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Circuit Court Sides with State on Gun Blueprints Appeal

In a ruling that will certainly anger gun owners and free speech groups, a majority of U.S. Fifth Circuit Court judges ruled Sept. 20 in favor of State's authority to enforce export control laws on unclassified technical data relating to prohibited munitions. In Defense Distributed v. U.S. Department of State, the majority of judges did not rule on the merits of the case, but simply affirmed that the district court did not abuse its discretion in denying an injunction to State's action.

> "Ordinarily, of course, the protection of constitutional rights would be the highest public interest at issue in a case. That is not necessarily true here, however, because the State Department has asserted a very strong public interest in national defense and national security," the judges ruled.

In May 2013, State asked Defense Distributed, an online weapons retailer, to pull gun blueprints off its website, saying it could violate the Arms Export Control Act (AECA). Defense Distributed and the Second Amendment Foundation filed for an injunction to block DDTC's action in May 2015 in Austin, Texas, U.S. District Court. The district court denied the injunction, but the company appealed that ruling to the circuit court.

"Without any evidence to the contrary, the court should have held that the domestic Internet publication of CAD files and other technical data for a 3D printer-enabled making of gun parts and the Liberator pistol presents no immediate danger to national security, especially in light of the fact that many of these files are now widely available over the Internet and that the world is awash with small arms," Judge Edith Jones wrote in dissent (see **WTTL**, Feb. 22, page 5).

WTO Compliance Panel Grounds Airbus Subsidies

The European Union (EU) and Germany, France, the United Kingdom and Spain have provided nearly $22 billion in subsidized financing to Airbus, violating World Trade

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Organization (WTO) commitments, a WTO compliance panel confirmed Sept. 22. The ruling, which caps a decade-long fight between the U.S. and EU, found that not only did the EU fail to comply with previous rulings, it made matters worse by adding new financing for the A350 XWB civil aircraft.

At issue was the provision of financing for design and development to Airbus companies (what the U.S. terms "launch aid" (LA) and what the EU terms "member State financing" (MSF)). In particular, the panel found the EU failed to comply with the obligation under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) "to take appropriate steps to remove the adverse effects or … withdraw the subsidy."

> It found that the effects of the challenged LA/MSF subsidies and the non-LA/MSF subsidies continue to be, respectively, a "genuine and substantial" and "genuine", cause of serious prejudice to the U.S.' interests. The U.S. first requested WTO consultations with the EU in October 2004. The subsidies in question include those relating to the entire family of Airbus aircraft (the A300 through the A380).

Next steps could include an EU appeal and then a negotiated settlement on trade damages, which could last a year. WTO rules provide for three months for an appeal and another three months for trade damages, but countries have exceeded that time in the past, U.S. trade officials told reporters.

Unresolved is a parallel case the EU launched in February 2015 against a Washington State incentive program to keep Boeing operations from moving to South Carolina (see **WTTL**, March 2, 2015, page 3). The EU has tried to tie the two disputes together, but the U.S. wants to keep them separate. In the call with reporters, a U.S. trade official called the two cases at "vastly different levels." The EU case claims a "quarter, maybe a fifth" of the amount of subsidies the EU provides Airbus, he said.

"Today's historic ruling finally holds the EU and Airbus to account for their flouting of global trade rules," said Dennis Muilenburg, Boeing chairman, president and CEO. "This long-awaited decision is a victory for fair trade worldwide and for U.S. aerospace workers, in particular. We commend the administration, specifically the …U.S. Trade Representative, and the U.S. Congress for their unwavering commitment to this matter and to enforcing global trade rules," he said.

Members of Congress and industry groups also welcomed the decision. "This is the largest trade ruling from WTO in history - and they have sided with U.S. manufacturers," said Sen. Maria Cantwell (D-Wash.) in a statement. "With this decisive ruling, it is now time for the EU to come to the table and settle, rather than waiting for future tariffs. Without having to compete against illegal, market-distorting practices, Boeing should win more sales around the world," she added.

"If we want to preserve a rules-based system, then countries, as well as international trade institutions, need to take a stand like this when commitments are broken and not allow clear violations to go on without consequences. We encourage the United States to seek WTO authorization to enact retaliatory tariffs to send a signal to the world that the rules-based trading system still works," Information Technology and Innovation Foundation (ITIF) President Robert Atkinson said in a statement.

BIS Implements 2015 Wassenaar Changes

As promised, Bureau of Industry and Security (BIS) Sept. 20 implemented dozens of changes Wassenaar Arrangement (WA) members agreed to at its December 2015 Plenary. Changes to the Export Administration Regulations (EAR) include revising 58 Export Control Classification Numbers (ECCNs) and adding two ECCNs, as well as adding a General "Information Security" Note. BIS also deleted the requirement for an encryption registration and made other changes to various license exceptions.

> The regime's annual updating of its control lists attempted to address digital technology advances that are moving into all types of products beyond traditional control categories, particularly for consumer products such as phones and televisions (see **WTTL**, Dec. 21, 2015, page 6).

Under Category 5- Part 2, the whole category was rewritten to clarify differences in controls for cryptographic items, non-cryptographic items and items used to defeat cryptography. These items are now controlled under three separate entries, including an existing ECCN (5A002) for cryptographic information security and two new ones: 5A003 for non-cryptographic information security and 5A004 for defeating, weakening or bypassing information security.

At the December plenary, Wassenaar continued its annual practice of raising the threshold for computer controls by adjusting adjusted peak performance (APP) to reflect the growing computation power in consumer and industrial products. This year the regime raised the APP from 8.0 to 12.5 Weighted TeraFLOPS (WT).

The agency also updated the performance parameters of "network infrastructure" items. "In paragraph (b)(2)(A)(1), the performance parameter for aggregate encrypted WAN, MAN, VPN, backhaul or long-haul throughput (including communications through wireless network elements such as gateways, mobile switches, and controllers) is updated from greater than 90 Mbps to equal to or greater than 250 Mbps," it said.

BIS included changes for measuring equipment and machine tool accuracy under ECCN 2B001. "The parameters for machine tools for turning and milling are revised to better align with the Unidirectional Positioning Repeatability (UPR) parameter that was implemented by WA in 2015. Because UPR value is generally proportional to the travel length of axis, WA agreed to set different control values depending on the travel length of machine tools," it said.

As predicted, BIS deleted the requirement for an encryption registration. The encryption registration requirement, which added to the Export Administration Regulations in 2010, "is being deleted to create a more streamlined and efficient reporting processes," BIS noted. At the same time, the agency removed the Foreign National Review requirement associated with deemed exports under License Exceptions APP and CIV. "Statistics indicate that the procedure is not used widely by industry, perhaps because it is not well understood. In addition, the fact that the review procedure has not resulted in any denials in over eight years indicates that government licensing resources should be redirected to other more sensitive licensing issues," BIS said.

Wassenaar Changes Lead to Entity List Updates

BIS' implementation of extensive Wassenaar changes to its regulations had domino effects in license requirements of entities on its Entity List. With a complete rewrite of Category 5- Part 2, certain items became EAR 99. Specifically, BIS deleted ECCNS 5A992/5D992.a and .b, as well as 5E992.a, but kept mass market ECCNs 5A992/5D992.c and 5E992.b.

> In a separate Federal Register notice Sept. 20, BIS updated license requirements for 12 entities in China listed on its Entity List to "all items subject to the EAR." "Currently, the license requirements for each of the twelve entities exclude EAR99 items. With the publication of this rule, EAR99 items will be included in the scope of the license requirements for these entities," BIS said.

These entities include: 33 Institute, 35 Institute, 54th Research Institute of China, Baotou Guanghua Chemical Industrial Corporation, Beijing Aerospace Automatic Control Institute, Beijing Institute of Structure and Environmental Engineering, China Aerodynamics Research and Development Center, Northwestern Polytechnical University, Shanghai Academy of Spaceflight Technology, Shanghai Institute of Space Power Sources, Southwest Research Institute of Electronics Technology and Xi'an Research Institute of Navigation Technology.

Nu Skin Settles SEC Bribery Charges

Provo, Utah-based marketing firm Nu Skin Enterprises, Inc. (Nu Skin US) Sept. 20 agreed to pay the Securities and Exchange Commission (SEC) $765,688 to settle charges of violating the Foreign Corrupt Practices Act (FCPA). The charges relate to a payment of one million RMB (approximately $154,000) its Chinese subsidiary (Nu Skin China) made to a charity to obtain the influence of a high-ranking Chinese official to impact an ongoing provincial agency investigation.

Chinese direct selling laws prohibit the multilevel commission structure employed by Nu Skin US domestically, according to the SEC order. Following an initial investigation, the provincial Administration of Industry and Commerce (AIC) informed Nu Skin China that it had gathered enough information to support charging the company for the unauthorized activities of its sales representatives, it added. "Concerned about the AIC investigation, certain Nu Skin China personnel decided to initiate a charity project in the province in order to affect the outcome of the investigation," the SEC said.

"Given the well-known corruption risks in China, Nu Skin US did not ensure that adequate due diligence was conducted by Nu Skin China with respect to charitable donations to identify links to government or political party officials and to prevent payments intended to improperly influence such persons in violation of the company's anticorruption policy and the FCPA," the SEC noted. Without admitting or denying the charges, the company agreed to pay disgorgement of $431,088, prejudgment interest of $34,600 and a $300,000 civil penalty.

Asia-Pacific Leaders Urge U.S. to Ratify TPP

The 11 other nations involved in the Trans-Pacific Partnership (TPP) talks are warily watching the unfolding drama between the Obama administration and a resistant Congress. World leaders in New York for the UN General Assembly spoke in favor of the deal and warned of the consequences the U.S. will face if it does not ratify the agreement.

> In a widely disseminated video, Rep. Steny Hoyer (D-Md.) said Sept. 21, in reference to the TPP, that "it's not gonna come to a vote." The House Minority Whip continued, "Neither Clinton's for it, Trump's not for it. The majority leader has indicated he's not going to put it on the floor. It's not coming to a vote." Hillary Clinton supported the TPP while secretary of State, but has disavowed the trade agreement as a presidential candidate.

Clinton met with Japanese Prime Minister Shinzo Abe briefly in New York Sept. 19 where he reportedly urged Clinton to support TPP. Abe repeated that message to American business leaders Sept. 21. "Ladies and gentlemen, for the TPP, we will seek approval of our parliament and do so ASAP. Why? Because it is good for free, fair and open trade," he said. "And here is my request to you: Please do ratify the TPP. The Asia Pacific should be much, much, much better off with the U.S. fully being a TPP member. We are simply waiting for you to take a leadership role. 'Come along, America,' should be my own message to you."

Australia's Prime Minister Malcolm Turnbull made a similar statement. "All of us are urging the Americans, the American Congress in particular – as indeed the President is of course – to ratify the TPP. I believe it's a very important call for the United States to ratify it," Turnbull said at a press conference. "It goes beyond just economics. It is a very important statement of America's strategic commitment to the rule of law which has underpinned the prosperity of the Asia Pacific and particularly East Asia," he added.

New Zealand's Prime Minister John Key warned in a speech before the Council on Foreign Relations Sept. 19 that the U.S. could lose political influence in the Asia-Pacific region if it fails to ratify TPP. "There are plenty of countries from China to Korea expressing interest in joining TPP. So our view is that if TPP fails to get ratified during the 'lame duck' period it will be a massive lost opportunity for the United States both for their consumers and business, but also for the geopolitics of the region. Because, in the end, if that vacuum is not filled by the United States, it will be filled by someone else - it has to be," he said.

Vietnam, meanwhile, has delayed TPP ratification. The Vietnamese National Assembly will not consider ratification at its next session, which begins Oct. 20, meaning that the soonest it can be considered is early 2017. Vietnam is considered among the countries that would benefit most from TPP.

President Obama used part of his last address before the UN General Assembly Sept. 20 to tout the TPP, but just a day later Vice President Biden admitted he sees a "less than even chance" that Congress will approve the trade deal before the administration's term comes to a close. The lame-duck session is "our only real shot," he said, "but it's going to be hard. I think it's less than an even chance, but there is a genuine chance. It's possible we can get it passed."

Trump's Proposed Trade Policies "Horribly Destructive," Says Report

Assuming the presidential candidates stick to their oft-repeated trade positions, a Donald Trump presidency would be disastrous, concludes the Peterson Institute for International Economics (PIIE) in a new study unveiled Sept. 19. PIIE not only outlined the worst-case scenarios, its fellows note that the legal framework is already in place.

> "What our study shows, and what I believe to be true, is that while Secretary Clinton's proposed policies would be harmful, they would be foregone opportunities. They would be losses on our foreign policy. They are not horrendous," said PIIE President Adam Posen at an event in Washington.

"Mr. Trump's proposed policies would… be horribly destructive. That is a genuine difference. That is not a partisan call. I don't care … who says the bad policies and I don't care who implements the bad policies. I just don't want them to happen. And I think that's what I and all our authors share," Posen continued.

Marcus Noland, Sherman Robinson and Tyler Moran modeled the impact of Clinton and Trump's proposals, but focused mainly on three Trump scenarios: full trade war, in which the U.S. imposes 45% tariffs on nonoil imports from China and 35% tariffs on the same imports from Mexico with both countries responding to the U.S. in kind; asymmetric trade war in which China and Mexico do not retaliate symmetrically; and aborted trade-war scenario in which U.S. tariffs are imposed for one year.

In the full trade-war scenario, by 2019 4.8 million private sector jobs would be lost, with the largest job losses occurring in nontrade service sectors like wholesale and retail distribution and sales, restaurants and health care. Washington State would see 5% private sector job loss with California, Massachusetts and Michigan seeing job loss in the 4.5-5% range. Sixteen more states would see private sector employment declines of more than 4%. Down to the county level, Los Angeles County would lose 176,000 jobs and Cook County, Ill., 91,000. An asymmetric trade war scenario could see China punishing the U.S. by barring state-owned enterprises from conducting business with U.S. firms, deny key components to supply chains, dumping of U.S. government bonds (China holds more than $1 trillion in U.S. Treasury securities and more than $2 trillion in U.S. financial assets overall), the study found.

> China could also halt the import of U.S. soybeans, resulting in 10% job losses in some rural counties in Mississippi and Missouri. The aborted trade-war scenario could still result in shortages and price rises of consumer products, shutdowns of supply chain-dependent factories, and turbulence in the financial market. The private sector could lose 1.3 million jobs or more than 1% compared to baseline.

But could President Trump actually carry out his trade agenda? PIIE Senior Fellow Gary Hufbauer argued the legal framework is already in place. "The Constitution consigns the regulation of trade internally and externally to the Congress. But what is not so well known in America at large … is that Congress over the last century has delegated enormous amounts of power to the President to restrict trade. And on occasion when we have trade agreements coming up, they grant temporary power to the President to liberalize trade," Hufbauer said.

The North American Free Trade Agreement (NAFTA), for example, has an "escape hatch." Chapter 22 of NAFTA enables any member to withdraw from the agreement after giving six month's written notice to the other signatories. Sections of the Trade Expansion Act of 1962 and the Trade Act of 1974 would help a President Trump get part of the way to his high-tariff goal without leaving the WTO, noted Hufbauer. The Trading with the Enemy Act of 1917 and the International Emergency Economic Powers Act of 1977 could also enable Trump to take drastic actions.

Efforts to amend or block these powers would be time-consuming and unlikely to take place before the next president is inaugurated. It's therefore likely that Trump could survive challenges to his trade policies in U.S. court, argued Hufbauer. "I don't think that American people can rely on the courts or Congress to quickly stop these threats from being carried out if the President were to decide to carry them out. We can expect legal battles obviously in our own courts and in the WTO. And I think this whole array really raises the issue which Congress should look at as to how much power it has delegated the President over the last 100 years to restrict trade," concluded Hufbauer.

* * * Briefs * * *

REBAR: Rebar Trade Action Coalition and its individual members Bayou Steel Group, Byer Steel Group, Inc., Commercial Metals Company, Gerdau Ameristeel U.S., Nucor Corporation, and Steel Dynamics filed antidumping and countervailing duty petitions Sept. 20 at ITA and ITC against steel concrete reinforcing bar from Japan, Taiwan and Turkey.

TRADE PEOPLE: President Obama Sept 20 nominated Tina Kaidanow to be assistant secretary of State for political-military affairs. Kaidanow was named acting assistant secretary in February, replacing Puneet Talwar (see **WTTL**, March 7, page 12). Kaidanow previously served as counter-terrorism coordinator from 2014 to 2016 and as deputy ambassador at U.S. Embassy in Kabul, Afghanistan from 2012 to 2013.

MORE TRADE PEOPLE: Former Commerce Undersecretary for International Trade Stefan Selig defended himself against accusations that he wasted taxpayer dollars on luxury travel and office redesign. In letter to Washington Post Sept. 16, Selig wrote that he followed instructions of department head and, as inspector general's report noted, told his staff he would cover costs beyond what government reimbursed. "I inherited an office in need of repair. All repairs were supervised by the department, not by my office. I paid for the furniture and decoration personally and offered to leave it to the department," Selig added. Selig, who was recruited to Commerce from Bank of America by Secretary Penny Pritzker in 2014, left his post in June.

OFAC: OFAC Sept. 22 designated PacNet Group as significant transnational criminal organization (TCO) pursuant to Executive Order 13581. PacNet is international payments processor and money services business with lengthy history of money laundering. OFAC also designated 12 individuals and 24 entities in 18 countries for assisting PacNet.

EX-IM BANK: President Obama Sept. 20 nominated Claudia Slacik to be Ex-Im Bank board member, replacing Patricia Loui. Slacik was bank's senior VP for export finance from 2013 to May 2016. Obama withdrew Loui's nomination to another term in January (see **WTTL**, Jan. 18, page 1). Prior to joining bank, Slacik held various positions at JPMorgan Chase & Co. and Citigroup. Senate Banking Committee has not acted on Obama's previous nomination of Mark McWatters, leaving Ex-Im board unable to reach quorum.

MORE EX-IM BANK: Kenneth Tinsley named Ex-Im senior chief risk officer Sept. 20. Tinsley joined Ex-Im in November 1979 and has been acting senior chief risk officer since January 2016. He continues to serve as senior VP of credit and risk management. Appointment is subject to approval of Ex-Im board of directors.

ANTIBOYCOTT: Gaylord Industries in Tualatin, Ore., subsidiary of Illinois Tool Works, agreed in June to pay $9,000 to settle five violations of BIS antiboycott regulations. Gaylord allegedly furnished information about business relationships with boycotted countries or blacklisted persons and failed to report receipt of request to engage in restrictive trade practice or foreign boycott against country friendly to U.S. in letters of credit and other documents with UAE and Qatar from May 2011 through December 2013.

BEEF: China lifted ban Sept. 22 on U.S. bone-in and boneless beef from cattle younger than 30 months old. Ban put in place in 2003 after discovery of case of bovine spongiform encephalopathy (aka mad cow disease). "This announcement is a critical first step to restore market access for U.S. beef and beef products. We look forward to prompt engagement by the relevant authorities for further technical discussions on the specific conditions that will allow trade to resume," Agriculture Secretary Tom Vilsack said in statement. Brazil opened market to U.S. beef and beef products in August (see **WTTL**, Aug. 8, page 6).

IRAN: OFAC granted licenses to Boeing and Airbus to sell aircraft to Iran, Treasury said Sept. 21. Airbus spokesperson Justin Dubon told press Airbus applied for two licenses. Newly announced license covers first 17 planes involved in deal (A320s and A330s). Airbus needs second license to cover rest of its Iran deal. Both aviation companies signed multi-billion dollar deals with Iran (see **WTTL**, June 27, page 2). "The licenses themselves are quite limited in that they relate solely to commercial passenger aviation, and there are specific provisions in here that prevent these aircraft from being transferred or conveyed to sanctioned entities in Iran or anywhere else. So there are limitations on this license," White House spokesperson Josh Earnest said Sept. 22.

<u>MTB</u>: ITC Sept. 21 published interim rules on submission and consideration of petitions for duty suspensions and reductions under American Manufacturing Competitiveness Act of 2016 (H.R. 4923). Comments are due 60 days after publication in Federal Register. New rules identify "the types of entities that may file a petition, describe the information that must be included in a petition, provide procedures for public comment, and describe the schedule for filing petitions and public comments," commission said in notice posted on website. ITC unveiled new MTB website week earlier (see **WTTL**, Sept. 19, page 11).

<u>ITC</u>: Jonathan R. Coleman Sept. 23 was named director, ITC office of industries. He has served as acting director since January. Coleman joined commission as international trade analyst in 1996.

<u>TEXTILES</u>: Proposed modifications to U.S.-Chile Free Trade Agreement rules of origin on certain woven fabrics of artificial filament yarn would likely have negligible effect on U.S. imports under agreement, total U.S. imports, total U.S. exports and U.S. production, ITC said in report released Sept. 23 (Pub. 4632). USTR Froman requested report in May (see **WTTL**, May 30 page 9).