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DDTC Clarifies Definitions of Retransfer, Release

A week after final harmonized export definitions went into effect, State's Directorate of Defense Trade Controls (DDTC) issued a revision to the definition of "retransfer" to clarify that temporary transfers to third parties and releases to same-country foreign persons are within the scope of the definitions.

At the same time, DDTC in the Federal Register Sept. 8 responded to public comments on the difference between DDTC and the Bureau of Industry and Security (BIS) definition of "release," specifically how it relates to theoretical access to technical data. In comments posted in July, commenters on DDTC's previous interim final rule took issue with a number of definitions and provisions (see **WTTL**, July 25, page 5). The definitions went into effect Sept. 1.

In the latest final rule, DDTC acknowledged the conflict. "The Department confirms that simply allowing a foreign person in the United States to possess a defense article does not require authorization under the ITAR unless technical data is revealed to that person through the possession, including subsequent inspection, of the defense article, or that person is taking the defense article into an embassy," it said.

Also in the final rule, DDTC clarified that the definitions of reexport and retransfer do not apply in the context of the Defense Trade Cooperation Treaties with Australia and the United Kingdom. "These treaties are controlling law, and the Department realized that, unless a correction were made in this final rule, the ITAR definitions of 'reexport' and 'retransfer' would be inconsistent with the treaty definitions," it said.

Washed Up: U.S. Loses Appeals in WTO South Korea Washers Case

In the first World Trade Organization (WTO) case dealing directly with Commerce's use of targeted dumping methodologies in antidumping investigations, the U.S. has exhausted

its last appeal. The WTO Appellate Body Sept. 7 rejected most of the U.S. appeals in the years-long battle on behalf of Whirlpool against its South Korean rivals Samsung and LG.

South Korea first brought the case against Commerce's implementation of antidumping and countervailing duties on large residential washers in August 2013. The Appellate Body said Commerce's approach to calculating antidumping duties and some countervailing duties on the washers was flawed, reversing decisions of a previous panel.

The U.S. did succeed in that the Appellate Body affirmed that WTO rules permit alternative methodologies in the face of targeted dumping. The ruling does not immediately eliminate U.S. imposed duties from 2013, but per WTO rules, the U.S. is expected to bring its rules into line with the Appellate Body's decision. Should the U.S. fail to meet its obligations, South Korea could request trade sanctions.

The Appellate Body criticized the March 2016 findings of the WTO dispute-settlement panel. The panel upheld South Korea's claim concerning the disproportionality finding in both determination and redetermination because Commerce did not conduct required relational analysis. It also upheld South Korea's claim that Commerce did not take into account two mandatory factors of de facto specificity. The panel rejected Korea's challenge of Commerce's determination that tax credit subsidies aren't tied to a particular product. Both the U.S. and South Korea appealed the panel's findings.

Following Commerce's decision to impose antidumping duties on Samsung and LG washers made in South Korea, those companies shifted production of large residential washing machines to China. Whirlpool once again complained and Commerce imposed preliminary antidumping duties in July (see **WTTL**, Aug. 1, page 7).

CBP Offers Guidance for Handling Hanjin Diversions

Three days after South Korean shipping company Hanjin's bankruptcy caused havoc in the cargo trade, Customs and Border Protection (CBP) Sept. 2 issued guidance on vessel diversions for Hanjin cargo in four different scenarios. Just days later, five members of the Congressional PORTS Caucus urged the administration to intervene even further.

"In anticipation of possible disruptions due to Hanjin Shipping vessels or cargo arriving to U.S. ports, CBP is providing the attached processing scenarios to help trade and CBP identify procedures to follow to prevent disruptions," CBP said in a notice to industry and partner government agencies.

Hanjin filed for bankruptcy Aug. 31, causing headaches for port operators and global retailers (see **WTTL**, Sept. 5, page 3). "The South Korean company made the filing with the Seoul Central District Court after its banks withdrew their backing, viewing a plan to tackle Hanjin's debt as insufficient," CBP said in its notice.

CBP outlined four scenarios, including when: a Hanjin vessel diverted to foreign port discharged or not discharged; Hanjin vessel diverted to another U.S. port and discharged

or not discharged; Hanjin vessel rests at anchor and not diverted; and in-bond (IT and T&E) cargo already in the U.S. moving under Hanjin's bond to a U.S. port for entry or export.

Four days later, five California House Democrats urged further action in a letter to Commerce Secretary Penny Pritzker Sept. 6. "As the co-chair and members of the Congressional PORTS Caucus, we call on you to step in and start discussions with Hanjin and South Korea to come to an agreement that guarantees our ports and our workers will be paid and these ships will be unloaded," they wrote. Letter signatories were Reps. Janice Hahn, Grace Napolitano, Alan Lowenthal, Julia Brownley and Loretta Sanchez.

U.S., India Remain at Impasse in WTO Poultry Dispute

At the Sept. 5 meeting of the WTO Dispute Settlement Body (DSB), the U.S. and India continued to clash over whether India complied with a previous WTO ruling that it modify its import ban on U.S. poultry.

The U.S. claimed at the July 19 DSB special meeting that India missed two deadlines to come into compliance, and therefore the U.S. requested authorization to impose \$450 million annually in additional duties on imports from India. The request was referred to arbitration at that time (see **WTTL**, July 25, page 3).

India maintains that it is now in compliance with the rulings and recommendations, therefore the U.S. has no legal basis. India called for an investigation into its compliance first instead of entering into arbitration over the U.S. request for retaliation.

The U.S. countered that nothing in WTO rules require such a sequence of procedures and that India's modifications have not brought the country into compliance with the DSB's findings. However, the U.S. said in a written statement that it "remains open to working with India on a mutually agreed resolution to this dispute."

G20 Leaders Pledge to Fight Protectionism, Help Environment

As expected, world leaders gathered in Hangzhou, China Sept. 4-5 for the G20 summit to address global economic recovery and environmental concerns. Though the group pledged to combat protectionism and currency manipulation, the leaders committed to few concrete deadlines.

Prior to the formal meeting, the U.S. and China officially joined the Paris Climate Agreement Sept. 3. According to a White House factsheet, with the joining of two of the world's largest economies, countries representing approximately 40% of global emissions have joined the pact and 55 more countries have joined or plan to join this year. The official G20 communique did not include a 2016 deadline for the entire G20 to join the

pact. In order for the pact to become law, 55 countries must join and account for 55% of global emissions.

On the sidelines of the meeting, the U.S. and China pledged to press forward on negotiations for a Bilateral Investment Treaty. In a lengthy factsheet released by the White House Sept. 4, the U.S. said it “welcomes the commitments China has made on economic reform, especially on supply-side structural reform, and progress achieved so far, including efforts to strengthen the fundamental role of domestic consumption in driving China’s economic growth.”

“China commits to steadfastly advance supply-side structural reform, concentrating on cutting excess capacity, reducing inventory, deleveraging, lowering costs, and enhancing support for addressing weaknesses in economic and social development, to support China’s transition to a more sustainable growth path,” the White House said.

G20 leaders welcomed the “landing zone” achieved in the Environmental Goods Agreement (EGA) negotiations (see **WTTL**, Sept. 5, page 6). World leaders further called upon all WTO members to ratify the Trade Facilitation Agreement by the end of 2016 and affirmed the importance of the internet as an engine of growth and spread of knowledge across borders.

In further efforts to level the playing field, G20 leaders vowed to refrain from competitive currency devaluations and not target exchange rates for competitive purposes. They called for the formation of a Global Forum to address steel excess capacity. The Forum is to provide a report at the next G20 meeting scheduled for July 2017 in Germany.

Union leaders denounced the lack of progress on addressing the global steel glut. “All of the dog-eared methods for dealing with this global crisis in steel have failed. So American steel executives and steelworkers and hundreds of thousands of other workers whose jobs depend on steel must hope that President Barack Obama used his private meeting with China’s President Xi Jinping Saturday to press for a novel solution. Because on this Labor Day, 14,500 American steelworkers and approximately 91,000 workers whose jobs depend on steel are out of work because China won’t stop making too much steel,” United Steelworkers President Leo Gerard wrote in a blog post Sept. 6.

Sen. Warren, Legal Scholars Blast ISDS Provisions in TPP

More than 200 law and economics professors under the auspices of Columbia University’s Center for Sustainable Investment fired off a letter Sept. 7 calling on Congress to oppose the Trans-Pacific Partnership (TPP) agreement due to its inclusion of the investor-state dispute resolution system (ISDS).

That same day, Sen. Elizabeth Warren (D-Mass.) blasted ISDS in a call organized by Public Citizen. “It allows companies to challenge foreign laws they don’t like, and

potentially win millions or even billions of dollars from taxpayers. These cases are not heard by courts, but instead are heard by a private panel of arbitrators who are usually corporate attorneys. And the decisions from these panels cannot be appealed or reviewed by any actual court,” Warren told reporters.

While ISDS made sense when it was first introduced, those justifications no longer hold up, she said. “What is ISDS used for now? The answer is, it’s about leverage. Leverage for big companies to threaten and intimidate governments who might dare take action that threatens their profits,” added Warren.

One of the letter writers, Professor Jeffrey Sachs, director of Columbia’s Earth Institute, told reporters that in his travels he has found “no advocates of ISDS other than U.S. corporate lobbies. This provision was jammed down the throats of the TPP partners; it has led to a firestorm of protests in Europe right now. It is going to sink TTIP [Transatlantic Trade and Investment Partnership], and it is absolutely a disgrace for President Obama to be pushing it at his last moment.”

The letter called on Congress to pressure the U.S. Trade Representative (USTR) to change course in TTIP negotiations and the Bilateral Investment Treaty (BIT) negotiations with China to ensure ISDS is not included in those pacts. In August, the U.S.-China Economic and Security Review Commission also raised questions about the scope of ISDS provisions in the BIT (see **WTTL**, Aug. 8, page 4). “This system undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law,” the professors noted.

The USTR’s office maintains that TPP upgrades and improves ISDS. In a factsheet on its website, USTR writes that new safeguards underscore countries right to regulate in the public interest, clarify that investors bear burden of proof, and limits damages an investor can recover to damages an investor has actually incurred.

USTR’s factsheet emphasizes that the U.S. has never lost an ISDS case. “We have had only 13 cases brought to conclusion against us, and the United States has prevailed in every case. And in part because we have continued to raise standards through each agreement, in recent years we have seen a drop in ISDS claims, despite increased levels of cross-border investment. Only one new case has been brought against the United States in the last five years.”

But Warren in her remarks dismissed such assurances as “window dressings” and warned that the expansion of ISDS to cover countries like Australia and Japan would expose the U.S. to “many more potential claims.”

Treasury Official Defends \$1.7 Billion Payment to Iran

A hearing of the House Financial Services Subcommittee on Oversight and Investigations Sept. 8 became the latest debate site over the \$1.7 billion paid to Iran in January and Iran

sanctions more broadly. The payment was not a ransom to return U.S. prisoners, but to settle the 30-year-old outstanding claim at the Iran-U.S. Claims Tribunal in The Hague, Treasury Assistant General Counsel Paul Ahern testified before the subcommittee.

“The sanctions regime we built with our international partners had effectively cut off Iran from the international financial system. Iran was very aware of the difficulties it would face in accessing and using these funds if they were in any form other than cash, even after the lifting of sanctions under the Joint Comprehensive Plan of Action,” Ahern said.

The administration announced the settlement in January on State’s website and the timing of the payments was not altered to free U.S. prisoners, Ahern testified. Treasury assisted the Defense Finance and Accounting Services (DFAS) to craft a wire instruction to transfer \$400 million Jan. 14. The money came from the Foreign Military Sales Trust Fund. Treasury worked with DFAS and Federal Reserve Bank of New York to transfer the funds to a European bank where the funds were converted to foreign currency and transported to Geneva. Treasury disbursed payment to an official from the Central Bank of Iran three days later.

The second payment settled the dispute over accrued interest was disbursed from the Judgment Fund. Technical limitations of the Fund meant that the remaining \$1.3 billion balance was broken into 13 claims of \$99,999,999.99 and the remainder of \$10,390,236.28. Treasury disbursed the payments with approval from Justice, Ahern said.

The subcommittee also heard from State and Justice officials. A second panel was comprised of experts from the Foundation for Defense of Democracies, American Enterprise Institute (AEI), Financial Integrity Network, and The Brookings Institute, who generally denounced the payment.

“That the Obama administration blessed a cash payment and allowed the Islamic Revolutionary Guard Corps to take possession of it augments the possibility that it will be used to catalyze terrorism across the globe and blinds the intelligence community and Treasury analysts who have dedicated their careers to keeping America safe,” testified AEI Resident Scholar Michael Rubin. Committee Republicans largely agreed with Rubin’s assessment that the timing of the all-cash payments was tantamount to paying a ransom.

On the other side of the aisle, Democrats forcefully denounced the hearing. Rep. Al Green (D-Texas) angrily announced he did not agree with the “style” of the hearing. “We have a circumstance wherein Americans were being held prisoners have been brought home. The exchange was money that was owed to the people that were holding the Americans and we are condemning that. You would think that we would have a parade. The president would be saluted. The people who negotiated be applauded. But this committee chooses to do what it has consistently done and that is deny this president any success they can block,” Green said.

The same day, the Center for a New American Security (CNAS) released its “The Next Generation of Sanctions” report at an event in Washington. “Balancing implementation of

the [JCPOA] with Iran, which relieved many sanctions, with continued sanctions implementation targeting Iran's support for terrorism, development of ballistic missiles, and efforts to destabilize the region," CNAS fellows Elizabeth Rosenberg and Peter Harrell wrote.

Much of the CNAS event, however, focused on how the next president will deal with Russia, assuming no change in its policy toward Ukraine. Existing sanctions are renewed on a six-month basis. It will be important for the next president to shore up his or her European counterparts especially since "EU support for sanctions is beginning to wane," Harrell said.

*** * * Briefs * * ***

CUBA: BIS in Federal Register Sept. 8 requested public comments on effectiveness of licensing procedures for export of agricultural commodities to Cuba. Comments due by Oct. 11. Comments will be included in biennial report to Congress under Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA).

ENTITY LIST: In Federal Register Sept. 7 BIS added 81 entities under 86 entries to Entity List under Crimea region of Ukraine, Hong Kong, India and Russia. Week earlier, Treasury designated 37 individuals and entities under three Executive Orders (EO) related to Russia and Ukraine (see WTTL, Sept. 5, page 11). "BIS is taking this action to ensure the efficacy of existing sanctions on the Russian Federation (Russia) for violating international law and fueling the conflict in eastern Ukraine," notice said. Entities include 51 Russian subsidiaries of Gazprom OAO.

OFAC: World Class Technology Corporation (WCT) in Portland, Ore., agreed Sept. 7 to pay \$43,200 to settle OFAC charges of violating Iran sanctions. WCT allegedly exported seven shipments of orthodontic devices, collectively valued at \$59,886, from U.S. to Germany, UAE and/or Lebanon, "with knowledge or reason to know that the shipments were intended specifically for supply, transshipment, or reexportation to Iran" between April 2008 and July 2010. Company did not voluntarily self-disclose alleged violations.

EXPORT ENFORCEMENT: Svetalina Zagon was sentenced Sept. 2 in Brooklyn U.S. District Court to time served on charges of unlicensed export of microelectronic products to Russian military and intelligence agencies between 2008 and 2012. She pleaded guilty in May to conspiracy to violate International Emergency Economic Powers Act (IEEPA) and Arms Export Control Act (AECA), and to commit wire fraud. Codefendant Alexander Fishenko, dual citizen of U.S. and Russia, was sentenced July 21 to 10 years in prison and more than \$500,000 in forfeiture (see WTTL, July 25, page 7). He pleaded guilty in September 2015 to more than 20 charges, including conspiracy to violate IEEPA and AECA, and obstructing justice. Codefendants Alexander Posobilov, Shavkat Abdullaev and Anastasia Diatlova were convicted in October and await sentencing.

RUBBER: In 6-0 preliminary vote Sept. 2, ITC found U.S. industry may be injured by allegedly dumped imports of emulsion styrene-butadiene rubber from Brazil, Korea, Mexico and Poland.

TPP: Consumers Union, policy and action division of Consumer Reports, and Consumer Federation of America sent letter to Congress Sept. 6 urging rejection of TPP this year "or if presented at any

time in its current form.” Chief among groups’ criticisms is ISDS. “In short, there is no actual need, and therefore no justification, for including ISDS in this agreement. And there is considerable risk of significant harm to the public. ISDS does not belong in the TPP, and its inclusion is a fatal flaw,” groups noted.

AGOA: AGOA Enhancement Act of 2015 (H.R.2845) passed House by voice vote Sept. 7. Bill directs president to establish African Growth and Opportunity Act (AGOA) website to disseminate information and technical assistance provided by USAID regional trade hubs and link to U.S. embassy websites in sub-Saharan African countries. “AGOA is making a difference and could have even more impact on the continent if the measures included in this AGOA Enhancement Act are implemented,” said bill sponsor Rep. Ed Royce (R-Calif.) during floor debate. Bill received in Senate Sept. 8 and referred to Foreign Relations Committee.

ITC: Happy 100th anniversary, International Trade Commission! ITC was created by Public Law 64-271 Sept. 8, 1916. “Through objective analysis and impartial administration of our trade remedy laws, the ITC has – in many ways – made the impossible possible. Today, the Commission’s work is essential to the development of sound U.S. trade policy that can stand up to the challenges of the 21st century global economy,” House Ways and Means Chairman Kevin Brady (R-Texas) said at centennial book launch Sept. 8.

STEEL: In final votes Sept. 2, ITC found U.S. industry is materially injured by dumped imports of cold-rolled steel flat products from Brazil, India, Russia, South Korea and UK and subsidized imports from Brazil, India, Korea and Russia. Votes were 6-0 on Brazil, Korea and UK and dumped imports from India. Commissioner F. Scott Kieff found that subsidized imports from India are negligible. ITC also found in 6-0 vote that subsidized imports of same product from Russia are negligible.

OPIOIDS: Obama administration Sept. 3 announced “enhanced measures” with Chinese government to combat supply of fentanyl and its analogues to U.S. China to target U.S.-bound export of substances controlled in U.S. but not controlled in China. Fentanyl is more potent than morphine or heroin, is sometimes mixed with powder heroin and is increasingly pressed into pill form and sold as counterfeit prescription opioid pills, said National Security Council Spokesperson Ned Price in statement. Sens. Rob Portman (R-Ohio), Ron Johnson (R-Wisc.) and Kelly Ayotte (R-N.H.) introduced Synthetics Trafficking & Overdose Prevention (STOP) Act (S. 3292) Sept. 7. Proposed legislation would require foreign mail shipped through U.S. Postal Service to provide advance electronic customs data before it enters U.S. UPS and FedEx already meet proposed requirement.

E2C2: DDTC is finalizing an arrangement to “have a couple of people assigned” to Export Enforcement Coordination Center (E2C2), DDTC Chief Brian Nilsson told conference in Washington Sept. 7. “I’ve taken the function from compliance and moved it into my office,” Nilsson said.... At same conference, E2C2 Director Craig Healy said he is moving on, bringing on new director in two months, along with recently hired FBI and Commerce deputy directors. This will be “whole new team” with “some fresh ideas,” Healy said. Transition is not related to upcoming election, Healy told WTTL.