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Lawmakers Want Agreement on Control List Changes

House and Senate committees that oversee U.S. export control statutes want an agreement with the Obama administration on how it will move items from the U.S. Munitions List (USML) to the Commerce Control List (CCL) and what licensing policies will apply to those items after they are moved, according to congressional sources. Under the White House export control reform initiative, hundreds of items now controlled on the USML could be shifted to the CCL. The agreement would be intended to avoid a protracted process, if the administration were to submit an individual notification to Congress for each transferred item as required by Section 38(f) of the Arms Export Control Act (AECA)(see **WTTL**, Dec. 13, page 3).

> As part of the reform effort, State and Defense officials are in the midst of reviewing 20 USML categories and converting them into a positive, three-tier system of controls. Many of the items that get placed into Tier 3, the lowest level of control, are likely to be candidates for transfer to the CCL.

Although the administration and congressional staffers are talking about how to deal with a massive dump of USML changes, "they are a long way from any agreement," one source told WTTL. Section 38(f) says any decision that an item on the USML no longer warrants export controls "shall be reported to the Speaker of the House of Representatives and to the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate. Such a report shall be submitted at least 30 days before any item is removed from the Munitions List and shall describe the nature of any controls to be imposed on that item under the Export Administration Act." Of most concern to lawmakers is the final portion of that provision: how transferred items will be controlled when they are moved to the CCL.

Court Orders Refund of Canadian Wheat Duties

The Court of Appeals for the Federal Circuit (CAFC) ordered Commerce April 19 to refund all cash deposits that the Canadian Wheat Board paid on antidumping (AD) and countervailing duty (CVD) orders on hard spring wheat from Canada in 2004, saying the department's decision not to refund the money was "bizarre and unfair." Commerce revoked the orders in 2006 after the International Trade Commission (ITC) acted on a remand from a binational NAFTA dispute-settlement panel and determined that a U.S. industry wasn't being injured by the imports. The CAFC ruling sets an important precedent on the role of NAFTA panel rulings. The decision "removes a very significant cloud that has hung over the binational panel process," says Mark Moran of Steptoe & Johnson, which represented the Canadian Wheat Board in the long legal

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battle to win the refund. The amount of the refund is confidential, he notes. Despite the ITC ruling, Commerce argued that its revocation order applied only prospectively and not to already paid cash deposits. Liquidation of the duties had been suspended pending the NAFTA panel and ITC rulings, as well as review by the Court of International Trade, which had ordered the refund of the deposits (see **WTTL**, Oct. 27, 2008, page 3).

> "The government contends that these statutory provisions and their legislative history show that Congress intended to preclude foreign sellers in the Canadians' position from recovering the duties they had deposited pursuant to antidumping orders that had been invalidated. We are not persuaded," wrote Circuit Judge Daniel Friedman for the three-judge CAFC panel. "The language of the relevant statutory provisions does not explicitly address that question," he added.

The Commerce "action is so bizarre and unfair that we would be most reluctant to sustain it unless we could say with complete assurance that there was no doubt that Congress intended that result," Friedman wrote. "Our analysis of the governing statutes and regulatory provisions indicates that Congress intended that foreign sellers in the Canadians' position could recover the suspended and unliquidated deposited antidumping duties involved in this case," he stated.

Lamy Warns of "Grave Situation" in Doha Talks

As most negotiators and trade observers have given up hope of completing the Doha Round in 2011, World Trade Organization (WTO) Director General Pascal Lamy warned April 21 that the talks have reached "a grave situation" and members "must face it squarely in order to try to find a way forward together." Lamy's statement came as the WTO released reports from the chairmen of the Doha negotiating groups on the status of talks in each of their sectors. The reports show little progress being made in talks in any Doha sector, including agriculture, non-agriculture market access (NAMA) and services (see **WTTL,** April 4, page 3).

> U.S. Trade Representative (USTR) Ron Kirk has joined those who don't think the round will finish this year. "All of us are concerned that some of the gaps that we have to bridge, particularly in opening markets outside of agriculture, manufacturing and services, are probably not going to be filled in time for us to do it in 2011," he told reporters April 20. "We aren't willing to walk away, if we're in a position where we might have a time out or a Plan B," he said.

In a cover note to the negotiating texts, Lamy stressed the value of what is on the table already in the round. He said the biggest gaps remain in the NAMA talks. "I believe we are confronted with a clear political gap which, as things stand, under the NAMA framework currently on the table, and from what I have heard in my consultations, is not bridgeable today," he stated. "But my frank assessment is that under the right conditions of temperature and pressure a deal would be doable," except in NAMA "where the differences today are effectively blocking progress and putting into serious doubt the conclusion of the Round this year," he reported.

In his report on farm talks, which he chairs, New Zealand Ambassador David Walker said "members have not been in a position to substantively resolve matters nor is there any discernible progress on these issues that can be captured in text." In talks on a Special Safeguard Mechanism, which derailed a potential deal in 2008, Walker said "analytical discussion appeared to have been exhausted."

In the NAMA talks, in addition to a lack of agreement on a formula for cutting tariffs, members also remain split over developed-countries demands for progress in talks on sectoral agreements and developing-countries insistence on protection against preference erosion. "These elements do not, in my view, provide me with additional inputs in order to change the present wording in the December 2008 NAMA text related to sectoral negotiations," said Swiss Ambassador Luzius Wasescha, who chairs these talks. Nonetheless, he reported progress in talks on nontariff barriers (NTBs) and the WTO agreement on Technical Barriers to Trade (TBT). "There is a

significant potential NTB-package within reach which would *inter alia* constitute a series of improvements to the functioning of the TBT agreement, create stimuli for legislators to privilege the reference to international standards and to diminish the tendency to deviate from international standards," he wrote (see related story, page 4).

> Negotiators made a renewed push for progress in services at an April 15 meeting where members voiced support for plurilateral request-offer talks, but overall service negotiations have made little progress. "Some Members have expressed concern over the state of the market access negotiations, indicating that no progress has occurred since the 2010 stocktaking, and little or none since the July 2008 Signaling Conference," reported Mexican Ambassador Fernando de Mateo.

Three FTAs Set For Congressional Consideration

Free trade agreements (FTAs) are starting to stack up in Congress like planes waiting to land at O'Hare Airport during rush hour. With administration officials already consulting with lawmakers on the Korea FTA, USTR Ron Kirk notified congressional committees April 18 that the White House is ready to start talks on legislation for the Panama FTA. Kirk told reporters April 20 that the administration could be ready soon after April 22 – perhaps even during week of April 25 – to send lawmakers a similar notice to start work on the Colombia FTA.

> Panama cleared the way for action on its FTA after it enacted legislation the U.S. was demanding on labor rights and tax information exchange. "Panama has now fulfilled its commitments regarding those actions," Kirk told the committees. After Panama passed the tax legislation, Ways and Means trade subcommittee chairman Kevin Brady (R-Texas) issued a statement saying he wants Congress to consider all the FTAs by July 1 (see **WTTL,** April 18, page 3).

In preparing the way for talks on legislation to implement the Colombia FTA, Kirk said Bogota won't have to complete all the steps it has promised to undertake to improve labor and human rights protection before work begins on the legislation. The seven steps promised by April 22 and five steps due June 15 "are the most relevant" to getting the FTA passed, Kirk said. "The other things we would have time to work on during the implementation period," he added. Kirk said it was highly unlikely that the three FTAs would be combined into one omnibus trade bill because of the fast-track rules governing trade deals. "It is highly unlikely – I'd say zero – that they would be in one bill for the reason that the way trade-promotion authority is granted, it is bill-by-bill," he said. Combining them would "run the risk of having all three knocked down by a point of order," Kirk explained.

Political System May Hamper China's R&D Goals

Although Beijing is pouring billions of dollars into making China an innovation leader by 2020 and a scientific power by 2050, its system of centralized planning might prevent that goal from being achieved, contends a report that the U.S.-China Economic and Security Review Commission released April 20. "The Chinese model of science in its present form is unlikely to deliver the types of creative research on which future high-technology leadership will depend," says the report written for the commission under contract by Centra Technology, Inc.

> "Bureaucratically-driven institutions and programs for science are wasteful," it notes. "China has yet to show that it can meaningfully use the tools of the state to drive the commercialization of discoveries in research labs in a competitive manner. And the nation's drift in a techno-nationalist direction could compromise China's enabling international scientific links," it adds.

Despite these drawbacks, Beijing is laying the groundwork for continued improvement in its innovation capacity, the report states. "China's corps of research scientists and engineers is

expanding, its research facilities have experienced a building boom, its share of publications in global science and engineering journals is quickly increasing, and its patenting activity is growing notably. China's research and development (R&D) spending reached $141 billion in 2010—according to purchasing power parity (PPP) estimates—more than twelve percent of the global total. China is on pace to surpass Japan in 2011 and become the largest source of R&D spending in the world after the United States," the report says.

U.S. Industry Groups Oppose EU Standards Proposal

U.S. trade associations urged the Obama administration April 14 to oppose a European Union (EU) proposal to identify recognized standards-setting organizations and standards as part of a Doha Round agreement on nontariff barriers to trade (NTBs). The EU proposal "restricts choice and flexibility not only by naming their list of preferred standardizing bodies and suggesting that only standards developed by these bodies are relevant internationally within the context of the WTO Agreement on Technical Barriers to Trade, but by essentially requiring countries to use standards from those bodies," said the letter from 16 U.S. trade groups to USTR Ron Kirk and White House officials Michael Froman and Cass Sunstein.

> "If the EU position were to be adopted, it would lead to technical regulations or conformity assessment procedures potentially becoming outdated as these few designated international standards bodies would become choke points to standards development and deployment," the letter argued. "While the EU asserts that its proposal responds to industry demands, we wish to make clear to you that we are strongly opposed to it," the groups added.

* * * Briefs * * *

EX-IM BANK: Ismael Garcia of Miami, Fla., was sentenced to 51 months in prison April 18 in D.C. U.S. District Court after pleading guilty to conspiracy to defraud Ex-Im Bank of more than $23 million. After jail, he must serve 36 months of supervised release, do 100 hours of community service and pay almost $18 million in restitution to government.

EXPORT ENFORCEMENT: Aegis Electronic Group, Inc., of Gilbert, Ariz., agreed to pay OFAC $20,000 fine as part of deferred prosecution agreement with Justice to settle charge that one of its former employees violated Iranian Transaction Regulations by conspiring to export Hitachi JU-Z2 Control Box part to Iran via Germany, OFAC reported April 8. Employee was actually working with federal undercover agent and got caught in sting operation.

MORE EXPORT ENFORCEMENT: Jeng "Jay" Shih, his company Sunrise Technologies and Trading Company of Queens N.Y., Massoud Habibion, Mohsen Motamedian and their company, Online Micro LLC of Costa Mesa, Calif., were indicted April 21 in D.C. U.S. District Court on charges of illegally exporting computer-related equipment to Iran via UAE without Treasury license.

NORTH KOREA: In move some see as effort to blunt objections to Korea FTA based on concerns about exports to U.S. from North Korea's Kaesong Industrial Zone, President Obama issued Executive Order April 18 declaring that, "Except to the extent provided in statutes or in licenses, regulations,orders, or directives that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order, the importation into the United States, directly or indirectly, of any goods, services, or technology from North Korea is prohibited" (see **WTTL**, March 28, page 4). FTA critic Rep. Brad Sherman (D-Calif.) reacted, saying EO is not enough. Congress needs to enact legislation.

CHEMICALS**:** BIS amended EAR in April 20 Federal Register to adopt Australia Group (AG) Control Lists changes from June 2010 AG plenary meeting. Specifically, it updated CCL listing for "valves" in the chemical manufacturing equipment entry to clarify controls.

FCPA: Of 38 nations that have signed OECD Antibribery Convention, only U.S. and four other countries are meeting their commitments to clamp down on bribery and corruption, OECD reported April 20. In 2010, only U.S., Germany, France, Switzerland and United Kingdom imposed penalties on companies and individuals for bribing foreign officials. "Most parties to the Convention have yet to sanction any individual or company," OECD said.