraft systems.

WTO Appellate Body Faults U.S. Tuna Rules

The complexity of U.S. "dolphin-safe" tuna labeling rules continues to produce mixed judgments from the World Trade Organization (WTO) as reflected in a May 16 ruling from the WTO Appellate Body on Mexico's complaint against the regulations. In upholding and reversing different parts of a dispute-settlement panel's findings, the Appellate Body generally agreed the tuna rules constitute a "technical regulation" under the WTO Technical Barriers to Trade (TBT) Agreement and U.S. application of the law provides Mexican tuna less favorable treatment than is given U.S.-caught tuna and tuna caught in other parts of world using different techniques than addressed in the regulations (see *WTTL*, Sept. 26, 2011, page 4).

The Appellate Body agreed with the panel's assessment that the rules were not more restrictive than necessary to achieve their goals. It also agreed the rules had a legitimate goal, but called for the U.S. to adjust them to come into compliance with its findings. That may be hard to do, given the ruling's thin parsing of the rules. The Sierra Club was among consumer and environmental groups that lambasted the decision. "This ruling is especially troubling in light of the negotiations that are currently taking place for the Trans-Pacific Partnership, a massive new

trade agreement that would have far-reaching implications for citizens and economies across the globe,” said a statement by Margrete Strand Rangnes, its labor and trade director. “The WTO decision raises serious questions for the future of other legitimate labeling programs and opens the door to further attacks on consumer protections and environmental standards,” she said.

* * * **Briefs** * * *

BURMA: U.S. will “ease its bans on the exportation of financial services and new investment in Burma,” President Obama announced May 17. Secretary of State Hillary Clinton said general license will be issued to provide authority for these investments. “We are suspending sanctions. We believe that that is the appropriate step for us to take today. We will be keeping relevant laws on the books as an insurance policy, but our goal and our commitment is to move as rapidly as we can to expand business and investment opportunities,” she said. General license will “enable American businesses to invest across the economy, allow citizens access to international credit markets and dollar-based transactions,” Clinton noted (see **WTTL**, April 30, page 2). Not everyone was happy with Obama’s move. “The Obama Administration is acting prematurely in easing sanctions on Burma. While small steps have been taken in the direction of democracy, serious questions remain about Burma’s journey toward democracy, as hundreds of political prisoners remain jailed and repression still exists,” said statement by House Foreign Affairs Committee Chairman Ileana Ros-Lehtinen (R-FL).

STEEL SHEET: On 6-0 vote May 15 in “sunset” review, ITC determined that ending antidumping order on tin and chromium-coated steel sheet from Japan would “be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”

FOUNDRY COKE: On 6-0 vote May 15 in “sunset” review, ITC determined that ending antidumping order on foundry coke from China would likely cause renewed injury to U.S. industry.

ANTIBOYCOTT: Steel Summit International (SSI) in New York April 13 agreed to pay \$14,400 fine to settle four BIS charges of violating antiboycott regulations by furnishing information about business relationships with boycotted countries or blacklisted persons. In 2009 through 2011, SSI engaged in transactions from U.S. to Saudi Arabia. SSI neither admitted nor denied charges.

MORE ANTI-BOYCOTT: Samuel Shapiro & Co. (SSC) in Baltimore, agreed March 8 to pay \$10,000 fine to settle five BIS charges of violating antiboycott rules by failing to report request to engage in restrictive trade practice or boycott. BIS said SSC engaged in transactions from U.S. to UAE. SSC neither admitted nor denied charges. This is its second antiboycott settlement (see **WTTL**, Sept. 23, 1996, page 2).

EXPORT ENFORCEMENT: Ulrich Davis, former manager of Netherlands-based freight-forwarder, was sentenced to six months in prison in N.J. U.S. District Court May 15 for conspiring to defraud U.S. by facilitating the illegal export of goods to Iran. Davis had pleaded guilty Feb. 6 to violating Commerce Temporary Denial Order (see **WTTL**, Aug. 15, page 4).

MORE EXPORT ENFORCEMENT: Massoud Habibion and Mohsen Motamedian, co-owners of Online Micro LLC in Costa Mesa, Calif., were sentenced May 16 in D.C. U.S. District Court for scheme to illegally export millions of dollars worth of computer-related goods to Iran through UAE. Habibion was sentenced to 13 months in prison for conspiracy to violate IEEPA and to defraud U.S. Motamedian was sentenced to three years’ supervised release for obstruction of justice. Habibion and Motamedian pleaded guilty on Feb. 16 (see **WTTL**, Feb. 20, page 4).

INDIA: After bilateral consultations failed to resolve U.S. complaints against India’s import restrictions on U.S. farm products, including poultry, meat and eggs, USTR’s office May 11 asked WTO to establish dispute-settlement panel to hear case (see **WTTL**, March 12, page 2).

EX-IM: Compromise between Senate Democrats and Republicans May 14 allowed five GOP members to offer amendments to bank’s reauthorization legislation (H.R. 2072). After Senate defeated all five by wide margins, it passed measure easily on 78-20 vote (see **WTTL**, May 14, page 1).

TPP: At latest Trans-Pacific Partnership (TPP) talks in Dallas May 10-16, U.S. offered proposal to assure that state-owned enterprises (SOEs) compete fairly with private firms, comply with trade disciplines and operate on level playing field. Discussions also covered Vietnam’s proposal for a single-transformation rule of origin for textiles and apparel. Under pressure from NGOs, USTR’s office released draft proposal May 18 of its proposal on TPP treatment of tobacco, which calls for recognition of tobacco’s unique health issues, phaseout of tariffs and quotas and allowing health authorities to adopt origin-neutral, science-based restrictions on tobacco products to safeguard public health (see **WTTL**, May 14, page 3).