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Sanctions on Libya Could Cut All Trade with Tripoli

Trade and financial sanctions imposed on Libyan leader Moammar Gadhafi, his family and the Libyan government by the U.S., UN and other countries could cut off most trade with Libya. U.S. government officials warn that the Gadhafis and the Libyan government have interests in almost every major business in the country as well as in businesses throughout Europe and the U.S., and the sanctions that President Obama imposed late on Feb. 25 against Gadhafi and his government could apply to those organizations as well (see **WTTL**, Feb. 28, page 4).

> The U.S. exported $665 million in goods to Libya in 2010 and imported $2.1 billion. The largest import from Libya ($1.6 billion) was for oil and gas. U.S. exports to Libya mainly supported oil and gas exploration and production, including $185 million in transportation equipment, $169 million in machinery and $67 million in computers. There were about $107 million in agriculture exports.

In addition to Obama's Executive Order 13566, State's Directorate of Defense Trade Controls (DDTC) has suspended all defense export licenses for Libya. On March 3, the Bureau of Industry and Security (BIS) said it was suspending all licenses it had issued for exports to Libya. Very few licensed exports to Libya are likely to be affected by the BIS order. In fiscal year 2010, which ended Sept. 30, 2010, BIS approved just 19 applications valued at $17.2 million for Libya. U.S. defense exports have been limited since February 2007 to mostly non-lethal articles and safety-of-use defense materials.

The near embargo could come from how Treasury's Office of Foreign Assets Control (OFAC) interprets the Executive Order. "It's true that the Executive Order did not specifically ban trade, but it is not just limited to financial transactions," OFAC General Counsel Sean Thornton told the BIS Export Control Forum Feb. 28. "But our definition of property includes goods. So the new Executive Order does prohibit exports of goods to the government of Libya and to any entity controlled by the government of Libya," he explained.

Mexican Trucking Agreement Reflects Changes in Congress

President Obama's ability to reach an agreement with Mexican President Calderon March 3 to establish a program to allow Mexican trucks to enter the U.S. was based in part on the administration's judgment that the new Republican-controlled House was unlikely to block the deal in the way that House Democrats in 2009 blocked funding for a pilot program set up by President George W. Bush. "I'm especially pleased to announce that, after nearly 20 years, we finally

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have found a clear path to resolving the dispute over trucking between our two countries," Obama said at a joint press conference with Calderon announcing the agreement. "I look forward to consulting with Congress and moving forward in a way that strengthens the safety of cross-border trucking, lifts tariffs on billions of dollars of U.S. goods, expands our exports to Mexico, and creates jobs on both sides of the border," he added.

> In January, Transportation Secretary Ray LaHood released a blueprint that led to the March 3 agreement, including certification requirements and electronic monitoring of Mexican truckers (see **WTTL**, Jan. 10, page 2). A White House fact sheet said the plan "will allow for the establishment of a reciprocal, phased-in program built on the highest safety standards that will authorize both Mexican and United States long-haul carriers to engage in cross-border operations under NAFTA."

Once a final agreement is reached, "Mexico will suspend its retaliatory tariffs in stages beginning with reducing tariffs by 50 percent at the signing of an agreement and will suspend the remaining 50 percent when the first Mexican carrier is granted operating authority under the program," the fact sheet explained. "Mexico will terminate all current tariffs once the program is normalized," it said. Some issues still need to be ironed out. "U.S. and Mexican negotiators are continuing to work through the remaining issues and expect to have a draft final agreement in place very soon," the fact sheet stated.

The Teamsters Union, which has led the fight against opening the border to Mexican trucks ever since NAFTA went into effect in 1995, continued to object to the new accord. "This deal puts Americans at risk," said Teamster General President Jim Hoffa. "This agreement caves in to business interests at the expense of the traveling public and American workers," he said. "The Bush-era pilot program was a failure that shouldn't be repeated," Hoffa added.

USTR's "Notorious Markets" Report Seeks Global Clampdown

The U.S. Trade Representative's (USTR) office is cranking up its attack against intellectual property rights (IPR) violations in a bid that industry groups hope will lead to a global clamp-down on counterfeiting and piracy. The USTR's first review of "notorious markets," released Feb. 28, identifies markets that are particularly prominent examples of IPR violations, While the review identified 17 websites and 17 physical markets in about a dozen countries that are responsible for the most egregious infringements of intellectual property rights, the report does not constitute an exhaustive list of all notorious markets around the world, the office said.

> The review is separate from the annual Special 301 Report on IPR protection around the world and was part of an "out-of-cycle review" of IPR violations. Among the markets identified in the report are street markets in Argentina, China, Hong Kong, Ecuador, India and Ukraine and websites in Russia, Canada, Ukraine and Bulgaria. The report also identified BitTorrent indexing and tracking sites. "BitTorrent indexing sites have become notorious hubs for infringing activities, even though such sites may also be used for lawful purposes," it said.

One identified website is China's Baidu, which is the Chinese version of Google. "Baidu recently ranked as the number one most visited site in China, and among the top ten in the world," the USTR's office said. Although Russia is one of the most maligned countries in the report, its Ministry of Economic Development said about 70% of illegal content linked to Russian language websites was actually located in foreign countries, mostly in Europe and the U.S.

The USTR report drew strong applause from several industry groups. The International Intellectual Property Alliance (IIPA) said the report highlights the need for "accountability in the online space" and "continuing vigilance" in physical piracy markets. The review should help the USTR "define concrete plans of action for the year ahead," said Michael Schlesinger, IIPA's counsel. "Enterprise end-user software piracy" is the principal and most damaging form of infringement to the business software industry today, Schlesinger said. The Internet Society said it is working on a position to advise policy makers on dealing with illegal content and the adverse effects of content blocking. Domain Name System blocking and other tactics governments use to fight crime and illegal content shouldn't adversely affect Internet stability, said Markus Kummer, the society's vice president of public policy, before the report was released. Neil Turkewitz, executive vice president of the Recording Industry Association of America (RIAA), urged governments to fight copyright infringement, whether that means seizure of servers, the removal of home pages or the blocking of sites.

"Cloud Computing" Doesn't Require Deemed Export Licenses

BIS in a Jan. 11 advisory opinion said foreign nationals who maintain cloud computing systems don't need a "deemed export" license under the Export Administration Regulations (EAR). The letter to an unidentified opinion seeker added to advice BIS gave on the regulatory status of cloud computing in an opinion it issued in January 2009 (see **WTTL,** March 30, 2009, page 1). The requester asked for "confirmation that EAR do not require cloud computing service providers to obtain deemed export licenses for foreign national information technology (IT) administrators who service and maintain their cloud computing systems," the opinion noted.

> "As stated in BIS' Jan. 13, 2009, Advisory Opinion regarding the applicability of the EAR to grid and cloud computing services, the service of providing computational capacity through grid or cloud computing is not subject to the EAR since the service provider is not shipping or transmitting any commodity, software or technology subject to the EAR to the user. Because the service provider is not an 'exporter', Company X would not be making a deemed export if a foreign national network administrator monitored or screened, as described above, user-generated technology subject to the EAR," BIS answered.

Trade Agenda Highlights Political Differences

Uncertainty about how freshman Republicans in the House feel about trade was clarified to some extent March 1 when 67 new and returning Republicans sent President Obama a letter urging him to submit the Korea, Panama and Colombia free trade agreements (FTA) to Congress for approval. The letter came the day after the USTR's office issued the Obama administration's 2011 trade agenda and annual report. The report drew criticism from both Republicans and Democrats for not providing more details on what has to be done to bring the Panama and Colombia pacts to Congress and not offering a timetable for moving those deals.

> "We stand ready to work with you to ensure that new opportunities are created for our farmers, manufacturers, service providers and workers by passing the three pending free trade agreements with Colombia, Panama and South Korea within the next six months," the freshmen wrote. "We believe that achieving the goal of doubling exports will require the implementation of these agreements," they said.

Although the report and agenda consumed 443 pages, the report itself ran only 199 pages. It was mostly a recapitulation of speeches, testimony and press releases the USTR has issued over the past two years with a seasoning of trade data, history, documents and lists, which made up 55% of the report. Nonetheless, USTR Ron Kirk boasted that "the Obama Administration has blazed a new trail on trade." The report modestly claimed "the Administration engaged in outreach of unprecedented scale and scope." Among the lists included with the report was one citing all existing and pending trade agreements. One was the "United States-Libya Trade and Investment Agreement (signed May 20, 2010, entry into force pending exchange of letters)."

House Ways and Means Chairman Dave Camp (R-Mich.) criticized the report for its lack of details. "The President's Agenda fails to lay out a concrete plan for generating good U.S. jobs by advancing our pending trade agreements with Colombia and Panama," he said. "As I have said repeatedly, I want to see all three agreements considered by July 1," Camp said. Sen. Max

Baucus (D-Mont.) complained that the agenda fails "to address Korea's continued unjustified restrictions on U.S. beef as well as the agenda's lack of a timeline or specific steps" to complete the Colombia FTA. "Montana ranchers, farmers and businesses can't afford to lose any further ground in the booming Colombian market," he said.

BIS to Create CCL Category for Emerging Technologies

BIS plans to create a new category on the Commerce Control List (CCL) to serve as a "catch-all" area for emerging technologies that might pose a national security risk and need to be controlled, according to BIS Under Secretary Eric Hirschhorn. The planned category will be modeled after Category XXI of the U.S. Munitions List (USML), which controls "miscellaneous articles" not covered by other categories on the list and technical data and defense services directly related to those articles. Hirschhorn said the tiering process that is being applied to the entire CCL as part of the export control reform exercise will also be used to review already controlled technology to determine whether the level of controls can be reduced.

> "Part of the point of this cascading construct – Tier 1, Tier 2, Tier 3 – is that as technology becomes more ripe, more mature, more widely available, they will cascade down the tiers," he told the BIS Export Control Forum in Irvine, Calif., Feb. 28. "By the same token, we are going to be trying to look at new technologies that will be added," he said. Hirschhorn explained how USML Category XXI is used as catch-all for new technology. "We expect to have a similar category added to the Commerce Control List, so that when a new technology comes along, there is a means to control it," he stated.

Defining "Specially Designed" Is BIS Priority, Hirschhorn Says

As part of an effort to harmonize export control definitions, BIS will make publication of a definition of "specially designed" a priority, Under Secretary Eric Hirschhorn told the agency's Export Control Forum Feb. 28. Although coming up with a definition has been "intellectually" difficult, "we hope to publish a proposed rule on this subject soon," Hirschhorn promised. "I must say, although there are other parts of the reform effort that may require more work and hours, this may be intellectually the most difficult piece," Hirschhorn told the forum.

> According to government sources, the push for publication of a definition of specially designed is coming from the Justice Department. U.S. attorneys reportedly have complained that they are reluctant to prosecute export control violations based on the specially designed criteria because they are afraid judges and juries will consider the term too vague.

"We are trying in general to reduce the use of the term specially designed, particularly in the Munitions List, but it is a term that appears in the [Wassenaar Arrangement] International Control List, so we can't ignore it," Hirschhorn said. "We do have to define it and try to define it in a way that makes sense in the various contexts in which it's used," he said.

* * * Brief * * *

<u>ITA</u>: After spending two years looking unsuccessfully for assistant secretary for import administration who wasn't tainted by working on antidumping and countervailing duty cases either on petitioner or respondent side, President Obama March 3 nominated someone who was already working in ITA's import administration office. Obama sent Senate name of Paul Piquado to fill position. Piquado currently serves as deputy assistant secretary for AD/CVD policy and negotiations in the ITA office. He previously spent five years as executive director of Pennsylvania's trade policy office. Before that he was on USTR's staff. Earlier, he was attorney with Sidley Austin and Powell, Goldstein, Frazer & Murphy law firms. Piquado holds J.D. from New York University School of Law, M.A.L.D from Tufts University Fletcher School of Law & Diplomacy and B.A. from Williams College.