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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

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## DDTC Clarifies Position on Firearms Policy, Maybe

In an attempt to clarify the applicability of its threshold for congressional notification under the International Traffic in Arms Regulations (ITAR), State's Directorate of Defense Trade Controls (DDTC) Nov. 4 issued what some call "conflicting" guidance in response to a firearms industry group that questioned the definition of "firearm" as well as why the $1 million notification threshold is lower than for other defense items.

> In his response to F.A.I.R. Trade Group, DDTC licensing chief Tony Dearth cited "long-standing practice," as well as agency determination given the lack of definition in the statute. "Following prior legal and policy review, the Department determined that… the statutory requirement to notify firearms could reasonably be interpreted as applying to items identified in paragraphs (a), (b), (c), (d), (e), and (g) of USML [U.S. Munitions List] Category I," Dearth wrote.

"Therefore, DDTC's long-standing practice has been to notify Congress of export licenses" for those items that meet the statutory threshold, he added. Regarding the lower dollar threshold, Dearth wrote, "The congressional notification thresholds are established in the statute, and DDTC does not control the threshold amount."

Former DDTC official Christopher Stagg called the guidance "conflicting." "Conspicuously absent from that common definition are [firearm] components…, such as a barrel or receiver. Thus, DDTC's statement … is a red-herring," he wrote. Contrary to its dubious assertion, Stagg wrote, DDTC has no such 'long-standing practice.' "Even if it did, a 'long-standing practice' that is contrary to law does not somehow make it valid, though it does reveal DDTC's non-compliance with the ITAR," Stagg wrote in a blog post Nov. 7.

## TPP is Dead, TTIP on Uncertain Ground

With Republicans retaining control of the House and Senate and capturing the White House during the election Nov. 8, the Trans-Pacific Partnership (TPP), at least in its

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current form, is all but dead as Republican leadership confirmed that a lame-duck vote will not happen. Though the Transatlantic Trade and Investment Partnership (TTIP) received less attention during the U.S. presidential campaign, its future could be tied up with that of TPP, as the president-elect vowed to review or renegotiate all trade deals.

"If the next president wants to negotiate a trade agreement, he has the opportunity to do that and to send it up," Senate Majority Leader Mitch McConnell (R-Ky.) told reporters Nov. 9. "It's certainly not going to be brought up this year and …I think the president-elect made it pretty clear he was not in favor of the current agreement."

Presumptive Senate Minority Leader Chuck Schumer (D-N.Y.) reportedly told the AFL-CIO executive council that a vote on TPP would not come up during the lame-duck session. It appeared Nov. 11 that the Obama administration also had resigned itself to this outcome. "We have worked closely with Congress to resolve outstanding issues and are ready to move forward, but this is a legislative process and it's up to Congressional leaders as to whether and when this moves forward," U.S. Trade Representative (USTR) spokesman Matt McAlvanah said in a statement.

Speaking before the Foreign Affairs Council that day, European Union (EU) Trade Commissioner Cecilia Malmstrom said the ministers had taken stock of where they stand on TTIP. "Obviously by the end of the year we need to see exactly where we are to see how we can safeguard some of the progress we have made, and then there will be a natural pause with the new administration to see what's happened. It's reasonable to think there will be a pause. How long remains to be seen, but … this is an agreement that makes a lot of sense from the European Union side and from the United States side, as well. We will be ready to resume negotiations when the new U.S. administration feels that they are ready, but the ball is in their court," said Malmstrom.

## Trade to be Central Issue for Trump

President-elect Donald Trump has rattled the business community and foreign trade partners with his anti-trade rhetoric during the election campaign, but his ability to make major changes in U.S. trade policies may be limited. Except for U.S. trade remedy laws and trade sanctions, a president's authority is restricted by congressional powers and the U.S. Constitution, and there is no sign so far that pro-trade Republicans in Congress, especially on the House Ways and Means Committee or Senate Finance Committee, would go along with changes to the U.S. tariff schedule.

While Trump has promised to renege on the Iran nuclear deal, he has expressed no interest in U.S. export controls or shown that he knows they even exist (see related story, page 4). His position toward sanctions on Russia and Cuba is vague and also could be restrained by international realities.

Trump's threat to pull out of NAFTA and disengage from the World Trade Organization (WTO), if pursued, would create turmoil for U.S. trade relations, although the actual

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implementation of such a course would face many hurdles. To end tariff-free treatment for NAFTA partners or other free-trade countries or adherence to the WTO's most-favored-nation (MFN) tariff rules, would require a major revision of the U.S. Harmonized Tariff Schedule, which only Congress has the power to amend under the Constitution except in the few cases where that authority is delegated specifically to the president.

In a series of tweets Nov. 9, WTO Director-General Roberto Azevedo congratulated the president-elect on his victory, while subtly trying to convince him to stay in the multilateral regime. "The WTO stands ready to work with the new administration. Ready to support the administration to ensure trade is a positive element in a new strategy for development and job creation. U.S. leadership in the global economy and the multilateral trading system remains vital. It's clear many feel trade isn't working for them. We must address this and ensure trade delivers the widest benefit to the most people."

> To renegotiate NAFTA, other bilateral free trade agreements or WTO rules sounds easier than experience has proven in TPP and Doha Round negotiations. Many provisions of NAFTA would be revised by TPP and, as those talks showed, getting further concessions from Mexico and Canada would be very difficult. Other nations have their own internal interests to protect. The leverage the U.S. once had during Uruguay Round negotiations no longer exists. Even the master of the "art of the deal" may find it hard to push trade partners to bow to U.S. demands.

To raise tariffs on Mexican or Chinese imports unilaterally to a level that would have any impact on the state of U.S. manufacturing except for a few selected industries would require rate increases of 10% or 25% or more. There is no indication that lawmakers would have the stomach to impose such broad tax increases on consumer goods or industrial supplies. More vigorous enforcement of U.S. antidumping and countervailing duty laws, including under rules related to currency manipulators, is certainly possible but would provide selected benefits for certain industries and not the entire manufacturing base.

Even if some in Congress were willing to go along with Trump on trade actions against China and Mexico, retaliation by those countries would not necessarily be tit-for-tat. Without imposing retaliatory measures against the U.S., which could be complicated, China and Mexico could just find alternative sources for their imports, particularly for food and finished goods, including commercial aircraft, industrial machinery and production equipment. Read that as Boeing, GE and Caterpillar. Australia, Canada, Brazil and Argentina would be glad to replace U.S. farm exports, while Europe and Japan would be ready to supply industrial products. The strong farm block in Congress understands that.

Any attempt to shift nearly 70 years of bipartisan support for open trade toward protectionism would definitely set off alarms among Washington lobbyists for both U.S. and international companies. Lobbyists, who run to the sound of gunfire whenever the word trade is mentioned, would likely swarm Congress in opposition to such moves. Globalization has gone too far to allow major disruptions to global supply chains that link

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American and foreign industries regardless of whether they are importers, exporters or merely domestic producers. A more likely scenario may be a reprise of the early years of the Obama administration when the White House stalled engagement in the Doha Round and postponed picking up the Bush administration's efforts toward a Pacific trade pact. Until a new trade consensus can be developed, the U.S. might make a lot of noise but be absent from new trade negotiations.

## Mixed Prospects for Export Controls, Sanctions Under Trump

U.S. exporters are unlikely to see any major change in licensing rules under the Export Administration Regulations (EAR) or the Arms Export Control Act (AECA) during the incoming Trump administration. Trade sanctions, however, could become the subject of potential changes in regard to Iran, Russia and Cuba. Enforcement of the Foreign Corrupt Practices Act (FCPA), which has produced billions of dollars in fines under the Obama administration, could be eased in a Trump administration if it takes a more accommodating, business friendly stance on regulations.

> Export licensing controls did not come up as an issue during the presidential campaign. While national security was a major topic, the subject dealt mostly with the fight against terrorism and ISIS but didn't get down to the level of how defense-related goods are handled by the Bureau of Industry and Security (BIS) or the Directorate of Defense Trade Controls (DDTC).

The seven-year process of export control reform, which is nearing its completion, has reshaped the topography of export regulation in a way that a new administration is unlikely to undo. "The objectives of the reform effort are now baked in to the system," BIS Assistant Secretary Kevin Wolf told the agency's Update conference in Washington Oct. 31. In the coming years, BIS and DDTC "will continue to review and adjust the controls to ensure they are clear, do not inadvertently control on the USML [U.S. Munitions List] items in normal commercial use, and account for technological developments," he added.

Because the Iran nuclear deal was just an executive action rather than a treaty, President-elect Trump could use his powers to pull out of the agreement or to invoke its "snapback" provisions. While that would be a popular stand, especially for both Republicans and Democrats who opposed the deal from the start, the actual fulfillment of the promise could be difficult to keep. The snapback provision allows participants in the agreement to reimpose sanctions if Tehran is found to be violating the accord. While there are claims that Iran isn't living up to its commitments, that fact has not yet been proven.

A unilateral decision to pull out of the deal or invoke the snapback provisions might appease critics of the pact but could leave the U.S. alone in its policy toward Iran and not necessarily change Iranian policies or behavior. The Joint Comprehensive Plan of Action (JCPOA), which went into effect on Implementation Day Jan. 16, 2016, was the product of so-called P5+1 talks that included the U.S., China, France, Germany, Russia, the United Kingdom and the EU.

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Washington, including then-Secretary of State Hillary Clinton, worked hard to get those other countries to impose common sanctions on Iran, and there is no indication that they would follow the U.S. to the exit door at this point by abandoning the JCPOA and putting sanctions back in place. On the contrary, many companies in those partner countries have already rushed to take advantage of the pact and enter business deals in Iran. Most American firms have not followed suit because of remaining U.S. sanctions. At this stage, absent verification that Iran has violated the accord, it would be difficult to rebuild the coalition for sanctions.

> Nonetheless, Congress is poised to renew the Iran Sanctions Act (ISA) of 1996, which expires Dec. 31, with new, tougher provisions that would give Trump authority to impose new restrictions on Iranian trade. House Foreign Affairs Committee Chairman Ed Royce (R-Calif.) is set to introduce a10-year renewal of ISA for consideration during the lame-duck session of Congress (see **WTTL**, Oct. 31, page 7).

The U.S. position on Russian sanctions in a Trump administration remains unclear. The ostensibly friendly attitude of Donald Trump toward Russian President Vladimir Putin suggests that his administration might seek a deal with the Kremlin to get the sanctions lifted. Such a move is fraught with complications and might undermine Trump's claim of toughness. It would be naïve to think Russia would give Crimea back to Ukraine or pull its troops and support out of Eastern Ukraine just in exchange for the lifting of sanctions without additional concessions on NATO issues. EU members would likely have their own concerns about a deal like that, while rebuilding a multilateral position on Russian aggression would not be easy.

The opening of relations, trade and tourism with Cuba might be hard to reverse at this point. The anti-Cuba coalition is no longer as strong as it once was, and even Cuban-Americans in Florida have started to embrace the new relationship. A Trump administration, however, could slow down the pace of rapprochement and demand more political and economic reforms from Havana before any new regulatory or legislative changes are made to remaining trade sanctions.

## Commerce Initiates Steel Anti-Circumvention Inquiries

Commerce is looking into whether certain imports of corrosion-resistant steel products (CORE) produced in Vietnam are using carbon hot-rolled and cold-rolled steel flat products made in China to avoid antidumping and countervailing duty orders on CORE from China. The department formally initiated anti-circumvention inquiries in the Federal Register Nov. 14. The U.S. has unleashed a slew of antidumping and countervailing duty orders against China in recent months (see **WTTL**, Oct. 31, page 5). The petitioners said Chinese steel producers immediately began shipping their products to Vietnam for corrosion-resistant modification then to be sent on to the U.S. and were thus able to pay Vietnam's lower tariff rate. Petitioners requested both an investigation and the suspension of imports of CORE products from Vietnam. Commerce in its notice said the

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corrosion-resistance processing in Vietnam accounts for very little of the products' value, perhaps between 10 and 31%, "depending on whether the underlying substrate is already cold-rolled."

The inquiries come at the request of the original petitioners: ArcelorMittal USA LLC, Nucor, U.S. Steel, AK Steel, Steel Dynamics, Inc. and California Steel Industries.

## USTR Will Review Argentina's GSP Status

The USTR's office will conduct a public review process to determine whether Argentina meets Generalized System of Preferences (GSP) criteria, USTR Michael Froman told the first meeting of the U.S.-Argentina Council on Trade and Investment Nov. 7. Argentina was suspended from GSP in 2012 due to outstanding arbitral awards to two U.S. companies that have since been settled.

> "I am particularly pleased by Argentina's support in launching a plurilateral initiative in the WTO to prohibit harmful fisheries subsidies, and its commitment to discuss intellectual property issues that are essential to the success of the United States' and Argentina's innovation economies. The progress we have made together today will help deepen the United States' trade relationship with Argentina, for the shared benefit of our two countries," Froman said in a statement.

The U.S. Trade and Development Agency in October announced it is resuming its program in Argentina for the first time since 2005, and Export-Import Bank announced its return to country the month before (see **WTTL**, Oct. 31, page 6). More than 500 U.S. companies operate in Argentina, and two-way goods and services trade totaled $23.4 billion in 2015, according to the USTR's office. The Council will next meet in Washington in 2017.

## WTO Panel to Review Export Restrictions on Raw Materials from China

The WTO Dispute Settlement Body (DSB) Nov. 8 established a panel, per U.S. request, to examine China's export restrictions on 11 raw materials. Two weeks before the DSB's special meeting, the U.S. requested the panel, a request China rejected. Per WTO rules, members can block a request for panel formation only once (see **WTTL**, Oct. 31, page 3).

"China specifically committed to abide by fair, non-discriminatory access to raw materials when it joined the WTO. We intend to hold them to that commitment to ensure that our workers and businesses get all the economic opportunities they're entitled to under our trade agreements," USTR Michael Froman said in a statement. China has exercised export restraint on antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin, which USTR describes as "key inputs into a wide range of American products in vital industrial sectors."

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In a statement to the DSB, China expressed its "disappointment" with the U.S. decision to request the establishment of a panel again. "China's policies concerning the products at issue are integral part of the comprehensive measures taken to promote the scientific management on natural resources products and strengthen the ecological environment protection with the purpose to achieve sustainable development," it noted. China said it published its Total Export Quotas of Industrial Products and Agricultural Products of 2017 Oct. 31 and accused the U.S. of failing to "carefully review" the new measures.

The EU also requested the establishment of a panel to address China's export restrictions on certain raw materials a request China also rejected. The DSB will next meet Nov. 23.

## AIA Urges Completion of Covered Agreement Negotiation

The American Insurance Association (AIA) said it welcomed the progress made during the latest round of covered agreement negotiations between the U.S. and European Commission. Officials from Treasury, USTR and the European Commission met Oct. 31-Nov. 1 in Brussels.

"Both sides continued to discuss in good faith matters relating to group supervision, exchange of confidential information between supervisory authorities on both sides, and reinsurance supervision, including collateral," U.S. and EU negotiators said in a joint statement Nov. 7.

> In the absence of a U.S. regulatory system considered equivalent to the EU's Solvency II Directive, which went into effect Jan. 1, U.S. insurance groups have faced discrimination, the industry group maintains. AIA urged the two sides to reach a successful conclusion that eliminates EU barriers to cross-border reinsurance trade and to operations of U.S. insurers with a presence in Europe.

In July, insurance industry groups including AIA said they supported the TTIP talks as a better opportunity to "create enduring structures for broad, ongoing regulatory cooperation." Now that TTIP's future is more uncertain, they may be taking a second look at the covered agreement (see **WTTL,** July 11, page 7).

"A successful covered agreement must give U.S. insurance groups certainty that they will not face discriminatory treatment from EU regulators now and in the future. We remain very concerned that European regulators continue to treat U.S. insurance groups less favorably than they treat European insurers and insurers from other countries," said Steve Simchak, AIA director of international affairs, in a statement.

## * * * Briefs * * *

OFAC: In Federal Register Nov. 4 OFAC removed Former Liberian Regime of Charles Taylor Sanctions Regulations from Code of Federal Regulations. President Obama in November 2015 lifted sanctions that had targeted former Liberian President Taylor and affiliates (**WTTL**, Nov. 30,

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2015, page 11). At same time, OFAC removed references to agency's fax-on-demand service to reflect discontinuation of that service. Agency terminated service in June due to lack of user demand.

BRAZIL: Brazil Nov. 11 requested WTO consultations with U.S. regarding countervailing duties on imports of Brazilian cold and hot-rolled steel flat products. Brazil claims U.S. measures inconsistent with parts of Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Article VI of GATT. Commerce slapped countervailing duties on Brazilian steel companies CSN and Usiminas in August (see **WTTL**, Aug. 15, page 5).

EXPORT ENFORCEMENT: Chinese national Xianfeng Zuo was sentenced Nov. 4 in New Haven U.S. District Court to 15 months in prison for trafficking in counterfeit goods/services. Charges are related to scheme to obtain and illegally export sophisticated Xilinx semiconductors stolen from U.S. military. Zuo pleaded guilty in March and has been detained since his arrest in December. Codefendant Daofu Zhang was sentenced in July to 15 months for related charges (see **WTTL**, July 18, page 10). Zhang pleaded guilty in April. Chinese national Jiang Guanghou Yan also pleaded guilty to related charges in March and is in custody awaiting sentencing.

SANCTIONS: Superseding indictment filed in Manhattan U .S. District Court Nov. 7 added Iranian-Turkish national Mohammad Zarrab to existing case against his brother Reza Zarrab and Iranian citizens Camelia Jamshidy and Hossein Najafzadeh. All were charged with violating U.S. Iran sanctions by conducting international financial transactions on behalf of Iranian government and other blocked entities, including Bank Mellat, between 2010 and 2015 (see **WTTL**, March 28, page 10). Indictment further alleges that defendants participated in financial transactions for benefit of Mahan Air, blocked Iranian airline. Reza Zarrab was arrested in March while other three defendants are at large.

NORTH KOREA: Treasury, via Financial Crimes Enforcement Network (FinCEN), in Federal Register Nov. 9 issued final rule to isolate North Korea from international financial system. Rule would "prohibit U.S. financial institutions from opening or maintaining a correspondent account for, or on behalf of, North Korean banking institutions." In addition, it "further prohibits U.S. financial institutions from processing transactions for the correspondent account of a foreign bank in the United States if such a transaction involves a North Korean financial institution, and requires institutions to apply special due diligence to guard against such use by North Korean financial institutions." Rule goes into effective Dec. 9. Treasury announced in June finding that North Korea is a "jurisdiction of 'primary money laundering concern'" under Section 311 of PATRIOT Act (see **WTTL**, June 6, page 6).

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