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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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BIS Creates New License Exception for Cuba Exports

Among the many changes the Bureau of Industry and Security (BIS) and the Office of Foreign Assets Control (OFAC) issued Jan. 16 for trade and travel with Cuba was the creation of a new license exception that will allow exports of nonsensitive products to Cuba without a license. License Exception Support for the Cuban People (SCP), however, will only cover exports of items that are EAR99 and not products on the Commerce Control List (CCL) or U.S. Munitions List (USML).

The Export Administration Regulations (EAR) and Cuban Assets Control Regulations (CACR) revisions, which became effective with their publication in the Federal Register, hone closely to policy changes President Obama announced in December (see **WTTL**, Dec. 22, page 1). In addition to the regulatory changes, both BIS and OFAC posted extensive Frequently Asked Questions (FAQs) on their websites.

Along with creating SCP, BIS also expanded its existing License Exception Consumer Communications Devices (CCD) in EAR Section 740.19 to allow sales of certain communications equipment to Cuba and not just donations. BIS revised CCD to eliminate technical limitations to covered products to allow exports of all items that are EAR99. SCP will permit license-free exports of a wide range of products, including building materials, farm equipment, and tools used in private enterprises from auto mechanics to hairstylists and restaurateurs. BIS also amended Section 746.2 "to add a general policy of approval for exports and reexports" of environmental protection products.

OFAC amended the CACR to establish a general license for travel tied to 12 types of activities in Cuba but not for tourism. It also redefined the "cash in advance" requirement for food exports to Cuba from "cash before shipment" to "cash before transfer of title to, and control of." In addition, it created a general license for exports of telecommunications equipment. Separately, Commerce reported that Secretary Penny Pritzker "plans to visit Cuba to lead commercial diplomacy efforts sometime this year."

Obama's State of the Union Expected to Launch Fast-Track Bid

President Obama is expected to use his Jan. 20 State of the Union address to launch the administration's drive for fast-track trade promotion authority (TPA). In advance of the

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speech, administration officials have reportedly begun to reach out to business groups to have them ready to issue their usual supporting statements applauding the announcement. Ahead of the talk, the White House also has begun to set up a "deployment campaign" to get Cabinet members involved in meeting with members of Congress and with the private sector to push the legislation. "The administration is trying to do a lot right now behind the scenes to get ahead of whatever he is going to say in the State of the Union," Bruce Josten, vice president of the Chamber of Commerce, told WTTL.

> Despite the expected pitch for fast-track in the State of the Union, the business community is still concerned Obama has not put his full effort behind the legislation. Several sources contrast Obama's approach to how President Bill Clinton worked personally to get approval for granting China permanent normal trade relations status and other trade bills passed during his administration.

"The president has to get involved in this deliberately and specifically," Josten said. "As good as Froman is and as much respect I have for him, he's not President Obama," he said, referring to U.S. Trade Representative (USTR) Michael Froman.

Josten dismissed complaints that industry doesn't know what is in the draft Trans-Pacific Partnership (TPP) and as a result is holding back its full support. "Some sectors know what's in the deal. I'm not sure everyone knows everything," he said. He also disparaged claims that lawmakers don't know what is in the deal. "The same members have been provided copies of the deal by Froman, have been briefed by Froman," he said.

Meanwhile, newly installed chairman of the House Ways and Means Committee, Paul Ryan (R-Wis.), confirmed at a Jan. 13 hearing his support for moving a TPA early in the new Congress. "The first thing we have to do is pass Trade Promotion Authority. TPA would empower Congress to set our negotiating objectives and hold the administration accountable. TPA would also help us get the best deal from our trading partners," he said in his opening statement.

Committee Republicans issued a more fulsome statement in support of TPA Jan. 15. "The new Congress is focused on helping create jobs and giving Americans greater economic opportunity. And America's trade agenda is critical to this effort," a committee press release said. Before the U.S. can complete current trade talks, "Congress must pass what is called Trade Promotion Authority," it said. "TPA gives the U.S. the strongest hand possible when negotiating with our trading partners, showing them that we are serious and that they must put their best offers on the table," the statement added. "TPA is the essential first step for expanding American exports and helping create new jobs, and one House Republicans are ready to take now," it concluded.

House GOP leaders have insisted they need some Democratic votes for TPA before they bring it to the floor because they don't want the measure to be passed with only Republican votes. How many votes they need is still unclear.

With the increase in Republican members after the November election, the party split now stands at 246 to 188 and there are fewer Democrats who might support a TPA bill. Of the 31 Democrats who voted for the U.S.-Colombia Free Trade Agreement (FTA) in 2011, nine are no longer in the House. Of the 59 Democrats voting yea on the Korea FTA the same day, 15 are gone. Democrats voted 2-1 against these two pacts.

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ConocoPhillips Asks BIS for Classification of Condensate

ConocoPhillips, a major oil exploration and production company, has joined the growing line of oil firms seeking commodity classifications from the Bureau of Industry and Security (BIS) for oil condensate that it produces. "We have a commodity classification in front of BIS," Chairman and CEO Ryan Lance told reporters Jan. 14.

> Lance said he was satisfied with new guidance BIS issued at the end of December in its Frequently Asked Questions (FAQ) on what processing would convert crude oil that cannot be exported into condensate that can be exported without a license (see **WTTL**, Jan. 5, page 1).

Although BIS officials have said its classification decisions and guidance reflect no change from past policies and written regulations on the definition of crude oil v. condensate, Lance said the new advice has clarified those policies. "I think a bit of the confusion in the industry was whether it needed to go through a fractionation and distillation phase or was stabilization or other processing that we do to condensate sufficient to classify it as a product," he said. "I think that was the uncertainty we had in the business, and I think BIS is clarifying that," he added.

"We're looking at the rulings and taking a look at how our condensate compares to the condensate they ruled on," he noted. "Every company's situation is a little different. We have a unique circumstance as to where we are sending our condensate," Lance said. Nonetheless, ConocoPhillips' condensate "doesn't have significant differentials" from what has been exported.

Earlier, Lance told a meeting of the Center for Strategic and International Studies that the growing export of condensate that meets Commerce conditions won't have significant impact on the oil surplus that has fueled a 50% drop in oil prices. "It helps but it doesn't eliminate problems we are experiencing in upper Texas and the Gulf Coast," he stated. He questioned suggestions that condensate exports could grow to a million barrels a day. Condensate helps "but by no stretch solves the problem," he said.

Lance also visited Congress to discuss energy issues, including repeal of the ban on crude oil exports. He said more work is needed to build support for a change. "The administration, the Hill and most people recognize that it makes good policy," he told reporters. "People are trying to figure out and understand the politics of it – how do we educate; how do we advocate; how do we describe the current state of the situation in the energy business and why exports are important," he said. "I think it needs a little bit more socialization, more education out there, but I am encouraged that a lot of people understand it and recognize the world we are going into is dramatically different from where we were in 1975 and the policy needs to be updated," he added.

Bangladesh Not Ready to Regain GSP Benefits, Review Finds

An interagency review has found that Bangladesh hasn't done enough to improve its enforcement of labor rights and worker safety to warrant renewing its eligibility under the Generalized System of Preferences (GSP). The GSP statute has lapsed for all participants, so the findings for now are academic. The review found that Bangladesh needs to make more progress in implementing a GSP Action Plan that was supposed to

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get it back on the road to GSP. "In particular, urgent progress is needed to fairly and systematically address reports of unfair labor practices and to advance and implement needed legal reforms," the USTR's office said in a press release.

> "The U.S. Government is concerned about continuing reports of harassment and violence against union activists seeking to establish new unions or to exercise their legal rights. There has also been little progress in advancing the labor law reforms called for in the Action Plan, including changes to ensure that workers are afforded the same rights and protections in Export Processing Zones as in the rest of the country," it said.

"We urge the government to complete remaining factory inspections as soon as possible to prevent recurrence of workplace tragedies such as those that occurred in 2012 and 2013," said USTR Michael Froman in the release. "We also urge the government to accelerate its efforts to ensure workers' rights and to take measures to address continuing reports of harassment of and violence against labor activists who are attempting to exercise their rights," he said.

The review found some progress on fire and building safety. It said over 2,000 initial safety inspections have been completed at garment factories in the last year mostly by North American and European clothing brands and retailers. "These inspections resulted in the closure of at least 31 factories, the partial closure of 17 additional factories, and the identification of needed remedial measures in hundreds more. The government is responsible for the inspection of several hundred more factories and has hired additional inspection teams to carry out and sustain the inspection effort," it reported.

EU Comments on ISDS Provisions Show Public Skepticism

European Union (EU) officials concede they face a political and public relations challenge to overcome an organized effort to have investor-state dispute-settlement (ISDS) provisions dropped from any Transatlantic Trade and Investment Partnership (TTIP) deal. A European Commission (EC) report Jan. 13 on the public comments it received on ISDS shows overwhelming opposition to the provisions but also a campaign to skew the results, which may have made them less representative of true public opinion than the numbers suggest.

> "The consultation clearly shows that there is a huge skepticism against the ISDS instrument," said EU Trade Commissioner Cecilia Malmström in a statement. She vowed that TTIP "would help us protect our strict standards. The European Commission would never even consider an agreement which would lower our standards or limit our governments' right to regulate. Neither would EU Member States, nor the European Parliament."

While it did not release any specific policy recommendations from the comments, the commission identified four areas that it will explore further: the protection of the right to regulate; the establishment and functioning of arbitral tribunals; the relationship between domestic judicial systems and ISDS; and the review of ISDS decisions through an appellate mechanism, the Commission noted. If nothing else, the concerns addressed in the comments mean the commission will keep talking to its stakeholders. "The diversity of perceptions and interests amongst the respondents makes further discussion

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necessary. The aim is to find the optimal way to address all interests and concerns, through an approach that would guarantee effectiveness, balance and transparency," the commission noted in an FAQ on the results.

> ISDS has drawn more public outcry than any trade issue since the ill-fated anticounterfeit agreement. While the EC received almost 150,000 responses to its calls for comment, it said 97% were "submitted through various on-line platforms of interest groups, containing pre-defined, negative answers."

Previously, former EU Trade Commissioner Karel De Gucht admitted to reporters that ISDS opponents figured out how circumvent the EC website where comments were to be filed and avoided having to enter separately answers to 12 questions the EC posed. Some responded just to the question of whether or not they support having ISDS provisions in the pact (see **WTTL**, Sept. 15, page 8).

The EC said all 145,000 of the collective submissions were "taken into account as valid contributions." Of the rest, more than 3,000 replies came from individuals and some 450 from organizations "representing a wide spectrum of EU civil society, including NGOs, business organizations, trade unions, consumer groups, law firms and academics. These replies generally go into more detail on the proposed approach," the EC said.

In addition, the Commission said it received replies from 60 individual companies, including 27 micro companies (less than 10 employees), 14 from small and medium-sized enterprises and 19 from large companies. The latter include very large EU (e.g. Total, Alstom, Veolia, GDF-Suez, Versalis, Daimler, Iberdrola, Repsol) and non-EU (e.g. Chevron, Japan Tobacco, Philip Morris) multinationals, many of which have been involved in high-visibility ISDS cases, it added.

Business groups encouraged the U.S. and EU to maintain the provisions, despite the public concerns. "The inclusion of ISDS in TTIP is crucial as it will provide the means to enforce these principles via a neutral, fact-based and apolitical form of dispute settlement. Such provisions have never undermined or limited in any manner the legitimate ability of States to regulate in the public interest," said a joint statement from groups including National Association of Manufacturers, National Foreign Trade Council, Coalition of Services Industries and the U.S. Chamber of Commerce

WTO Appellate Body Upholds Ruling Against Argentina

The World Trade Organization's (WTO) Appellate Body has upheld a dispute-settlement panel report that Argentina's import restrictions violate WTO trade rules. The Appellate Body's findings were released Jan. 15 even though it completed its work Dec. 12.

The Appellate Body rejected Argentina's complaints about the panel ruling and supported U.S. and EU arguments that a procedure connected to the Advance Sworn Import Declaration, also known as a Declaración Jurada Anticipada de Importación (DJAI), and other trade-related requirements (TRRs) on imports violate WTO rules (see **WTTL**, Sept. 1, page 6). The Appellate Body agreed with the panel that Argentina's "imposition on economic operators of one or more of the five trade-related requirements identified by the complainants as a condition to import or to obtain certain benefits, operates as a single measure" and "constitutes a restriction on the importation of goods and is thus

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inconsistent with Article XI:1 of the GATT 1994." In addition, those requirements modify "the conditions of competition in the Argentine market, so that imported products are granted less favourable treatment than like domestic products."

> Argentina's local content requirement "is inconsistent with Article III:4 of the GATT 1994 because it modifies the conditions of competition in the Argentine market, so that imported products are granted less favourable treatment than like domestic products," it concluded.

"This is a great win for the United States," USTR Michael Froman said in a statement. "Argentina's protectionist measures impact a broad segment of U.S. exports, potentially affecting billions of dollars in U.S. exports each year that support high-quality, middle class American jobs," he added. A release from his office noted that U.S. exports in the 12-month period ending Nov. 30, 2014, totaled $100 billion. The largest export sectors included energy products ($2.9 billion), electronics and machinery ($2.9 bil.), aerospace ($719 million), pharmaceuticals ($453 mil.), instruments and medical devices ($422 mil.) and chemicals ($400 mil.).

Transportation Department Lifts Ban on Mexican Truckers

Ignoring domestic criticism and its own internal audit, Transportation decided to "accept applications from Mexico-domiciled motor carriers seeking authority to operate in long-haul transportation beyond the U.S. commercial zones," it said in the Federal Register Jan. 15. It based the decision on a three-year pilot program that only had 13 participants in the end, out of dozens of applicants. Along with the decision, the department's Federal Motor Carrier Safety Administration (FMCSA) submitted a report to Congress on the results of the pilot program, defending the safety of truckers participating.

> "Evaluating driver out-of-service (OOS) rates, vehicle OOS rates, brake violations, hour of service (HOS) violations, driver fitness violations, and moving violations, along with safety ratings and acute and critical violations, the primary criteria used to measure the safety of motor carriers operating in the United States, the analysis finds evidence that Mexico-domiciled motor carriers operating beyond the commercial zones had safety records that were equal to or better than the national average for U.S. and Canadian motor carriers operating in the United States," the report said.

FMCSA acknowledged an internal report from the department's Inspector General (OIG) reached a different conclusion. The report "indicated that the Pilot Program lacked an adequate and representative sample to make confident projections regarding long-haul operations by Mexico-domiciled motor carriers," the agency noted (see **WTTL**, April 29, 2013, page 6). "Based on their statistical analysis, which was statutorily limited to the Pilot Program carriers, the OIG concluded that the participation of 15 carriers, in relation to the 37 applicants, was not adequate to confidently project safety performance for an unknown future population," it said in its report to Congress on the program.

Domestic trucking associations and unions have long fought the pilot program and the decision to allow Mexican truckers beyond the commercial zone. In its last legal challenge, U.S. Court of Appeals for the D.C. Circuit refused to review the pilot program in an April 2013 decision in a suit brought by the Owner-Operator Independent Drivers

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Association (OOIDA) and the International Brotherhood of Teamsters. "The FMCSA is clearly doing an end-around and playing with numbers to try and justify opening the border to long-haul trucks from Mexico," said Todd Spencer, OOIDA executive vice president, in a statement. "It's clear from the lack of participation that Mexico-based motor carriers are not interested in hauling beyond the commercial zone, if it means complying with the same regulations that U.S. truckers do," he said.

> Teamsters General President Jim Hoffa said in a statement that he was "outraged that the Department of Transportation has chosen to ignore the findings of the DOT Inspector General and is moving forward with a plan to open the border to Mexican trucks in the coming months." He said the IG report makes it clear "the pilot program was a failure."

At issue were approximately $2.4 billion in retaliatory tariffs Mexico imposed on U.S. agricultural and manufacturing goods between 2009 and 2011. The tariffs were permitted by a 2001 NAFTA Arbitration Panel decision, which found the U.S. moratorium on Mexican truckers in breach of its NAFTA cross-border trucking obligations.

Report Debunks Claims of "Reshoring" of U.S. Manufacturing

A report Jan. 12 by the Information Technology & Innovation Foundation (ITIF) attempts to debunk claims that there is a renaissance in American manufacturing that is leading to a "reshoring" of factories and jobs. The report takes aim at it what it calls the "myths" about the renaissance and suggestions that the U.S. is becoming more competitive.

> "Conditions for U.S. manufacturing are certainly better than they were a decade ago, as employment and output are both growing, albeit slowly. Despite this improvement, there is not yet evidence to support the notion of a U.S. manufacturing renaissance. Much of the growth since the recession's lows was just a cyclical recovery instead of real structural growth that will improve long-term conditions, and there is a strong possibility that manufacturing will once again decline once domestic demand recovers," said the report from the technology think tank.

Myth number 1 is the argument that rising labor costs in China are reducing the disparity between pay in the U.S. and China. It concedes that Chinese wages increased 16.7% annually from 2002 to 2009. "Even if Chinese wage growth continues at over 15 percent per year from 2010 to 2015, the average Chinese laborer would still earn just roughly $4.40 an hour, a scant 12 percent of U.S. wages," it contends.

The second myth claims shipping costs give the U.S. an advantage. It concedes that the Baltic Dry Index of shipping costs increased 635% from 2000 to 2008 but dropped 93% during the recession. "Today, shipping costs have returned to normal as the shipping industry readjusts to demand and oil costs decline," it said.

Myth three contends the shale oil and natural gas revolution is lowering costs and attracting energy-reliant manufacturing. "Shale gas and increased U.S. oil production has had only a marginal impact on most industries. The benefits are concentrated in oil and gas refining and energy intensive industries," it said. For 90% of the manufacturing sector, energy costs are lower than 5% of shipment value. "Energy cost reductions will

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have only marginal impact on cost for the vast majority of industries, and will have no significant overarching impact on firm location choices," it argues.

> The fourth myth contends a weak dollar will lead to reshoring. That idea is being undermined by the recent increase in the value of the dollar. "To the extent that the dollar has rebounded, it is less attributable to U.S. competitiveness and more due to uncertainty abroad," the report states.

The fifth myth touts U.S. productivity growth through new technology such as 3D printers. "This idea is convenient, as it both justifies U.S. manufacturing employment losses and presents the United States with a clear road to restoring manufacturing strength," the report says. Moreover, as other reports have also noted, U.S. productivity growth has slowed in recent years and averaged only 2.5% annually since 2009. This compares to 4.2% growth in the European Union and 8.5% growth in China.

* * * Briefs * * *

DRAWBACKS: CIT Judge Delissa A. Ridgway ruled Jan. 13 that Customs' interpretation of 19 U.S.C. Section 1504(a)(2)(C), which provides for deemed liquidation of drawback entries, "is erroneous, arbitrary and capricious, and otherwise not in accordance with law" (slip op. 15-2). Case involves 17 drawback claims filed by Ford Motor Company. "Customs has no legal authority to review, liquidate, or take any other action with respect to the 17 subject Drawback Claims (including the five that Customs purportedly affirmatively liquidated after this action was commenced), other than to recognize the status of those Drawback Claims as deemed liquidated as of December 3, 2005, at the amounts claimed by Ford," she wrote issuing judgment for Ford.

LAWN GROOMERS: In 6-0 "sunset" vote Jan. 12, ITC said revoking antidumping order on tow-behind lawn groomers and parts from China would cause renewed injury to U.S. industry.

FERROVANADIUM: In 6-0 "sunset" vote Jan. 14, ITC found revoking antidumping order on ferrovanadium from China and South Africa would renew injury to U.S. industry.

EX-IM BANK: Michael Whalen has joined Ex-Im Bank as vice president of structured finance, bank announced Jan. 12. He most recently served as head of structured finance department at Overseas Private Investment Corporation.

EXPORT ENFORCEMENT: Hui Sheng Shen, aka Charlie, and Huan Ling Chang, aka Alice, two Taiwanese nationals, were sentenced Jan. 5 in Newark U.S. District Court after pleading guilty to conspiracy to violate Arms Export Control Act (AECA) for attempting to export military technology to China. Shen was sentenced to 49 months in prison, while Chang got time served. Both pleaded guilty in September 2014, and remain in custody. Pair originally were charged in April 2012 following their arrest in New York on drug importation charges.

MORE EXPORT ENFORCEMENT: Netria Corporation in Exeter, N.H. was sentenced Jan. 13 in Concord, N.H., U.S. District Court to one year probation for violating Arms Export Control Act by exporting two Lockheed Martin fuel quantity indicators without State licenses in April 2009. Company pleaded guilty in October 2014. Netria also agreed to forfeit $12,560.

TRADE PEOPLE: President Obama renominated Adewale Adeyemo Jan. 16 to be Treasury assistant secretary for international markets and development, to replace Marisa Lago, whom he nominated to be deputy USTR (see **WTTL**, Nov. 17, page 6). Adeyemo currently is deputy chief of staff at department.

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