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Industry Pleased with Aircraft Reforms, But Wants Clarifications

After a year's experience with export control reforms that revised Category VIII (military aircraft) on the U.S. Munitions List (USML) and transferred items to the Commerce Control List (CCL), exporters are generally happy with the results, according to comments to the Bureau of Industry and Security (BIS) and the Directorate of Defense Trade Controls (DDTC). Industry, however, still wants more clarification of rules for license exceptions, definitions and jurisdiction over specific parts (see **WTTL**, March 2, page 6).

Rolls-Royce voiced concerns about using License Exception Strategic Trade Authorization (STA) when the foreign consignee is a government. The rules have caused confusion and disagreement along the supply chain, it wrote. Boeing asked for clarification of definitions, such as "end item," "equipment" and "component." Minor revisions "would add clarity and thus more consistent application," the company said.

BAE Systems said foreign companies have concerns about self-classification. "Companies are at times having trouble obtaining jurisdiction and classification information from producers and exporters. Where European companies are unable to obtain this information, they are fearful of U.S. enforcement activities for well-meaning, technical errors in self-classification," it wrote. General Electric referred to "ambiguities" in USML and CCL controls, particularly for minor parts of engines and aircraft. "It is unclear why the T700 engine has been singled out for inclusion on the USML given similarity to its CT7 commercial variant," GE said.

The one comment addressed to the parallel DDTC rule questioned the remaining use of catch-all phrases in the USML. "For example, in subparagraph USML VIII (h) (11), Air-to-air refueling systems and hover-in-flight refueling (HIFR) systems, the use of the phrase 'and specially designed parts and components therefor' is inappropriate and not in keeping with the objective of ECR to create a more positive list," Robert Licht wrote.

ISDS Is "Toxic" in Europe, Malmstrom Says

The issue of whether to include investor-state dispute-settlement (ISDS) provisions in a Transatlantic Trade and Investment Partnership (TTIP) has sparked a major debate in the

European Union (EU), and ISDS “is the most toxic acronym in Europe,” EU Trade Commissioner Cecilia Malmstrom said May 4. “I spend half my working time answering questions about this,” she told a program sponsored by the Center for Strategic and International Studies (CSIS) while in Washington for meetings with U.S. Trade Representative (USTR) Michael Froman and members of Congress.

To address these concerns, Malmstrom submitted to the EU Parliament May 6 a concept paper detailing potential changes to ISDS provisions in trade deals (see story below). “My assessment of the traditional ISDS system has been clear - it is not fit for purpose in the 21st century. I want the rule of law, not the rule of lawyers,” Malmstrom said in a blog.

At the CSIS event Malmstrom said ISDS rules need reform to bring them up to date. “It is time. They are old-fashioned and when they were created in the ‘60s they had more the companies’ interests than the right to regulate,” she said. Malmstrom indicated that her proposed reforms would address concerns some have about ISDS challenges of tobacco regulations. She said her proposal would strengthen the right of countries to regulate for health and safety reasons. The current challenges of tobacco rules “probably would not be successful in the EU in the terms that we have put up on ISDS,” she said.

Malmstrom identified several issues that are important to the EU in the TTIP talks, including data protection, government procurement, agriculture and geographic indications (GIs). Data protection “is indeed a very important part of our negotiations because data flows across the Atlantic every single second,” she said. “When it becomes difficult is when we come to personal data and how it is used. That is where we have said, so far, the data protection regime of Europe is not going to be negotiated,” she declared.

Malmstrom noted the ongoing review of the U.S.-EU “safe harbor” agreement that allows certain EU personal data to be transferred to the U.S. when American parties provide adequate protection for the data. U.S. and EU officials are working on updating the agreement and their differences “are about to be solved very soon,” she reported. In addition, U.S. and EU justice officials are working on a new “umbrella” agreement on the prosecution of violators of safe-harbor rules.

Government procurement needs to be addressed when TTIP talks enter the “political” phase, she said. EU companies want more access to U.S. government and state markets. “I don’t think we can conclude an agreement if we haven’t made progress on that,” Malmstrom said. Agriculture, a perennial subject of dispute between the U.S. and EU, are a big part of TTIP negotiations, she said, acknowledging that there are sensitive product areas that might not be part of a deal. “We are looking at TTIP as the basis for liberalization of tariffs across the board, but there are obviously, here in the U.S. and in the EU, some sensitivities that have to be excluded,” she conceded. “We think it is an offensive issue for us,” she added.

EU Plan for ISDS Calls for International Investment Court

As part of a wide-ranging concept paper that EU Trade Commission Cecilia Malmstrom unveiled May 6 for reforming investor-state dispute-settlement (ISDS) rules, is a proposal to create an international investment court with permanent judges and an appellate mechanism. Creation of a permanent court would address concerns that current ad hoc

tribunals pose conflicts of interests because members are sometimes also counsel for parties in other disputes (see story above). “We address fears of an unhealthy link between arbitrators and the parties to a dispute. This improved system would move away from individual, ad hoc cases to become much more like traditional courts. It sets out clearly that our goal is a permanent, international investment court,” Malmstrom said in her prepared statement to the European Parliament where she discussed her plan.

The initial response of ISDS critics to her paper was cautious. One source said they are waiting to see an actual proposal and not just a concept paper. Moreover, critics complain that words in an agreement don’t always restrict how arbitration panelists interpret rules in practice.

Because creating an international court will take time, Malmstrom said a first step would be to revise the ISDS rules in bilateral agreements, including the Transatlantic Trade and Investment Partnership (TTIP). The plan would require the selection of arbitrators from a pre-vetted list and their appointment jointly by the EU and the U.S. in the case of TTIP instead of by the parties. In addition, it would set “the qualifications requirements to become an arbitrator at the same level as those of judges,” she said.

Malmstrom noted that what she was presenting to the parliament “is a concept paper not a legal proposal.” A proposal will come later after the parliament and member states have a chance to review the paper and comment on it.

The EU commissioner noted that some reforms to ISDS rules have already been made as part of free trade agreements the EU has concluded with Canada and Singapore. The new paper would take those reforms further, she said. Malmstrom also said ISDS provisions are needed in TTIP even though the U.S. is a functioning democracy because “U.S. courts are not obliged to follow commitments that the U.S. takes internationally. And the U.S. does not always respect its international commitments. The U.S. has the most WTO cases against it of any WTO member, for example.”

The 12-page concept paper acknowledges concerns that were raised on the ISDS issue in public comments submitted to the EU Commission last year (see **WTTL**, Jan. 19, page 4). Those comments addressed (1) the protection of the right to regulate; (2) the establishment and functioning of arbitral tribunals; (3) the review of ISDS decisions through an appellate mechanism; and (4) the relationship between domestic judicial systems and ISDS. The concept paper responds to each of those issues.

The paper says the EU should propose ISDS provisions that will enhance the ability of governments to regulate in the public interest through language that states have the right “to take measures to achieve legitimate public policy objectives, on the basis of the level of protection that they deem appropriate.” It addition, the agreement should recognize “the right of domestic authorities to regulate matters within their own borders which exists already under international law.” It should also clarify “that the agreement shall not be construed as preventing a Party from discontinuing the granting of state aid, and/or requesting the reimbursement of state aid already paid, when such state aid has been declared prohibited by its competent authorities.”

Just as the call for an international investment court is a goal beyond TTIP, the concept paper also proposes a permanent appellate mechanism. Until then, “the EU proposal should include a bilateral appellate mechanism for ISDS,” the paper says. “The appellate

mechanism would review awards as regards errors of law and manifest errors in the assessment of facts (this would include an incorrect factual treatment of domestic law as interpreted by domestic courts), ensure consistency in the interpretation of TTIP and increase legitimacy both on substance and through institutional design by strengthening independence, impartiality and predictability,” it explains. The appellate mechanism could be modeled on the World Trade Organization (WTO) Appellate Body or the International Court of Justice, it adds.

The paper also address concerns about parties seeking parallel remedies both in domestic courts and through arbitration, saying a party would have to choose one or the other. In addition, it says provisions should confirm that: “the application of domestic law does not fall under the competence of ISDS tribunals; domestic law can be taken into account by ISDS tribunals only as factual matter; and any interpretations of domestic law made by ISDS tribunals are not binding on domestic courts.”

EU to Seek Public Comments on Export Control Reforms

The EU’s slow move toward export control reforms for dual-use products may be about to accelerate, EU Trade Commissioner Cecilia Malmstrom indicated May 6. In a presentation to the European Parliament mostly about ISDS rules, Malmstrom also reported that the EU Commission is “moving ahead with our ongoing review of the EU’s system of export controls on dual-use goods” (see related story page 2).

Malmstrom said the commission is assessing the economic, social and environmental impacts of options in a “communication” sent the parliament in May 2014 (see **WTTL**, May 12, 2014, page 1). “We are collecting a lot of data. We aim to launch a full written public consultation in the middle of the year,” Malmstrom said in her prepared statement. The goal is to “finish the impact assessment process by the end of the year,” she added.

“That would allow us to make a proposal in the first half of next year. In the meantime, we are engaging with the [European] Council and with you so that we have a full understanding of the political landscape,” she said. The EU initiated its review of export controls in 2011 with a “Green Paper” that outlined the issues facing EU controls.

The May 2014 communication identified four reform priorities that 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 said it considers evolving controls to include a “human security” approach that recognizes that security and human rights are inextricably interlinked. It said its review will consider more countries with proliferation capabilities, non-state actors, rapid scientific and technology advancements, and more complex and vulnerable supply chains.

According to David Hayes, who writes the “Exporting from Europe” column in our sister publication, *The Export Practitioner*, EU officials met last October with industry and

civil society representatives. “What was clear to me at the meeting was that there is far from unanimous support for the expansion of controls into a poorly defined ‘human security’ arena,” Hayes wrote in his November 2014 column. He also noted that some in Europe oppose consolidation of more powers to the EU Commission.

“There is a popular mistrust of European institutions and their tendency to pull powers toward the center and a natural tension between member states and the collective,” Hayes wrote. “This mistrust can often read across into concerns that broadly drafted, vague terminology is one method the EU uses to expand its reach, and some would say its interference, into areas which are properly the domain of member states,” he added.

OFAC Guidance on Cuba Puts Requirements on Ferry Services

Ferry services that are approved to transport passengers to Cuba from the U.S. will need to assure that those passengers meet the restrictions that allow Americans to visit Cuba, according to new guidance Treasury’s Office of Foreign Assets Control (OFAC) issued May 5. Along with the new guidance, the Obama administration has opened the way for more Americans to travel to Cuba with the approval of licenses for several ferry services to carry passengers to the island nation.

Even with licenses in hand, ferry companies will need to document that U.S. passengers are eligible to travel to Cuba under one of the 12 allowed categories. “Persons subject to U.S. jurisdiction providing travel or carrier services pursuant to an OFAC general or specific license shall be required to retain for at least five years from the date of the transaction a certification from each customer indicating the section of the CACR [Cuban Assets Control Regulations], or the specific license, that authorizes the person to travel to Cuba,” the OFAC guidance noted.

And it’s not just with OFAC that ferry providers need to be authorized. “Additionally, separate authorization from Commerce Department’s Bureau of Industry and Security (BIS) is required for the temporary sojourn to Cuba of both aircraft and vessels. Persons engaging in these activities may require additional authorizations by other U.S. government agencies,” the guidance said.

An OFAC spokesperson would not provide details on the widely reported licensing of the ferry services. “I can confirm that OFAC has issued certain specific licenses for passenger ferry service, but we cannot provide additional details as to whom or how many,” Treasury spokesperson Hagar Chemali wrote in an email to WTTL. “I would note the Cuba regulations have not changed. There is no general license authorizing passenger ferry service between the United States and Cuba. Specific licenses may be issued on a case-by-case basis,” she wrote.

Individual companies were not as cautious. Havana Ferry Partners posted its success on its Facebook page. “Just this morning Havana Ferry Partners LLC has received the approval from both the U.S. Treasury Department/OFAC and the U.S. Commerce Department/BIS to operate our passenger/cargo ferry from four S. Florida Ports to Havana, Cuba. This is a Historical event,” the company wrote. International Port Corp (IPC) issued a traditional press release. IPC “received U.S. Licenses today from both the U.S.

Treasury Department and the U.S. Commerce Department for direct passenger ferry service from Florida to Cuba,” it said. “Through IPC’s direct container shipping division, from Miami to Cuba, IPC has security clearance for vessels and terminal privileges,” the company added. Other companies may soon follow through the port gates. CubaKat posted a notice on its website: “CubaKat’s goal is to offer our ferry service, from the Florida Keys to ports within Cuba, some time in 2015. Currently, we’re working with officials from both countries to make this venture a reality.”

Meanwhile, JetBlue announced a weekly flight from New York (JFK) to Havana with its partner Cuba Travel Services beginning July 3, and Swift Air reportedly will begin flying non-stop between Baltimore and Havana in September. “The milestone makes JetBlue the first major carrier to announce a new flight to Cuba from New York since travel restrictions were recently eased,” the company said in a statement. The news followed JetBlue CEO Robin Hayes’ participation in a trade mission to Cuba with N.Y. Governor Andrew Cuomo, the company noted.

Bright Line on Night-Vision Rules Might Be in Eye of Beholder

Proposed changes to U.S. Munitions List (USML) Category XII (night vision) and Commerce Control List (CCL) Category 6, published in the Federal Register May 5, were supposed to offer industry a “bright line” between military and commercial uses of thermal imaging products. The two agencies, however, acknowledge that difference between State and Commerce controls might still be hazy, despite the addition of more product details than are in existing regulations.

Both BIS and DDTC asked for specific comments on the proposed new rules and whether the promised bright line is as clear as the authors think it is. BIS officials previously said the changes won’t see many licenses moving from State to Commerce (see **WTTL**, May 4, page 2).

“As the U.S. Government works through the proposed revisions to the USML and the related proposed new controls on the CCL, the agencies recognize that some proposed control parameters may control items in normal commercial use and on the Wassenaar Arrangement’s Dual Use List,” both notices said.

As expected, the proposed rule would create new “600 series” Export Control Classification Numbers (ECCNs) 6A615, 6B615 and 6D615 for military fire control, range finder, and optical items, revise ECCN 7A611 and add new ECCNs 7B611, 7C611 and 7E611 for military optical and guidance items moving from the USML. It also would add new licensing requirements for items under ECCNs 6A002 and 6A003, including for exports to Canada, while excluding those ECCNs from eligibility for License Exception Strategic Trade Authorization (STA).

On the USML side, the State rule would add almost 70 new paragraphs enumerating the specific items under its jurisdiction, listing such items as laser spot trackers, helmet mounted display (HMD) systems, tunable semiconductor lasers, multi-spectral detector infrared focal plane arrays (IRFPAs), accelerometers and gyroscopes or angular rate sensors. As in previous rules, the Category XII transfers could be the subject of a second proposed rule before final implementation, depending on the comments the agencies

receive. "I suspect as much discussion as there was in the interagency on that particular rule, to get it out, the likelihood exists that it will probably go out in proposed fashion again," Alexander Lopes, director of the BIS Office of Nonproliferation and Treaty Compliance, told the agency's Materials Technical Advisory Committee (MTAC) May 7.

A proposal on Category XIV (toxins) "has been particularly difficult because of the equities among the different government agencies," Lopes said. "We are near closure -- I think I might have said that a year ago," he joked.

Nonetheless, he said he expects a proposed rule "within the next month." BIS and State will combine the proposal on Category XVIII (directed energy weapons) with the toxins rule, "since there's little impact on the Commerce Control List," Lopes said.

In the May 5 notice, BIS also proposed revising other ECCNs, including: 0A987, optical sighting devices for firearms; 2A984, concealed object detection equipment; 6A004, optical equipment and components; 6A005, lasers, components, and optical equipment; 6A007, gravity meters and gravity gradiometers; 6A008, radar systems, equipment, and assemblies; 6A107, gravity meters and gravity gradiometers; 7A001, accelerometers; 7A002, gyros or angular rate sensors; 7A003, inertial measurement equipment or systems; 7A005, Global Navigation Satellite Systems receiving equipment; 7A101, accelerometers; and 7A102, gyros.

"In order to maintain consistency with the Wassenaar Arrangement, proposed revisions to these ECCNs would not amend the control parameters in the Items paragraph of the ECCNs. Rather, most amendments add notes to the Related Controls paragraph or specific subparagraphs of the Items paragraph to reference the corresponding control under Category XII of the USML," the notice said.

EU Plans for Single Digital Market Raise Concerns

An EU Commission "communication" to the European Parliament and Council May 5, outlining plans for creating a Digital Single Market (DSM), has drawn concerns from U.S. industry that the proposal could exclude foreign Internet and e-commerce providers from the market. Release of the plan comes just weeks after the EU upset some U.S. providers by launching an antitrust investigation April 15 of Google's Android operating system and its issuance of a Statement of Objections to Google alleging the company has abused its dominant position in the markets for general Internet search services.

The plans for a DSM include an examination of current EU policies on audio-visual products and services, a topic of long-running dispute between the U.S. and EU. "The Commission will review the Audiovisual Media Services Directive with a focus on its scope and on the nature of the rules applicable to all market players, in particular measures for the promotion of European works, and the rules on protection of minors and advertising rules," the communication promises.

The Commission's communication outlines three main "pillars" on which it will base the DSM plus 16 proposals it will make over the coming year to achieve its goals. "Achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally," the

document says. “Europe has the capabilities to lead in the global digital economy but we are currently not making the most of them. Fragmentation and barriers that do not exist in the physical Single Market are holding the EU back. Bringing down these barriers within Europe could contribute an additional EUR 415 billion to European GDP,” the communication states. (**Editor’s Note:** Copy of communication and 109-page EU staff working document will be sent to subscribers on request.)

The three pillars for future regulation aim to provide better access for consumers and businesses to online goods and services across Europe; create the right conditions for digital networks and services to flourish; and maximize the growth potential of the European Digital Economy, including through investment in information and communication technology (ICT) infrastructures and technologies such as Cloud computing and Big Data, research and innovation, and public services and skills.

“The Commission will make an amended proposal before the end of 2015 (i) covering harmonised EU rules for online purchases of digital content, and (ii) allowing traders to rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods,” the paper states. It also will submit a proposal for a review of the regulation on Consumer Protection Cooperation in order to develop more efficient cooperation mechanisms.

Among the proposals the Commission said it would make in the next 12 months are: measures on price transparency and regulation of parcel delivery; legislative proposals to end unjustified geo-blocking; a Competition Sector Inquiry into e-commerce; legislation to reduce the differences between national copyright regimes and online access to works and enforcement; legislation to reduce the administrative burden from different value-added taxes (VAT); and “an ambitious overhaul of the telecoms regulatory framework,” focusing on spectrum policy and management, regulatory fragmentation, consistent application of the rules, and promoting investment in high speed broadband networks.

The communication provides an opportunity to reduce barriers to innovation in Europe, said a statement by Dean Garfield, president and CEO of the Information Technology Industry Council (ITI). “Unfortunately, elements of the proposal — namely the possibility of a new regulatory framework for ‘online platforms’ — have the potential to do more harm than good,” he said.

“We are concerned that such regulation would penalize the innovation and creativity that have contributed so much to the economies and societies of both Europe and America. Moreover, some have proposed new platform regulation as a way to affect the market position of U.S.-headquartered tech companies,” Garfield added.

Robert Atkinson, president of the Information Technology and Innovation Foundation (ITIF), said his organization is concerned the proposal as drafted would create a single market for Europe at the expense of the global digital economy. “In particular, the EU should avoid developing European-only, government-led technology standards. When other nations have attempted this, the results have been bad for all concerned,” he said in a statement. In addition, the proposal on ICT services and business models “appears to want to regulate these 21st technologies to fit 20th century regulation,” he said.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Abelardo Delmundo of Toms River, N.J., pleaded guilty April 30 in Camden, N.J., U.S. District Court to conspiracy to violate Arms Export Control Act by shipping \$200,000 worth of firearms parts, including rifle barrels, to Philippines without State licenses. Sentencing is scheduled for Aug. 7. He is out on \$50,000 bond. Kirby Santos was charged April 22 with same violation for his role in scheme (see **WTTL**, April 27, page 8).

MORE EXPORT ENFORCEMENT: Federal jury in Greenbelt, Md., U.S. District Court convicted Sam Rafic Ghanem May 1 after five-day trial for attempting to illegally export defense articles, specifically firearms parts and accessories, to Lebanon in 2013. Ghanem, naturalized U.S. citizen born in Lebanon, owned Washington Movers, Inc., freight forwarding business in District Heights, Md. Articles included 9mm semi-automatic pistols; .40 caliber semi-automatic pistols; AR-15 .223 caliber semi-automatic rifles; and advanced combat optic gun sights. Sentencing is set for Aug. 12.

MORE EXPORT ENFORCEMENT: Ergun Yildiz, resident of UAE, was sentenced to time served and two years' probation in San Diego U.S. District Court May 8 for conspiracy to export marine navigation equipment and military electronic equipment to Iran. He pleaded guilty in October 2014. Yildiz was president of Tig Marine, Dubai company that codefendant Koorush Taherkhani, Iranian national and resident, allegedly used as "front company." Taherkhani remains at large. Arash Ghahreman of Staten Island, N.Y., was convicted in April of related charges and will be sentenced in July (see **WTTL**, May 4, page 9).

RUSSIA: Moscow has turned to WTO to counter sanctions it faces for actions in Ukraine. It asked for dispute-settlement consultations with Ukraine May 7 to resolve complaint that Kiev has maintained antidumping duties on ammonium nitrate from Russia. Also on May 7, it initiated dispute-settlement process with EU over EU's "cost adjustment" methodologies used to calculate antidumping margins in investigations and reviews of several Russian products. Russia has brought four cases to WTO since joining in 2012, including three against EU.

SERVICES: USTR requested comments in Federal Register May 8 on Mauritius' participation in Trade in Services Agreement (TISA) talks. It invited comments on "the nature of any existing barriers to trade in services with these markets or issues affecting the supply of services to these markets through various modes of supply and technologies." Comments due by June 8.

TRADE FIGURES: Merchandise exports in March fell 6.5% from year ago to \$127.1 billion, but up from record lows in February, Commerce reported May 5. Services exports gained 4.2% to \$60.8 billion from March 2014. Goods imports dipped 0.24% from March 2014 to \$197.6 billion, as services imports gained 6.9% to \$41.6 billion. Numbers reflect "sharp increase in imports following resolution of the labor dispute at West Coast ports, which depressed imports sharply in February and created a backlog of shipments that has now been worked off," Commerce said. Much of export decline was due to drop in refined petroleum prices from year ago, including for exports to Canada, Brazil, China, South Korea and other Latin and Central American countries. Merchandise exports for first quarter 2015 fell 4.8% from year ago to \$381.2 billion. Services exports gained 4.3% to \$182.1 billion from first quarter 2014. Goods imports declined 2.0% from first quarter 2014 to \$569.9 billion, as services imports gained 5.5% to \$123.2 billion.

SACCHARIN: In 6-0 negative "sunset" vote May 7, ITC determined revoking antidumping duty order on saccharin from China would not renew injury to U.S. industry.

BYRD AMENDMENT: In one more ruling on Byrd Amendment, Court of Appeals for Federal Circuit affirmed May 7 in *Pat Huval Restaurant & Oyster Bar, Inc. v. ITC* CIT decision that granting eligibility retroactively to supporters of antidumping and CVD cases initiated before law's passage didn't violate Constitution's due-process clause (see **WTTL**, May 4, page 7).