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# Washington Tariff & Trade Letter®

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301.570.4544 Fax: 301.570.4545

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## U.S. Tightens Sanctions Against Syria

Whatever limited trade and investment that still exist between the U.S. and Syria were effectively blocked Aug. 18 by President Obama's executive order freezing Syrian government assets under U.S. jurisdiction and barring Americans from providing any services or investment in the troubled Middle Eastern country. The order appears to block payments and financial services that might facilitate previously licensed or approved sales and investments.

> "The prohibitions in sections 1 and 2 of this order apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order," the executive order states (see **WTTL**, Aug. 15, page 4).

"This Order also prohibits the exportation or reexportation of services from the United States, or by U.S. persons, to Syria – supplementing an existing export ban on most products of the United States to Syria. New investment in Syria by a U.S. person, wherever located, is also prohibited under the Order," a Treasury fact sheet explains.

The order prohibits: (a) new investment in Syria by a U.S. person; (b) the exportation, reexportation, sale or supply, directly or indirectly of any services to Syria; (c) the import into the U.S. of petroleum or petroleum products of Syrian origin; (d) any transaction or dealing related to petroleum or petroleum products of Syrian origin; and (e) any approval, financing, facilitation or guarantee by a U.S. person, wherever located, of a transaction by a foreign person where the transaction would be prohibited if performed by a U.S. person or within the U.S.

## Data Show Shift in Global Semiconductor Trade

Twenty years after the U.S. and Japan signed their second Semiconductor Arrangement in an effort to pry open the Japanese chip market, an International Trade Commission (ITC) report released Aug. 15 shows how much the electronics world and global supply chain have changed since then. In its annual "Shifts in U.S. Merchandise Trade" covering 2010, the ITC data show exports to Japan last year were below the levels reached in the early 1990s after the last arrangement was signed in 1991. The decline, however, is no longer due to trade barriers in Japan, but rather to the massive shift of electronic assembly work to countries such as China, Malaysia and Taiwan. U.S. exports to Japan of semiconductors and integrated circuits in 2010 rose 23.9% from 2009, but still only reached $835 million. In comparison, chip exports to



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China were $5.2 billion; to Malaysia, $4.9 billion; to Taiwan, $2.5 billion; and to Korea, $2.5 billion. Overall, semiconductor exports topped $31.2 billion, a 24.8% increase from 2009. These exports were still off the pre-recession levels of 2006, when they reached $37.2 billion.

> The decline in exports to Japan is now attributed to offshoring of production by Japanese electronics firms. Chips used in Japanese name-brand electronic products, including mobile phones, computers and games, are sent to assembly plants in other Asian countries and come back to Japan in the form of either circuit boards or finished products. What the ITC report "illustrates is that the vast majority of assembly has moved to China," says W. Clark McFadden II, a partner with Dewey & LeBoeuf and counsel to the Semiconductor Industry Association.

Trade complaints about the Japanese chip market have nearly disappeared compared to the decade-long fight between Washington and Tokyo in the late 1980s and early 1990s. "I am not aware of any complaints about market barriers, formal or informal, for semiconductors in Japan," McFadden says. "To my knowledge, there are no systemic market access problems for semiconductors in Japan," he tells WTTL (see **WTTL**, June 10, 1991, page 1).

## Exporters Will Have Plenty to Say on Proposed BIS Rule

Export control officials should expect plenty of comments on their proposed rule on moving items from the U.S. Munitions List (USML) to the Commerce Control List (CCL), as exporters try to apply them to their unique situations, indicate questions submitted to a weekly teleconference call held by Bureau of Industry and Security (BIS) Assistant Secretary for Export Administration Kevin Wolf. For example, during his Aug. 17 call, Wolf faced questions about the status of existing USML licenses for items shifted to the CCL.

> One caller asked whether companies have to reapply for new BIS licenses or will they be automatically approved? BIS is "working through" this process, Wolf replied. "I'm confident there will be some sort of grandfather clause that we'll address later. Short answer is: we'll deal with it later," he said.

Another outstanding detail is the process for submitting eligibility requests for the License Exception Strategic Trade Authorization (STA) at the same time as a license application for a transferred item. "The proposed Federal Register notice did not describe that process, but what we did say was that the STA eligibility determination would be done concurrently with the license review process. The two will be done at the same time. That implies that we will be coordinating if there are different groups involved," Wolf said.

Exporters also questioned the 10% *de minimis* rule for the new "600 series" for USML items moved to the CCL, saying it is too restrictive. Wolf explained the current *de minimis* rules in the Export Administration Regulations (EAR) apply a 10% rule to the T5 countries of Iran, Sudan, Syria, North Korea and Cuba. "The question goes to whether or not [the questioner] thinks 10% is adequate or proper or meets the national security objectives that we're describing, and we look forward to reading the comments in that regard," Wolf noted. He also responded to questions about licensing of 600-series items to arms-embargoed countries. "We are basically adopting the presumptive denial or prohibitions that are in ITAR Section 126.1 and migrating those same general denial policies and prohibitions to the EAR with respect to items that are in the 600 series," Wolf said.

## WTO Panel Rules Against Philippines Tax on Distilled Spirits

Countries that attempt to favor domestic distilled spirits to the disadvantage of imports, particularly popular U.S. and European Union (EU) whiskies such as bourbon, scotch and gin, could face challenges at the World Trade Organization (WTO) following a WTO dispute-settlement

panel ruling Aug. 15 against an excise tax imposed by the Philippines. The panel sided with the U.S. and EU in their contention that the tax violated WTO rules and are a *prima facie* nullification or impairment of U.S. and EU rights. Through its excise tax, the Philippines is "acting in a manner inconsistent with Article III:2, first sentence, of the GATT 1994," the panel ruled. The Philippines has indicated it will appeal the ruling, according to Manila news sources.

> The Philippines imposes a low flat tax on spirits made from designated raw materials, but a significantly higher tax on spirits made from non-designated materials. In the Philippines, all domestic distilled spirits are made from one of the designated raw materials, cane sugar, while the vast majority of imported spirits are made from non-designated materials such as cereals or grapes.

## Critics Hit Environmental Report on Mexican Trucking

Opponents of a pilot program to open U.S. highways to Mexican trucking are criticizing the Transportation Department's draft environmental assessment (DEA), claiming it's too late and too narrow in scope to be of any use. The Teamsters Union, Sierra Club and the Owner-Operator Independent Drivers Association (OOIDA) submitted comments Aug. 12 in response to a Federal Register notice on the DEA for the program, which officially launched July 8.

> "It appears that the Pilot Program plan has already been finalized and this Notice seeking public input regarding environmental concerns is merely a hoop that FMCSA [Federal Motor Carrier Safety Administration] is jumping through because it is required to do so by law. It is not a meaningful opportunity for the public to assist FMCSA in dealing with environmental issues and the comments received will not be used by the Agency to correct any noted deficiencies," OOIDA said in its comments (see **WTTL**, July 11, page 3).

In its joint comments, the Teamsters and the Sierra Club also took issue with the narrow scope of the FMCSA assessment, which was limited to the impact of border inspections, the union said. "With this assessment, the FMCSA is recklessly ignoring the true environmental impact Mexican trucks will have if permitted to travel without restrictions throughout our country," said Teamsters General President Jim Hoffa. The FMCSA notice admitted it will not assess the environmental effects of the pilot program in general, citing a 2004 Supreme Court decision that it claimed limited the coverage of the DEA to the department's regulations.

## Wolf Claims No "Hole" in Specially Designed Definition

BIS Assistant Secretary for Export Administration Kevin Wolf contends there is no "hole" in the proposed definition of "specially designed" that was included in the agency's proposed rule for transferring items from the U.S. Munitions List (USML) to the Commerce Control List (CCL). "You missed the point of this discussion," Wolf says in an e-mail to WTTL in response to an article reporting questions that members of the BIS Materials Technical Advisory Committee (MTAC) raised at their Aug. 11 meeting.

> One MTAC member asked Wolf about the application of the proposed definition to parts that are made for a controlled end-item, but serve only safety or aesthetic purposes, such as safety railings for machine tools. The member suggested that these parts didn't fit under the four specific exclusions from "specially designed" spelled out in the proposed regulation (see **WTTL**, Aug. 15, page 1). WTTL used the term "hole" to describe this possible gap.

The discussion "didn't pertain to a 'hole' in the definition," Wolf complains. "To the contrary, it pertained to a fact pattern where the item at issue would be 'specially designed' under either of the existing definitions -- from Lachman or from the MTCR -- and that it would still be 'specially designed' under the proposed definition," he writes. "I said that we were not

attempting with the proposed, objective approach to defining the term to radically roll back the scope of controls. I was asking for examples of something that would not now be 'specially designed' for a controlled end item but would be as a result of the new definition. The MTAC member may not have liked the answer and there are almost certainly going to be ways to improve the definition based on the comments we get, but that doesn't mean that the discussion regarding the safety railing was evidence of a 'hole' in the definition," Wolf explains.

## Court Grants Surety Extra Time to File Protest

In a divided 2-1 decision, the Court of Appeals for the Federal Circuit (CAFC) reversed a Court of International Trade (CIT) ruling and granted surety, Hartford Fire Insurance Company, extra time to file a protest with Customs and Border Protection (CBP) based on Hartford's late discovery that a firm it had bonded might have been involved in illegal imports of crawfish from China. Two CAFC judges agreed the CIT erred in "determining that the surety's claim accrued prior to the end of the protest period." In a dissenting opinion, Judge Alan Lourie claimed: "The issue here is not simply when Hartford became aware of the basis for its claim, but rather when it *should have reasonably* become aware of the claim" (his emphasis).

> Hartford had provided surety bonds to Sunline Business Solutions Corporation for imports of frozen cooked crawfish from China, which were the subject of an antidumping order. When an administrative review increased the dumping duty, Sunline did not make the required additional payments, and Customs sought the money from Sunline's surety, Hartford.

"Meanwhile, in May of 2005, Hartford's counsel learned from an individual connected with a Customs brokerage firm that personnel from Sunline had been arrested for using false invoices," the CAFC ruling noted. From its investigation into the allegations, Hartford believed it learned of potential grounds upon which it could deny liability. "The circumstances leading up to Hartford's eventual discovery of the information it alleges to support its causes of action remind one of a detective story filled with happenstance, rather than what might be expected to surface as a result of routine uncovering of information through the exercise of due diligence," wrote CAFC Judge S. Jay Plager for the court in the Aug. 11 decision.

## * * * Briefs * * *

EU: European Union (EU) requested dispute consultation Aug. 11 with Canada over complaints that Ontario's Green Energy and Economy Act (OGEA) is inconsistent with Canada's WTO obligations. Under OGEA, Ontario Power Authority (OPA) is allowed to develop program to encourage use of renewable energy. "Under this regime, the OPA has developed a feed-in-tariff (FIT) programme that allows it to buy renewable energy at an above market price. This is a subsidy. In order to benefit from this incentive programme, the OPA has set conditions that favour domestic products and services," EU statement argued.

ENTITY LIST: BIS added 15 persons and companies under 20 entries in Cyprus, Greece, Iran, Syria, Ukraine and UK to its Entity List in Aug. 15 Federal Register.

EXPORT ENFORCEMENT: Iranian national Davoud Baniameri of Woodland Hills, Calif., was sentenced in Chicago U.S. District Court Aug. 12 to 51 months in federal prison for attempted export of missile components and radio test sets to Iran via UAE (see **WTTL,** June 6, page 4).

PET: ITC voted 6-0 in final "sunset" determination Aug. 15 that U.S. industry isn't likely to be injured if the antidumping order on polyethylene teraphthalate (PET) from Korea were revoked.

GLYCINE: U.S. industry would likely be hurt if the antidumping order on glycine from China were revoked, ITC determined on 6-0 vote in "sunset" decision Aug. 15.

**EDITOR'S NOTE:** In keeping with our regular schedule, there will be no issue of ***Washington Tariff & Trade Letter*** on Aug. 29. Our next issue will be dated Sept. 5.