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Paper Maps Plans for EU Export Control Reforms

The European Union (EU) is moving toward its own export control reform initiative with the European Commission's adoption April 24 of a "communication" outlining potential steps the EU could take to update controls on weapons of mass destruction (WMD) and other sensitive goods and technology. The latest action is the result of a three-year review of export control policies that began with the release of a "Green Paper" in 2011 identifying issues to be reviewed (see **WTTL**, July 4, 2011, page 1).

"The present Communication aims at mapping the direction for EU export controls, and identifies concrete policy options for their modernisation and their adaptation to rapidly changing technological, economic and political circumstances," the communication said. It outlined four priorities the commission wants to address and asked for reactions from the European Council and the European Parliament.

The four priorities aim to: (1) adjust to an evolving security environment and enhance the EU contribution to international security; (2) promote export control convergence and a global level-playing field; (3) develop an effective and competitive EU export control regime; and (4) support effective and consistent export control implementation and enforcement. The EU acknowledges changes since it adopted its current control system. These includes more countries with proliferation capabilities, non-state actors, rapid scientific and technology advancements and more complex and vulnerable supply chains.

The EU will consider evolving controls towards a "human security" approach that recognizes that security and human rights are inextricably interlinked. It also will consider the division of export control jurisdiction between member states and the commission, which "provides for a unique and flexible system, but instances of divergent application [that] may occasionally compromise their overall effectiveness."

TTIP Negotiations Tiptoe Around Investor-State Dispute Rules

USTR Michael Froman and European Union (EU) Trade Commissioner Karel De Gucht in speeches May 5 in Berlin tried to dampen concerns about how investor-state dispute settlement (ISDS) rules would be handled in a proposed Transatlantic Trade and

Investment Partnership (TTIP). Both officials stressed the strong legal protections investors already enjoy in the U.S. and EU and said the goal of a TTIP deal on ISDS would be to set high standards for other countries to meet.

Talks on ISDS in the TTIP are frozen for now, as the EU collects public views on the issue (see **WTTL**, Jan. 27, page 3). The next round of TTIP talks is scheduled to be held outside Washington May 19-23.

“We both have strong rule of law. We have strong legal traditions against discrimination against foreign investors. But many of the other countries don’t, and for this reason, we hope that investment protection will be one of several areas in which TTIP is able to set a new global standard,” Froman said in his prepared speech.

He said he acknowledged concerns some stakeholders have about ISDS. “In fact, we share many of those concerns,” he said; noting a four-year review the Obama administration undertook of U.S. policies in bilateral investment treaties (BITs). The result has been a policy that seeks to strengthen safeguards around disputes while ensuring governments can engage in bona fide regulation in the public interest, he said.

“In recent agreements, we have proposed mechanisms to make sure we have the ability to discourage and dismiss frivolous suits; to create greater transparency around ISDS proceedings and allow non-parties such as civil society organizations to make their own submissions to ISDS tribunals. To allow the two governments involved to direct the tribunal to dismiss cases in certain areas or to agree on an interpretation of an obligation that is then binding on the arbitral tribunal,” Froman noted.

In his speech, De Gucht also focused on ISDS issues. “What many people seem to believe is that the goal of the EU and U.S. is to create a system where companies can sue to block any regulation they don’t like the look of. But that is just not the case,” he said. “What I’m trying to do is make sure this agreement encourages job creating investments but also that we start tightening up the system of 1,400 bilateral investment treaties,” De Gucht said. “Some companies do want to stretch the meaning of existing rules beyond their existing purpose and I want to stop that happening,” he declared.

De Gucht said ISDS was one of three areas on which the EU is taking a strong stand in TTIP talks. “EU law on hormone beef and genetically modified foods won’t be changed as a result of this deal,” he said. Nor will EU data privacy rules be changed. “Data protection is a fundamental right in the European Union so this agreement can do nothing to undermine it legally or morally,” he stated. Facilitating digital trade is important “but we will not be doing anything to change Europeans’ right to privacy,” he added. There are issues that need to be resolved on this subject “but they need to be tackled outside the framework of these talks,” De Gucht stated.

Froman: Doha Round Must Address Changing Agriculture Policies

While still calling for a balanced approach that addresses market access and services issues along with agriculture, U.S. Trade Representative (USTR) Michael Froman said any effort to restart the dormant Doha Round must also acknowledge changes in farm policies since the round began. “We cannot ignore the fact that the nature of who subsidizes has transformed dramatically in the 13 years since the Doha Round was

established,” he told a “mini-ministerial” meeting held in Paris May 7 on the sidelines of the annual meeting of the Organization for Economic Cooperation and Development (OECD). “The largest emerging economies now subsidize their farmers at levels as high or higher than the United States and Europe. Moreover, developed country subsidies have been decreasing, while emerging country subsidies have risen dramatically,” Froman said, according to his prepared statement.

“In talking about the importance of Doha as a development round, lowering tariffs are even more vital given the ever-increasing importance of South-South trade. Market access barriers as well as export competition issues including state trading enterprises must be a central part of our discussion as we work to develop a post-Bali work plan. Ignoring these significant market distortions, quite simply, would not be a credible exercise,” he said.

Talk about reviving the Doha Round has been part of a “post-Bali” agenda being pushed by World Trade Organization (WTO) Director-General Roberto Azevedo. Since the WTO ministerial meeting in Bali in December, diplomats in Geneva have been trying to flesh out the details of agreements adopted at the meeting, including on trade facilitation. Froman complained that work on agriculture has been hampered because many countries have not submitted required reports on their farm subsidies. “So right now we are flying blind, and that’s not a good way to begin a serious negotiation,” he said.

The U.S. continues to insist that non-agriculture market access (NAMA) and services must be part of a balanced Doha Round deal. That has to include concessions from emerging markets as well as developed countries, Froman argued. “For the U.S., we can envisage a Doha outcome defined by a range of ambition levels. But whether it’s high ambition or low ambition, balance is key. Whatever the ambition level, it must run parallel in agriculture, NAMA, and services,” he said.

Ex-Im Backers Stress Bank’s Aid to Small Business

Supporters of reauthorization of the Export-Import Bank (Ex-Im) lobbied Congress May 7, trying to convince members that the bank is essential for small business exporters. That effort was counterbalanced by a group of airline pilots and attendants who spent the week on Capitol Hill arguing that Ex-Im financing of large civilian aircraft sales to foreign airlines has hurt domestic U.S. airlines and their workers (see **WTTL**, April 28, page 1). Supporters are making the small-business pitch even though small exporters accounted for just 19% of Ex-Im financing in 2013. Of the bank’s \$27.3 billion in aid in fiscal 2013, \$8.5 billion was aviation related, including for commercial airplanes.

The lobbying battle underscored the tough fight the bank’s reauthorization faces in light of strong opposition from House Financial Services Committee Chairman Jeb Hensarling (R-Texas) and a cohort of conservative members who view the bank as a government subsidy.

Congressional sources say they expect House Majority Leader Eric Cantor (R-Va.), a strong Ex-Im supporter, to play a key role in getting reauthorization legislation through the House just as he did with the bank’s last reauthorization in 2012, which passed after many delays and a long struggle. The competition between Cantor and Hensarling over Ex-Im is seen by congressional sources as part of a broader fight between the two

Republicans to be the potential successor to House Speaker John Boehner (R-Ohio). Rumors have swirled around Congress that Boehner, who bought a condominium in January in Florida where he spends an increasing amount of time, is planning to retire at the end of the year. Sources suggest Boehner might stay if Republicans win control of the Senate in November but would leave if they don't. While Hensarling has tried to become the champion of tea party conservatives in the House, Cantor has moved to a more moderate stand on many issues.

Hensarling reasserted his opposition to Ex-Im after the Obama administration sent Congress a draft reauthorization bill April 23. "I have always believed that reauthorizing the Export-Import Bank is a bad idea. In many respects, it's the face of cronyism," he said in a statement. "Only in Washington can a taxpayer-subsidized program whose only purpose is to pick winners and losers 'fail upward' by requesting more money," he added. Hensarling said he would hold a hearing on the reauthorization request "in the coming months."

"Obviously, we all know where Chairman Hensarling stands, but he has set up a working group that is looking at it, and there are members on that working group that are strong supporters of Ex-Im Bank reauthorization," Linda Dempsey, vice president for international economic affairs at the National Association of Manufacturers, told reporters on a conference call May 7. "We are hopeful that there is a way through the committee and if not, we will work with every member of the House at all levels to try to move this forward," she added.

The 20 flight attendants and seven pilots who spent the week of May 5 lobbying for reform of the bank told lawmakers Ex-Im guarantees for aircraft sales "directly threaten U.S. airline jobs, because state-owned and supported foreign carriers enjoy a significant financial advantage on international flights thanks to the Bank's loan guarantees," said a press release issued by Delta Airlines, which is embroiled in a court suit trying to block Ex-Im aircraft financing. Delta filed a new suit in the D.C. U.S. District Court in January after Ex-Im issued a new justification for its financing in response to an order from the D.C. U.S. Court of Appeals (see **WTTL**, Dec. 2, 2013, page 8).

Two Trade Nominees Get Easy Day at Finance Committee

At a Senate Finance Committee hearing May 8, two of President Obama's trade nominees got a warm welcome and mostly unanimous support from the sparsely populated hearing. Committee members served a few softball questions to Darci L. Vetter, who was familiar to lawmakers as a former Finance staffer, on her nomination to be chief agricultural negotiator at the U.S. Trade Representative's (USTR) office, and to Stefan M. Selig, vice chairman at Bank of America Merrill Lynch, to be under secretary of Commerce for international trade. Both responded with prepared and pat answers.

"The U.S. is in the middle of important, yet difficult, negotiations with Japan and other Trans-Pacific Partnership participants regarding America's most important agricultural crops: wheat, dairy, poultry. We will be relying on Darci to push for the comprehensive and ambitious outcome that our farmers and producers expect and our economy needs," Committee Chairman Ron Wyden (D-Ore.) said in his opening statement. "Darci is the right person at the right time," he added. Wyden said Selig is "well-suited to take on this

challenge. He knows how to navigate the global economy and understands what businesses need to be competitive.” The chairman expressed concern, however, about trade enforcement. “If confirmed, he must ensure that we step up enforcement of our trade remedy laws,” Wyden declared.

Ranking Member Orrin Hatch (R-Utah) also supported Selig, while pointing out the “obvious hypocrisy” of the president nominating someone from Wall Street. He noted Selig’s “significant investments in overseas accounts,” including Sun Capital Partners and Conversus Capital.

The “inconsistency and often unfair attacks levied against people who have done similar work in the private sector shouldn’t go unnoticed,” Hatch said. Selig told the committee he has sold the Conversus investment and will sell the Sun investment upon confirmation. He said he was not aware the funds had moved offshore and he received no tax benefits from the move.

Hatch told Vetter he hoped she would be able to negotiate a breakthrough with Japan in TPP talks. “I expect that you will continue negotiating until you’ve reached an agreement on full and comprehensive liberalization with Japan,” he said. Other members asked the nominees about biotech approvals in China, food safety regulations in the European Union, market access for agriculture in Canada and intellectual property protection and of course, Trade Promotion Authority. Vetter and Selig said these are all important issues that they will consider.

If confirmed, Vetter would succeed Islam Siddiqui, who resigned in December (see **WTTL**, Jan. 13, page 8). She has been deputy under secretary for Farm and Foreign Agricultural Services at Agriculture since 2010. Earlier, she was a trade advisor on the Finance staff and spent six years before that at USTR, most recently as director for agricultural affairs. Obama renominated Selig Jan. 6 to replace Francisco Sanchez, who stepped down Nov. 6 (see **WTTL**, Jan. 27, page 1). He is currently executive vice chairman of global corporate and investment banking at Bank of America Merrill Lynch. Before that, he held various positions at Banc of America Securities and UBS Securities.

Chinese Citizen Resentenced to Prison After Two Counts Vacated

A year after an appellate court vacated two out of 17 charges against her for violating the Arms Export Control Act (AECA), a Chinese woman was resentenced April 30 to 23 months in prison and two years’ probation in Boston U.S. District. Yufeng Wei, aka Annie Wei, of Belmont, Mass, managed Chitron Electronics, Inc., with her now ex-husband and then-husband Zhen Zhou Wu. Wei’s new sentence was a sharp reduction from her original sentence of 36 months in January 2011.

Wei and Wu were convicted in May 2010 after a six-week trial of conspiring to export military and sophisticated electronics used in military phased array radar, electronic warfare and missile systems to China from 1997 to 2007 and illegally exporting sensitive electronic components in violation of the Export Administration Regulations (EAR).

A three-judge panel in the First Circuit, which included retired Supreme Court Justice David Souter, upheld in March 2013 their convictions on 15 counts, but vacated two

counts of violating the AECA based on State's "after-the-fact" classification of their exports as being subject to the U.S. Munitions List (USML) (see **WTTL**, April 1, 2013, page 1). Wu, who was originally sentenced to 97 months in prison, was resentenced to 84 months Sept. 9, 2013. Chitron Electronics was ordered to pay a \$15.5 million criminal fine for the same charges.

In its resentencing memo filed in court April 24, Justice argued for use of the same sentencing guidelines, despite the vacated charges. "The First Circuit vacated two counts, not for evidentiary sufficiency, but rather because of instructional error," the Justice memo noted. "Had the jury been properly instructed, the government would have proven beyond a reasonable doubt that the phase shifters were covered by the United States Munitions List (USML) based upon the evidence presented at trial and the testimony of three former employees of M/A Com, Inc," Justice added.

Affidavits of those employees "make clear that the phase shifters at issue -- which the defendant never denied exporting -- were specifically designed for military applications and were not in normal commercial use at the time of the alleged illegal exports in June 2006," the memo said.

U.S. Imposes Backdoor Sanctions on Russia

The U.S. continued its slow economic squeeze of Russia for its actions in Ukraine the week of May 5, with backdoor measures cutting Russia's eligibility for the Generalized System of Preferences (GSP) May 7 and adding Russia's Tempbank and the chairman of its management committee, Mikhail Georgievich Gagloev, to Treasury's Specially Designated Nationals May 8 for dealing with Syria. Separately, Treasury's Office of Foreign Assets Control (OFAC) published regulations to implement previous sanctions against entities in Ukraine in the May 8 Federal Register (see **WTTL**, May 5, page 1).

President Obama notified Congress of his intent to end Moscow's GSP benefits because "it no longer warrants preferential treatment reserved for less advanced developing countries." USTR Michael Froman said in a statement that the president's decision is "consistent with the World Bank's designation of Russia as a 'high income country' as well as actions by the European Union and Canada to remove Russia from similar programs."

Removal of Russia's GSP eligibility is mostly symbolic, as the program expired in July 31, 2013, and the country hasn't received those benefits since then. Even before that, only a small share of Russian exports to the U.S. received GSP treatment. According to USTR data, GSP benefits applied to \$296 million in goods from Russia from January to July 2013. That compares to total U.S imports from Russia of \$11.2 billion in 2013.

The sanctions against Tempbank and Gagloev were part of a batch of sanctions OFAC imposed against Syrian officials, banks, individuals and entities in Syria for "providing material support and services to the Government of Syria, including the Central Bank of Syria and SYTROL, Syria's state oil marketing firm," Treasury said. "Tempbank has provided millions of dollars in cash and facilitated financial services to the Syrian regime," the department said. "In one instance, Tempbank arranged to deliver millions of dollars in cash to Vnukovo Airport in Moscow for pick-up by cash couriers working

for the Central Bank of Syria,” it noted. “In addition to its close cooperation with the Central Bank of Syria, Tempbank has facilitated deals and provided financial services to SYTROL, a Syrian state oil company sanctioned by the United States and the European Union,” the department added. Gagloev was designated “for acting for or on behalf of Tempbank.” He “has personally travelled to Damascus to make deals with the Syrian regime on behalf of Tempbank,” it claimed.

USA*Engage, a business lobbying group, sent Congress a communique May 9 cautioning against legislation that would impose unilateral sanctions on Russia. “Recently, some members of Congress have called for legislation of draconian, unilateral U.S. sanctions on key sectors of the Russian economy and exclusion of Russia from the global financial system,” the group wrote. “The historical record is clear; unilateral U.S. sanctions are a lose-lose tactic,” it said. “The U.S. sanctions fail because companies in other countries fill the void left by U.S. companies, U.S. companies lose markets to their global competitors, and U.S. company assets may have to be abandoned with inevitable loss for the U.S. economy,” it added.

* * * **Briefs** * * *

TRADE PEOPLE: Former ITC Commissioner Shara Aranoff joined Covington & Burling May 5. She will be part of law firm’s intellectual property and international trade practices, with focus on Section 337 cases and trade litigation and enforcement. Before nomination to ITC in 2005, she was Democratic trade counsel to Senate Finance Committee and earlier was ITC attorney.

TRADE FIGURES: U.S. merchandise exports in March went up 4.5% from year ago to \$135.1 billion, Commerce reported May 6. Services exports jumped 6.0% to \$58.8 billion from same month in 2013. Goods imports leapt up 6.1% from March 2013 to \$195.8 billion, as services imports gained 4.8% to \$38.4 billion. For first quarter of 2014, merchandise exports went up 2.4% to \$400.6 billion from year ago. Services exports increased 5.45% to 176.2 billion from first quarter in 2013. Goods imports gained 2.2% to 582.4 billion, as services imports jumped 5.25% to \$116.2 billion from same quarter of 2013.

SUGAR: ITC in 5-0 preliminary vote May 9 found U.S. industry may be materially injured by dumped and subsidized imports of sugar from Mexico. Newly sworn in Commissioner Rhonda Schmidlein did not participate in investigations.

ANTIDUMPING: In Federal Register May 9, Commerce requested comments on its “differential pricing” analysis, which it currently applies in targeted antidumping investigations (see **WTTL**, April 28, page 4).

IRAN: Unnamed individual from Washington state agreed May 6 to pay \$29,340 to settle OFAC charges of violating Iran sanctions from May 2007 through November 2009. Individual allegedly exported unlicensed medical goods and/or related banking services to Iran in 19 separate transactions. Individual did not voluntarily self-disclose matter to OFAC, agency said. Medical devices are potentially licensable by OFAC under existing licensing policy, it added.

NAFTA: In latest iteration of long-running dispute over CBP’s denial of Ford’s request for duty refunds for NAFTA imports, CIT Judge Judith Barzilay sustained Customs’ remand determination continuing to deny request. Court of Appeals for Federal Circuit (CAFC) had ordered remand after reversing Barzilay’s earlier ruling in favor of CBP (see **WTTL**, May 6, 2013, page 4). CAFC had concluded that Customs failed to adequately explain why it treats NAFTA post-importation refund claims under 19 U.S.C. Section 1520(d) differently for purposes of

waiver depending on whether they were submitted traditionally or through the Reconciliation Program. Ford did not present the relevant certificates of origin (CO) covering the subject merchandise, CBP had argued. “The statute gives Customs a good deal of discretion to define the scope of its waiver authority,” Barzilay wrote. “Under the current regime, however, there are legitimate reasons for treating claims differently for purposes of waiver. Therefore, Customs’ explanation for treating claims under Section 1520(d) differently for purposes of waiver constitutes a permissible construction of the statute,” she ruled (slip op. 14-53).

HOLLYWOOD vs. TPP: Anti-TPP groups gained support from some entertainment celebrities, including former Tonight Show host Jay Leno, who joined protests May 5 against inclusion of Brunei in TPP negotiations. TPP opponents complained about Brunei’s adoption of Islamic Sharia law as its legal system, which, among other things, criminalizes gay and lesbian relations. “Ellen DeGeneres, Jay Leno and other Hollywood celebrities have joined the Human Rights Campaign, the Feminist Majority Foundation and the city of Beverly Hills in blasting Brunei and calling for a boycott of properties owned by the government of Brunei, including the Beverly Hills Hotel,” said release issued by American Jobs Alliance. “Virgin Airlines founder Richard Branson announced his companies will boycott all hotels owned by Brunei worldwide. These government-owned investments provide financial support to the medieval brutality in Brunei,” it added. Among targeted Brunei-owned hotels is Beverly Hills Hotel.

CUBA: Giant insurer American International Group, Inc. (AIG) in New York agreed May 8 to pay \$279,038 to settle OFAC charges of violating Cuba sanctions between January 2006 and March 2009. Two AIG subsidiaries in Canada allegedly issued or renewed three types of property and casualty insurance policies that insured Cuban risks of Canadian corporate entity. Separately, Travel Guard Canada—another AIG subsidiary in Canada—sold, renewed or maintained 3,446 travel insurance policies in which Cuba was identified as destination. AIG voluntarily self-disclosed apparent violations to OFAC, agency noted. “Upon identifying and voluntarily disclosing these matters, AIG implemented comprehensive improvements to its global sanctions compliance program, including improvements targeted to more effectively address applicable sanctions laws,” wrote Matthew Gallagher, AIG spokesman, in email to WTTL.

MORE CUBA: Argentine travel provider Decolar.com, Inc. agreed May 8 to pay \$2,809,800 to settle OFAC charges of violating Cuba sanctions between March 2009 and March 2012. Company’s foreign subsidiaries are charged with assisting 17,836 people with flight reservations to Cuba from countries other than U.S. and/or hotel reservations in Cuba. “Upon discovering the apparent violations, Decolar immediately stopped offering any Cuba-related travel services to any of its customers,” OFAC said. Decolar voluntarily self-disclosed matter to OFAC.

INDONESIA: U.S. May 8 requested, along with New Zealand, new WTO dispute settlement consultations with Indonesia to address recent modifications to country’s import licensing restrictions on horticultural products, animals and animal products. U.S. previously requested consultations in January 2013 and August 2013 (see WTTL, Sept. 2, 2013, page 8). “Indonesia revised its import licensing requirements in response to action by the United States at the WTO. Unfortunately, the revised system still appears to breach WTO rules and restrict U.S. agricultural exports,” USTR Michael Froman said in statement. New Zealand and U.S. proposed to Indonesia that consultations be held jointly.

CIGARETTES: WTO Director-General Roberto Azevêdo appointed three panelists May 5 to hear complaints against Australia’s “plain packaging” requirements for tobacco products. He acted after five complaining countries and Australia couldn’t agree on selection of panel. On April 28, six parties involved in this dispute – Australia, Ukraine, Honduras, Dominican Republic, Cuba and Indonesia – agreed to have one panel consider their separate, but not identical, complaints and to harmonize timetable for panel proceedings. With expected third-party participants, case will involve more members than even high-profile “banana dispute,” according to sources in Geneva.