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## Exporters Want Lowest Tiers in New Tiered CCL

Comments to the Bureau of Industry and Security (BIS) on its proposed system of “tiering” the Commerce Control List (CCL) found many exporters urging the agency to make sure their individual products end up in Tier 3, the lowest level of controls possible. In response to the BIS call for comments on the tiering concept in the Dec. 9 Federal Register, more than 50 comments came in from individuals, companies and trade associations. The 1450 pages of comments range in length from three paragraphs of general views to 345 pages of detailed information about specific products (see **WTTL**, Jan. 17, page 1).

The comments fell into two baskets, according to BIS export analyst Tim Mooney. There were those that asked for more technical information to clarify Export Control Classification Numbers (ECCNs) that are controlled as “not elsewhere specified” and others offering specific tiering recommendations and identifying foreign availability. In general, “people were very supportive of the reform initiative,” he told a BIS advisory committee March 9.

Most comments addressed specific ECCNs, but some dealt with the structure of the tiers in general. The Semiconductor Industry of America (SIA) suggested a straightforward approach: “SIA would urge the criteria for the three tier approach to be as follows: Tier 1 should be reserved for the few items of vital national importance such as weapons of mass destruction; Tier 2 should be reserved for defense articles and munitions items set forth on the USML [U.S. Munitions List]; and Tier 3 should be reserved for dual-use items set forth on the CCL.”

“BIS has interpreted ‘specially designed’ to mean that any modification to an existing component or accessory for use with a 3B001 device, regardless of its significance, and renders that component or accessory as ‘specially designed’ for the 3B001 device,” commented Advanced Energy Industries. “This approach is overly broad and results in a wide variety of items being classified under a more stringent ECCN, regardless of the nature of the adjustments to such items and regardless of whether there is a national security or other policy basis for controlling the item with the minor adjustments,” the company noted.

## PNTR for Russia Faces High Hurdles in Congress

The Obama administration is pulling out the same arguments the Clinton administration used to build support for granting China Permanent Normal Trade Relations (PNTR) status in its early push for PNTR for Russia. The outcome, however, is likely to be much different. Congress-



sional opposition to lifting the Jackson-Vanik Act restrictions on Russia is strong, and it is uncertain whether the business community will mount the same high-level, organized lobbying campaign for Russia as it did for China PNTR.

Vice President Biden endorsed Russia's entry to the WTO and the granting of PNTR during a March 9-10 visit to Moscow. "Our administration also strongly supports -- I want to make this clear -- strongly supports the lifting of Jackson-Vanik," Biden told a business group March 9. In a speech the next day at Moscow State University, he said, "it's better for Americans and better for Russians to be able to trade with each other under predictable and transparent rules."

At a March 9 hearing with U.S. Trade Representative (USTR) Ron Kirk, Senate Finance Committee members complained about Russian restrictions on U.S. beef and its lack of intellectual property protection. Sen. Orrin Hatch (R-Utah) had a particularly contentious exchange with Kirk over labor rights in Russia and forced labor of foreign workers in the logging industry. Hatch called it a "double standard" to delay the Colombia FTA over labor issues but still support Russia's accession to the WTO. Kirk defended the administration's stand, saying, "Our standards for an FTA are much higher and different than they are for admission to the WTO."

Echoing Clinton era statements on China, Kirk also warned that U.S. businesses would be at a disadvantage, if Washington did not grant PNTR to Russia after it joins the WTO. "We have worked with Russia to address many of the issues that American businesses brought to us, and it looks reasonably likely that Russia will be admitted to the WTO," he said. "So the question before this body is going to be, 'Are we the ones going to be responsible for bringing Russia into the WTO, but leaving Jackson-Vanik in place?' Then no American businesses benefit from those reduced tariffs," Kirk said.

## Doubts about Doha Deal This Year Rise

As an April 21 deadline looms for the tabling of new draft texts for major portions of a Doha Round agreement, many trade diplomats in Geneva are becoming more pessimistic about the chances of reaching a final deal this year, and some say conclusion of the round may be put off until 2014, if a total collapse of negotiations is averted. There are others who still harbor hopes that private bilateral talks – especially recent and coming talks between the U.S. and China – might still lead to a breakthrough that is not yet visible.

Although there have been dire warnings before about the demise of the round, a sense of panic has set in among some negotiators. One ambassador from a country belonging to the G-20 group of emerging market countries says failure to clinch a deal this year is a foregone conclusion. A lawyer close to the talks warns that time pressure is increasing. Some progress is being made but not nearly fast enough, he says. He contends July and not April is the deadline for agreements on agriculture and nonagriculture market access (NAMA) draft texts.

A pessimistic note was sounded March 8 by Brazilian Ambassador Roberto Azevedo in a statement to the World Trade Organization's (WTO) Trade Negotiations Committee (TNC). "We all clearly agree that we are not making sufficient progress despite our engagement in the various formats of the cocktail approach," he said. "Despite these obvious shortcomings from a developing country perspective, a few developed members argue that what we have on the table is unbalanced and that to sell the Round at home they need further contributions," Azevedo noted.

"The formula cuts cannot be interpreted as a minor down payment for the actual NAMA liberalization, which would actually be delivered by the sectorals. If this view prevails – and this is a big 'if' – then we have not reached the 'endgame'; we have reached the 'end of the game'," he declared. Azevedo also defended the offers that Brazil has already made in the NAMA talks. "Under the negotiated NAMA formula, Brazil will cut current applied rates – not bound rates – by 33% in key strategic and vulnerable sectors such as automobiles, textiles,

footwear, and toys,” he said. “To be clear, these deep cuts are with the use of the flexibilities,” he added (his emphasis). At the same time, members such as the U.S. and European Union (EU) are unwilling to offer deeper cuts in agriculture, he complained.

Azevedo echoed concerns of other Brazilian officials about the devaluation of currencies by the U.S. and EU. “Further aggravating this scenario are the existing currency asymmetries provoked by excessively flexible monetary and fiscal policies adopted by some key developed economies,” he said.

Azevedo’s statement was part “truth” and part “tactical maneuvering,” one trade official said. “It really is an endgame now,” he said. If a deal is about to be cut and compromises made, some will speak in a way that maximizes what they can get, the official said. Another source said there is always brinkmanship near the end of negotiations. Some see indications that the U.S. and EU may be signaling a willingness to make more concessions on agriculture to meet the demands of advanced developing countries for payment for further openings in NAMA.

Officials of advanced developing countries say they are carefully watching the talks between the U.S. and China. Beijing didn’t reject the request to use a “basket” approach for NAMA and sectorals after it held bilateral talks with the U.S. in February. China wants to see what kind of special and differential treatment it can get and what flexibility it will have in applying the formula cut to industrial tariffs. It also wants to be granted “market economy status” earlier than the 2016 date set in its WTO accession protocol. Such a move would likely be politically difficult in the U.S., one lawyer said. In addition, the Chinese are seeking cuts in tariff peaks on clothing and textiles, something that might draw opposition from African and Central American countries that fear erosion of trade preference programs or FTA benefits.

## **Colombia, Panama Pacts Will Block Korea FTA**

Democrats and Republicans in the House and Senate made it clear during the week of March 7 that they won’t approve legislation to implement the U.S.-Korea Free Trade Agreement (FTA) unless the Obama administration sends Congress the Panama and Colombia FTAs for approval at the same time. Action on renewal of the Trade Adjustment Assistance (TAA), the Andean Trade Preferences Act (ATPA) and the Generalized System of Preferences (GSP) also will be stalled until the three FTAs are submitted, lawmakers warn.

USTR Ron Kirk sent a letter to the House Ways and Means and Senate Finance committees March 7 saying the administration is ready to begin the informal process of drafting legislation to implement the Korean FTA and take the measure through the mock markup process called for under congressional “fast-track” rules for handling trade pacts. “We hope our discussions to review these documents may commence without delay,” Kirk wrote.

Besides demands for action on the Panama and Colombia deals, Finance Chairman Max Baucus (D-Mont.) told Kirk at a March 9 hearing that he would not move the Korean accord until the administration follows through with its promise to work toward getting full market access in Korea for U.S. beef. “We are simply asking Korea to consult with us on a roadmap to full market access in the future,” Baucus said. “I think it is necessary for us to move forward on this whole range of issues we are talking about – the FTAs, TAA, ATPA– all of them, they all come together,” he said.

Ranking Finance Member Orrin Hatch (R-Utah) also criticized the delay in bringing Colombia and Panama to Congress. “I don’t believe the President will ever act on the Colombia and Panama agreements unless these agreements move with Korea,” he said. The day after the hearing, Baucus and Hatch sent Kirk a letter seeking discussions implementing legislation for the Panama and Colombia FTAs. “We urge you and your team, in addition to our continuing technical discussions on the Korea FTA implementing bill, to meet with our staff to immediately begin technical discussions on the implementing bills for the Colombia and Panama FTAs,”

they wrote. Ways and Means Chairman Dave Camp (R-Mich.) replied to Kirk's notice on Korean discussions by repeating his position "that all three agreements should be considered by Congress by July 1, and I have repeatedly urged the Administration to advance the Colombia and Panama agreements." He said, "The time for action is now. Therefore, I again request that you submit your action plan for advancing the Colombia and Panama agreements."

At the hearing, Kirk remained vague on when the administration would be ready to bring the Colombia and Panama deals to Congress. In reaching a new agreement with Colombia, Kirk said, "We are closer than many of you think we are." Towards that end, Deputy USTR Miriam Sapiro held talks March 10-11 with a delegation from Colombia.

## **Crowdsourcing Suggested to Identify Emerging Technologies**

Members of the Bureau of Industry and Security's (BIS) Emerging Technology and Research Advisory Committee (ETRAC) want to use the wisdom of crowds to help the agency identify emerging technologies that might need to be controlled under U.S. export law. At the ETRAC's March 9 meeting, however, members questioned whether BIS would have the resources to manage a "crowdsourcing" approach to collecting such advice from 1,000-2,000 leading scientists and engineers in a kind of peer-reviewed blog where participants could discuss information on current research and potentially disruptive technology.

BIS would need to add 10-15 people to take in and evaluate data produced from this solution, suggested Eileen Albanese, director of the BIS office of national security and technology transfer controls. That number of personnel would allow one person per category of the Commerce Control List (CCL), she noted.

That would represent a 15% increase in BIS' non-enforcement staff and is not included in the current or proposed agency budget. This added staffing might not be the highest priority for the agency, advised Alex Lopes, director, office of nonproliferation and treaty compliance. "I'm not sure how BIS would prioritize a crowdsourcing project," he told ETRAC. In addition to hiring more staff, another suggested idea would be to restructure the current technical advisory committees (TACs) to assign them specifically a role in identifying emerging technology. Albanese said, "it would help." The TACs would need a new charter and different kinds of people, she said. Currently, only the Materials TAC considers emerging technology.

ETRAC co-chair Tom Tierney of Los Alamos National Laboratory made it clear the committee was not suggesting BIS build the system from scratch. It would be most cost effective if BIS contracted out setting up and maintaining the system and issuing data reports, he said. In addition to export controls, the results of the crowdsourcing could drive investment more broadly, he added. Crowdsourcing links a large undefined community or crowd of people over the Internet to outsource through an open call tasks traditionally performed internally by a single organization. Its advocates say it gathers those who are most fit to perform tasks, solve complex problems and contribute relevant and fresh ideas.

## **Congressional Turf Battles Likely to Block Trade Reorganization**

A White House review announced March 11 of the organization of U.S. trade, export promotion and competitiveness agencies could flounder early on the shoals of congressional jealousy over committee jurisdiction for these functions. With numerous House and Senate committees controlling different aspects of trade, including trade negotiations, trade promotion, financing and agriculture, any effort to consolidate or change these functions is likely to face resistance from Capitol Hill. A presidential memo established a Government Reform for Competitiveness and Innovation Initiative to be headed by a Chief Performance Officer. Jeffrey Zients, deputy director of the Office of Management and Budget, will head the review. In the memo, President Obama said he wants a report and recommendations within 90 days on how "to restructure

and streamline Federal Government programs focused on trade and competitiveness.” “We are very early on” in the review, Zients told the President’s Export Council (PEC) March 11. “At a first look, there seems to be an opportunity for consolidation and streamlining,” he said. “The benefits have to be very clear and outweigh the short-term costs,” he told the PEC. “It is clear that moving boxes around just for the sake of moving boxes is a losing proposition,” Zients said. “At the end of the day, the most important perspective here is the customer’s perspective, which is business,” he added.

Administration officials were quick to refute reports that a decision had already been made to merge the USTR’s office with Commerce trade functions. In his State of the Union address, Obama said at least 12 different agencies have trade functions. The memo doesn’t name which agencies and departments will be examined, but besides Commerce and USTR, trade responsibilities exist in the Export-Import Bank, Small Business Administration, Foreign Agriculture Service, Overseas Private Investment Corp. and Trade and Development Agency.

Senate Finance Committee Chairman Max Baucus (D-Mont.) voiced objection to the potential merger of the USTR’s office and Commerce even before Obama issued his memo. At a March 9 hearing with USTR Ron Kirk, Baucus said, “I’m concerned frankly. It sounds good in theory, but in practice it could be a nightmare, an absolute nightmare.” As an example, he cited the possible merger of Ex-Im and the USTR’s office. “You’ve got two different missions. You’d have so many layers of bureaucracy to get sign offs, to get agreements, you’d be hamstrung,” he said. “This committee cares a lot about your agency,” Baucus told Kirk.

This isn’t the first time consolidation of trade agencies has been considered. Sen. Bill Roth (R-Del.) introduced a bill (S. 121) in 1983 to merge the USTR, Commerce and Ex-Im into a Department of Trade. The Reagan administration supported the proposal. Then-Commerce Secretary Malcolm Baldrige and USTR Bill Brock issued a joint statement in April 1983 saying, “The administration is ready to work with the Congress as expeditiously as possible to create a unified Cabinet-level department.” Robert Hormats, who now serves as assistant secretary of State, was a vice president with Goldman Sachs then and testified on the legislation. “Constructive organizational arrangements and rearrangements can improve prospects, but are no substitute for good policy,” he testified.

## **GAO Report Still Finds Fault with Deemed Export Enforcement**

BIS still isn’t doing enough to enforce its deemed export rules to avoid unauthorized access to controlled technologies, the Government Accountability Office (GAO) claimed in a Feb. 2 report released March 7 (GAO-11-354). The GAO repeats complaints raised in previous reports that led to the creation of the Deemed Export Advisory Committee (DEAC). “Commerce and Immigration and Customs Enforcement (ICE) have not implemented prior recommended changes to the deemed export licensing process involving outreach, and Commerce has taken action to clarify a regulatory definition, but confusion may remain,” the GAO says.

“As a result, employers may not be aware of deemed export licensing requirements and obtaining the licenses required,” it adds. In its latest report, GAO recommends that “Commerce should (1) assess issuance of specialty occupation visas covered by deemed export license applications and (2) report to Congress on how it will implement prior deemed export recommendations as part of the export control reform process.”

In written comments responding to a draft of the report, BIS said it “agreed with our recommendation to assess the extent to which foreign nationals from countries of concern who were issued specialty occupation visas also should have been covered by deemed export licenses and use the results to identify vulnerabilities in the deemed export control system, target and inform employers about deemed export licensing requirements, and incorporate immigration data into its enforcement screening activities,” the GAO notes. A controversial recommendation in an earlier report called for BIS to clarify the definition of “use” of transferred technology. In

response to recommendations made by the Commerce Inspector General, BIS in 2005 asked for public comments on changing the definition and drew scores of comments objecting to its proposed changes. In May 2006, the agency clarified that all activities listed in the definition of ‘use’ technology must be performed to trigger a deemed export requirement, but it did not change the definition. “Despite these actions taken by Commerce, the IG does not believe that Commerce fully implemented its recommendation to modify the definition of ‘use’ of EAR-controlled equipment by foreign nationals,” the report states.

The recent addition of a checkbox on the I-129 non-immigrant visa petition application, which requires applicants to certify that the person receiving the visa either will have a deemed export license if needed or won’t have access to controlled technology, should help efforts to enforce the regulations, federal agencies told the GAO. “In addition to making it easier for Commerce to screen thousands of H-1B change-of-status visa applications submitted domestically, Commerce, ICE, and FBI officials said that, if implemented, the addition of a ‘deemed export acknowledgement’ section to the form could make it easier to enforce deemed export control regulations by helping to ensure that companies employing foreign nationals endeavor to comply with the EAR,” the GAO says in the report.

## WTO Appellate Body Agrees with U.S. Courts on NME Case

A WTO Appellate Body ruling March 11 supporting China’s complaint against the way the U.S. treated Chinese goods in antidumping (AD) and countervailing duty (CVD) cases drew an angry response from USTR Ron Kirk. “I am deeply troubled by this report,” Kirk said. “It appears to be a clear case of overreaching by the Appellate Body. We are reviewing the findings closely in order to understand fully their implications.” His office said it “will continue to review the Appellate Body report and will work with Commerce to determine the appropriate response to the adverse findings.” The WTO Dispute Settlement Body is expected to adopt the report within the next 30 days.

The Appellate Body reversed an October 2010 dispute-settlement panel ruling that sided with the U.S. against a Chinese complaint involving the application of non-market economy (NME) rules to AD and CVD rulings on four products: steel pipe, light-walled rectangular pipe and tube, laminated woven sacks and off-the-road tires. The panel said the U.S. was permitted under WTO rules to apply both AD and CVD duties to the same product (see **WTTL**, Oct. 25, page 3).

The Appellate Body disagreed, taking the same position as the Court of International Trade, which said “double remedies” are not permitted under methodology Commerce had used. The Appellate Body reversed the panel, saying, “the imposition of double remedies, that is, the offsetting of the same subsidization twice by the concurrent imposition of antidumping duties calculated on the basis of an NME methodology and countervailing duties, is inconsistent with Article 19.3 of the SCM Agreement.” It also reversed the panel’s decision in support of the way the U.S. determined that state-owned enterprises (SOE) and state-owned commercial banks (SOCB) in China are “public bodies” under WTO rules, a position taken by the U.S.

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**TRADE FIGURES:** Exports of goods and services in January hit record high of \$167.7 billion, up 16% from last January. Imports of goods and services were highest since August 2008 at \$214 billion.

**EXPORT ENFORCEMENT:** In indictment unsealed March 9, Nadeem Akhtar, of Silver Spring, Md., was charged in Baltimore U.S. District Court with conspiring to illegally export radiation detection devices, resins for coolant water purification, calibration and switching equipment and surface refinishing abrasives to Pakistan without licenses. All these items are related to nuclear reactors and processing nuclear material. Akhtar, lawful permanent resident of U.S., owns Computer Communication USA.