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

# Washington Tariff & Trade Letter®

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Vol. 34, No. 45

November 17, 2014

## Commercial Satellites Move to Commerce

As the transition of commercial satellites from the U.S. Munitions List (USML) to the Commerce Control List (CCL) went into effect Nov. 10, the Bureau of Industry and Security (BIS) and the Directorate of Defense Trade Controls (DDTC) published “cleanup” rules the same day to clarify and correct several provisions of the satellite regulations. The changes, however, still do not address industry concerns about controls on remote sensing and commercial spaceflight (see **WTTL**, May 19, page 4).

There is “certain to be a second rule, where we take into account what we accept or reject from the public comments and when we implement whatever we decide to do on those ... open topics,” BIS Assistant Secretary Kevin Wolf told the agency’s Transportation and Related Equipment Technical Advisory Committee (TransTAC) Nov. 12.

Wolf tried to calm TransTAC concerns that the immediate implementation of the cleanup rule could cause misclassification of items. “We’re very flexible and accommodating when it comes to enforcement” of these products, he said. “To the extent the mistake involves something involved in the transition, and it was an honest, good faith mistake, that you were caught behind or something like that, we’ve not pursued any of those cases, and we’ve been telling people, ‘don’t worry about it,’” Wolf said.

Wolf called the Nov. 10 BIS Federal Register notice a “relatively minor” cleanup rule to address the “inadvertent dropoff” of pressure suits (i.e., space suits) capable of operating at altitudes 55,000 feet above sea level from new Export Control Classification Number (ECCN) 9A515. The rule also included clarifications to other satellite provisions.

Wolf invited the commercial satellite industry to nominate members to join TransTAC. “Now that we’re responsible for commercial satellites, we need to expand the TACs to have expertise from the industry in our TAC community, and the Transportation TAC seemed like the obvious vehicle for that (no pun intended),” he noted.

## Froman Reaches Deal with India on Trade Facilitation

U.S. Trade Representative (USTR) Michael Froman agreed Nov. 13 to give India what it has been seeking since last December – a near-permanent extension of an agreement to

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WTTL is published weekly 50 times a year except last week  
in August and December. Subscriptions are \$697 a year.  
Additional subscriptions with full-priced subscriptions are  
\$100 each. Site and corporate licenses also available.

allow India to subsidize its farmers without facing a challenge at the World Trade Organization (WTO). As part of a deal to let the WTO implement the trade facilitation agreement adopted at its ministerial in Bali in December, the U.S. agreed to support India's demand to keep its food security and public food stockholding programs in place until a permanent solution on farm subsidies has been adopted at the WTO.

Although the Bali agreement created a work program with the goal of completing talks on a permanent solution by the time of the 11th WTO Ministerial Conference at the end of 2017, the publicly released statement on the U.S. agreement with India sets no deadline for such a solution. Presumably, a permanent solution would be part of any Doha Round agreement on agriculture. But with Doha nearly dead and India still able to block any potential Doha text it dislikes, permanent now means permanent.

"We eliminated any ambiguity in Bali about the duration of the so-called 'peace clause,' provided that the food stockpiling programs meet the agreed-upon conditions in Bali," Froman told a press call Nov. 13. Those conditions include transparency and assurance that the programs don't harm other WTO members. One U.S. trade official speaking on background called the Bali agreement language "constructive ambiguity."

In September, the European Union (EU) signaled that it was also ready to meet India's demands for a long-term extension of the peace clause as long as it just meant a clarification of the Bali deal. EU Trade Commissioner Karel De Gucht and Froman discussed that option during a meeting in Washington Sept. 9 (see **WTTL**, Sept. 15, page 6).

A statement by Indian Commerce & Industry Minister Nirmala Sitharaman said she was "extremely happy that India and the U.S. have successfully resolved their differences" in a way that addresses India's concerns about the Bali package. "We supported the Bali Package but when subsequent developments belied that hope, India had no option but to seek a course correction. India, therefore, took the stand that till there was an assurance of our concerns being addressed, it would be difficult to join the consensus on the Protocol of Amendment for the Trade Facilitation Agreement," her statement said.

To save face, U.S. trade officials claim the U.S.-India deal requires no change to the Bali package. The two countries want the peace clause clarification to be adopted by the WTO General Council, which is next scheduled to meet Dec. 10-11. "This breakthrough represents a significant step in efforts to get the Bali package and the multilateral trading system back on track. It will now be important to consult with all WTO members so that we can collectively resolve the current impasse as quickly as possible," said WTO Director-General Roberto Azevedo in a statement. The deal could still face opposition from countries that compete with India in the rice market, such as Pakistan and Thailand.

## **Phase-Out Periods for ITA Tariffs Remain to Be Negotiated**

China's Nov. 10 agreement to reduce the number of products it wants excluded from an Information Technology Agreement (ITA) leaves open the question of how long Beijing will insist the phase-out period should be for tariffs on items covered by the accord. "In trade negotiations there's always issues of how the obligations are phased in over time, and that will be part of what's discussed in Geneva," USTR Michael Froman told a press conference in Beijing Nov. 10. Froman did not identify what concessions the U.S. made

to China to get it to revise its offer and to revive the ITA talks, which were suspended in December 2013. Ahead of the meetings in China, Froman and then-European Union Trade Commissioner Karel De Gucht indicated they were willing to be flexible in meeting China's demands (see **WTTL**, Sept. 15, page 3).

The agreement on resuming the ITA talks came just before the start of the summit of Asia-Pacific Economic Cooperation Forum (APEC) leaders in Beijing. It was widely expected that China wanted to reach an ITA deal as part of a public relations campaign to show its international leadership.

“We are going to take what has been achieved here in Beijing back to Geneva and work with our WTO partners, and while we don't take anything for granted, we are hopeful that we'll be able to work quickly to bring ITA to a successful conclusion,” Froman said. “We now have agreed to more than 200 tariff lines representing about a trillion dollars of trade to be covered by the ITA. For the last six months we've been focused not just on the quantity of the lines, but the quality of the lines. And the lines that have the greatest potential, for example, for U.S. exports, where the U.S. plays a leading role, areas of expected future growth,” he said.

A White House fact sheet identified several products the U.S. expects to be covered by an ITA deal, including some that now face tariffs up to 30%. They include: next generation semiconductors, magnetic resonance imaging machines, computed tomography scanners, global positioning system (GPS) devices, printed matter/cards to download software and games, printer ink cartridges, static converters and inductors, loudspeakers, software media, such as solid state drives, and video games. “We export more than \$2 billion of those products a year, and they face high tariffs around the region,” Froman noted. “This will eliminate those tariffs and allow us to expand our exports,” he added.

“The product lines that are a priority to us and some more will make it to the final round now,” John Neuffer, senior vice president for global policy at the Information Technology Industry Council, said in an email to **WTTL**. “Those lines are few in number, but are very commercially significant. So it was worth the wait,” he added. While the U.S. and China have reached consensus on the product scope for an ITA deal, “much work needs to be done to achieve consensus from the broader group,” Neuffer said.

## **U.S., China Set Goals for BIT Talks in 2015, Extend Visa Periods**

Among the several agreements the U.S. and China reached on the sidelines of the APEC meeting in Beijing Nov. 11 was a promise to get the stalled negotiations on a bilateral investment treaty (BIT) moving again in 2015. “We agreed to accelerate the negotiations of the BIT, and we'll make efforts to reach agreement on the core issues and the major articles of the treaty text, and to initiate the negative list of negotiations in 2015,” Chinese President Xi Jinping said at a joint press conference with President Obama Nov. 12.

After five years of exploratory talks, the U.S. and China agreed to launch BIT negotiations in July 2013. Industry groups have been pressing the Obama administration to reach a BIT deal next year (see **WTTL**, Oct. 20, page 1). Since last year, “we've had very good discussions in the bilateral investment treaty channel. We've had a series of rounds to walk through our model of it and to talk about how it would be applied in the case of China,” USTR Michael Froman told a press conference in Beijing Nov. 10. “We

have further work to do. Next year, early next year, China has agreed to give us their first version of their negative list. And it will be very important if we're to achieve early progress in these negotiations that that list be as short and as focused, as narrowly tailored as possible. And we're encouraging our Chinese counterparts, including while we're here for this visit and around this summit to focus on making that list as narrow and as short as possible so that we can proceed with negotiations and make progress next year," he added.

In addition to the BIT and a promise to resume talks in Geneva on an Information Technology Agreement, the U.S. and China also agreed to extend the validity period for visitor visas. "The United States and China have agreed to implement a new arrangement for visas that will benefit everyone from students, to tourists, to businesses large and small," President Obama announced Nov. 10.

"Under the current arrangement, visas between our two countries last for only one year. Under the new arrangement, student and exchange visas will be extended to five years; business and tourist visas will be extended to 10 years," he said. The president noted that in 2013, 1.8 million Chinese visited the U.S. and spent \$21 billion. "This agreement could help us more than quadruple those numbers," he claimed.

"The summit between Presidents Obama and Xi over the last two days shows what high-level engagement can do to move the US-China relationship forward," said a statement by John Frisbie, president of the US-China Business Council (USCBC). The visa agreement will not only facilitate trade and investment flows, "but it will also remove a constant, low-level irritant felt by executives in both countries," he said. "USCBC is also pleased with President Obama and President Xi's support of a high-standard US-China Bilateral Investment Treaty (BIT) and its designation as a top priority on the economic agenda," he added.

## **TPP Leaders Give Wishy-Washy Directions to Negotiators**

Nothing significant was promised to come out of the meeting of leaders of the 12 countries negotiating the Trans-Pacific Partnership (TPP) Nov. 10 and nothing did. "We are encouraged that ministers and negotiators have narrowed the remaining gaps on the legal text of the agreement and that they are intensively engaging to complete ambitious and balanced packages to open our markets to one another, in accordance with the instructions we gave them in Bali a year ago," the leaders said in a joint statement.

"With the end coming into focus, we have instructed our ministers and negotiators to make concluding this agreement a top priority so that our businesses, workers, farmers, and consumers can start to reap the real and substantial benefits of the TPP agreement as soon as possible," the statement added. "We remain committed to a TPP structure that can include other regional partners that are prepared to adopt its high standards," the leaders said (see **WTTL**, Nov. 10, page 7).

At a Nov. 10 press conference, USTR Michael Froman claimed the U.S. has "made very significant progress" on market access with most countries, including Japan, on agriculture and autos. As he has many times before, he also conceded that "there are

still outstanding issues.” Froman said negotiators are working to close out issues and narrow differences on trade rules. “In terms of the end coming into focus, these negotiations are an ongoing reiterative process. And at every stage, we close out issues, we narrow differences, we try and find landing zones, and then we try and build consensus around them. And I think it's becoming clearer and clearer what the final landing zones might look like, but we still have some work to do, both to define them and then build support for them,” Froman said.

He also said the administration was working on parallel paths to complete TPP while seeking approval of fast-track trade promotion authority (TPA). “On TPP and TPA, our view has always been that the president has made clear that, of course, he would like to get a Trade Promotion Authority, he’d like to finish TPP consistent with it being an ambitious, comprehensive, high-standard agreement as soon as possible. And we are working in parallel tracks on that, that ultimately the only guarantee that a trade agreement earns the support of Congress is that we bring back a good agreement,” he said.

At the opening of the TPP leaders’ meeting, President Obama said the talks have made good progress on several outstanding issues. “Today is an opportunity at the political level for us to break some remaining logjams,” he asserted. That didn’t seem to happen.

“To ensure that TPP is a success, we also have to make sure that all of our people back home understand the benefits for them,” Obama said. As part of that effort, U.S. officials say they are collecting anecdotal stories of U.S. companies that have benefitted from trade to use during the debate over TPA. “That’s the case that I’ll continue to make to Congress and the American people,” Obama said.

In a report filled with generalities to their leaders, the TPP trade ministers claimed they have “made significant progress on commitments seeking to eliminate barriers to investment.” They also said progress has been made on rules of origin and they are “far along toward agreement on such issues as customs, trade facilitation and logistics.”

The report also said negotiators are working to eliminate non-tariff barriers to trade “in a way that preserves our governments’ ability to protect the public interest, including on health, safety, and environmental protection.” They said the talks have advanced on digital economy issues, rules on state-owned enterprises and cross-cutting issues.

## **APEC Agrees to Launch Work on Broader Asia-Pacific Trade Pact**

Leaders attending the Asia-Pacific Economic Cooperation Forum (APEC) Nov. 10-11 in Beijing agreed to support China’s push to create a Free Trade Area of the Asia-Pacific (FTAAP), which could include all countries in the region and some see as a possible competitor to a Trans-Pacific Partnership (TPP).

“In this regard, we decide to kick off and advance the process in a comprehensive and systematic manner towards the eventual realization of the FTAAP, and endorse the Beijing Roadmap for APEC’s Contribution to the Realization of the FTAAP,” the APEC leaders said in their final declaration (see **WTTL**, Sept. 22, page 7). The statement, however, falls short of actually starting talks on such a deal. “Through the implementation of this Roadmap, we decide to accelerate our efforts on realizing the FTAAP on the

basis of the conclusion of the ongoing pathways, and affirm our commitment to the eventual realization of the FTAAP as early as possible by building on ongoing regional undertakings, which will contribute significantly to regional economic integration, sustained growth and common prosperity in the Asia-Pacific region. We instruct Ministers and officials to undertake the specific actions and report the outcomes to track the achievements,” the declaration said.

In his closing remarks to the APEC meeting, Chinese President Xi Jinping said the agreement was “a substantive move” towards the FTAAP. “It marks the official launch of the FTAAP process and demonstrates the confidence of APEC members in promoting regional economic integration and their commitment. It will take regional economic integration to a new level, deliver gains to all economies on both sides of the Pacific and inject new impetus to the economic growth of the Asia-Pacific and common development of APEC members,” he said.

In addition to backing the FTAAP, the APEC leaders called for continued work on an agreement to reduce tariffs on environmental goods to 5% or less by the end of 2015. WTO talks have been started on an environmental goods deal. The leaders also agreed to cooperate against bribery and corruption and adopted APEC Principles on the Prevention of Bribery and Enforcement of Anti-Bribery Laws, and APEC General Elements of Effective Voluntary Corporate Compliance Programs.

“We commend the strong resolve shown in fighting corruption, including through effective anti-corruption measures,” the leaders said. “We commit to work together against corruption and deny safe haven for corrupt officials and their illicitly-acquired assets,” they added. They agreed to cooperate on the extradition of corrupt officials and the confiscation of corrupt proceeds.

## Obama Moves to Fill Long-Vacant Deputy USTR Seat

By the time Congress comes back in January, one Deputy USTR post will have been vacant for almost a full year. To fill that spot, President Obama Nov. 12 nominated Treasury Assistant Secretary for International Markets and Development Marisa Lago to replace Miriam Sapiro, who left her post in February (see **WTTL**, Jan. 27, page 1). The Senate is not expected to take up her confirmation until after the new year when Republicans take over the majority.



Marisa Lago

Lago has been at Treasury since 2010, and her nomination could give credence to claims that Treasury dictates trade policy more than the USTR’s office. Since 2013, Lago has concurrently served as acting U.S. director of the European Bank for Reconstruction and Development. Previously, she was CEO and president of Empire State Development from 2008 to 2009.

Earlier, she was global head of compliance for Citigroup’s corporate and investment bank after heading the office of international affairs for the Securities and Exchange Commission from 1997 to 2001. Lago received a B.S. from Cooper Union and a J.D. from Harvard Law School. Nominated to replace her at Treasury is Adewale Adeyemo, who currently is deputy chief of staff at the department. Adeyemo has served in

various Treasury positions since 2009, including as senior advisor to the chief of staff and deputy executive secretary. He also served as chief of staff at the Consumer Financial Protection Bureau from 2010 to 2011. Adeyemo received a B.A. from the University of California, Berkeley and a J.D. from Yale Law School.

Scott Morris, visiting policy fellow at the Center for Global Development, called Lago “formidable” on Twitter Nov. 10. “Obama administration musical chairs: the formidable Marisa Lago to #USTR and Wally Adeyemo to take her old job at Treasury. Congrats to both!” he wrote.

As Deputy USTR, Sapiro oversaw activities in Europe, the Middle East, North Africa and the Americas as well as initiatives on services and investment, market access and industrial competitiveness, intellectual property and innovation, and labor.

### **Labor, Environment Deals Need Better Monitoring, GAO Says**

While labor and environmental commitments in free trade agreements (FTAs) have been relatively successful in leading trade partners to implement reforms, U.S. agencies and partners face challenges in enforcing and monitoring those reforms, the Government Accountability Office (GAO) found in two reports released Nov. 13. “U.S. agencies reported, and GAO found, persistent challenges to labor rights, such as limited enforcement capacity, the use of subcontracting to avoid direct employment, and, in Colombia and Guatemala, violence against union leaders,” the GAO said (GAO-15-160).

Although the two agencies involved in monitoring these reforms, the USTR’s office and Labor, “have taken several steps since 2009 to strengthen their monitoring and enforcement of FTA labor provisions, they lack a strategic approach to systematically assess whether partner countries’ conditions and practices are inconsistent with labor provisions in the FTAs,” the report noted. The two agencies “generally agreed with the recommendations but disagreed with some findings, including the finding that they lack a systematic approach to monitor and enforce labor provisions in all FTAs. GAO stands by its findings,” it added.

On the issue of environmental commitments, the GAO said the “USTR’s monitoring lacks timeframes and performance indicators to measure partner progress in meeting FTA environmental commitments.” In its second report, the agency said the U.S.-Peru bilateral action plan addresses specific challenges in Peru’s forestry sector and identifies actions for Peru to take, “but does not include timeframes and indicators” (GAO-15-161).

While the GAO reports confirm that free trade agreements have resulted in partner countries taking steps to raise their labor and environmental standards, “the reports also make clear that much more needs to be done to ensure that existing commitments are fully implemented and enforced,” said Ways and Means Committee Ranking Member Sander Levin (D-Mich.) and Rep. George Miller (D-Calif.) in a joint statement.

“In particular, labor provisions in existing free trade agreements have not been consistently monitored or enforced, and investigations into violations have been subject to extensive delays, both of which have contributed to the persistence of problematic labor conditions,” they added.

## Tea Party Affiliates Join Fight Against Fast Track

A strange alliance against fast-track trade promotion authority (TPA) has formed between conservative groups claiming to be allied with the tea party and progressive groups and unions. In a conference call with reporters Nov. 10, representatives of several conservative organizations lambasted what they called “Obamatrade” and the usurpation of the Constitution by the president. They said they have often appeared together with unions such as the Teamsters at meetings where opposition to the legislation was discussed.

The complaints about TPA were not limited to the president, but also were aimed at Republicans in Congress who support fast track, including soon-to-be Senate Majority Leader Mitch McConnell (R-Ky.), Finance Committee Ranking Member Orrin Hatch (R-Utah) and House Speaker John Boehner (R-Ohio). “I don’t necessarily think they are anti-constitutional,” said Stephanie Scruggs, of EndGlobalGovernance.com.

“They desperately want to help their constituents get jobs again and allow the United States Chamber of Commerce and other high-paid lobbyists to put incorrect information in their ear,” she said. Scruggs also suggested the Chamber should be called the “U.S. Chamber of Multinational Corporations.”

The groups pointed out that the Constitution gives Congress the authority to regulate foreign trade and it violated the Constitution to create fast-track rules, starting with the 1974 Trade Act. They claim the 1974 law differed from the authority given President Franklin Roosevelt in the 1934 Reciprocal Trade Act.

Former presidential candidate Ambassador Alan Keyes questioned why lawmakers would be willing to create a system that would make the Senate a “rubber stamp” for whatever the president negotiates. He said a lot of those pushing for fast-track also “told us that this was a lawless president, that acted in disregard of the law, in disregard of the Constitution, and we’re supposed to turn over to such a president the negotiation of treaties by a method that precludes due consultation with the representatives of the people.” In the same vein, Judson Philips of Tea Party Nation asked, “do we trust Barack Obama to negotiate successfully a treaty that is good for America? The answer is no.”

## Obama’s Export Initiative Is Missing Its Goals

President Obama’s highly touted National Export Initiative (NEI) is falling far below its goal of doubling exports in five years from 2009 to 2014 and attracting more U.S. firms to exporting. Projecting trade data Census released Nov. 4 for the first nine months of 2014 to the full year, U.S. goods exports will reach about \$1.6 billion, which would be just a 52.2% increase from 2009 (see **WTTL**, Nov. 10, page 9). Together, goods and services exports in 2014 should reach about \$2.3 billion, a 47.7% rise in five years.

Even though the administration used 2009, the year exports dropped 18% due to the recession, as its baseline, some of the shortfall is beyond its control. Economic growth slowed or declined in key U.S. export markets, particularly Europe and Japan, and growth rates in emerging markets also declined during the period. The NEI’s miss is especially seen in its effort to attract more U.S. companies to exporting. According to recently

released Census preliminary figures, the number of known exporters in 2013 declined 1% from 2012 to 302,051. There was a slight 0.5% increase in manufacturing exporters over those two years to 74,879. The total preliminary 2013 number is 9.5% above 2009, but just 4% over 2008, the last year before the Great Recession. Compared to 2008, there was only a 2% increase in the number of known manufacturers exporting in 2013.

Earlier in 2014, the administration launched a new version of the exporting program, which it calls NEI NEXT, to try supposedly different export promotion methods. Most of these exporting projects are only different variations of programs dating back to the Reagan administration.

For NEI NEXT, the administration has set no numerical goals. Instead, it said its success will be measured by the number of U.S. companies exporting, including small and medium-sized businesses and minority- and women-owned businesses as well as the number of companies new to exporting; the number of companies exporting to more than one market; and exports to emerging countries and trade agreement markets.

**\* \* \* Briefs \* \* \***

1,1,1,2-TETRAFLUORETHANE: In 4-2 negative final vote Nov. 12, ITC determined that U.S. industry is not materially injured by dumped and subsidized imports of 1,1,1,2-Tetrafluorethane (R-134a) from China.

KUWAIT: USTR's office said Nov. 10 it has elevated Kuwait to Special 301 "Priority Watch List" from "Watch List" after out-of-cycle review of country's intellectual property protections found it did not adopt needed reforms to copyright laws and enforcement. "The United States is encouraged by Kuwait's recent accessions to the Berne and Paris Conventions and by recent reported progress on enforcement against copyright infringement. However, the U.S. remains concerned about the lack of sustained enforcement action against trademark infringement and the lack of progress in passage of updates to Kuwait's copyright legislation, which hamper the overall market environment for intellectual property-intensive industries," office said.

CUBA: ESCO Corporation, equipment manufacturer in Portland, Oregon, agreed Nov. 13 to pay \$2,057,540 to settle OFAC charges of violating Cuba sanctions. OFAC said firm's subsidiary purchased nickel briquettes made or derived from Cuban-origin nickel, which were ultimately sourced from Specially Designated Nationals, from November 2007 through June 2011. ESCO voluntarily self-disclosed apparent violations.

MELAMINE: Cornerstone Chemical Company filed antidumping and countervailing duty petitions Nov. 12 with ITA and ITC against melamine from China and Trinidad and Tobago.

FAST-TRACK: More than 200 companies and trade groups wrote Nov. 12 to House and Senate leaders urging them to pass trade promotion authority this year (see **WTTL**, Sept. 10, page 4).

EXPORT ENFORCEMENT: See Kee Chin, aka Alfred Chin, Chinese citizen from Hong Kong, was sentenced Nov. 10 in Seattle U.S. District Court to two years in prison for conspiracy to violate Arms Control Export Act by attempting to obtain and export certain Q-Flex accelerometers without State licenses. Items are covered under USML Category XII. Chin pleaded guilty in August and has been in custody since being arrested in February at Seatac Airport (see **WTTL**, Feb. 17, page 7).