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White House Export Review to Produce Results in Stages

The National Security Council (NSC) review of U.S. export controls that President Obama ordered in August is likely to produce its results in stages depending on the difficulty of the issues being addressed, according to Matthew Borman, acting assistant secretary for export administration in the Bureau of Industry and Security (BIS). Commerce Secretary Gary Locke's proposal to create a "license-free" zone for exports to the European Union and other close U.S. allies is now part of that NSC review, Borman told the BIS Sensors and Instrumentation Technical Advisory Committee (SITAC) Oct. 27. The NSC review "is well underway," he said.

"The NSC-led review has several pieces to it, and the Commerce initiative will be part of that," Borman said. "There are some [parts] we are trying to do in a shorter timeframe and others that will take a little longer, and then there is a more fundamental piece that will take still longer," he said (see **WTTL**, Oct. 5, page 1).

Senior Obama officials met in early October to establish assignments for the review and coordinate the work. In addition to Locke's proposed changes in licensing requirements, the review will also examine the Commodity Jurisdiction (CJ) process and BIS' controversial proposal for establishing an Intra-Company Transfer (ICT) license exception. While the administration will coordinate its effort with the House Foreign Affairs Committee, which is working on a rewrite of the Export Administration Act (EAA), the NSC review is trying to find changes that won't require legislation. "Very few, if any, of the things we are talking about, so far, in the executive branch would need legislative changes," Borman said.

Roth's Appeal Cites Circuit Court Ruling in Pulungan

Former University of Tennessee Professor J. Reece Roth has cited the Seventh Circuit's ruling in *Pulungan v. U.S.* to argue why the Sixth Circuit should grant his appeal and overturn his conviction for violating the Arms Export Control Act (AECA) (see **WTTL**, July 6, page 1). In the *Pulungan* case, the circuit court vacated the conviction of a man charged with attempting to export riflescopes because the court found the government had not proven the items he was trying to export met defense specifications. Roth's attorney, Thomas Dundon, notes that Seventh Circuit Chief Judge Frank Easterbrook "recently addressed the government's burden to prove that an item is actually included on the USML" [U.S. Munitions List].

Easterbrook said the government "must prove, and not just assert," that the riflescopes were "manufactured to military specifications," Dundon's appeal brief states. "While this Court is



obviously not bound to follow the persuasive authority of the Seventh Circuit's decision, it is no response to point out that *Pulungan* was a sufficiency of the evidence, not a jury instruction, case," Dundon writes. "Having ruled that the government was required to prove as an element of the offense that the defendant knew he was dealing in 'defense articles' on the USML, the *Pulungan* court necessarily and unavoidably conveyed the corollary that a consistent jury instruction should be given in future cases. And because Defendant properly requested it here, the District Court should have given such a charge in this case," the brief argues.

Dundon contends the research Roth worked on was for a commercial aircraft and not a military aircraft subject to the USML. Any work for military use was done after Roth had finished his work on the contract, he says. Moreover, government witnesses in the case could not agree on which part of the USML covered the research Roth conducted. "Four government witnesses gave different opinions as to which category of the USML covered the Phase II data," Dundon points out. One said the research fell under Categories II and IV of the USML. A second said it was under Category I. A third claimed it was subject to Category IV and VII, while a fourth said it was defense data under Category VIII.

Dundon claims the Air Force contract with Atmospheric Glow Technologies, Inc., which developed the technology Roth studied, and the University of Tennessee did not clearly identify the research as subject to export controls. "The administrative portions of the task order referred to 96 separate regulations, including the penultimate reference to AFMC-FAR 5352.227-9000 Export-Controlled Data Restrictions," the brief states.

"Negotiating Fatigue" Marks Doha Talks, Executives Find

U.S. industry executives who visited European capitals the week of Oct. 26 say they found frustration, negotiating fatigue and continuing questions about the Obama administration's trade policy. "Absolute negotiating fatigue" was one of the striking things about the trip, said Christopher Wenk, the U.S. Chamber of Commerce's senior director of international policy. People are "very worn out" with these negotiations, Wenk told reporters Oct. 29. Trade diplomats in Geneva also want more signals from Washington, Wenk reported.

Wenk said the frustration was aimed not only at U.S. trade policy but also the fact that key presidentially appointed U.S. trade officials are not in place yet. Geneva officials are "very, very excited" about a Senate nomination hearing scheduled for Nov. 4 for Michael Punke to be deputy U.S. trade representative in Geneva and Islam Siddiqui to be chief agricultural negotiator, Wenk said.

The Chamber-led business group included executives from Amway, General Electric, Ford, FedEx, Citigroup, Manitowoc and UPS. They met in Berlin, Brussels and Geneva with officials from the U.S., Brazil, India, the European Union, Malaysia, Uruguay, China and the World Trade Organization secretariat. Brazil and India are willing to talk about how they'll use flexibilities in the negotiations to address U.S. demands, but China isn't quite there yet, Wenk said. At the "very, very, very, very, very end of the day," the two key players in negotiations are the U.S. and China, Wenk added. For now, health-care is using all "the oxygen" in Washington, Wenk said. Once something is done on health care, President Obama "will have enormous political capital to go on and do other things," he said; adding that presidential leadership will be "absolutely essential" on trade. Everybody in Brussels is waiting for Obama to give his trade speech, an outline of a strong, broad trade policy agenda, Wenk said (see story below).

Don't Look for "Leather-Bound" Trade Policy, Official Says

U.S. trade officials have become touchy about criticism that President Obama hasn't articulated a clear trade policy. A defense of the administration's trade policy came Oct. 26 from Assistant U.S. Trade Representative for Europe Chris Wilson. The new administration is conducting

a review of trade policy, but “this has led to a misapprehension that this will lead to a nice published leather-bound volume which would be the holy bible of the Obama administration’s trade policy which would make everything perfectly clear,” he said at a Johns Hopkins University program featuring European Union Trade Commissioner Catherine Ashton.

“When you stop looking for the published volume and actually look at some of the indications that have been coming out, a clear direction is starting to emerge,” Wilson asserted. What has become clear in the first eight months of the administration “is the commitment to keep our shoulder to the wheel in Doha,” he said. “The president certainly had the option to pull the plug on our participation in Doha and he did not do that,” Wilson added.

“The president and Ambassador Kirk have also been very clear that from their perspective the biggest mistake we could make is to come back with a Doha agreement that would be rejected politically by the U.S. Congress. That would do tremendous damage to the WTO as an institution,” he said. “A suggestion is often made that we are not being sufficiently clear about what we need in the Doha Round. Again, that’s not borne out by the facts. We’ve been quite clear that what we need are lower applied tariff rates and commitments to those from a number of major emerging economies,” Wilson stated. “The administration has also been clear that it wants to move forward on the free trade agreements that have been negotiated by the previous administration and not yet approved by the Congress and is working to create the conditions in which those agreements could be successfully considered,” he said.

Wassenaar Set to Ease Controls on Composite Materials

The Wassenaar Arrangement is expected at its annual plenary meeting in early December to accept the recommendations of its experts’ group to ease export controls on some composite materials used on commercial aircraft (see **WTTL**, Sept. 14, page 4). The changes, based on advice from a BIS-industry working group, would change the threshold for the glass transition temperature in current controls to eliminate licensing requirements for certain lower-performance materials. Many of these materials are already commonly available from many sources.

The change would not affect controls on higher-performance materials that are used in military applications, according to sources. Industry representatives from the BIS-industry working group participated in the experts’ group meeting early in September and reportedly were satisfied with the changes adopted. There was reportedly some resistance to the change from several countries, including Japan, the United Kingdom, France and Germany, that were concerned the revision would allow sensitive materials to be exported to North Korea. A final compromise carved out from decontrol certain materials of concern.

Chinese Claim “Black Liquor” Causes U.S. Paper Industry Injury

Attorneys for Chinese firms accused of dumping coated sheet paper in the U.S. have suggested alternative causes of injury to U.S. paper producers, including subsidies to U.S. firms for so-called “Black Liquor,” the lumber waste that has qualified as a renewable energy source for cash payments and tax credits for producers. At a pre-hearing conference and in a brief filed with the International Trade Commission (ITC), attorneys at Winston & Strawn claimed the Black Liquor subsidies caused over-production and lower prices (see **WTTL**, Sept. 28, page 3).

These subsidies “have dramatically changed the supply/demand” situation in the paper industry and “provide an enormous financial incentive for pulp makers (both those that are non-integrated and those that are integrated with downstream papermaking production) to run at peak capacity,” they argue. “In a period of declining paper demand, however, excess pulp production can only push down pulp prices. And that is precisely what happened in 2009,” they contend. The Chinese respondents also want the ITC to adopt the same “like-product”

definition it used in the 2007 case against Chinese paper imports when the commission found no injury to the domestic industry. They say web rolls make up about 80% of domestic sales and are mostly shielded from imports. In their new petition, U.S. firms and the United Steelworkers are seeking a narrower scope determination.

“The Commission should adhere to its conclusion in the previous CFS Paper investigation for purposes of defining the domestic like product and domestic industry,” the Chinese respondents suggest. They contend the like product should continue to include web rolls, sheeter rolls and sheets. “This investigation concerns a nearly identical product, and there have been no changes to this product or the coated paper industry since the last investigation,” they contend.

*** * * Briefs * * ***

BIS: Tour of duty in China for BIS liaison Jennette Chu is scheduled to end around Dec. 31. BIS officials say no replacement has been selected and future of China office is awaiting appropriations legislation that hasn't passed Congress yet. Chu conducts all pre- and post-shipment inspections in China and is responsible for keeping licensed exports to China flowing.

GUINEA: DDTC Oct. 26 said it will delay action on USML license applications for Guinea due to political situation in country. “License applications will continue to be reviewed on a case-by-case basis, but approval should not be assumed,” it said in notice. “We encourage exporters to take the current situation into account and if applying for a new license to export or re-export USML items to Guinea, that the license application provide detailed information on the end-use and end-user of the USML items,” it added.

ANTIBOYCOTT: BIS has reached agreement with M-I Production Chemicals of Dubai, United Arab Emirates, to settle 20 charges related to violations of antiboycott regulations. Although based in UAE, M-I is controlled in fact by two U.S. firms, Smith International, Inc., and M-I LLC. M-I, which voluntarily disclosed alleged violations, agreed to pay \$44,625 civil fine.

EXPORT ENFORCEMENT: Utech Products, Inc., of Schenectady, N.Y., has agreed to pay \$125,000 civil fine and conduct internal audit to settle three BIS charges that it exported oscilloscopes to Pakistan without approved licenses. BIS will allow firm to pay fine in 10 monthly payments of \$12,500 each.

IRAN: Two congressional panels have given President Obama more ammunition to use when he threatens Iran with tougher sanctions if diplomacy fails to halt Tehran's nuclear arms development. House Foreign Affairs Committee Oct. 28 and Senate Banking Committee Oct. 29 both reported out bills to tighten trade sanctions on Tehran, including authorizing sanctions on firms exporting refined petroleum to Iran and barring U.S. government business with companies that sell Iran equipment to jam communications.

LOW-LIGHT SENSORS: BIS is close to interagency agreement on new rules to impose licensing requirements on low-light cameras, including EMCCD devices used in medical devices and scientific equipment. New controls will follow pattern established earlier this year for uncooled thermal imaging cameras (UTIC), BIS Acting Assistant Secretary Matthew Borman told agency's Sensors TAC Oct. 27. Agreement on new rules will clear approval and publication in next few weeks of regulation to implement Wassenaar Arrangement changes to export controls adopted in December 2008, Borman said.

JORDAN: Jordan and U.S. are negotiating memorandum of understanding under which Washington will provide technical assistance to Amman to continue its effort to correct labor problems in its Qualified Industrial Zones (QIZ). Jordanian officials in Washington week of Oct. 26 presented report on progress already made to improve rights of workers, most of whom are foreign women, in QIZ apparel factories. Although QIZ program is aimed at helping Jordan, 80% of workers in zones are foreigners, including women from Sri Lanka, Bangladesh, India and China.

CHINA: U.S. officials claimed progress in talks with Chinese during Oct. 28-29 meeting of Joint Commission on Commerce and Trade (JCCT) in Hangzhou, China (see **WTTL**, Oct. 26, page 3). While most agreements were in future tense with promises to fix trade irritants, including such phrases as “China agreed to establish a dialogue,” USTR Ron Kirk, Commerce Secretary Gary Locke and Agriculture Secretary Tom Vilsack emphasized Beijing's promise to reopen market for U.S. pork, to end domestic content requirements on wind turbines and to make new offer in WTO government procurement talks. Although not mentioned in USTR press release, BIS Acting Under Secretary Dan Hill was supposed to sign MOU with Chinese Ministry of Commerce to cooperate on providing more education to Chinese importers on U.S. export controls and when license aren't needed.