

Vol. 35, No. 48

December 7, 2015

BIS Pushes Back on Trusted Trader Program for Exporters

Bureau of Industry and Security (BIS) officials showed strong resistance Dec. 2 to proposals by members of the President's Export Council Subcommittee on Export Administration (PECSEA) to implement a Trusted Trader program for U.S. exporters. The BISers objected to the idea on two counts: First, that such a program exists in practice, and second, that license delays or outright denials have almost nothing to do with the U.S. exporter but rather the end-user or end-use.

BIS Assistant Secretary Kevin Wolf threw cold water on the recommendations. "On the application side, the issue generally isn't licensing the exporter, it's who the foreign parties are, what the end-uses are, what the intel is on diversion risk, or the identity of the companies. That has nothing to do with who the trader is, who the exporter is," he told the PECSEA. "Intellectually, I can't get past a program where the focus is on the U.S. exporter, because from our perspective, that isn't the issue," Wolf added.

"You can't know what we know," BIS Under Secretary Eric Hirschhorn told PECSEA. "We're not basing [licenses] on what we know about the exporter, because the exporter may not know everything we want to know. So we're basing it on the country it's going to, the degree of sophistication of the technology or of the item," he said. In practice, however, "there is a sort of a trusted trader program, in the sense that licensing officers get familiar with companies, they get familiar with supply chains, they get familiar with end-users and end-uses," Hirschhorn said.

In addition to licensing, the program could also be used to expedite Customs procedures. "How can we gather that information to come up with some type of program that could expedite release?" Geoff Powell, president of C.H. Powell Company, who chairs the PECSEA process improvement and trusted trader subcommittee, said. "What can we do to expedite that cargo and decrease the chances of those goods being stopped? How can we make those parties better known to those agencies?" he wondered.

Action Likely Soon on Trade Enforcement Legislation

House and Senate lawmakers appear close to ironing out differences in the two different versions of the Trade Facilitation and Trade Enforcement Act of 2015 (H.R. 644) that

they passed in June and a vote on a compromise could come this month or early in 2016. The signal that a deal was near came Dec. 1 when the House finally voted to go to a House-Senate Conference with the Senate on the legislation and appointed conferees.

The vote to go to conference was mostly a pro forma step since the House Ways and Means Committee and Senate Finance Committee staffs have been working on the legislation since the two chambers passed their versions of the bill in June (see **WTTL**, June 29, page 1). The House named newly elected Ways and Means Chairman Kevin Brady (R-Texas), trade subcommittee chairman Dave Reichert (R-Wash.), Reps. Pat Tiberi (R-Ohio), Sander Levin (D-Mich.) and Linda T. Sanchez (D-Calif.) to the conference.

While appointing the conferees, the House rejected a motion Dec. 2 to instruct the House participants in the conference to accept Senate provisions on currency manipulation. Sponsored by Rep. Ann Kuster (D-N.H.), the motion was defeated by a vote of 193-232.

During the debate on Kuster's motion, Democrats complained that they had been given only 30 minutes notice that a vote on going to conference was coming to the House floor. "In terms of process, I do think it is important that, before there is a motion to go to conference, there be some notification to the minority; because there have been discussions underway about the Customs bill for a long time, and no one on our side, including our leadership, was given any notice of the motion to go to conference today. I think that is a mistake, and I hope it won't be repeated. I say that in good faith and with some good cheer," Levin said on the House floor.

Kuster said the goal of her motion was to support job creation and economic opportunity. "Unfortunately, U.S. manufacturers already face so many challenges that make it more difficult to compete with foreign companies. From the lower cost of labor to limited environmental protections, our manufacturers must compete with foreign policies that lead to an uneven playing field," she said on the House floor.

Brady said he opposed the motion because the House version already has strong currency provisions. "In addition, earlier this year, we passed a trade promotion authority legislation that, for the very first time, raised fighting manipulation to a primary negotiating objective and provides the administration more tools to tackle the practice," he said. "However, if the United States begins unilaterally levying tariffs, our trading partners will no doubt do the same, leading to a very dangerous cycle," he added. "I am also concerned that pursuing a unilateral approach could cause the United States to be a target for retaliation by countries like China," Brady argued.

House Votes to Repeal Restrictions on Crude Oil Exports (Again)

Once again, the House passed a bill with an amendment to end the president's authority to ban crude oil exports, despite a White House veto threat. The North American Energy Security and Infrastructure Act (H.R. 8) passed Dec. 3 in a 249 to 174 vote.

Included in the bill was an amendment sponsored by Rep. Joe Barton (R-Texas) that is almost identical to a measure (H.R. 702) that passed in October (see **WTTL**, Oct. 12, page 9). The House approved the amendment 255 to 168. "This is necessary because, while we had hoped that H.R. 702 would be brought up in the other body as a stand-

alone bill, it doesn't appear that is going to happen this session, so we want to try to put this on another vehicle that the Senate may yet bring up," Barton said on the House floor Dec. 2. "I ask everybody who voted for it before to vote for it again, and for those of you who didn't see the light the last time, we are going to give you a second chance tonight to vote for it," Barton joked. The amendment had two differences from his original bill, he noted.

"One, it does not have the maritime provision to provide some additional funding for our maritime merchant marine fleet because that was not germane--not because we don't support it, but it was not germane. And, two, we had a requirement that we do a study of the Strategic Petroleum Reserve. That is no longer necessary because that part of the bill has become law," he explained.

Rep. John Garamendi (D-Calif.) opposed the amendment. "This is not a big deal. After all, Big Oil wants it. It is no big deal that we would take, as we move towards energy independence, the one product that is available that could diminish the 25 percent oil we currently import. No. We are simply going to ship it offshore," he said.

In its statement of administrative policy (SAP), which was issued Nov. 30 before Barton offered his amendment, the White House objected to several other pieces of the legislation, including its provisions on hydropower licensing, energy efficiency and approval of natural gas exports. The bill would "unnecessarily curtail DOE's ability to fully consider whether natural gas export projects are consistent with the public interest," it wrote. The SAP said the president's staff would recommend that he veto the bill.

BIS Proposes Requiring Offset Reporting for 600 Series

U.S. defense exporters that participate in offset agreements with foreign buyers might have thought that once their items moved to Commerce jurisdiction under export control reform, they'd be off the hook to report those agreements. Not so fast, the Bureau of Industry and Security (BIS) said in the Federal Register Dec. 2.

In its notice, BIS proposed requiring reporting of offsets involving items controlled in the new "600 series" Export Control Classification Numbers (ECCNs) created in the reform process. The reporting would be required "regardless of whether the item was added to a 600 series ECCN simultaneously with its removal from the USML or was subject to the EAR prior to its inclusion in a 600 series ECCN," BIS said.

The proposal would exclude "certain submersible and semi-submersible cargo transport vessels and related items that are not on control lists of any of the multilateral export control regimes of which the United States is a member," the agency noted. Comments on the proposal are due Feb. 1, 2016.

Commerce's latest annual report to Congress on offset trade in March 2015 included information on deals from 21 firms for the calendar year 2013, the most recent period for which data are available. In that year, U.S. defense contractors reported entering into 67 new offset agreements with 18 countries valued at \$5.0 billion, BIS said. The value of those agreements equaled 52.9% of the \$9.4 billion in reported contracts for sales to

foreign entities of defense articles and services with associated offset agreements. In 2013, U.S. firms also reported 541 offset transactions conducted to fulfill prior offset agreement obligations with 32 countries at an actual value of \$3.1 billion, and an offset credit value of \$3.5 billion, the agency reported.

Ex-Im Renewal Hitches Ride on Transportation Bill

Thanks to a massive lobbying effort by U.S. business, the Export-Import Bank (Ex-Im) won a full five-year reauthorization Dec. 4, but it may be a while before the bank can get back to full operation. Ex-Im's charter was attached to a highway bill (H.R. 22) that President Obama signed Dec. 4 after the House passed it by a vote of 359-65 and the Senate with a vote of 83-16 on Dec. 3.

Ex-Im President and Chairman Fred Hochberg thanked members of the President's Export Council (PEC) Dec. 3 for their efforts in educating members of Congress on the bank's importance. "That was critical for them to understand what Ex-Im meant, what it means in their districts. A number of members changed their vote from 2012 when they learned about the actual jobs created and supported in their district," he said.

"We were told early on that we needed a vehicle to attach our bill to, to ride along. I couldn't think of a better vehicle than the highway bill," Hochberg joked. The transportation bill included the same Ex-Im provisions as in Rep. Stephen Fincher's (R-Tenn.) legislation (H.R. 597) that the House passed Oct. 27 (see **WTTL**, Nov. 2, page 1). The measure reauthorizes the bank through 2019, which is the longest horizon in his tenure at the bank, Hochberg noted.

Hochberg said the bank still needs to fill the empty seats on its board to have a quorum to approve deals valued at more than \$10 million. "We do not have a quorum as yet. The two Republican members did not want to be nominated until we were authorized, so we need to get those nominations up on the Hill and then voted on. We will only be able to do transactions up to approximately \$10 million. In order to move forward on larger infrastructure deals, we've got to get this board approved," he urged.

In a Dec. 4 letter to customers and stakeholders, Hochberg said Ex-Im is ready as of that date to restart the work needed to meet its mission. "All of us at EXIM are ready to receive applications for new transactions. Given the expected volume, the efforts required to get our processes back up and running, and the need to apply our comprehensive due diligence requirements to every transaction, we are asking customers and other EXIM stakeholders to be patient while we resume authorized activities," he wrote. "We expect online application systems and exim.gov to be fully operational no later than Tuesday, December 8, and customers can always reach us at 1-800-565-EXIM," he added.

Ex-Im's renewal is a blow to Republican conservatives, led by House Financial Services Committee Chairman Jeb Hensarling (R-Texas), who fought strenuously to eliminate the bank. "Finally, common sense prevailed over extreme partisan politics in favor of American businesses and workers," said Sen. Maria Cantwell (D-Wash.), one of Ex-Im's main supporters, in a statement. "For reckless, political reasons, some in Congress let this critical agency expire even though it supports American workers and has overwhelming bipartisan support in Congress. For the past several months, I've been fighting to

reauthorize the Export-Import Bank and stand up to petty politics that have held hundreds of businesses nationwide hostage,” said a statement from Sen. Heidi Heitkamp (D-N.D.), who cosponsored a version of Fincher’s bill in the Senate.

The U.S. Chamber of Commerce, which spearheaded the lobbying effort for the transportation bill, welcomed the votes. “The Chamber also welcomes the reauthorization of the U.S. Export-Import Bank, which has garnered overwhelming support in Congress. In recent weeks, we’ve seen how American companies are forced to operate at a unique disadvantage in global markets without Ex-Im, resulting in lost sales and lost jobs. We applaud the determined work of those congressional leaders who have acted to protect the competitiveness of American companies,” it said in a statement.

Changes to Investment Rules in TPP Don’t Satisfy Critics

The attempt by U.S. negotiators to revise the investor-state dispute-settlement (ISDS) language in the Trans-Pacific Partnership (TPP) hasn’t satisfied critics of these rules, while adding some provisions that the business community finds troubling, a Dec. 2 hearing held by House Ways and Means Committee Democrats was told. Both ISDS supporters and opponents who testified at the hearing said the TPP rules are important because they could set the precedent for a bilateral investment treaty (BIT) the U.S. is negotiating with China and in talks with the European Union (EU) on a Transatlantic Trade and Investment Partnership (TTIP).

Ways and Means Ranking Member Sander Levin (D-Mich.), who chaired the hearing, complained that U.S. Trade Representative (USTR) Michael Froman didn’t accept all the recommended changes to the ISDS provisions that Ways and Means Democrats had proposed. “In some cases, those suggestions were adopted, in other cases, they were not,” he said.

ISDS is just one of the TPP provisions that the pact’s critics have cited to oppose the deal, but it “has become more prominent in the trade picture” in recent years, Levin said. While the chances of Congress approving the agreement remain uncertain, Rep. John Larson (D-Conn.) said he hasn’t heard compelling arguments for the deal but its benefits will be greater for some than others. “I am assuming that if the vote on TPP follows the vote on TPA, its about where we are going to end up on this issue,” he said, referring to trade promotion authority (TPA). If TPP were defeated, “how would we be better off?” said Larson, who voted against TPA.

Thea Lee, deputy chief of staff of the AFL-CIO, said many of the changes to ISDS in TPP are “cosmetic and useless.” In response to a question to a question from Rep. Charles Rangel (D-N.Y.), Lee conceded that the AFL-CIO would not support TPP even if the ISDS provisions were changed to meet its complaints. The scope of ISDS cases has expanded over the years and presented “a very troubling set of experiences,” Lee told the Democratic hearing, which was more tempered and thoughtful than would be expected from one-party hearing.

Even though the U.S. has won all ISDS challenges, the rules put governments on the defensive, Lee argued, suggesting it is like a soccer game where one team is always

taking shots. Lee had served as co-chair of a State advisory committee that recommended changes to the Model BIT.

Matt Porterfield, deputy director the Harrison Institute at Georgetown University, also criticized the ISDS provisions in TPP, saying the changes did little to balance to rights of governments to regulation and investor rights. He said the provisions give foreign investor rights that are not available to U.S. investors to sue the government. The attempt to link provisions requiring “fair and equitable treatment” to international law produced “largely meaningless language,” he testified.

ISDS had its defenders. Ted Posner, a partner with Weil, Gotshal & Manges, said the idea of rules is “still a sound one” and provides investors consistency against “a patchwork of legal regimes.” He disagreed with Porterfield’s complaints about “fair and equitable” requirements in the deal, contending it is “not a vague concept” and is “well-grounded in international law.” He conceded he found some new footnotes added to the provisions concerning but not enough to oppose TPP.

Michael Smart, vice president of Rock Creek Global Advisors and an ex-aide to former Sen. Max Baucus (D-Mont.), also backed TPP’s ISDS provisions. He noted that sales of overseas affiliates of U.S. companies were twice as much as U.S. exports in 2014. While the accord isn’t perfect, “it is fully in line” with the objectives of past U.S. legislation, including TPA, he argued. It also achieved agreements from countries such as Japan and Malaysia, which had not adopted foreign investment protections before, as well as from Australia which opposed ISDS rules in the U.S.-Australia Free Trade Agreement.

*** * * Briefs * * ***

MELAMINE: In 6-0 final vote Dec. 2, ITC found U.S. industry is materially injured by imports of dumped and subsidized melamine from China. At same time, ITC in 6-0 negative vote found U.S. industry is not materially injured by imports from Trinidad and Tobago.

WASSENAAR: In Federal Register Dec. 3, BIS issued corrections to May 21 rule implementing Wassenaar Arrangement agreements. Changes to EAR include update to Commerce Country Chart, clarification to control text for rebreathing equipment, removal of Fiji from list of embargoed countries, and removal of outdated reference to “signal analyzer (dynamic) . . .” in Definitions section (see **WTTL**, May 25, page 9).

TRADE FIGURES: Merchandise exports in October fell 10.4% from year ago to \$123.8 billion, lowest level since mid-2011, Commerce reported Dec. 4. Services exports gained 1.1% to \$60.3 billion from last October. Imports dipped 6.6% from October 2014 to \$186.8 billion, as services imports gained 1.6% to \$41.1 billion. Year to date, goods exports are down 6.6% from 2014 to \$1.27 trillion. Services exports gained 1.0% to \$596.1 billion. Goods imports for ten months slipped 3.7% from 2014 to \$1.91 trillion, as services imports rose 2.8% to \$406.7 billion.

TPP: In report to President Obama Dec. 2 on trade accord, Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) said “agreement fails to advance the economic interests of the U.S. and does not fulfill all of the negotiating objectives identified by Congress in the Trade Priorities and Accountability Act of 2015.” In cover letter, LAC Chairman R. Thomas Buffenbarger, international president of International Association of Machinists and Aerospace Workers, said, “The threat to future economic gains here in the U.S. and the

standard of living of our people will be put in jeopardy by the Agreement.” He noted potential expansion of accord to countries such as Indonesia and China. “The LAC believes the agreement should not be submitted to Congress or, if it is, it should be quickly rejected. The interests of U.S. manufacturers, businesses, workers and consumers would be severely undermined by the entry into force of the TPP,” he wrote. Obama received differed advice Dec. 3 from the USTR’s Advisory Committee for Trade Policy and Negotiations (ACTPN). “A majority of ACTPN endorses the TPP agreement,” ACTPN Chairman Harold (Terry) McGraw III said in cover letter accompanying its views. “It is clear that all signatories had to accept compromises across a number of areas in order to reach final agreement. A majority of ACTPN believes, on balance, the TPP is a strong agreement that conforms to U.S. priorities to liberalize trade and investment rules to open new markets,” he wrote.

CUSTOMS PENALTIES: Court of Appeals for Federal Circuit Dec. 1 affirmed CIT decision that government can’t make base penalty claim on negligence for failure to exhaust administrative remedies. Government argued that it should not be barred from seeking penalty in court at culpability level that is lower than that administratively asserted by U.S. Customs and Border Protection. “Because the statutory framework of Section 1592 does not allow the government to change the culpability level that Customs alleged in the penalty claim, we affirm,” wrote Appellate Judge Raymond Clevenger III for three-judge panel in *U.S. v. Nitek Electronics*.

BEDROOM FURNITURE: CIT Judge Jane Restani remanded to Commerce Dec. 1 scope ruling on certain chests imported by Ethan Allen Operations, Inc. “Whatever occurred in this case, it is fair to say there is a genuine dispute as to whether the four chests at issue are within the scope of the order. It is possible that the retroactivity issue will be mooted, that is, all the chests may be found to be outside the scope. Thus, the court need not finally resolve this, but it will require further facts, including information about Customs’ treatment of Ethan Allen’s chests subsequent to entry, before it decides whether relief is warranted,” she wrote (slip op.15-134). Restani also suggested Commerce reconsider its liquidation instructions.

GARLIC: Commerce’s 18th administrative review of fresh garlic from China was remanded in part and upheld in part Nov. 30 by CIT Judge Jane Restani. She told department to consider evidence of petitioner’s independence from government control, whether it is entitled to separate-rate status, and, if it is, to determine new antidumping rate. Restani also said Commerce should “reconsider its surrogate country selection in the light of the court’s ruling concerning its interpretation of ‘significant producer’.”

Is a Site or Corporate License for You?

- When many individuals in your organization need to read *Washington Tariff & Trade Letter*, there’s an easy way to make sure they get the news they need as quickly and conveniently as possible.
- That’s through a site or corporate license giving an unlimited number of your colleagues access to each weekly issue of *WTTL*.
- With a low-cost site or corporate license, you can avoid potential copyright violations and get the vital information in *WTTL* to everyone who should be reading it.

For More Information and Pricing Details, Call: 301-570-4544