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## Export Reforms Address Past Criticisms, GAO Reports

The Obama administration's export control reforms got somewhat of a boost from the Government Accountability Office (GAO) which says the plans will address many of the problems it has identified with the export licensing and enforcement system over the years. As with all GAO reports, however, the report released Dec. 16 to Sen. Jon Kyl (R-Ariz.) contains enough caveats to give critics ammunition to oppose the plans. Kyl is expected to be one of the chief opponents of legislation that will be needed to implement the final stages of the reforms.

“The export control reform framework—as proposed—has the potential to address weaknesses in the U.S. export control system related to control lists, licensing, enforcement, and information technology, including areas where agencies have not addressed prior findings,” the GAO said (GAO-11-135R). “However, for a few areas, such as developing measures of effectiveness for the arms export control system, agencies have not addressed some of our prior findings and the reform framework does not contain specific initiatives to address them,” it stated.

“Furthermore, the administration may have challenges in implementing fundamental reform of the export control system—such as reaching interagency agreement on which items need to be controlled and obtaining congressional approval for implementing reforms,” cautioned the GAO, which is the investigating arm of Congress. While examining how each of the proposed export control reforms deals with past GAO complaints, the agency said it was making no new recommendations (see **WTTL**, Dec. 13, page 1).

One area of previous concern was commodity jurisdiction, the GAO noted. “While the reform initiative announced that agencies will apply new criteria for determining jurisdiction, several potential challenges remain before aligning the State and Commerce control lists,” it said. The GAO also acknowledged progress State has made already in speeding up the handling of export licenses for defense articles. “In September 2010, State reported an average processing time of about 15 calendar days, down from an average of 43 days in 2006, and a reduction of the number of cases in process (i.e., open cases) from 10,000 to 3,500—despite a 20 percent increase in the number of cases received annually,” the GAO reported.

## Chinese See Hope in Export Control Reform Plans

The easing of U.S. controls on exports to China was again a main demand that Chinese officials made during the Dec. 14-15 meeting of the Joint Commission on Commerce and Trade (JCCT)



in Washington, but they apparently came away from the talks empty handed. While expressing the hope that the Obama administration's export control reforms will help improve this trade in the future, a senior Chinese official said he was disappointed that China would not be eligible for the proposed License Exception Strategic Trade Authorization (see **WTTL**, Dec. 13, page 1).

“China has high hopes that the proposal made by President Obama and his administration will improve and reform its export control regime,” said China's Minister of Commerce Chen Deming at a press conference following the JCCT meeting. “To my regret and disappointment, China has not yet got any trade facilitation measures from the United States,” he said through an interpreter.

Chen said China hopes the U.S. could provide “spare parts and components and also offer maintenance to those products that it already sold to China in the past.” In addition, he said China wants to work with the U.S. on the development of new products, particularly in the area of low-carbon technology and green economy products.

## **JCCT Results Improve Atmosphere for Hu's State Visit**

Agreements that U.S. and Chinese officials reached during the Dec. 14-15 meeting of the JCCT should make Chinese President Hu Jintao's state visit to Washington in January a much more pleasant affair than it would be if the JCCT hadn't addressed some of the major irritants in the bilateral relationship. After the JCCT talks, U.S. officials also hinted that Hu might bring additional trade concessions with him. The big dispute over China's currency manipulation wasn't on the JCCT agenda, but the results of the talk are likely to reduce pressure on Congress to enact legislation aimed at China's exchange rates (see **WTTL**, Nov. 8, page 1).

“We're very, very pleased with the outcome of the 21<sup>st</sup> session” of the JCCT, Commerce Secretary Gary Locke said after the meeting. “We look forward to even further announcements building up the economic relationship between China and the United States when President Hu Jintao visits the United States in Washington, DC, next month,” he added.

As at most previous JCCT sessions, the Chinese made many new promises to fix trade problems that U.S. officials raised. This time the Chinese said they would hold talks to reopen the market to U.S. beef younger than 30 months and poultry from Idaho and Kentucky, revise indigenous innovation rules to end discrimination against foreign products, change procurement rules for wind turbines to make it easier for foreign firms to qualify, work on harmonizing trade statistics, cooperate on smart-grid technology standards, ease movement of Chinese tourists to the U.S., launch anti-counterfeit and piracy campaign, increase government budgets to buy legal software, improve inspection procedures for U.S. soybeans and address other barriers involving pharmaceuticals, medical devices and 4G mobile phone equipment.

No deadlines were placed on the achievement of most of these promises. Representatives of the U.S. wind turbine industry are still skeptical about the JCCT agreement, noting that foreign firms with production in China are being discriminated against. There is also caution about prospects for opening China's beef market, which has been the subject of bilateral talks for three years. “Talks on lifting China's ban on U.S. beef must conclude swiftly – before President Hu's visit in January – and China must agree to abide by scientific standards and open its doors to American beef,” said Senate Finance Committee Chairman Max Baucus (D-Mont.) in a statement. “It's disappointing that with beef, all we have is an agreement to start talking again in the new year,” said Sen. Charles Grassley (R-Iowa).

## **ITC Says IPR Violations in China Remain Serious**

Just as a Chinese delegation arrived in Washington to participate in the Joint Commission on Commerce and Trade (JCCT) and offer to crack down on counterfeiting and piracy, the Inter-

national Trade Commission (ITC) issued a report Dec. 13 confirming concerns that intellectual property rights (IPR) violations in China are creating trade barriers and an unlevel playing field for U.S. industry. “IPR infringement in China remains a serious and costly problem for many U.S. firms,” the ITC report declared. Nonetheless, the commission found U.S. firms reluctant to stay out of the Chinese market for fear of losing business to foreign competitors.

“Weak IPR enforcement in China is estimated to have significant costs for the U.S. and the Chinese economies,” the report said. “Ineffective IPR enforcement and the resulting infringement reportedly has led to reduced U.S. exports of IP-sensitive products and technologies and to lower profits for both U.S. firms operating in China and for U.S. firms that license IP to Chinese entities,” it noted, citing testimony from a June 2010 hearing.

Despite the concerns over IPR infringement, U.S. industry representatives told the ITC that China is a critical growth market for U.S. exports and foreign investment. “According to these sources, if U.S. firms were to refrain from operating in China, their global competitors would fill the void, leading to substantial revenue losses for U.S. companies,” the report noted.

## **ETRAC Members Concerned about Innovation, Resources**

Members of the Bureau of Industry and Security’s (BIS) Emerging Technology Research Advisory Committee (ETRAC) raised concerns Dec. 13 that the early identification of a technology as one needing export controls would inhibit innovation without necessarily protecting national security. In response to a question on how quickly these technologies would be regulated, BIS senior analyst Mark Crawford said the agency has “no presumption of regulation.”

Although the government wants to identify research that will turn into commercial or military products and set up the controls in time, ETRAC members agreed it is almost impossible to predict what will come out of research. There is “no correlation between basic research and end product,” said ETRAC Chairman Tom Tierney of the Los Alamos Laboratory. Member Seth Marder, a chemistry professor at Georgia Tech University, said mapping technology 20 years over the horizon with existing criteria “seems improbable to me.”

ETRAC members also repeated concerns about the resources and personnel BIS would need to track emerging technologies. Tierney said the committee is still waiting for information on “current resource capabilities and constraints” which it is supposed to evaluate as part of its assignment. Crawford tried to assure the group that there will be an “expansion of staff to some degree” to handle the expected transfer of items from State’s jurisdiction to BIS as part of the Obama administration’s export control reform plans (see **WTTL**, Dec. 13, page 1).

To see how their recommendations might fit into an actual emerging technology, the ETRAC heard a presentation from Mikhail Roco of the National Science Foundation on nanotechnology. At the beginning of the development of nanotechnology there were comments from the extremes that it was totally safe or completely unsafe, Roco said. “Scientific evaluation has to address this, to balance the system,” he told the ETRAC. “You need to have scenarios, structures, recognition patterns. You need a framework, but one that is not too formal,” he advised.

## **Tire Case Shows China Using WTO to Defend Rights**

Usually seen as the target of trade complaints at the World Trade Organization (WTO), China is batting .500 recently as the defender of its rights before WTO panels and likely to continue using the WTO to fight back against trade actions hitting its exports. Beijing’s failure to convince a WTO panel Dec. 13 that U.S. import restrictions on Chinese tires under the Special China Safeguard provisions of Section 421 of the Trade Act violated WTO rules, came just 10 days after China won a WTO victory against European Union (EU) antidumping duties on

imports of Chinese iron or steel fasteners. In ruling for the U.S. in the tire dispute, the WTO panel found “there was no obligation on the United States to explain why a three-year measure was needed to prevent or remedy the market disruption caused by subject imports.” It also said there is “no obligation on the United States to quantify the injury caused by increasing imports, or separate and distinguish that injury from injury caused by other factors.”

The panel report said it wasn’t enough for China to simply demonstrate that the International Trade Commission had failed to ascertain the alleged effect of subject imports on the domestic industry. “Instead, the onus is on China to establish prima facie that a three-year measure was excessive. China has failed to meet this burden,” the panel ruled. China is likely to appeal the decision.

In the EU fastener case, a separate WTO panel agreed with China that the EU had violated the WTO antidumping agreement in its Basic AD Regulation and also with respect to individual treatment determinations; the consideration of the volume of dumped imports; causation analysis; normal value determination; handling of nonconfidential versions of questionnaire responses of two European producers and an Indian producer; confidential treatment of the Eurostat data; and disclosing confidential information.

### \* \* \* Briefs \* \* \*

MTB: By voice vote, House Dec. 15 passed Omnibus Trade Act of 2010 (H.R. 6517), which included 298 miscellaneous tariff bills plus extension of TAA for 18 months, extension of Generalized System of Preferences and the Andean Trade Preferences Act for 18 months and continued authorization of Wool Trust Fund which aids U.S. wool suit makers and workers. At press time, fate of measure in Senate was still uncertain, although passage is likely (see **WTTL**, Nov. 29, page 3).

KOREA: Assistant USTR Wendy Cutler and Korean Deputy Trade Minister Choi Seok-young were to meet in Seattle Dec. 17-19 to work on legal text of supplemental agreements reached Dec. 3 to U.S.-Korea FTA.

DOHA ROUND: EU Trade Commissioner Karel DeGucht in Washington Dec. 16 said Doha deal can be done in 2011 but will need modalities set before summer holidays start in August. “It has become clear to us, which before was not necessarily the case, that the U.S. really wants to do Doha,” he said. “I personally believe we will get a deal. I believe this because certain emerging countries have increasing interest in getting a deal done...[although] they will not say that openly,” he told luncheon.

REMANDMANIA: CIT Judge Judith Barzilay, in *NSK v. U.S.*, issued fifth remand to ITC Dec. 9 in dispute over injury ruling in Sunset review of antidumping order on ball bearing imports (slip op. 10-133). “The agency must determine whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry that likely will continue or recur in the absence of the antidumping duty orders, given the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the United States market,” she ordered (see **WTTL**, Nov. 22, page 4).

NME: ITA in Dec. 16 Federal Register called for comments on changing to random selection method for naming NME respondents in antidumping cases and on *de facto* criteria it uses to establish separate rates in NME antidumping proceedings (see **WTTL**, Dec. 6, page 3).

EX-IM BANK: Yader A. Padilla, 59, was sentenced to 24 months in prison Dec. 3 in Miami U.S. District Court after pleading guilty to defrauding the Ex-Im Bank of \$310,639 in scheme to export pharmaceuticals to South America from his pharmacy. After jail he must serve 36 months of supervised release, do 1,400 hours of community service and pay \$215,639 in restitution to government.

FCPA: RAE Systems Inc. of San Jose, Calif., has agreed to pay approximately \$3 million to SEC and Justice to settle charges of violating FCPA when it made bribes through two Chinese joint ventures to Chinese officials to obtain government contracts for their gas and chemical detection products.

ACTA: USTR’s office asked for public comment in Dec. 17 Federal Register on final Anti-Counterfeiting Trade Agreement (see **WTTL**, Nov. 22, page 4).

**EDITOR’S NOTE**: In keeping with our regular schedule of 50 issues a year, there will be no issue of *Washington Tariff & Trade Letter* on Dec. 27, 2010. Our next issue will be Jan. 3, 2011. Until then, we wish all our readers a HAPPY HOLIDAY and a HEALTHY AND PROSPEROUS NEW YEAR.