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## Shutdown Causes Cancellation of TTIP Talks in Brussels

Planned negotiations on a Transatlantic Trade and Investment Partnership (TTIP) in Brussels Oct. 7-11 have been cancelled because of the U.S. government shutdown. “U.S. Trade Representative Michael Froman telephoned me earlier today. He informed me that due to the on-going furlough, the U.S. administration will not be able to send to Brussels next week officials from USTR and U.S. government agencies to maintain the planned second round of negotiations,” European Union (EU) Trade Commissioner Karel De Gucht said in a statement issued Oct. 4.

“The U.S. side has promised to provide us with further information as soon as is feasible on when and how further occasions for engagement - including negotiation rounds - can be scheduled,” De Gucht added. “The cancellation of next week’s negotiation round in Brussels is clearly unfortunate but let me underline that it in no way distracts us from our overall aim of achieving an ambitious trade and investment deal between Europe and the U.S. which will bring real economic benefit to people on both sides of the Atlantic,” he said (see related story page x).

## Hopes Rise for China’s Return to ITA Talks

Trade negotiators hope suspended talks on the expansion of the Information Technology Agreement (ITA) could restart soon with a new offer from China on the list of products it wants excluded from a deal. The impetus for China to revise its list of sensitive products could come from an expected strong statement in favor of a new ITA deal in the communique that leaders will issue after the meeting of the Asia-Pacific Economic Cooperation Forum (APEC) in Bali, Indonesia, Oct. 7-8, sources say. Past APEC leader statements have driven earlier trade talks, including the ITA, the sources note.

How to get China to revise its list and to resume talks reportedly was the topic of a meeting of trade ambassadors in Geneva Sept. 25. That session is said to have made progress, although no details were released about how the ambassadors plan to achieve that goal (see **WTTL**, July 22, page 4). While other issues remain unresolved and other countries still have sensitive products they want left out, China’s long list of proposed

exclusions has been the major impediment to progress in the talks. The length of China's list has confused many observers who note that Chinese industry doesn't produce some of the items on the list while its manufacturers already dominate other items on its list. While it was presumed that Beijing was trying to protect many of its industries from competition, China also was believed to have been looking toward future competition in areas it wants to enter.

If China comes back with an acceptable list of sensitive products, sources say the ITA talks could speed up considerably. Much work has already been done on a new agreement, and a proposed accord could be ready to take to the World Trade Organization's (WTO) ministerial conference in Bali in December, they suggest.

## **Shutdown Puts Trade Remedy Cases on Hold**

With the U.S. government still closed as of press time Oct. 4, federal agencies are issuing guidance on what functions they will stop performing and which will continue. For example, pending antidumping (AD) and countervailing duty (CVD) cases will be put on hold as long as the government remains shutdown by the budget impasse in Congress. The International Trade Administration (ITA) and the International Trade Commission (ITC) have posted notices saying they are ceasing work on all pending cases and tolling their investigations.

The ITC said it has shut down all investigations "for the duration of the absence of appropriation." This includes AD and CVD cases, as well as Section 337 unfair trade cases and Section 332 studies. The ITC said it would have held staff conferences in preliminary AD and CVD investigations scheduled for Oct. 7 and Oct. 9, if it had resumed operations by Oct. 3, but now will have to reschedule them.

A "sunset" hearing on hot-rolled steel set for Oct. 3 also will have to be rescheduled, as will five-year reviews scheduled for Oct. 3. A Section 332 hearing on trade barriers for small business planned for Oct. 8 also faces rescheduling.

ITA said that due to "the expiration of current appropriations, Enforcement and Compliance (formerly, Import Administration) intends to uniformly toll all administrative deadlines related to the administration of U.S. antidumping and countervailing duty laws for the duration of the shutdown of the United States Government." This will include preliminary and final AD and CVD investigations and administrative reviews "and those for all actions by parties to these proceedings," it announced.

"For steel import licensing customers, as required by the lapse of appropriations, the online steel licensing system has been temporarily suspended and the computer system closed. However, you will need a license number to complete customs entry summary processes," it said. It advises those needing steel import licenses to send an e-mail to [steel.license@trade.gov](mailto:steel.license@trade.gov) or to contact a local Customs and Border Protection office.

State's Directorate of Defense Trade Controls (DDTC) posted a notice that it was open for normal operations through Friday, Oct. 4. "However, other agencies involved in the review of licenses are operating on very limited status and only reviewing licenses directly in support of ongoing combat or contingency operations," it said. Staff

shortages also will affect requests for Commodity Jurisdiction determinations, it noted. DDTC will still handle requests for new or renewing registrations. “For consideration of licenses to support military, humanitarian or other emergencies as determined by DDTC, please email Lisa Aguirre at AguirreLV@state.gov,” it advised. “The subject line of your email should read ‘Request for Emergency License’,” it added.

A message on the Bureau of Industry and Security’s (BIS) website said it is no longer accepting export license applications, classification requests, encryption reviews, encryption registrations, or advisory opinion requests. “Similarly, BIS will not be issuing any final determinations,” it said.

“The SNAP-R application on BIS’s Website is not available and will not reopen until the Federal Government shutdown ends. All pending export license applications, commodity classification requests, encryption reviews, encryption registrations, and advisory opinion requests will be held without action by BIS until the shutdown ends,” BIS announced.

“Applicants may request emergency processing of export license applications for national security reasons by submitting email requests to Deputy Assistant Secretary for Export Administration Matthew Borman at Matthew.Borman@bis.doc.gov,” it advised. The subject line of the e-mail should read “Request for Emergency License” and identify the applicant, including point of contact, intermediate and ultimate consignees, and end user(s), items, end use, and national security justification for the emergency processing.

Treasury’s shutdown guidance doesn’t directly address functions of the Office of Foreign Assets Control (OFAC). It said its international affairs office will continue several functions involving international financial markets and institutions and also will “perform caretaker functions with respect to notices of foreign acquisitions of U.S. companies brought to the Committee on Foreign Investment in the United States (CFIUS).”

Treasury’s Office of Terrorism and Financial Intelligence will continue to perform several of its functions, including monitoring and disseminating intelligence reports, law enforcement, intelligence and military activities and administration of the Specially Designated Nationals (SDN) list and enforcement of economic and trade sanctions.

The Financial Crimes Enforcement Network (FinCen) will furlough 315 of its 345 employees during the closure. It will continue to support law enforcement investigations; dissemination issues; computer operations; and maintaining minimal telecommunications. If the hiatus lasts more than five days, an additional 20 employees may return. “Significant agency activities that will cease include: responding to foreign financial intelligence unit requests to exchange information in support of foreign law enforcement investigations; issuing regulations and guidance/outreach to industry; suspend activity on BSA compliance efforts, and developing geographic and industry assessments, comprehensive reference materials, and other strategic analysis efforts,” Treasury said.

## **Industry, Embassies Want Permanent, Seamless AGOA Renewal**

USTR Michael Froman’s suggestion that the U.S. might consider graduating some countries and some products from eligibility for the trade benefits of the Africa Growth and Opportunity Act (AGOA) has raised concerns among African beneficiaries. In Washington Oct. 3, South Africa’s ambassador to the U.S., H.E. Ebrahim Rasool, took issue with

any talk of his country's "graduation" from the pact. Mention of the word caused South Africa to be anxious and the rest of the continent to be anxious as well. "Is the one at the top of the class the one you punish for being at the top of the class?" Rasool asked at a program sponsored by the Washington International Trade Association (WITA).

In Addis Ababa for the AGOA forum in August, Froman raised questions about graduation. "Should there be graduation, for sectors or for countries? How should we treat African export sectors that are globally competitive, versus those just starting out?" he said.

To make the most of AGOA's potential, the U.S. should put "all of its eggs in the basket" of regional economic integration, taking advantage of existing regional groups such as East African Community (EAC) and Southern African Development Community (SADC), Rasool suggested. This would overcome existing infrastructure constraints as well as market constraints, he added.

The Obama administration has talked about a "seamless renewal" of AGOA, which expires in 2015, but the apparel and retail industries are pushing not only seamless renewal, but long-term, even perhaps permanent renewal of the trade pact. Stephen Lamar, executive VP of the American Apparel & Footwear Association (AAFA), advocated for permanent renewal of the pact ahead of the 2015 expiration, saying his members need predictability and simplicity in their business investments in Africa. The "herky-jerky" of short-term and last-minute renewal dissuades people from doing business there, he told WITA. Because a supply chain takes a minimum of 10 years to set up, an eight-year deal is "clearly not enough," Lamar said.

## **Obama's Cancellation of Trip to APEC Sets Back TPP Talks**

President Obama's decision to cancel his trip to Asia because of the government shut-down will set back optimistic hopes that a Trans-Pacific Partnership (TPP) agreement can be reached by the end of the year. One of Obama's stops was supposed to be a meeting of leaders of the 12 TPP negotiating countries on the sidelines of the Oct. 7-8 Asia-Pacific Economic Cooperation (APEC) annual meeting in Bali. The meeting of TPP leaders was touted as a milestone in the negotiations and potentially the place where political decisions were to be made to propel talks to completion by the end of the year. Secretary of State John Kerry reportedly will fill in for Obama, but it is questionable if he can give the TPP the boost it needs.

Ahead of the leaders' meeting, the public relations battle between supporters and opponents of a deal is heating up, while members of Congress are taking a cautious stand on the deal. While the business community is claiming broad benefits from a deal, unions, consumer groups and health care advocates are raising dire warnings about the negative impact an agreement will have.

In a conference call with reporters Oct. 3, Rep. Jim McDermott (D-Wash.) said he hasn't seen the negotiating text, although members of Congress supposedly have access to the documents. "I haven't made up my mind one way or another," McDermott said. He cited access to medicines as his most pressing concern. Rep. Rosa DeLauro (D-Conn.),

who has been more vocal in her opposition to a deal, highlighted her concern about food safety, especially with increased seafood imports from trading partners such as Vietnam and Malaysia. Both lawmakers were concerned about the transparency of the process and especially about granting fast-track authority that would limit their colleagues' input. While DeLauro said she wouldn't reject an accord outright, she opposes what was in past agreements. "More members should be involved in the process," she urged.

On the call with McDermott and DeLauro were several representatives of groups and unions opposing a TPP deal, including Lori Wallach, director, Public Citizen's Global Trade Watch. Public Citizen has long been critical of the TPP and other trade agreements (see **WTTL**, July 15, page 7).

One speaker, Brian O'Shaughnessy, chairman of Revere Copper Products, said the lack of transparency in the process leads to "loopholes" that countries can take advantage of, such as currency manipulation, border taxes and ignoring environmental and labor rules. These loopholes have a "major adverse impact on the U.S. economy," he said.

In contrast, the Business Roundtable released a study Oct. 1 on the positive benefits TPP would have on individual states and the U.S. as a whole. "The TPP will also provide the United States with an opportunity to open new markets for its goods and services in countries that are not current FTA partners," it claimed. Of the 11 TPP countries the U.S. is negotiating with, five (Brunei, Japan, Malaysia, New Zealand, and Vietnam) are not current U.S. free trade agreement (FTA) partners. With a combined population of 249 million people and a combined economy of \$6.4 trillion dollars, these "new FTA" TPP countries have the potential to be vibrant new markets for U.S. exports, it said.

"In addition, the TPP could potentially expand the number of American producers who benefit from trade because the 'new FTA' TPP countries tend to buy a diverse mix," the study noted. In 2012, 45% of U.S. exports of goods and services went to the 11 other TPP countries, making them America's largest combined market, the Roundtable noted. Those exports supported an estimated 14.9 million American jobs, it said.

## **U.S. Seeks Dismissal of Pulungan's Suit for Compensation**

The Justice Department asked the Federal Court of Claims Sept. 23 to dismiss a suit filed by Doli Syarief Pulungan seeking \$25 million in damages from the government for his unjust imprisonment for allegedly violating the Arms Export Control Act (AECA). Based on the reversal of his conviction by a federal circuit court, Pulungan claimed he was innocent and entitled to compensation.

In its motion to dismiss the suit, Justice noted that Pulungan's separate legal action to obtain a "certificate of innocence" resulted in a Seventh Circuit Court reversal in July of a district court decision to grant the certificate (see **WTTL**, Sept. 2, page 1). "Because Mr. Pulungan no longer possesses a valid certificate of innocence, this Court does not possess jurisdiction to entertain his claim," the government's brief argued.

Pulungan's original acquittal on the AECA charges was a major blow to government prosecution of arms export cases based on the circuit court's blunt criticism of how State determines what items are on the U.S. Munitions List (USML) because they are made to

military specifications and the department's opaque decision making. "The Seventh Circuit reversed the jury's verdict on the ground that the Government failed to prove Mr. Pulungan acted willfully," the brief noted. "Central to the court's holding was a conclusion that, in this particular case, the Government had conceded that the word 'willfully' in 22 U.S.C. Section 2778(c) required it to prove that: (1) Mr. Pulungan knew it would be illegal to export the riflescopes, and (2) Mr. Pulungan knew specifically that it would be illegal to export the riflescopes without an 'export license' because the scopes had been designated 'defense articles'," it explained.

"The court expressly stated that it was not ruling on whether the concession reflected the correct definition of willfulness," the brief said. "Nevertheless, using this definition, the Seventh Circuit determined that, although the Government proved convincingly that Mr. Pulungan believed his conduct was illegal, the evidence was insufficient to demonstrate that Mr. Pulungan knew that Leupold Mark 4 CQ/T riflescopes are 'manufactured to military specifications' and thus defense articles requiring a license for export," it recounted.

In a footnote, Justice denied that it made any concession about the definition of willfulness. "The Government disputes that it made such a concession, and that, even if had made concession [sic], any such concession would amount to legal error. However, this issue is not relevant to the current proceedings in this Court," it asserted.

Pulungan was originally prosecuted for attempting to circumvent what he thought was an arms embargo on Indonesia. Before his scheme was tipped to the FBI, he tried to find someone to ship the riflescopes to Saudi Arabia for forwarding to Indonesia. For some reason, he did not know that the embargo had been lifted two years earlier.

## **Froman Presses for WTO Deals at Bali Ministerial**

U.S. Trade Representative (USTR) Michael Froman gave the World Trade Organization (WTO) a pep talk Oct. 1, saying successful deals on trade facilitation, services and information technology and a package of agreements at the Bali ministerial in December would assure the organization's future. A favorable scenario would see WTO members "could come together to craft a meaningful Bali package - a package whose contours are already apparent," he told a forum in Geneva.

"In this scenario, we beat market expectations. We surprise a skeptical global audience. We demonstrate through actions that the WTO can solve practical problems facing our workers, farmers and ranchers; of manufacturers and service providers; of investors, entrepreneurs and consumers," he said.

Froman noted the different attitudes towards trade facilitation that he sees when he visited foreign countries and the stand taken by negotiators in Geneva. "I am sometimes struck by the dichotomy I sense between capitals and Geneva when it comes to trade facilitation. Every time I go to Africa, most recently for the AGOA [Africa Growth and Opportunity Act] Forum in Addis Ababa in August, it is clear that trade facilitation is a central goal of every government with which I have met, the focal point of domestic, bilateral and regional work," Froman said. "In Geneva, trade facilitation is too often a bargaining chip in the great game of multilateral trade negotiations, a pivot point for

tactical maneuvering,” he said. “To succeed by Bali – and frankly, to retain the credibility of the WTO as a forum for global trade liberalization – we must close this gap,” he declared. Froman also cited the decision made at the 2011 ministerial in Geneva to find ways to get around the deadlock in the Doha Round.

“When President Obama came into office in January 2009, the fact that Doha was deadlocked was well established. It’s just that no one wanted to say it. At summit after summit, leaders got together and declared that this, finally, was the year to get it done. And with each passing year, the credibility of those assertions declined and the cynicism of the international community’s about Doha – and the WTO – grew,” he said.

“There is a degree to which this approach makes everyone unhappy. Certainly the United States is not happy that core issues like industrial tariffs, multilateral services liberalization and new market access for agriculture have been set aside for the time being,” Froman said. “But this is no time to focus on what we can’t do. We should focus instead on what we can do. A concrete result at Bali is still possible,” he declared.

### **Froman’s Speech Seen As Promise and Warning for WTO Talks**

USTR Michael Froman’s speech in Geneva Oct. 1 was seen as a favorable sign of Washington’s renewed interest in the WTO and multilateralism, but also a threat that the U.S. would continue to seek bilateral and plurilateral trade deals if its wishes for the WTO ministerial in Bali in December aren’t fulfilled (see story above). Froman’s visit to Geneva was viewed positively by many WTO members, one high-ranking trade official told WTTL, although another official said he there wasn’t anything new in his speech.

Froman’s speech was “very good,” but it hasn’t changed the negotiating dynamics for the Bali package, the second official said. Some people were disappointed the speech didn’t include many signals of openings, he said.

Froman’s speech was perceived “as relatively bluntly saying ‘Listen, either you do something which is acceptable to us in the multilateral system or we have other means,’” a former ambassador to the WTO told WTTL. The speech implied the U.S. would abandon the multilateral track if its objectives can’t be met, the ex-ambassador said. It was a “veiled threat” delivered in the form of encouragement to move ahead, he added.

People are starting to position themselves for no agreement at Bali, the former ambassador said. Nobody wants to be blamed if agreement isn’t reached at Bali, he said. The U.S. is “very exposed,” he said. The U.S. and other developed countries are opposed to a G-33 proposal on food security, but the G-33 is hiding behind the U.S. because those countries don’t want to be blamed either, he said (see WTTL, Sept. 30, page 6).

If ministers can’t agree on a Bali package for all three main areas being negotiated, other issues will then become part of any Bali declaration or post-Bali work program, Remigi Winzap, Switzerland’s ambassador to the WTO, told WTTL. While focus now is on a Bali agreement, a post-Bali agenda may include issues that weren’t finished and possibly new areas, he said. That discussion could go into the future of multilateralism, which is now is very theoretical, he said. Without agreement in Bali, there will be even less political capital in capitals than now, he suggested.

## Azevedo Asks for Political-Level Support for Bali Deal

WTO Director-General Roberto Azevedo went over the heads of member-state representatives in Geneva and wrote directly to trade ministers in national capitals Sept. 30, seeking their support for a deal at the WTO ministerial in Bali in December. “Today I am sending a letter to each of your ministers to emphasize the need for their personal and active engagement in the process from now on,” Azevedo told the WTO Trade Negotiations Committee. “Ministers and senior officials need to give you the additional room you need to genuinely look for convergence in each of the three areas,” he said.

“I am also asking your ministers to consider the bigger picture — the fate of our negotiating arm and with it, the DDA [Doha Development Agenda]. But more importantly, as I have repeatedly stressed, at stake is the credibility of the multilateral trading system itself. I am also underlining that the Geneva process is very much alive, but that the time available to show results is increasingly limited,” he said (see related story below).

Azevedo stressed that he is keeping to his October target for preliminary agreements on trade facilitations and a “due restraint” agreement on agriculture (see **WTTL**, Sept. 30, page 6). “This is necessary for proper finalization of our work in November. But it means that from now on, we have to count every day as a working day,” he said.

## Azevedo Using Honeymoon Period to Push Trade Talks

New WTO Director-General Roberto Azevedo is getting praised for the fresh approach and new energy he is bringing to trade negotiations in Geneva, especially on a package for the Bali ministerial conference in December, but caution is also being raised that his efforts won’t succeed unless members are willing to make concessions. Diplomatic sources in Geneva say Azevedo is using the honeymoon period since his selection to organize negotiating sessions, set deadlines and push members to make deals.

Azevedo’s stewardship has brought “clear improvement,” Remigi Winzap, Switzerland’s ambassador to the WTO, told **WTTL**. Azevedo’s approach is “quite a departure,” Winzap said, noting that his WTO colleagues are “pleased” with how Azevedo has shown leadership from the start in the way he conducts meetings and brings in his knowledge. Azevedo has “an authority” based on his experience, knowledge and the respect he earned while ambassador to the WTO from Brazil, he said. That may have earned him some additional latitude (see related story above).

Another trade official also noted how the new WTO chief is very active in the meetings, setting up clear rules, including limiting speaking time. Participants can’t repeat themselves and can’t waste time agreeing with discussions, he noted. That is leading to more practical discussion rather than political discourse, he said. Azevedo is playing the “schoolmaster” and members are willing to be “schoolmastered,” the trade official said. Ex-WTO Director-General Pascal Lamy didn’t play that role, he added.

Another difference between Azevedo and Lamy is the new director-general’s attempt to reach out to a larger number of members in side negotiations. Where Lamy used the so-called “Green Room” process to seek deals among a dozen or so members, Azevedo has

been using so-called Room D and E sessions, referring to conference rooms at WTO headquarters, to include more members. He has extended invitations to any ambassador who has expressed formal interest in the meetings, one official noted. But the outstanding issues for Bali “have not become easier” with the change of gears, Winzap said.

A former ambassador to the WTO said Azevedo has succeeded in injecting new momentum into negotiations, but that has been done many times before. “It doesn’t really help much if people don’t move,” he said, noting that the next phase will require ministers to be involved.

That may happen when Azevedo attends the meeting of the Asia-Pacific Economic Cooperation Forum (APEC) in Bali, Oct.4-8, including sessions with trade and foreign ministers and country leaders. He also will travel to India for talks with Indian Commerce Minister Anand Sharma and then to Washington Oct. 11-12 for annual meetings of the boards of governors of the International Monetary Fund and the World Bank Group.

## **U.S., EU Acknowledge Regulatory Differences in TTIP Talks**

Before a last-minute cancellation of talks planned for Brussels Oct. 7-11 on a Transatlantic Trade and Investment Partnership (TTIP) because of the U.S. government shutdown, U.S. and European Union (EU) trade ministers tried to persuade critics that the TTIP would not water down regulations on either side of the Atlantic. At the same time, they acknowledged the different approaches to regulation two partners have taken over the last decades (see related story page 1).

Cancelled talks in Brussels were expected to focus on regulatory issues. The goal would have been to have issues ready to present to U.S. and EU leaders in January 2014. After this meeting, the next round was to be in Washington in December, but plans likely will have to be revised now.

“There is nothing we seek to do through TTIP to undermine the determinations that each of our systems has made with regard to the appropriate level of health, safety and environmental protection of our people,” asserted U.S. Trade Representative (USTR) Michael Froman in a speech in Brussels Sept. 30. “When we talk about regulation and standards, we are talking about how to bridge the divergences between two well-regulated markets, not about launching a broad deregulatory agenda,” he declared.

“These differences in our approach to regulation and standards have also inhibited our ability to present a shared vision to other countries and to agree on global rules. Finding new ways to address these issues is perhaps the greatest contribution that TTIP can make to our long-term growth and competitiveness,” he added.

EU Trade Commissioner Karel De Gucht also spoke, stressing the need for mutual recognition. “I would like to see a set of horizontal rules to guide regulatory co-operation – and what I mean by that is we should ultimately strive for the mutual recognition of our regulations across a broad range of sectors,” he said. “Europe has seen its standards rise to a level of global excellence and leadership. And it’s on this basis that both sides agree to use such a transformative process to raise their game. So, whether we are looking at food safety, financial services such as the regulation of derivatives or standards for electric cars, we need to establish the rules and institutions that ensure this effective

regulatory cooperation,” De Gucht added. In his speech, Froman highlighted one sector where national borders become almost irrelevant. “We have seen this in the incredibly innovative area of information technology, where ultimately, the need for interoperable standards encouraged the EU to join the U.S. in working with private sector-led standards. But in other areas, an inability to incorporate the best ideas from market-driven standard-setting processes has discouraged innovation and interoperability, increased costs and reduced competitiveness.”

## **BIS, DDTC Publish Clarifications to Reform Transition Rules**

In the Oct. 3 Federal Register, Bureau of Industry and Security (BIS) and State’s Directorate of Defense Trade Controls (DDTC) issued corrections to “transition” rules relating to the export control reform effort that go into effect Oct. 15. “Most of the changes in this rule are meant to clarify the regulation by correcting grammatical and punctuation errors, providing references and more appropriate arrangement of the regulation, and in a few instances, correcting unintended consequences of the regulation as published on April 16,” the DDTC notice said.

The DDTC notice also includes guidance on how BIS and DDTC will handle violations and voluntary disclosures after the transition. “On the effective date of each rule that adds an item to the CCL that was previously subject to the ITAR, that item will be subject to the EAR,” DDTC advises.

“Approvals issued by DDTC for license applications and other authorization requests may continue to be used as described above by exporters, temporary importers, manufacturers, and brokers,” it notes.

“The violation of a previously issued DDTC authorization (including any condition of a DDTC authorization) that is continued to be used as described above is a violation of the ITAR,” it states. “With respect to a transitioned item, persons who discover a possible violation of the ITAR, the EAR, or any license or authorization issued thereunder, are strongly encouraged to disclose this violation to DDTC, BIS, or both offices, as appropriate, pursuant to established procedures for submitting voluntary disclosures,” it suggests.

“License holders and foreign persons must obtain Department of State authorization before disposing, reselling, transshipping, or otherwise transferring any item in their possession that remains on the USML,” DDTC notes. “Exporters, temporary importers, manufacturers, and brokers are cautioned to closely monitor ITAR and EAR compliance concerning Department of State licenses and agreements for items transitioning from the USML to the CCL,” it advises.

The BIS rule includes changes and clarifications to License Exception Strategic Trade Authorization (STA). In new language it says: “The new provision would allow the use of STA for exports, reexports or in-country transfers to a consignee in one of the Country Group A:5 countries so long as the foreign consignee has a valid license where the United States Government has authorized the ultimate end use, the license or other authorization is in effect, and the consignee verifies in writing that they have such authorization and provides the license or other approval identifier to the exporter.” Other grammatical changes in the notices include: removing or adding commas; adding section references; changing the words “certain commodities” to “certain commodities

and software”; adding missing words, such as “for”; and correcting International Trade in Arms Regulations to International Traffic in Arms Regulations in several places.

## Microsoft Mostly Loses Appeal in 337 Patent Dispute

The battle of technology titans over smartphone patents continues, with Microsoft mostly losing the latest fight at the Court of Appeals for the Federal Circuit (CAFC) Oct. 3. The three-judge panel upheld an International Trade Commission (ITC) Section 337 ruling that Motorola did not infringe three Microsoft patents but reversed the commission’s non-infringement ruling on one patent.

“We affirm the finding that Motorola does not infringe the ’054 patent, as well as the finding that Microsoft failed to prove that a domestic industry exists for products protected by the ’762 and ’376 patents,” the appellate court ruled in *Microsoft v. ITC*. It reversed the commission’s decision on patent ’133, holding that “the Commission relied on incorrect claim constructions in finding no infringement,” and remanding that claim to the ITC for further proceedings.

The commission’s administrative law judge (ALJ) had determined that Microsoft failed to make that domestic-industry showing because it did not offer sufficient proof of articles that were actually protected by the patent. “Microsoft’s failing was simple. Although Dr. Olivier purported to identify ‘client applications’ in an example application that Microsoft provides to third-party phone manufacturers, Microsoft failed to show that any such ‘client applications’ are actually implemented on any third-party mobile device,” Circuit Judge Richard Taranto wrote for the court.

“In this appeal, we do not reach Microsoft’s challenge to the non-infringement determination because we find substantial evidence to support the Commission’s finding of no domestic industry, which suffices to support its finding of no violation based on this patent,” the court ruled. “There is no question about the substantiality of Microsoft’s investment in its operating system or about the importance of that operating system to mobile phones on which it runs. But that is not enough under the statute. Section 337, though not requiring that an article protected by the patent be produced in the United States, unmistakably requires that the domestic company’s substantial investments relate to actual ‘articles protected by the patent,’” it added.

“A company seeking section 337 protection must therefore provide evidence that its substantial domestic investment—*e.g.*, in research and development—relates to an actual article that practices the patent, regardless of whether or not that article is manufactured domestically or abroad,” the ruling stated.

## State Wants to Delay New Iran Sanctions ahead of Talks

The Obama administration asked Congress to delay enactment of new, tougher sanctions on Iran to see if its diplomatic initiative with Tehran yields substantive progress. In testimony to the Senate Foreign Relations Committee Oct. 3, Wendy Sherman, under secretary of State for political affairs, asked lawmakers to wait and see whether Iran comes to talks with the U.S. in Geneva Oct. 15-16 with concrete plans for opening its

nuclear program before moving forward with new measures. She said she would tell the Iranians that “if you do not come on the 15th with that substantive plan, that is real and verifiable, our Congress will take action and we will support them to do so.”

“I would hope that you would allow us the time to begin the negotiations and see if, in fact, there is anything real here,” Sherman said. When asked if the administration supported pending legislation, she demurred, saying she could not speak for the administration on every particular in the bills.

After the hearing, Sen. Mark Kirk (R-Ill.), who has sponsored legislation (S. 1001) to impose new sanctions on Iran, issued a statement saying Congress should go ahead with new measures. “So long as Iran continues to pursue a nuclear weapons capability, build longer range ballistic missiles, sponsor terrorism around the world and abuse human rights, the Senate should impose maximum economic pressure on Iran to give diplomacy a chance to succeed,” he said in his statement.

House Foreign Affairs Committee Chairman Ed Royce (R-Calif.) criticized the administration’s request. “The administration’s comments today are troubling,” he said in a statement. “Rather, I strongly encourage the Senate to pass sanctions legislation now. It is critical that we increase the pressure on Iran to increase our negotiating leverage and deny Tehran the resources to continue its nuclear program,” he said. Royce cosponsored the bipartisan Nuclear Iran Prevention Act (H.R. 850), which passed the House 400-20 in July and is currently pending in the Senate (see **WTTL**, Aug. 5, page 9).

## **BIS Scales Back References to Parts, Components in CCL Cleanup**

When Bureau of Industry and Security (BIS) first proposed a “cleanup” of the Commerce Control List (CCL) in November 2012 in parallel with ongoing export control reform efforts, industry comments seemed to indicate the proposal may be trying to do too much. BIS listened, scaling back the number of Export Control Classification Numbers (ECCNs) affected in its final rule published in the Federal Register Oct. 4.

“The majority of changes proposed in the November 29 rule and being implemented in this final rule amend the CCL without changing the scope of the controls,” BIS said. “The bulk of the changes this final rule is making to the CCL are non-substantive and will provide additional regulatory guidance to people classifying items subject to the EAR [Export Administration Regulations],” it noted.

BIS noted one exception to this rule. “This final rule does include changes that would affect the scope of one ECCN. Specifically, this final rule removes ECCN 8A918 and adds certain marine boilers to ECCN 8A992, where they would be controlled for AT and UN reasons,” the agency said.

One major concern from the November notice was the proposal to add references to parts and components, where only one was previously mentioned (see **WTTL**, Feb. 11, page 8). “The changes that are implemented in this final rule include adding additional references to ‘part’ (although scaled back considerably compared to what was proposed in the November 29 proposed rule), and ‘component’ in certain ECCNs to clarify that the scope of those ECCNs also extends to ‘parts’ and ‘components’ even if previously those ECCNs

may have only referenced either ‘part’ or ‘component,’ but not both terms together,” BIS noted. In its comment on the proposed rule, United Technologies Corporation was concerned with the proposal to use “parts and components” interchangeably with “parts or components.” “There are cases where this may cause some readers to read the control as being narrower than intended,” it wrote.

The six main changes are: (1) Clarifying existing CCL controls, including the use of the terms “parts” and “components” on the CCL; (2) Conforming CCL to multilateral export control regime lists and previous EAR amendments; (3) Structural changes to improve the clarity of the CCL; (4) Removal of 14 ECCNs moved to jurisdiction of the Nuclear Regulatory Commission; (5) Revisions to Shipping Tolerances and removal of all “Unit” paragraphs; and (6) Clarifications to April 16, 2013, initial implementation rule.

In the notice, BIS kept open the possibility of further cleanup efforts, even outside the export control reform effort. “An effective control list is not static; therefore, although this final rule implements a large number of changes to improve the CCL, no single rule, including this final rule, can eliminate the need for review of the CCL to ensure that it is clear and the scope reflects the current national security and foreign policy interests of the United States,” BIS said.

**\* \* \* Briefs \* \* \***

EXPORT ENFORCMENT: United Medical Instruments (UMI) of San Jose, Calif. agreed Sept. 26 to pay \$500,000 civil penalty to settle 22 BIS charges of selling medical equipment to Iran without license, failing to file shipper’s export declaration or automated export system record and misrepresentation of values on shipper’s export declaration. Fine will be suspended for two years and then waived, provided UMI commits no further violations. Afshin “Sean” Naghibi, UMI’s chief operational officer and international sales manager, also agreed to pay \$800,000 civil penalty to settle related charges, of which \$37,000 will be paid in six installments and rest be suspended for two years and then waived, provided Naghibi commits no further violations.

CROATIA: With its accession to EU July 1, Croatia also assumed EU commitments to WTO Agreement on Government Procurement (GPA), USTR’s office said Oct. 1. “On June 27, 2013 the WTO Committee on Government Procurement approved the application of the GPA to the Republic of Croatia. The United States, which is also a party to the GPA, has agreed to waive discriminatory purchasing requirements for eligible products and suppliers of the Republic of Croatia, beginning on September 30, 2013,” it stated.

EX-IM BANK: Jose L. Quijano, formerly of Miami, was extradited from Argentina to U.S. Oct. 3 to face prison sentence in connection with scheme to defraud Ex-Im Bank of approximately \$956,251. Quijano was sentenced in absentia June 27, 2011, in Miami U.S. District Court to 46 months in prison, followed by 36 months of supervised release, and was ordered to pay \$956,251 in restitution (see WTTL, Aug. 1, 2011, page 4). Quijano pleaded guilty Feb. 9, 2011, to conspiracy to commit wire fraud but then fled from pre-trial release.

TRADE PEOPLE: *Washington Post* reported death Sept. 23 of former ITC General Counsel Michael Stein. After leaving government in 1984 he joined Dewey Ballantine law firms in Washington, retiring in 2007...Tim Punke, former Senate Finance Committee trade staffer, has left Monument Policy Group consultants to become senior vice president, corporate affairs and public policy at Plum Creek Timber Company, Inc., in Seattle, effective Oct. 1. Plum Creek is among largest private landowners in U.S., with some 6.3 million acres of timberlands and wood products manufacturing facilities in Northwest...Christopher B. Staggs has left senior policy advisor post at DDTC to join law firm Williams Mullen’s international practice group in D.C.