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Obama Officials Optimistic on Congressional Notification

A week after State notified Congress of the first proposed transfers of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL), administration officials sounded hopeful the process would go smoothly, despite months of reported disagreement between Congress and the White House. “The tremendous amount of time and effort we’ve put into consulting with Congress makes us very optimistic that this formal notification period will be a very collegial and straightforward process,” Andrew Shapiro, assistant secretary of State for political-military affairs, told the President’s Export Council Subcommittee on Export Administration (PECSEA) March 14 (see **WTTL**, March 11, page 1).

“While this formal statutory notification period is 30 days, it’s by no means Congress’ first bite at the apple. The informal review period...has for many categories lasted more than a year,” Shapiro said. “In most cases, the proposed rules have changed very little from the beginning... The Hill is really not seeing anything during the formal notification process that it hasn’t already seen,” he noted.

The PECSEA was told the exception for “fundamental research” in the International Traffic in Arms Regulations (ITAR) will be handled the same way by Commerce. “We are picking up the university exception in the ITAR,” Bureau of Industry and Security (BIS) Under Secretary Eric Hirschhorn said. “So that’s one little plus you’re going to get out of the change. We looked very hard at the ITAR exceptions and exemptions, some of which we don’t have. That’s one that we don’t have that we’re going to pick up. It is still limited to full-time bonafide employees, not students, but at least it’s a lot more than you have today,” he explained.

Abe Seeks to Join TPP but Promises to Protect Farm Interests

As anticipated as the white smoke from the Sistine Chapel announcing the new pope, Japanese Prime Minister Shinzo Abe announced March 15 that Japan will seek to join the Trans-Pacific Partnership (TPP) talks. While warning that Japan risks falling behind in the new Asia-Pacific “economic sphere” if it doesn’t participate, Abe also promised to seek to protect Japanese agricultural interests in the negotiations. At a Tokyo press conference, he noted assurances he received from President Obama in February that Japan would not

have to commit to the elimination of tariffs “with no sanctuary” (see WTTL, March 4, page 2). “If Japan alone stays inward oriented there’s no chance that Japan can naturally grow,” Abe said, according to a translator. “No company would be willing to invest in Japan if Japan is like that. People of high caliber will not be willing to assemble in Japan. TPP is a framework that promises future prosperity of Asia and the Pacific,” he said.

Abe noted economic projections that predict a decrease in production in the agriculture, forestry and fishery sectors if Japan joins the TPP. Such claims are based on “unrealistic assumptions that all tariffs will be eliminated immediately with no countermeasures taken domestically,” he said. Abe acknowledged the voices of “concern and anxiety” from Japan’s agriculture community, while noting that farming in Japan is shrinking and that the average age of Japanese farmers is 66.

Nonetheless, in talks on agriculture, “through all possible efforts, I hereby pledge to protect the Japanese agriculture and to preserve the food of Japan,” Abe said. “In negotiations that follow, every effort will be made to minimize the adverse impact, including special considerations and attention paid to Japan’s sensitive items, needless to say,” he said. “Exercising our bargaining power, what we need to defend shall be defended and things that we need to take the offense is something we intend to do,” he stated.

By entering the TPP talks, Japan also will have an opportunity to shape trade rules not only in the Asia-Pacific area but also in other multilateral talks, Abe said. “Unfortunately, it’s already been two years since the [TPP] negotiations began. If there are already agreed rules, it is difficult for Japan, a late participant, to reverse those agreements,” he noted. “It’s a hard fact. Not much time remains for us,” he added. “I am convinced, if Japan participates in the negotiations, Japan can take a leadership in making new rules,” he said.

Deputy U.S. Trade Representative (USTR) Demetrios Marantis, who became acting USTR March 15, welcomed Abe’s announcement. “Since early last year, the United States has been engaged with Japan in bilateral TPP consultations on issues of concern with respect to the automotive and insurance sectors and other non-tariff measures, and also conducting work regarding meeting TPP’s high standards,” he said in a statement. “While we continue to make progress in these consultations, important work remains to be done. We look forward to continuing these consultations with Japan as the 11 TPP countries consider Japan’s candidacy for this vital initiative in the Asia-Pacific region,” he added.

Ahead of Abe’s announcement, 38 House members and eight senators wrote to President Obama March 14, noting Japan’s long-term resistance to opening its auto sector and warning of the negative impact on U.S. jobs and industry if U.S. tariffs on cars and trucks from Japan were eliminated. “While some have compared this challenge to the one we faced with Korea, the Japanese auto market is more impenetrable, the history of formidable barriers and imbalanced trade is longer, and the magnitude of the problem is far greater than with Korea. Indeed, our trade deficit with Japan is more than four times as large as our deficit with Korea,” they wrote.

While noting the failure of bilateral talks over 30 years to solve this problem, the lawmakers also highlighted past unsuccessful initiatives to open the Japanese market. These included the Market-Oriented Sector-Selective talks in 1986, the Structural Impediment Initiative talks in 1989 and the 1995 U.S.-Japan Auto Agreement. “None of these agreements has resulted in barriers coming down and American exports going up,” they wrote.

Divisions Remain as Arms Trade Treaty Talks Restart

Strong differences remain among United Nations (UN) members as negotiators start a second attempt at reaching an Arms Trade Treaty (ATT) in talks in New York March 18-28. At the same time, opposition to U.S. participation in a treaty continues to be raised by members of Congress who see it as a backdoor attempt at gun control, despite repeated assertions by Obama administration officials that a pact would not change current U.S. laws. UN members reportedly are still split over the scope of the proposed treaty, including whether or not to include ammunition under its provisions, which the U.S. opposes.

“I reiterate my support for an Arms Trade Treaty that regulates international transfers of both weapons and ammunition and provides for common standards for exporting States,” said UN Secretary-General Ban Ki-moon in a statement March 14. “These standards are important for assessing the risks that transferred weapons are not used to fuel conflict, arm criminals or abet violations of international humanitarian or human rights law. This is the only path to more accountability, openness and transparency in the arms trade,” he said.

Ahead of the talks, House and Senate members filed non-binding resolutions opposing any deal. Rep. Mike Kelly (R-Pa.) and 122 cosponsors March 13 introduced House concurrent resolution (H. Con. Res. 23) opposing the ATT. A companion resolution in the Senate (S. Con. Res. 7) was introduced by Sen. Jerry Moran (R-Kan.) and 28 cosponsors. The ATT “poses significant risks to the national security, foreign policy, and economic interests of the United States as well as to the constitutional rights of United States citizens and United States sovereignty,” the bills claim. Even supporters of an ATT concede the Senate would never ratify a treaty, if one were concluded, because of this opposition.

Court Remands Surrogate Ruling for Justification

The Court of International Trade (CIT) continues to rebuke Commerce for its practices in selecting surrogate values in antidumping cases (AD) for non-market economies (NME). In the latest ruling March 11, CIT Judge Richard Eaton remanded to Commerce its administrative review and new shipper determination on folding metal tables and chairs from China because it had not adequately explained why it chose price data from a small sample rather than a larger, more representative sample.

In its preliminary ruling, Commerce had used Global Trade Atlas (GTA) data from India to determine the surrogate value of cold-rolled steel coil. “From a review of the record and of the facts and reasoning found in the Issues and Decision Memorandum, the court concludes that Commerce has failed to provide a rational explanation for its selection of the GTA data as the best available information on the record,” Eaton wrote.

“Here, confronted with data that indicates that Commerce chose low volume, aberrational data, Commerce did not evaluate the data on the record in comparison to benchmarks, but instead relied only on the claim that the data selected was better than other data from the acceptable surrogate countries,” he added. “It is apparent that Commerce skipped a critical step by failing to explain why, in light of the foregoing, its GTA data would not produce an aberrational surrogate value,” he wrote. When Commerce fails to establish that a small amount of data are statistically or commercially significant, “remand is appropriate

for Commerce to do so, including issuance of an instruction that Commerce ‘state its method for determining what is an insignificant quantity’,” he ruled.

State-Owned Enterprises Can Be Target in CVD Cases, CIT Rules

In ruling that last year’s change to the countervailing duty (CVD) law’s application to non-market economies is constitutional, CIT Senior Judge Nicholas Tsoucalas also agreed that the goods supplied by state-owned enterprises (SOE) can be considered a countervailable subsidy, opening a broad new basis for calculating subsidies in CVD case. Tsoucalas’ findings (slip op. 13-31) on the constitutionality of the law followed the same reasoning as CIT Judge Jane Restani’s January ruling in *GPX International Tire*, with both judges saying the law doesn’t violate the Constitution’s ex post facto, due process or equal protection clauses (see **WTTL**, Jan. 14, page 2).

In the latest case, *Guangdong Wireking Housewares (GWK) v. U.S.*, which challenged Commerce’s ruling on kitchen shelving and racks from China, plaintiffs also asked the court to reject the department’s finding that a SOE that sold steel wire rod to GWK should be considered a “public entity” and its pricing a form of government subsidy. “The court finds that Commerce’s interpretation of ‘public entity’ is reasonable,” Tsoucalas ruled.

“Because the purpose of CVD law is to offset the harm to domestic industries caused by foreign subsidies..., it is reasonable for Commerce to attempt to detect and counteract all forms of foreign subsidies,” he explained. “Commerce’s interpretation of ‘public entities’ reflects the realities of corporate ownership and control and enables it to detect certain forms of subsidization which are not provided directly by the government but instead pass through private or quasi-private channels. Furthermore, Commerce provides interested parties the opportunity to present evidence that the entity in question is not government controlled,” he added.

“Plaintiffs provide general information regarding the operation of SOEs in the Chinese economy, but do not offer evidence that negates any of Commerce’s specific findings. Finally, Plaintiffs appear to overstate the level of separation between government ownership and government control under Chinese law,” Tsoucalas stated. He noted that the government of China “provided a financial contribution to private trading companies.” As a result, that gave a benefit to GWK through the provision of wire rod from the trading companies at a less than arms-length rate. “Essentially, Commerce found that GWK received the benefits of an indirect financial contribution, enabling it to purchase wire rod below the benchmark price,” he ruled.

Dual Nationals with Clearances Are Canadians, BIS Says

In its latest Advisory Opinion, BIS affirmed that the foreign national regular employees who have passed Canadian security controls would be considered Canadians for the purpose of deemed export and reexport licenses. That status would depend on the individual receiving a positive security assessment under the Canadian Government/Controlled Goods Program’s (CGP) Enhanced Security Strategy (ESS), it said. The request for advice asked for “guidance on whether such a positive security assessment evaluation would allow the employee (a third country national or dual citizen of Canada and another country, where the

individual obtains Canadian citizenship at birth and subsequently acquires a second citizenship) to be considered a Canadian national” under EAR [Export Administration Regulations], BIS said. The request “described situations in which a third country national or dual citizen regular employee is residing in Canada with a Canadian employment history that includes a positive security assessment under the CGP sufficient to satisfy the provisions of Section 126.18 of the ITAR,” the BIS noted.

“Consistent with BIS’s policy that BIS may look at the facts of a specific case to determine home country in such situations and ITAR section 126.18(c)(1), BIS deems those who have a positive security assessment evaluation under the CGP’s ESS to be Canadian nationals under the EAR,” the agency stated.

BIS cited a Federal Register notice in May 2006 in which it said its deemed export licensing requirement is based on a foreign national’s most recent country of citizenship or permanent residency. “However, BIS indicated that this approach would be applied in a flexible manner to address ‘concerns that may arise in instances where a foreign national maintains dual citizenship or multiple permanent residence relationships,’” the advisory opinion, posted March 8 and dated Feb. 23, noted.

Canada Has Own Goals in Pacific, Atlantic Trade Talks

Canada is willing to work with the U.S. on certain issues in TPP talks where the two nations have common interests, but will promote its own issues where the approaches differ, Canadian Trade Minister Ed Fast said March 14. In some areas, where a TPP deal can not produce a satisfactory result, Ottawa may seek a bilateral agreement with the U.S., he indicated. Fast made it clear that two top priorities for Canada, including in a free trade agreement it is negotiating with the European Union (EU), where a bilateral accord may be necessary are government procurement and mobility of professionals.

“On many of the issues, Canada and the United States are allied,” he told reporters after speaking to the Peterson Institute. “In those areas where we have common cause, which is probably the majority of them, we tend to work with each other to promote our objectives. And in those areas where we may have differences of approach, we obviously promote our own interests,” he said.

In the TPP talks, Canada also is pushing for a trade facilitation agreement to improve supply chain management. It is concerned, however, about proposals that would raise the *de minimis* level for shipments that would be exempt from tariffs because such a provision might undercut Canada’s value-added tax system. Any government procurement deal should apply down to the municipal and local levels, he said. As part of his trip to Washington, Fast said he was meeting with members of Congress to discuss several bills that include “Buy America” provisions.

Fast said government procurement is a top priority in the ongoing Canada-EU talks. While Canadian officials have been looking ahead to proposed talks between the U.S. and EU, he said it was pre-mature to seek a Trans-Atlantic deal as broad as the TPP. In any U.S.-EU deal, Fast said Canada would want a “cumulation” provision that would allow Canadian components and parts to be counted toward any U.S.-EU rule of origin.

Obama Talks EU, Pacific Trade at Export Council

At the President's Export Council (PEC) meeting March 12, President Obama said he was “modestly optimistic” about chances for a U.S.- European Union (EU) agreement despite years of certain countries blocking trade agreements to protect their own domestic industries. He also expressed his support for the Trans-Pacific Partnership (TPP).

“What I think has changed is the recognition throughout Europe that it is hard for them to figure out a recipe for growth at this point, in part because of the austerity measures that have been put in place throughout the eurozone, in the absence of a more aggressive trade component,” Obama said. “So I think they are hungrier for a deal than they have been in the past,” he added.

The president also admitted that there are some hurdles ahead. “I think it will still be a heavy slog. There’s no guarantee that in the end some of the countries that have been hard cases in the past won’t block it again, but I think that you’re going to see more pressure from more countries on the other side of the Atlantic to get this done than we’ve seen in the past,” the president noted.

On another important item on his trade agenda, Obama also advocated for the high labor and environment standards in the TPP, which just completed a negotiating round in Singapore (see related story below). Obama said his administration is “moving aggressively” toward the TPP, which “sets a bar that ensures that trade is fair and free.”

“For those of us who abide by high labor standards and high environmental standards, obviously being able to lock in those kinds of high standards in the fastest-growing region of the world and the most populous region of the world can yield enormous benefits and help to generate billions of dollars in trade and millions of jobs,” he noted. Obama also connected climate change to the logistics of trade. “Recently, we had the challenge of ... getting goods from the Midwest down the Mississippi when the water started going down.

And if, in fact, temperatures are warming ... but I think we can anticipate that we may end up having some challenges in terms of managing our waterways. Well, whether or not we can continue to use barges to move a lot of product out of the American heartland to ports around the world, that's going to depend on our infrastructure,” he said.

Officials Claim Progress in TPP Talks in Singapore

Negotiators from the U.S. and 10 other Pacific countries concluded the 16th round of TPP talks in Singapore March 13 on an upbeat note, claiming they are still working to reach a final deal by the end of 2013 – a goal that many observers still find dubious especially after Japan’s decision to join the talks. A report on the meeting from the USTR’s office said negotiators succeeded in finding solutions to many issues in areas such as customs, telecommunications, investment, services, technical barriers to trade, sanitary and phytosanitary measures, intellectual property, regulatory coherence and development.

“With this progress, some negotiating groups, including customs, telecommunications, regulatory coherence, and development will not meet again to discuss the legal texts in future rounds and any remaining work in these areas will be taken up in late-stage rounds as the agreement is finalized,” the USTR release said. This will allow negotiators to concentrate on resolving the most challenging issues that remain, including related to

intellectual property, competition, and environment, it said. Progress also was made on market access for goods, services and investment, and government procurement, it claimed. Before the next round of talks in Lima, Peru, May 15-24, negotiators agreed they will need to do what they call “intersessional work” on market access issues. Industry sources say one of the areas where there is still wide divide is between Vietnam and the U.S. over Hanoi’s demands for more access to the U.S. textile and footwear market.

USTR Gets Opposing Advice on Services Talks

The Obama administration’s desire to negotiate a new International Services Agreement (ISA) will face the challenge of having to balance opposing views on a deal from the business community and key Democratic constituents, including labor unions, consumer groups and environmentalists. At a March 12 public hearing, officials from the USTR’s Office, Commerce, State, Labor and Treasury heard starkly different advice from witnesses on what an ISA should cover or not cover (see **WTTL**, Jan. 28, page 5).

One of the main areas of division is over whether the list of covered services sectors in any agreement should be a “positive” list that enumerates only those specific services covered or a “negative” list that includes all services except those specifically excluded. Industry and U.S. negotiators favor a negative list, while unions and consumer groups want a positive list.

“The ISA should employ positive lists for all commitments,” testified Celeste Drake, a trade policy specialist with the AFL-CIO. “Positive lists are less likely to create confusion. Positive lists will also ensure that governments have the ability to regulate newly conceived services as necessary to protect the general welfare,” she said. Unions oppose an ISA deal that would infringe on the responsibility of Congress to set visa and immigration policy. As Congress and the White House work toward immigration reform, “it is essential that trade negotiations not supersede these reforms by including minimum visa quotas or other immigration commitments in the ISA,” Drake said. Her views were echoed by Jeffrey Soth, political director of the Operating Engineers Union, who said visa limits should be set by statute, “not through bilateral or multilateral agreements.”

Industry witnesses stressed the need to cover state-owned enterprises in an ISA and also address cross-border data flows. Sarah Thorn, Walmart’s senior director for international trade, urged the including of retailing and distribution and the binding of previous services commitments in free trade agreements (FTAs). Karen Petrou, managing partner with Federal Financial Analytics, Inc., said any agreement to cover financial services in the ISA should not only seek to make the trade free and fair but also safe and sound.

Former Deputy USTR Peter Allgeier, who is now president of the Coalition of Service Industries, drew on his experience with the Doha Round to explain why an ISA would be different. “The experience that we had in the Doha Round, unfortunately, points out why it is important to do a services-only agreement,” he said. “The negotiations will not be held hostage to impasses in other areas,” he said. The ISA has a better chance at success than the round because participants have proactively chosen to participate, there has already been a high degree of cooperation among negotiators, many of the participating countries already have services in provisions in their FTAs and the negotiations are being conducted in Geneva where negotiators are stationed full time, Allgeier explained.

*** * * Briefs * * ***

USTR: Deputy USTR Demetrios Marantis became acting USTR March 15. USTR Ron Kirk, who announced in January that he would leave post at end of February, delayed departure to manage implementation of sequester on USTR's office (see **WTTL**, Jan. 28, page 3).

ANTIBOYCOTT: Particle Measuring Systems Inc. (PMS) of Boulder, Colo., received warning letter from BIS March 7 for failing to report receipt of request to engage in a restrictive trade practice or boycott on two occasions in April 2009 and March 2010. Two letters of credit issued for it by Standard Chartered Bank (Bangladesh) included language: "Shipment/Transshipment of goods from Israel or in the flag vessels of that country is not allowed."

EXPORT ENFORCEMENT: Mehdi Khorramshahgol of Rockville, Md., U.S. citizen and Iranian national, was charged March 7 in Alexandria, Va., U.S. District Court with conspiring to violate International Emergency Economic Powers Act by allegedly exporting parts to Iran in 2008. He is in custody without bond after being arrested March 7.

MORE EXPORT ENFORCEMENT: Vantec World Transport (USA), Inc., freight forwarder in Torrance, Calif., agreed March 8 to pay \$40,000 to settle two BIS charges of exporting EAR99 antennae, cables and atmospheric testing device to Pakistan Space and Upper Atmosphere Research Commission (SUPARCO), which is on BIS Entity List, in 2007. Fine will be suspended for two years and then waived provided Vantec commits no further violations, BIS noted.

TRADE PEOPLE: Eric Autor has left National Retail Federation where he was vice president and international trade counsel to form his own consulting firm, Autor Global Strategies, LLC. He can be reached at (202) 250-9580.

NAFTA RULES OF ORIGIN: USTR March 14 requested ITC investigation under Section 103 on "probable economic effect of the modifications reflected in the proposals on U.S. trade under the NAFTA, on total U.S. trade and on domestic industries."

INDONESIA: USTR March 14 requested World Trade Organization (WTO) dispute-settlement panel to examine Indonesia's "trade-restrictive measures" applied to horticultural products, animals and animal products. In February, U.S. and Indonesia held unsuccessful consultations, which U.S. first requested in January (see **WTTL**, Jan. 14, page 4).

DIRECT COMMERCIAL SALES: Andrew Shapiro, assistant secretary of State for political-military affairs, told President's Export Council Subcommittee on Export Administration March 14 that there have been "positive results" in the new process that replaced "broken" congressional pre-notification for direct commercial sales (DCS) of arms transfers. In 2012, there was 28% reduction in congressional staff review time for DCS and 40% in foreign military sales (FMS).

IRAN: Treasury's Office of Foreign Assets Control (OFAC) March 14 added Greek businessman Dimitris Cambis, president of Impire Shipping Limited, his companies, tankers and other Iranian front companies to list of specially designated nationals (SDN) for helping Iran evade international oil sanctions. Companies sanctioned include: Libra Shipping, Sima General Trading, Polinex General Trading, Asia Energy General Trading and Synergy General Trading.

AES: Modernized platform for legacy AES system, including electronic document imaging submission, is being developed and should be ready by end of September, for phased-in rollout in fall 2013. Legacy AES could then be turned off before end of calendar year, William Delansky, watch commander at Customs' National Targeting Center, told PECSEA March 14.

CENSUS: Sooner than expected, Census issued final revisions to its Foreign Trade Regulations in the Federal Register March 14 (see **WTTL**, March 4, page 5). Among changes, rule cuts deadline for reporting shipment data for items exported under Option 4 post-departure filing to five days from 10 days in the Automated Export System.