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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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CIT: ITAR Workers Not Eligible for TAA

Workers who lost jobs involving items subject to the International Traffic in Arms Regulations (ITAR) are not eligible for Trade Adjustment Assistance (TAA) due to foreign competition or imports, because their ITAR work must be done domestically, ruled Court of International Trade (CIT) Judge Gregory Carman Aug. 11. Carman upheld a Labor Department decision to reject a request from former workers at Boeing's Defense and Space (BDS) Division in Wichita, Kan., to be certified eligible for TAA benefits.

> "Because products and services covered by ITAR must be domestically produced and serviced, this work cannot shift abroad. Military aircraft and associated equipment are included. Therefore, products or services covered by ITAR do not meet the criteria for TAA eligibility," Carman ruled.

Boeing had sold off its commercial aircraft operations in Wichita and kept open BDS to work on programs owned by the U.S. and foreign military. "Labor discovered that the Boeing Wichita facility did not engage in new production of commercial or military aircraft but rather modified existing military aircraft," Carman noted (slip op. 14-92)

"Despite management's effort, the Boeing Wichita facility continued to struggle financially," he wrote. "The record shows that the lack of work coupled with the U.S. Department of Defense's budget cuts led to Boeing's decision to close its Wichita facility this summer," he added. After the closing, the International Association of Machinists &Aerospace Workers' local filed for TAA for the workers with Labor.

"During its review of Petitioners' application for certification eligibility, Labor learned that the Boeing Wichita's facility did not produce commercial aircraft during the period of investigation and had not produced military aircraft for several years even predating the period of investigation," Carman wrote. "Rather, Labor discovered that Plaintiffs were engaged in employment related to the maintenance and modification of military aircraft covered by the International Traffic in Arms Regulations," he noted. Carman said the CIT had reached a similar decision in 2009 on a petition from Honeywell employees.

Trade Growth Remains Slow in First Half of 2014

The strong post-recession bounce in trade has become a memory as U.S. exports and imports have slowed in the last two years, and first half of 2014 trade figures show

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continued lethargy. In the first six months of the year, exports inched up just 2.2% from the same period in 2013, while imports gained 3.3%. These numbers mask some sharp shifts in several sectors, reflecting regional differences as well as technology changes (see charts). The highly publicized boom in U.S. oil and gas production has had an impact on both exports and imports, including in volume and prices. This is seen most clearly in U.S. trade with nations belonging to the Organization of Petroleum Exporting Countries (OPEC).

Preliminary U.S. Goods Exports--Imports
Selected Markets -- First 6 Months 2014 v. 2013
(In billions; Seasonally adjusted)

	Exports 2014	Exports 2013	% Change	Imports 2014	Imports 2013	% Change
Total	$801.7	$781.4	2.6	$1,166.2	$1,129.5	3.3
Canada	152.3	148.9	2.3	169.0	164.1	3.0
EU	138.6	128.8	7.6	208.2	190.0	9.6
China	60.9	57.4	6.0	226.1	215.5	4.9
OPEC	39.7	44.8	-11.5	73.0	78.1	-6.6
Japan	33.6	32.5	3.5	67.8	70.2	-3.4
Africa	19.4	18.1	7.0	17.5	27.5	-36.3
S. Korea	22.4	20.2	11.2	33.7	31.5	6.8

U.S. imports from OPEC members dropped 11.5% in the first half from a year ago. The declines came primarily from Saudi Arabia and Nigeria. At the same time, U.S. exports of these products jumped, including for crude oil exempt from the U.S. ban, rising 131.4% so far this year.

Exports for Selected Sectors
First 6 Months 2014 v. 2013
(In billions; Seasonally adjusted)

	2014	2013	% Change
Autos	$77.1	75.3	2.5
Organic Chemicals	15.9	17.8	-10.6
Civilian Aircraft	27.5	25.4	8.4
Crude Oil	5.1	2.2	131.4
Gold	10.8	20.9	-48
Weapons	1.2	2.3	-46
Corn	6.8	3.4	103

The decline in oil trade also hurt U.S. imports from Africa, which dropped 36.3%, due almost entirely to the drop in oil imports from Nigeria, the largest African exporter to the U.S., but whose oil exports to the U.S. have been shrinking nearly steadily for five years. The Obama administration tried to counter this decline with the sponsorship of a U.S.-Africa Business Forum in Washington Aug. 4-5 that was attended by some 40-50 African leaders, and the signing of a presidential executive order Aug. 5 directing Commerce to establish a President's Advisory Council on Doing Business in Africa and to offer other help for exports to Africa.

Imports for Selected Sectors
First 6 Months 2014 v. 2013
(In billions; Seasonally adjusted)

	2014	2013	% Change
Autos	$160.5	$150.2	6.8
Petroleum Products	166.4	175.4	-5.0
Pharmaceuticals	45.5	42.4	7.4
Computers	30.2	32.1	-5.8
Iron-Steel Products	11.9	8.8	35.3
Chemical Fertilizers	7.3	8.6	-15.1
TVs, Video Equip.	14.3	15.3	-6.8

The rebound in Europe's economy helped drive a 7.6% increase in U.S. exports to the European Union (EU) in the period from January to June compared to the same period last year.

Imports from the EU grew even faster at 9.6%, propelled by auto imports and machinery. The strong improvement in the auto sector, didn't help Japan, which exported 3.4% less goods to the U.S. in the first half compared to a year ago. Several individual sectors pop out for their significant ups and downs. Exports

of nonmonetary gold, which may be used for jewelry as well as by financial institutions and investors, plunged 48% in the first six months of the year versus 2013. Gold prices are down slightly from a year ago when a price drop caused a buying frenzy, but industry reports show a deep decline in gold buying in the second quarter of this year due to the turmoil in Asia and the Middle East and less buying from China and India.

A category described only as "weapons" shrank 46% and organic chemicals slid 10.6%. At the same time, corn, which suffered a drought last year that caused shortages and decline in exports, bounced back 103% so far in 2014.

> Technology changes and consumer preferences have hurt computer imports, which declined 5.8% in the first six months, and also television and video equipment, which was off 6.8%. The decline in TVs may be due to the sharp drop in prices for flat-screen TVs.

U.S.-Korea Free Trade Agreement critics, who complained that the first two years of the deal had seen a sharp increase in the trade deficit with Korea, may have less to criticize based on the latest numbers. The deficit with Seoul appears to be stabilizing, and U.S. exports saw a strong 11.2% increase so far this year, while imports increased 6.8%.

The U.S. steel industry's battle against imports may see new complaints in the coming months, as iron and steel product imports surged 35.3% in the first half. The American Institute for International Steel (AIIS), which represents steel importers, has also raised concern that escalating trade sanctions against Russia for its support of rebels in Ukraine and Moscow's retaliation against U.S. farm goods could disrupt the existing suspension agreement Commerce has with Russia covering imports of hot-rolled steel. The agreement was first signed in 1999 and had its reference price mechanism adjusted in 2002.

"Specifically, we are concerned that Russia's actions yesterday may increase the likelihood that the revised U.S.-Russia agreement suspending the U.S. antidumping investigation on hot-rolled steel from the Russian Federation is in more significant jeopardy than it was before the Russian import bans were imposed," AIIS said in a statement. It said any Commerce decision "on whether to terminate this agreement should be made on the basis of an impartial assessment of the facts and evidence presented with respect to the request to terminate the agreement —which we believe is working as intended — and not on the basis of any geopolitical considerations."

Trade in services increased just 3% in the first half to $350.6 billion from a year ago. The gain was due almost entirely to improvements in the travel and transportation sector, which saw trade grow 5.9% to $90.4 billion, and in maintenance and repair services, which grew 35% to $9.4 billion from the same period in 2013.

Some Registered Lobbyists to Be Welcomed Back to ITACs

The Obama administration has walked back one of its early actions to ban registered lobbyists from membership on Industry Trade Advisory Committees (ITACs), including those that advise Commerce and the U.S. Trade Representative (USTR). In the Federal Register Aug. 13, the Office of Management and Budget (OMB) issued revised guidance to allow registered lobbyists back on ITACs if they meet specific conditions. The notice says it is intended "to clarify that the ban applies to persons serving on advisory com-

mittees, boards, and commissions in their individual capacity and does not apply if they are specifically appointed to represent the interests of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, environmental groups, etc.), or state or local governments."

> The OMB notice responds to a lawsuit filed by six registered lobbyists who claimed the ban violated their First Amendment rights and denied them of a government benefit. After the D.C. U.S. District Court rejected those arguments and dismissed the suit, the D.C. Court of Appeals in January reversed and remanded the ruling, ordering the lower court to hear the case. Before the district court could take it up again, the government and the lobbyists informed the court that they were working on a settlement agreement. The court gave them until Aug. 13 to reach a deal.

In September 2009, the Obama administration, in what it claimed was a good-government effort to open advisory committees to the public, told ITAC members that are registered lobbyists that they wouldn't be allowed to remain on the panels after Feb. 17, 2010, when their current terms expire (see **WTTL**, Oct. 5, 2009, page 3). In June 2010, President Obama issued a memorandum making the policy official with the goal of ending "the undue influence of special interests." OMB published its original guidance on the policy in 2011. As expected, industry reacted strongly to the original ban.

Industry had claimed that half of the 330 members then on ITACs would be barred from membership under the new rules. That worst-case scenario didn't come to pass, as ITACs simply recruited different representatives of the same companies and associations as the barred members, but who weren't registered lobbyists. Not surprising, public interest groups on social media blamed revised policy to the influence of money in government.

The appellate court ruling, written by Circuit Judge Harry Edwards, agreed with the lobbyists that membership on the ITACs was a benefit and their First Amendment rights deserved protection. Edwards was dismissive of many of the government's arguments. Listening to government lawyers, "one might get the impression that this case is about the President's ability to select his Chief of Staff or White House Counsel. Nothing could be further from the truth," he wrote.

Edwards also noted that Congress created the ITACs and their advisory role with the purpose of getting industry advice on trade. "Unlike many advisory committees, ITACs exist for the very purpose of reflecting the viewpoints of private industry," he wrote. In sending the case back to the district court, he cited Obama's Presidential Memorandum and suggested the "court may also want to ask the government to explain how banning lobbyists from committees composed of representatives of the likes of Boeing and General Electric protects the 'voices of ordinary Americans'."

Court Rejects Motion to File Amicus Brief in Wood Flooring Case

Parties involved in antidumping cases at the Court of International Trade (CIT) can't seek to file *amicus curiae* briefs when they should be intervenors in the suit, CIT Senior Judge Donald Pogue ruled Aug. 11 (slip op. 14-93). In his decision, Pogue denied a motion filed by the Alliance for Free Choice and Jobs in Flooring (AFCJF) for permission to submit an *amicus* brief in a pending suit challenging Commerce's antidumping

order on multi-layered wood flooring from China. The litigation has produced two remands and two corresponding redeterminations so far.

> "Movants seek to blur the line between intervenor and *amicus*," Pogue wrote, noting that AFCJF includes some importers and exports that participated in the investigation as separate rate respondents. "Specifically, they want a zero rate for all separate rate respondents. While a pecuniary interest in the outcome of a case does not preclude a nonparty from *amicus* standing, 'an *amicus curiae* is not a party to litigation' and is not entitled to seek relief," he stated.

Pogue said a*micus* standing should not become a substitute for intervention. "Movants here seek not so much to be a friend of the court as to compensate for a failure to timely intervene," he wrote. "Here, the Movants' brief merely duplicates Plaintiffs' and Plaintiff-Intervenors' briefs. This is neither desirable nor useful to the court," he added. While Movants claim AFCJF brings a unique and informative perspective to the court, "the proposed *amicus* brief merely repeats or incorporates by reference arguments already made before the court by Plaintiffs and Plaintiff-Intervenors," Pogue argued.

Briefs in Pulungan Case Debate "Willfulness" Standard

The case of Doli Syarief Pulungan, the Indonesian man whose conviction for exporting riflescopes to Indonesia was overturned and is now filing to collect compensation for his legal fees, continues to rack up billable hours. Ahead of an evidentiary hearing set for October in the Madison, Wis., U.S. District Court to determine whether Pulungan is entitled to a certificate of innocence, attorneys for Pulungan and Justice have filed opposing briefs arguing over the interpretation of "willfulness" in the criminal prosecution of export control violations (see **WTTL**, March 24, page 10.) Pulungan filed a motion in July asking the court to clarify use of that word.

> "Mr. Pulungan contends that the law of the matter is clear, and that his burden as to 'willfulness' is to show that he did not have knowledge of the law --*i.e.,* he did not know the riflescopes were a defense article or that a license was required to export them," his attorneys at Quarles & Brady in Madison wrote. "The government contends otherwise, but the 7th Cir-cuit has spoken to this matter now twice. Thus, the government's argument, and its attempt to re-litigate this issue, should be rejected," they added.

Justice disagreed. "In preparation for the upcoming evidentiary hearing, the parties have asked this Court to clarify which standard this Court intends to apply when evaluating Pulungan's claim of actual innocence - the heightened standard or the *Beck* standard. Pulungan asks this Court to find that the heightened standard is the law of the case," Justice said in reply. "The United States maintains that this Court is not bound to accept an erroneous concession of law, and the law of the case doctrine does not require otherwise. The United States has not conceded that the heightened standard applies in this Certificate of Innocence case," it added.

Pulungan contends it was unclear whether the scopes he was accused of exporting were a defense article or dual-use and a commodity jurisdiction ruling said they were dual-use

subject to the Export Administration Regulations (EAR). Justice brushed aside this claim. "Regardless of whether the Court determines that, as a matter of fact, the Riflescope was a 'defense article' or a 'dual-use' item in 2007, Pulungan cannot show he meets the actual innocence prong of the Certificate of Innocence requirements because, as a matter of law, a conspiracy to export the Riflescopes constituted a violation of federal criminal law either way," it argued.

> "In a criminal case, the United States is limited to the charges in the indictment, and is not free to argue that the jury should convict the defendant because of uncharged conduct. But, in a Certificate of Innocence case, the Court can consider whether an acquitted person's conduct might have constituted any other offense, even when that offense was not charged, provided the conduct was related to the charged offense," it asserted.

A scheduled March hearing in the case was postponed because Pulungan couldn't get a visa to travel to the U.S. Then a July 24 hearing was moved to early October, since the former date was the end of Ramadan and it proved difficult to get a translator.

In June 2009, the Seventh Circuit Court in Chicago threw out Pulungan's conviction of violating the Arms Export Control Act (AECA), saying the government had not proven that the scopes were manufactured to military specifications. Four years later, Pulungan filed a claim for compensation for his legal fees and an apology for prosecution. In November 2013, U.S. Court of Federal Claims Judge Thomas Wheeler dismissed a Justice motion to have Pulungan's suit for compensation thrown out and stayed the case to give Pulungan another chance to get a "certificate of innocence" from Madison federal court.

OFAC Urges Caution in Applying "Controlled By" Rule

As the Obama administration continues to expand sanctions against Russian and other entities, Treasury's Office of Foreign Assets Control (OFAC) tried to clarify confusion about its existing policies on companies "controlled by" but not necessarily owned by blocked entities. New guidance issued Aug. 13 may not end that confusion.

> In court papers filed in May as part of a legal fight over the applications of sanctions against Russian officials, Treasury seemed to narrow significantly the meaning of when a third party is "owned or controlled by" a person placed on the Specially Designated Nationals (SDN) list. In effect, it said an entity is "controlled by" an SDN only when the department says it is - at least under the Russian and Ukraine sanctions (see **WTTL**, May 19, page 1).

In new guidance on its website, OFAC said U.S. persons "are advised to act with caution when considering a transaction with a non-blocked entity in which one or more blocked persons has a significant ownership interest that is less than 50 percent or which one or more blocked persons may control by means other than a majority ownership interest."

Caution is needed because the agency doesn't preclude future action against those companies. "Such entities may be the subject of future designation or enforcement action by OFAC. Furthermore, a U.S. person may not procure goods, services, or technology from, or engage in transactions with, a blocked person directly or indirectly (including through a third-party intermediary)," it added. In Frequently Asked Questions (FAQs) posted

along with the guidance, OFAC said its 50 Percent Rule "speaks only to ownership and not to control. An entity that is controlled (but not owned 50 percent or more) by one or more blocked persons is *not* considered automatically blocked pursuant to OFAC's 50 Percent Rule." The agency "may, however, designate the entity and add it to the SDN List pursuant to a statute or Executive order that provides the authority for OFAC to designate entities over which a blocked person exercises control," it cautioned.

> OFAC also clarified its position on aggregate or joint ownership. "OFAC's 50 Percent Rule applies to entities owned 50 percent or more in the aggregate by one or more blocked persons," it declared. For example, "if Blocked Person X owns 25 percent of Entity A, and Blocked Person Y owns another 25 percent of Entity A, Entity A is considered to be blocked. This is so because Entity A is owned 50 percent or more in the aggregate by one or more blocked persons," it explained.

Treasury's May opinion was in a letter to the U.S. Court of Federal Claims in a suit by Space Exploration Technologies Corp. (SpaceX) to block a government contract with United Launch Services (ULS), a joint venture between Lockheed Martin and Boeing, for rockets for Defense launches. SpaceX claims the Russian rocket engines ULS uses come from NPO Energomash, which it says is controlled by Russian Deputy Prime Minister Dmitry Rogozin, who was named to the SDN list March 17.

* * * Briefs * * *

SUDAN: OFAC Aug. 11 expanded scope of general license (GL 1A) authorizing certain academic and professional exchange activities between U.S. and Sudan that are otherwise prohibited by Sudanese Sanctions Regulations (see **WTTL**, April 22, 2013, page 8). Changes include expanding definition of "U.S. academic institutions" to include third-country branch campuses and contractors; authorizing U.S. academic institutions to engage in necessary activities, such as accepting payments for tuition, admission application fees, and document certification or warehousing fees, involving Sudanese nationals; and allowing U.S. financial institutions to process transfers of funds by Sudanese nationals to pay fees and expenses (including tuition, living expenses, and enrollment fees).

EXPORT ENFORCEMENT: Federal jury Aug. 11 convicted Ali Saboonchi, U.S. citizen in Parkville, Md., of conspiracy and seven counts of exporting manufactured industrial products and services to Iran. Saboonchi and Arash Rashti Mohammad (Rashti), Iranian citizen and resident, were indicted March 7, 2013, in Greenbelt, Md., U.S. District Court for exporting items, including cyclone separators, thermocouples, flow meters, actuator springs and others, from November 2009 to present without Treasury authorization. Sentencing is set for Feb. 2, 2015. Saboonchi was released on bond, while Rashti is at large, believed to be living in Iran.

RUSSIA: UK's Export Control Organization (ECO) issued guidance and Frequently Asked Questions (FAQs) Aug. 14 on how it is applying EU sanctions imposed on Russia (see **WTTL**, Aug. 4, page 5). It added Russia to list of "non-permitted destinations" for various licenses as well as for Open General Trade Control Licence (OGEL) for Category C goods and OGEL for Trade and Transportation: Small Arms and Light Weapons.

TRADE PEOPLE: Jonathan Poling, formerly with counterespionage unit in Justice's national security division, has become partner at Akin Gump. He was recently at Baker & McKenzie.

EDITOR'S NOTE: In keeping with our 50-week publishing schedule, there will be no issue of ***Washington Tariff & Trade Letter*** on Aug. 25. Our next issue will be Sept. 1.