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Wassenaar Adopts Extensive Changes to Control Lists

The plenary session of the Wassenaar Arrangement, the multilateral export control regime, adopted numerous changes to its control lists Dec. 3, including in such areas as machine tools, information security, spacecraft and high-performance computer (HPC) technology. The change to machine tool controls was uncertain until the meeting and caps a two-year effort to shift the control methodology to the measurement of uni-directional repeatability from precision accuracy (see **WTTL**, Nov. 3, page 7).

New controls in category 2.B.1.a cover turning machines with “unidirectional positioning repeatability” equal to or less (better) than “1.1 μm along one or more linear axis” and two or more axes “which can be coordinated simultaneously for ‘contouring control’.” For five-axes or more milling machines, there are separate controls for those that travel less than 1 m and those that travel; greater than 1 m and less than 4 m; and greater than 4 m.

As **WTTL** reported previously, Wassenaar revised Note 1 to category 5 part 2. The new note states: “The status of ‘information security’ items or functions is determined in Category 5, Part 2 even if they are components, ‘software’ or functions of other systems or equipment.” The regime also added a new software note to category 5.D.2.c.

Controls on software and technology for the development or production of digital computers were raised to an Adjusted Peak Performance (APP) of 1.0 Weighted TeraFLOPS (WT) from 0.06 WT. The regime added a technical note on APP for shared memory when “any processor is capable of accessing any memory location in the system.”

Among other changes, Wassenaar revised the definition of “civil aircraft” and added new definitions for “fly-by-light” and “fly-by-wire.” It also adopted new definitions in category 9 for “spacecraft bus” and “spacecraft payload.”

ITA Technical Talks Resume in Geneva

Renewed talks on an Information Technology Agreement (ITA) began on a technical and bilateral level in Geneva the week of Dec. 1, with no progress reported on moving negotiations forward. “Things look good, but I also heard comments about some difficulties,” one source in Geneva said. Expectations for a breakthrough in the talks

were raised following an agreement between the U.S. and China in November on the sidelines of the Asia-Pacific Economic Cooperation Forum (APEC) meeting in Beijing. The Chinese reportedly promised to reduce the number of items they want excluded from an ITA deal (see **WTTL**, Nov. 17, page 2).

Sources in Geneva say they believe negotiators are working toward the preparation of proposals that will be presented to the World Trade Organization (WTO) General Council Dec. 10. “We expect something to come up on Tuesday evening ahead of the General Council on Wednesday. Some members will continue consulting over the weekend,” one source noted.

The ITA talks were suspended in November 2013 after China insisted on excluding a large number of “sensitive” products from the list of IT products that would be in any agreement and demanded a five-year phaseout period for tariffs on some 60-70 products compared to the normal three-year period negotiators were considering. In the announcement after the recent Beijing agreement, U.S. officials said China has agreed to include many products that it previously wanted excluded from the ITA, including for some medical devices, next generation semiconductors, video games and computer components. The announcement didn’t mention anything about an expected phaseout period.

CAFC Reverses CIT Ruling on Chinese Bedroom Furniture

Court of International Trade (CIT) Judge Jane Restani issued one remand order too many in sending back to Commerce its first remand determination on the review of the anti-dumping order on wooden bedroom from China, the Court of Appeals for the Federal Circuit (CAFC) in essence said in reversing her second remand order Dec. 1. The appellate court agreed with her that the department’s final order on the review failed to support the dumping margin it calculated, but found this failure was corrected with the first remand decision, and Restani erred in ordering a second remand.

At issue was Commerce’s use of “best information available” in determining the surrogate value of inputs used in a nonmarket economy case. “Although substantial evidence did not support Commerce’s valuation of inputs in the Final Results, substantial evidence supported Commerce’s valuation in the First Redetermination,” wrote CAFC Judge Kathleen O’Malley for the three-judge panel in *Home Meridian International v. U.S.*

“Substantial evidence did not support Commerce’s valuation in the Final Results because Commerce failed to make any factual determination as to the reliability of the market economy purchases or weigh the merits of those purchases against the surrogate values,” she added. In its first remand determination the department clarified that while its use of the Antidumping Methodologies created a rebuttable presumption in favor of using market economy purchases, the presumption only applies when a specified volume of those purchases are made during the period of review. Because it found that respondent Huafeng had not made such purchases during the Period of Review, Commerce said the presumption did not apply. Restani disagreed and remanded the case for a second time.

In the second remand determination, the department bowed to Restani’s views and adjusted its margin finding. She sustained that decision. The government and the American Furniture Manufacturers Committee for Legal Trade (AFMC) appealed. “No

regulation or statute imposes a strict requirement on Commerce to use non-contemporaneous market economy purchases rather than contemporaneous surrogate values, or vice versa, in valuing inputs for the calculation of a dumping margin,” O’Malley wrote.

“Commerce, instead, must only determine what set of data represents the ‘best available information.’ Commerce’s interpretation of Section 351.408(c)(1), specifically its language that Commerce ‘normally will use the price paid to the market economy supplier,’ was reasonable because the word ‘normally’ indicates that Commerce has the discretion not to use market economy purchases when it does not constitute the ‘best available information,’” she wrote.

“Home Meridian and AFMC advance alternative interpretations, but both are misplaced. Home Meridian argues that Commerce must use the market economy purchases for valuation and that there is no contemporaneity requirement in Section 351.408(c)(1). Neither the regulation nor the governing statute, however, prohibits Commerce from relying on contemporaneity as a factor in valuation, and Commerce is not required to use market economy purchases when they do not constitute the ‘best available information,’” she wrote.

AFMC argued that the section and the Antidumping Methodologies, read together, allow Commerce to completely disregard market economy purchases. “This is an overstatement. Here, Commerce correctly determined from the unambiguous language of the Antidumping Methodologies that the presumption to use market economy purchases did not apply because Huafeng made no such purchases during the Period of Review,” she concluded.

CBP Didn’t Need to Warn Surety of Risk, CAFC Rules

Customs and Border Protection (CBP) did not abuse its discretion by not warning an insurance company that imports it was bonding were linked to a company that was under investigation, the Court of Appeals for the Federal Circuit (CAFC) ruled Dec. 1, upholding the same CIT findings. The CAFC also rejected Hartford Fire Insurance Company’s arguments that CBP should have required the importer to post a cash deposit instead of a bond because the investigation allegedly suggested the bond might be forfeited.

Sunline Business Solution Corporation obtained the bond from Hartford for entries of freshwater crawfish tailmeat from China that was produced by Hubei and subject to an antidumping order. When Commerce denied Hubei’s request for a separate new shipper rate and imposed an antidumping rate of 223.01% on its goods, Sunline failed to pay the duties owed after liquidation and Customs demanded payment from Hartford.

The alleged investigation was at an early stage and not related to the subject imports, but Hartford argued that CBP should have informed it of the investigation anyway.

“Hartford has not, however, pled any facts as to how the existence of Customs’ fraud investigation could plausibly serve as the basis for an abuse of discretion claim with respect to the Hubei Entries,” wrote CAFC Judge Evan Wallach for the three-judge panel. “Indeed, even if all of Hartford’s alleged facts are accepted as true, without a connection to the Hubei Entries they do not establish a plausible claim that Customs abused its discretion by failing to reject the bonds or the Hubei Entries,” he added. “Thus, regardless of the investigation into Sunline, there are no facts alleged from which

the court can plausibly infer Customs had any reason to believe that the Hubei Entries were problematic, or that any information submitted with respect to the Hubei Entries had been falsified,” Wallach wrote. “While Customs might have required a cash deposit or other security in lieu of insufficient entry bonds, there was no abuse of discretion when Customs acted in accordance with the bonding privilege of 19 U.S.C. Section 1675(a)(2)(B)(iii), in which Congress expressly afforded the discretion to decide whether to submit bonds in lieu of cash deposits to importers, not to Customs,” he noted.

“By this express statutory directive, Customs was required to permit Sunline to secure the Hubei Entries with bonds in lieu of cash deposits. None of the statutes or regulations relied upon by Hartford contravenes or supplants this directive,” he concluded in *Hartford Fire Insurance Co. v. U.S.*

Everyone Wants to Pass Fast-Track Authority, So They Say

After six years of coyness, President Obama finally says he will work with Congress to get a fast-track Trade Promotion Authority (TPA) bill passed. “I’m going to be talking to McConnell and Boehner, Reid and Pelosi, and making a strong case on the merits as to why this has to get done,” he told the Business Roundtable (BRT) Dec. 3, referring to the Senate and House leaders. The declaration came in response to a question from the audience; not in his speech, which said little about trade.

Incoming Senate Finance Committee Chairman Orrin Hatch (R-Utah) at first applauded the remarks, then stepped back from that positive sentiment. “Today, the President rightly acknowledged TPA is critical to advancing his trade agenda and creating prosperity for American job-creators and workers. This is long overdue,” Hatch said in a statement after the president spoke.

But later in the evening at a National Foreign Trade Council (NFTC) dinner in Washington, where he received the World Trade Award, Hatch complained that Obama didn’t say he would fight for TPA. “He didn’t go that far,” Hatch said. “It’s going to take presidential leadership and no country that is worth its salt or understands our system is going to really negotiate fully with us without TPA,” the senator added. At the NFTC event, Hatch said, “We stand ready, willing and able to help the president in these matters, and the president is going to have to lead in these matters.”

Hatch praised U.S. Trade Representative (USTR) Michael Froman. “I have a very high opinion of him,” the Utah Republican said. “I believe if he is allowed to do what he wants to do and knows how to do, and if the president will get behind him, we’ll get these matters done, both TTIP and Trans-Pacific Partnership [TPP],” Hatch said. If the president follows through on TPA, “Froman is very capable of doing the work in this area, and he is going to have a lot of help from me,” he said. “I’m going to tell him right now that he needs to tell the president, ‘No more goofing off. We need to get this done’,” Hatch said (see **WTTL**, Nov. 17, page 2).

In response to questions from business executives at the BRT session, Obama was more expansive about the benefits of trade than in any statements during his presidency. He conceded, however, that his work will have to be focused on his own party. Obama admonished Democrats for fighting old battles. “Part of the argument that I’m making to Democrats is, don’t fight the last war,” he said. “I think that there are folks in my own

party and in my own constituency that have legitimate complaints about some of the trend lines of inequality, but are barking up the wrong tree when it comes to opposing TPP, and I'm going to have to make that argument," he added (see story below).

"If somebody wanted to outsource, if any of the companies here wanted to locate in China, you've already done it. If you wanted to locate in a low-wage country with low labor standards and low environmental standards, there hasn't been that much preventing you from doing so," Obama said. He argued that TPP would force "some countries to boost their labor standards, boost their environmental standards, boost transparency, reduce corruption, increase intellectual property protection."

Obama cited Vietnam, one of the countries in the TPP talks, as an example. "Right now, there are no labor rights in Vietnam. I don't know how it's good for labor for us to tank a deal that would require Vietnam to improve its laws around labor organization and safety. I mean, we're not punishing them somehow by leaving them out of something like this. Let's bring them in," the president said.

Obama said he also will have to correct the "half-truth" that trade causes wage stagnation. "I say it's a half-truth because there's no doubt that some manufacturing moved offshore in the wake of China entering the WTO and as a consequence of NAFTA. Now, more of those jobs were lost because of automation and capital investment, but there's a narrative there that makes for some tough politics," he said. "We have to be able to talk directly to the public about why trade is good for America, good for American businesses and good for American workers. And we have to dispel some of the myths," he declared.

Labor Report Gives Democrats New Ammo in Fight Against TPP

President Obama's pro-trade talk Dec. 3, especially comments aimed at members of his own party, didn't persuade some progressive Democrats, who cite a new Labor Department report on child and forced labor as justification for opposing a Trans-Pacific Partnership (TPP) (see story above). In a conference call with reporters Dec. 4, several House Democrats highlighted a recent department report that gives "dishonorable mention" to four TPP partners -- Vietnam, Malaysia, Mexico and Peru.

In response to a question about Obama's remarks at the Business Roundtable, Rep. Rosa DeLauro (D-Conn.) and other colleagues disputed his claims. "He said that our existing free trade partners have tried to improve their standards. And he said that TPP would have the opportunity to raise those standards. However, that is not what we have seen," DeLauro said.

"We have not seen labor standards rise to expectations in the countries with which we have free trade agreements," she said. "It may be that one can posit that, but the facts belie the accuracy of what this trade agreement will do," she added. Rep. Loretta Sanchez (D-Calif.) noted that with "Vietnam in particular, we brought down the embargo, we did a bilateral trade agreement, they had accession into WTO. In no case, did the situation get any better; in fact, it got worse, despite the promises."

In a separate meeting with reporters Dec. 5, House Ways and Means Ranking Member Sander Levin (D-Mich.) offered a more moderate approach to trade and said the focus

should be on negotiating TPP and not passing a fast-track TPA bill. “I really think that the key here has to be the focus on TPP and not trying to move on TPA now – I think it puts the cart before the horse,” he said. “Because if you go down the list of these issues there’s no way for TPA to spell out what Congress thinks needs to be contained in an effective TPP,” Levin added.

He said Congress has to be involved deeply in the TPP process and maintain its leverage. “It’s a serious mistake to bring up TPA before there is much more effective involvement of Congress in the discussion of and the proposed resolution of these issues,” he said.

Levin also indicated that he is willing to support a TPP deal if it addresses the concerns he has raised. “I’m in favor of a TPP that should be supported by a broad range within the Democratic party as well as the Republican party. I’m in favor of a TPP that addresses these issues. I’m in favor of a TPP that at long last breaks Japan’s exclusion of American industrial products. I’m in favor of a TPP that opens up the Japanese market. I’m in favor of a TPP that addresses this difficult investor-state issue,” he said.

“I don’t like it that the investor-state issue becomes essentially a technique of people – an opportunity for people to say ‘down with TPP, period.’ I’m in favor of addressing the Vietnam labor issue – it’s a difficult issue. We’ve never negotiated a trade agreement with a non-market economy with a non-free labor market. It isn’t an easy issue to resolve,” Levin continued.

The Labor Department report published Dec. 1 listed 136 goods from 74 countries as made from either child or forced labor or both. Regarding TPP countries, the report added a “child labor” designation to one good that was already in the “forced labor” category: palm oil from Malaysia. The department also added electronics from Malaysia for being produced with forced labor. Vietnam was mentioned for bricks and garments; Mexico for chile peppers, coffee, cucumbers, eggplants, green beans, melons, onions, pornography, sugarcane, tobacco and tomatoes; and Peru for brazil nuts/chestnuts, bricks, coca, fireworks, fish, gold and timber.

Restrictions on Russia’s Rosoboronexport Come with Waiver

A compromise 2015 National Defense Authorization Act (NDAA) bill (H.R. 3979) introduced Dec. 3 would prohibit the Pentagon from doing business with Rosoboronexport, Russia’s largest defense exporter, but also would allow a waiver of the prohibition under certain conditions to allow continued purchases of parts and maintenance for Russian helicopters in Afghanistan. The House and Senate are expected to vote on the bill, which was shaved down from original House and Senate measures, the week of Dec. 8.

Section 1242(e) of the legislation also would prohibit bilateral military-to-military cooperation between the U.S and Russia until the secretary of Defense, in coordination with the secretary of State, certifies that Russia has ceased its occupation of Ukrainian territory and aggressive activities that threaten Ukraine and NATO members (see **WTTL**, March 31, page 1).

The secretary of Defense could waive the prohibition “if the Secretary determines that doing so is in the U.S. national security interest and the Secretary provides prior

notification to the appropriate committees of Congress, including certain specified information,” according to an explanation of the bill issued by the House and Senate Armed Services committees. The prohibition on the use of funds to do business with Rosoboronexport in Section 1246 of the legislation bars Defense from entering into “a contract, memorandum of understanding, or cooperative agreement with, to make a grant to, or to provide a loan or loan guarantee to Rosoboronexport or a subsidiary that is publicly known to be controlled by Rosoboronexport,” the measure states.

This restriction can be waived if the commander of U.S. forces in Afghanistan certifies that the parts are critical to the success of the mission of the Afghan National Security Forces and lack of the parts would have a negative impact on the mission of U.S. forces in Afghanistan.

In addition, Defense would have to certify that no alternative supply source is available and the secretary of Defense determines the purchase is in the U.S. national security interest. The secretary of Defense would be prevented from using the waiver until after he submits to Congress a report required by the 2014 NDAA on incorporating U.S.-made rotary wing aircraft into the Afghan National Security Forces.

Another section of the legislation (Section 1266) includes language that was also in the 2014 NDAA barring any use of Defense funds to implement the United Nations Arms Trade Treaty. The bill, however, would allow use of appropriations to assist “foreign countries in bringing their laws and regulations up to United States standards.”

EU Amends Russian Sanctions to “Grandfather” Some Exports

The European Union (EU) amended its sanctions on Russia Dec. 4 to follow the U.S. clarification on exports related to shale drilling and also to provide a waiver for contracts that were entered into before it imposed its sanctions in September. The new rules published in the EU Official Journal Dec. 5 went into effect Dec. 6.

“The latest EU measures are intended to provide additional clarity to the scope and application of certain provisions. They do not introduce new sanctions or widen the scope of existing sanctions,” the United Kingdom’s export control office explained.

The new rules clarify that restrictions on exports that would aid Russia’s oil exploration in shale deposits, including fracking, don’t apply to traditional drilling through shale. The restriction applies to “projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing; it does not apply to exploration and production through shale formations to locate or extract oil from non-shale reservoirs,” the new rule states (see **WTTL**, Nov. 24, page 2).

Along with this clarification, the EU clarified restriction on arctic drilling and deepwater drilling. Deepwater drilling means “oil exploration and production in waters deeper than 150 metres,” it says; Arctic drilling means “oil exploration and production in the off-shore area north of the Arctic Circle,” it adds. The new “grandfathering” language in the rules will permit EU export licensing agencies to “grant an authorization where the export concerns the execution of an obligation arising from a contract concluded before 1 August 2014, or ancillary contracts necessary for the execution of such a contract,” the

regulations state. In addition, prohibitions on exports to the oil sectors “shall be without prejudice to the execution of contracts concluded before 12 September 2014, or ancillary contracts necessary for the execution of such contracts, and to the provision of assistance necessary for the maintenance and safety of existing capabilities within the EU,” the rule says. Associated services necessary for these exports also are permitted.

In addition, the EU will permit members to license “the sale, supply, transfer or export of the items is necessary for the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment.” In duly justified cases of emergency, such exports can be made without prior authorization provided the exporter notifies the competent authority within five days.

The EU also clarifies its restrictions on financial dealings with Russia to assure continued financing for permitted exports and imports. It says the restrictions apply to “the capital market for certain financial institutions, excluding Russia-based institutions with international status established by intergovernmental agreements with Russia as one of the shareholders; restrictions on legal persons, entities or bodies established in Russia in the defence sector, with the exception of those mainly active in the space and nuclear energy industry; and restrictions on legal persons, entities or bodies established in Russia whose main activities relate to the sale or transportation of crude oil or petroleum products,” the revised regulation explains.

*** * * Briefs * * ***

TRANSPARENCY, MAYBE: TPP talks are “most transparent negotiations ever,” USTR Michael Froman reportedly told group of business leaders Dec. 3 during conference call that was off the record and closed to press.

TRADE PEOPLE: John Neuffer, senior vice president of Information Technology Industry Council, named president and CEO of Semiconductor Industry Association (SIA)... David Laufman, who has been in own practice since 2012 and previously was with Kelley Drye & Warren, appointed chief of counterespionage section in Justice’s national security division.

MANGANESE DIOXIDE: In mixed 6-0 “sunset” votes Dec. 2, ITC determined revoking antidumping duty order on electrolytic manganese dioxide from China would cause renewed injury to U.S. industry, while revoking order on product from Australia would not.

IRAN OIL: In Dec. 4 Federal Register, State announced Malaysia, Singapore and South Africa qualified for 180-day exception under National Defense Authorization Act (NDAA) requirement to reduce purchases of oil from Iran.

EXPORT ENFORCEMENT: Hetran Inc., of Orwigsburg, Pa., and its CEO, Helmut Oertmann, were sentenced Dec. 3 in Harrisburg, Pa., U.S. District Court for attempting to smuggle lathe machine, also known as bar peeling machine, to Iran via UAE in June 2012 without license. Machine was designated EAR99 and worth \$895,544. Oertmann was sentenced to 12 months probation, and as part of sentence, BIS imposed civil penalty of \$837,500, of which \$500,000 was suspended. Oertmann and Hetran pleaded guilty in June (see **WTTL**, June 23, page 10).

TRADE FIGURES: U.S. merchandise exports in October increased 1.4% from year ago to \$138.0 billion, Commerce reported Dec. 5. Services exports gained 2.9% to \$59.5 billion from same month in 2013. Goods imports went up 3.5% from October 2013 to \$200.7 billion, as services imports increased 2.8% to \$40.25 billion.