

Special Report: WTO Nairobi Ministerial

WTO Nairobi Ministerial Ends with Last-Minute Deals

After two years of negotiations in Geneva and two days of intense talks at the end of the World Trade Organization's (WTO) Tenth Ministerial Conference (MC10), trade ministers in Nairobi, Kenya, reached a deal Dec. 19 on a package of issues to curb agriculture export subsidies and provide benefits for least developed countries (LDCs). The ministers, however, left the future of the long-stalled Doha Round up in the air.

The agreement resulted from round-the-clock and late-night talks, including a meeting that started at 2:00 AM Nairobi time Dec. 19, among members known as the G-5: the U.S., European Union (EU), Brazil, China and India. As with past ministerials, negotiations among the 162 WTO members proved unwieldy and fell to the G-5 to iron out an accord.

For most of the week of talks at the MC10, which was formally supposed to run from Dec. 15 to 18, members could not agree on agriculture or Doha's future. The closing session, which came 24 hours after its original schedule, saw members adopt a G-5 draft declaration that covered agriculture (see related story page 2) and several decisions that had been negotiated in Geneva to help LDCs with regard to cotton, rules of origin, services and pharmaceutical patents (see related story page 3).

On the Doha Round, members, particularly India and many LDCs, refused to put a stake in its heart. The final declaration leaves the fate of the round up in the air. "Success was achieved here despite members' persistent and fundamental divisions on our negotiating agenda — not because those divisions have been solved," WTO Director-General Roberto Azevedo said at the ministerial's closing session.

"We have to face up to this problem. We have to address it. The Ministerial Declaration acknowledges the differing opinions. And it instructs us to find ways to advance negotiations in Geneva. Members must decide — the world must decide — about the future of this organization. The world must decide what path this organization should take," he said (see related story page 3).

Nairobi Reaches Deal on Agriculture Export Competition

The elimination of agriculture export subsidies, which has been a goal of trade negotiators dating back to before the Uruguay Round, took a major step forward at the WTO ministerial in Nairobi where members finally agreed on a plan to end such practices. Export subsidies were part of a larger set of farm reforms that also include an effort to curb the role of state-trading enterprises in farm trade, a special safeguard mechanism for developing countries and a plan for accelerated negotiations on food stockholding.

“Our work to secure a global ban on export subsidies will help level the playing field for American farmers and ranchers,” USTR Michael Froman said in a statement at the end of MC10. “The WTO’s actions in this area will put an end to some of the most trade-distorting subsidies in existence and demonstrates what is possible when the multilateral trading system comes together to solve a problem,” he added.

“The decision you have taken today on export competition is truly historic,” WTO Director-General Roberto Azevedo said at the meeting’s closing session Dec. 19. “It is the WTO’s most significant outcome on agriculture. The elimination of agricultural export subsidies is particularly significant,” he said. “Today’s decision tackles the issue once and for all. It removes the distortions that these subsidies cause in agriculture markets, thereby helping to level the playing field for the benefit of farmers and exporters in developing and least-developed countries,” he added.

Under the decision, developed members have committed to remove export subsidies immediately, except for a handful of agriculture products, and developing countries will do so by 2018. Developing members will keep the flexibility to cover marketing and transport costs for agriculture exports until the end of 2023, and the poorest and food-importing countries would enjoy additional time to cut export subsidies.

Provisions on public food stockholding reaffirmed a decision ministers made at the Bali ministerial to allow developing countries to continue to use this form of food security while negotiators continue to find a solution to the issue by the time of the next ministerial in 2017. This has been a major goal of India.

Provisions on export credits include a promise that members “undertake not to provide export credits, export credit guarantees or insurance programmes for exports of products listed in Annex 1 of the Agreement on Agriculture (hereafter ‘agricultural products’) other than in conformity with this Decision,” said the final agriculture text.

The accord identifies several forms of credit that are covered by these rules, including direct financing, export credit insurance, credit guarantees, government-to-government credit agreements and any other form of governmental export credit support, direct or indirect, including deferred invoicing and foreign exchange risk hedging.

Agreed upon disciplines on state-trading enterprises call for members to “ensure that agricultural exporting state trading enterprises do not operate in a manner that circumvents any other disciplines contained in this Decision.” It says “shall make their best efforts to ensure that the use of export monopoly powers by agricultural exporting state trading enterprises is exercised in a manner that minimizes trade distorting effects and does not result in displacing or impeding the exports of another Member.” Developed

countries also agreed to give duty-free and quota-free access to their markets for cotton from LDCs, with those able to do so, starting Jan. 1, 2016. The deal would require developed countries to end cotton export subsidies immediately and developing countries to do so at a later date.

Nairobi Leaves Doha Round's Future Ambiguous

USTR Michael Froman made clear at the outset of MC10 in Nairobi Washington's desire to close the book on the Doha Round and launch negotiations on new topics. In a speech to the plenary session of the meeting Dec. 17, Froman repeated objections he and other U.S. officials have made before to continuing the round (see **WTTL**, Dec. 14, page 2). Froman's arguments, however, failed to convince WTO members to end work on the round. The final declaration leaves the round the walking dead.

“We recognize that many Members reaffirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations,” the declaration states.

“We acknowledge the strong legal structure of this Organization. Nevertheless, there remains a strong commitment of all Members to advance negotiations on the remaining Doha issues,” it notes. “Work on all the Ministerial Decisions adopted in Part II of this Declaration will remain an important element of our future agenda,” the declaration says. “Many Members want to carry out the work on the basis of the Doha structure, while some want to explore new architectures,” it acknowledges.

In his prepared remarks, Froman said the WTO needs “a better path forward” and “a new form of pragmatic multilateralism.” He said, “Moving beyond Doha doesn't mean leaving its unfinished business behind. Rather, it means bringing new approaches to the table.”

It is unacceptable for the round to hold other issues hostage, he argued. “Freeing ourselves from the strictures of the Doha framework would allow us bring new, creative approaches to those issues, as well as allow us to explore emerging trade issues, revitalizing the WTO and the multilateral trading system,” he declared.

Nairobi Adopts Measures to Help LDCs

The delayed end of MC10 was caused in part by LDC concerns that they would lose their voice in multilateral trade negotiation if the Doha Round was terminated, while they are being left out of regional trade pacts. To meet many of these concerns, trade ministers at MC10 adopted several measures that had already been negotiated in Geneva.

“We strongly commit to addressing the marginalization of LDCs in international trade and to improving their effective participation in the multilateral trading system. Towards that end, we shall ensure that all issues of specific interest to LDCs shall be pursued on

a priority basis, with a view to strengthening them, making them commercially meaningful and, when appropriate, legally binding,” the ministerial declaration states.

A WTO statement said the ministerial decision provides more detailed directions on how goods from LDCs can qualify for preferences as “made in an LDC,” and when inputs from other sources can be “cumulated” — or combined together — into the consideration of origin. It calls on preference-granting members to consider allowing the use of non-originating materials up to 75% of the final value of the product.

Another provision extends preferential treatment for LDC services and service providers in non-LDC countries. The waiver is extended 15 years to Dec. 31, 2030. Members also extended rules that exempt LDCs from drug patent protection rules under the Agreement on Trade in Intellectual Products (TRIPS).

“We further welcome the adoption by the TRIPS Council of the Decision on the Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-developed Country Members for certain obligations with respect to pharmaceutical products as well as the related Waiver Decision adopted by the General Council concerning least-developed country Members’ obligations under Article 70.8 and 70.9 of the TRIPS Agreement,” the declaration notes.

Nairobi Sees Launch of Public-Private Aid for Trade Facilitation

The Trade Facilitation Agreement (TFA) that the WTO adopted at its Bali ministerial in 2013 has only been ratified by 63 members, which is still shy of the two-thirds needed to bring the accord into force. While awaiting its ratification, the WTO launched the Global Alliance for Trade Facilitation Dec. 17, a public-private coalition to provide technical and financial help to countries implementing the customs modernization steps called for in the pact.

The alliance is backed with funding from the World Economic Forum, the International Chamber of Commerce, the Center for International Private Enterprise, donor countries and the private sector, including Canada, Germany, the United Kingdom and Australia, plus A.P. Møller-Mærsk, DHL, Wal-Mart, eBay and Huawei. The TFA is intended to expedite the movement, release and clearance of goods through customs and in transit, provide more transparency in customs regulation and improve cooperation among customs authorities.

At a press conference announcing the alliance, WTO Director-General Roberto Azevedo noted that 63 members have completed their ratification processes, including six that notified the WTO of their actions during the Nairobi ministerial: Myanmar, Norway, Zambia, Ukraine, Vietnam and Brunei. “This is good news — we are now long past halfway to the target number at which the Agreement comes into force. So we must keep increasing the pace,” Azevedo said.

Another step is to ensure that reforms are implemented “as smoothly as possible, and that businesses can seize the opportunities they bring. And this is what the Global Alliance we are launching today is all about. It brings to life a new framework for businesses,

particularly small- and medium-sized enterprises, to partner up with governments to ensure that the reforms delivered are meaningful and beneficial to all,” Azevedo said.

USTR Michael Froman noted that USAID a year ago convened a group of donors around the world, as well as private sector representatives, to talk about working together to promote the TFA’s implementation. “We have a whole of government approach, from USAID to the MCC [Millennium Challenge], to our other organizations who play a significant role in this,” he said at the press conference. “The U.S. has mobilized \$50 million to support the Global Alliance,” he added.

Nairobi Meeting Approves Membership for Afghanistan, Liberia

The WTO demonstrated its commitment to delivering benefits for least developed countries (LDCs) with or without a Doha Round agreement in Nairobi with the approval of membership for Afghanistan and Liberia. Members approved Liberia’s membership Dec. 16 and Afghanistan’s Dec. 17. The two will have until June to submit ratification and implementation documents to become full members.

Liberia started its negotiations to join the WTO in 2007 and completed work on its accession protocol and commitments in October. Afghanistan started the process in 2004 and finished its talks with the WTO working party in November (see **WTTL**, Nov. 16, page 10).

Liberia will become the 35th LDC member of the WTO and Afghanistan the 36th. “That number seems to be rising fast! The LDCs are more than a fifth of the whole WTO membership. It is an important and active constituency,” WTO Director-General Roberto Azevedo said. He noted that Somalia filed its membership application Dec. 17. “This is something I strongly welcome and I will work with members to advance this effort as quickly as possible,” he said.

“Afghanistan’s WTO accession is a clear sign for all the world to see that the country is building a business-friendly environment. I am confident that WTO membership will contribute to establishing a firm foundation for Afghanistan’s future development and prosperity,” Azevedo said at a press conference marking approval of Kabul’s membership. “Despite very challenging circumstances, and under the shadow of conflict, you have shown the determination needed to complete this complex process,” he said.

Liberia’s WTO membership “marks another turning point in our history, particularly in our journey of economic transformation for inclusive growth,” Liberian President Ellen Johnson Sirleaf said after the WTO ministers approved her country’s accession. “We fully subscribe to the African common position on strengthening the rules-based multi-lateral trading system to create the Africa that we want,” she said.

Nairobi Delivers Final ITA Deal

Last-minute foot dragging by China added drama to completion of a final Information Technology Agreement (ITA) Dec. 16 but didn’t block the accord. Beijing had delayed providing its final schedule of tariff cuts but in the end left its offer where it was when

talks concluded in November (see **WTTL**, Nov. 16, page 1). “The final stumbling block was a last-minute demand by China to include some additional text in the ministers' declaration announcing the agreement on staging and the achievement of the critical mass necessary for the agreement to enter into force, John Neuffer, president of the Semiconductor Industry Association, wrote in a blog.

“The short of it is the Chinese needed assurances that should trade in products covered by the agreement dip below critical mass, there would be an opportunity to discuss how to handle the problem of potential freeriders,” he said. “When the negotiating parties agreed this afternoon to insert text in the declaration to capture this idea, the deal was done,” Neuffer added. China has loaded its tariff cuts toward the end of seven years, the longest period permitted under the accord. China promises only to take 36% of its ITA tariffs to zero upon implementation of the pact.

“Today marks a very significant achievement. Eliminating tariffs on trade of this magnitude will have a huge impact,” WTO Director-General Roberto Azevedo told a press conference in Nairobi where the final deal was announced. “As per the plan concluded today, around 65% of tariff lines will be eliminated in 2016 (accounting for around 88% of imports). By 2019 this will increase to 89% of the tariff lines (and 95% of imports). This will reach 100% over 7 years,” he explained.

“In addition, because it is a WTO agreement, all WTO members will benefit under the most-favoured nation principle. This means that all members can export these 201 products duty-free to each of these markets. And of course they will also feel the knock-on benefits for other sectors. Moreover, the agreement is open to all WTO members to join,” he said.

Wassenaar Plenary Addresses Creeping Technology Advances

The Wassenaar Arrangement's annual updating of its control lists Dec. 3 attempted to address digital technology advances that are moving into all types of products beyond traditional control categories, particularly for consumer products such as phones and televisions. The approved changes also prepared the lists to become more positive in keeping with U.S. export control reforms and, in many cases, to restructure and clarify sections as part of the regime's ongoing list review.

At the Wassenaar meeting in Vienna, U.S. representatives presented a “non-paper” on the debate in the U.S. over proposed changes in controls on cyber-intrusion products and technology. The non-paper didn't include any proposed changes to the rules, which have been adopted by most other regime members but still face opposition from U.S. industry (see **WTTL**, Nov. 2, page 3). According to sources, other Wassenaar countries are not interested in changing the already adopted rules.

Among some 40 changes to the regime's list are new rules for biodefense under Category 1, changes for measuring equipment and machine tool accuracy in Category 2, some relaxation of electronics controls and clarification of controls on analog-to-digital converters in Category 3, and the raising of computer control levels in Category 4. Wassenaar rewrote all of Category 5 part 2 to restructure provisions into a more logical

sequence and to clarify differences in controls for cryptographic and non-cryptographic products. It also relaxed control levels on some lasers in Category 6 to account for foreign availability and to clarify definition of “accuracy.” Similar changes regarding accuracy for aircraft controls were included in Category 7.

In Category 9, it agreed to delete note on specific controls for model aircraft and include general control levels for unmanned aerial systems. Other changes applied to explosive material, biological agent protection, and electronic devices for military helmets. Controls were eased for “technologies used in consumer industries (e.g. car production, domestic medical devices), optical mirrors for solar power installations, battery cells, underwater still cameras and equipment incorporating information security,” Wassenaar reported.

Court Upholds Zeroing for Case Caught in Transition

When Commerce ended the use of “zeroing” in antidumping cases in 2007 to comply with a WTO ruling against the practice, some pending antidumping cases got caught in the transition to the new policy. In a Dec. 14 ruling, the Court of Appeals for the Federal Circuit (CAFC) upheld the department’s decision to maintain its old policy in its antidumping finding on diamond sawblades and parts from China and Korea.

“We conclude that the Final Modification is at best ambiguous as it applies to the present matter. In fact, aspects of the Final Modification strongly support Commerce’s determination. We therefore uphold Commerce’s determination that the no-zeroing policy does not apply here,” wrote Appellate Judge Richard Taranto for the three-judge panel.

“The question is not whether Commerce committed any reversible error in what it decided in the Final Modification about which dumping proceedings would be governed by the new no-zeroing policy; the question is only what it did decide. As to that interpretive question, it is undisputed that it suffices for us to uphold Commerce’s answer if we conclude that the Final Modification is ambiguous on the point and Commerce’s interpretation is a reasonable resolution of the ambiguity,” Taranto wrote in *Diamond Sawblades Manufacturers Coalition v. U.S.*

When Commerce changed its policy, it attempted to draw a line between pending cases to which zeroing would be applied and new cases to which the policy wouldn’t. That effective date was Jan. 16, 2007. Because the diamond sawblade case went through remand and redeterminations after that date, the dispute was over when the new or old policy applied. “Later events in this investigation did not make this a new investigation...or make unreasonable the conclusion that this investigation had not been pending before Commerce in February 2007,” the CAFC found. After the department took up the case again in 2009, it performed only ministerial actions, it concluded.

BIS Ramping up Outreach on License Exception STA

Citing a “massive amount of over-control” by U.S. exporters, Bureau of Industry and Security (BIS) officials are starting an “aggressive effort” to get firms to start using

License Exception Strategic Trade Authorization (STA), Eileen Albanese, director of BIS' national security office, told the Practising Law Institute export conference in Washington Dec. 17. "People are not using it," she admitted. Low use of STA has plagued the exception since its institution. In the 600-series created under export control reform, almost 70% of licenses BIS receives are eligible to use the exception, Albanese noted. Over the next several months, the agency will make an "aggressive effort to get people to start using STA, and to hopefully alleviate some of the concerns that have been expressed by foreign consignees," she said.

"What we're doing is we're reaching out to the foreign consignees that have indicated to their U.S. customers that they do not want to use STA," she said. "We are also reaching out to those companies who, according to our licensing information and AES information, are shipping things that are eligible for STA and are not. We're reaching out to them to try to find out why, what can we do. Is it something that maybe STA needs to be modified, do we need to be clearer on what the expectations are?" Albanese said.

According to BIS statistics, through October 2015, \$1.4 billion in 21,092 shipments have been exported under STA since July 2011. Of these shipments, 7,684 (36.4%) were worth less than \$2,500. In total, 649 companies have used the exception, with Japan, South Korea, and the United Kingdom (UK) the top destinations.

BIS Assistant Secretary Kevin Wolf further clarified the misinformation about STA, especially among foreign customers. These companies will say, "We don't want that level of exposure, we don't want any burden, so we tell our U.S. companies to apply for a license, that way we're immune from liability thereafter," Wolf noted. In fact, it was "never actually that way under the ITAR, it's not that way under the EAR, there isn't any more burden or liability as a legal matter under STA than used to exist," he told PLI. "You're just making your life and our lives more difficult," Wolf added.

Christine Lee, director, compliance & international trade counsel at United Technologies, explained the industry perspective. "There's a thought that if you're operating under a license exception, you can't see it. If you have license you can touch it, you can print it out, and you can wave it at people," she said. "There's a security of having a license that people liked," Lee added.

U.S.-Cuba Reach Deals on Mail, Air Travel

The first anniversary of President Obama's renewal of relations with Cuba was marked with bilateral agreements to reopen direct mail delivery and resume normal commercial flights between the two countries. An agreement on mail service was reached Dec. 10 and talks on commercial air service were concluded Dec. 17.

The accord on mail service calls for the implementation of a pilot plan for the transportation of mail. "The plan will provide for mail flights between the two countries several times a week, rather than routing mail through a third country. Details will be finalized in the coming weeks," a State Department statement said. "We are starting a pilot program of mail service. I can't give an exact date yet," a senior State official told reporters on a conference call Dec. 15. "It should be very, very soon when that will start. But I think the important thing to bear in mind here is that this is the first time we will see

direct mail service between the United States and Cuba in something like 50 years,” the official said. The arrangement for commercial air flights “will continue to allow charter operations and establish scheduled air service, which will facilitate an increase in authorized travel, enhance traveler choices, and promote people-to-people links between the two countries,” a State press statement said. “While U.S. law continues to prohibit travel to Cuba for tourist activities, a stronger civil aviation relationship will facilitate growth in authorized travel between our two countries — a critical component of the President’s policy toward Cuba,” it added.

“Today’s announcement is great news for our customers as it brings us one step closer to connecting the U.S. and Cuba with scheduled air service,” said American Airlines Chairman and CEO Doug Parker in a statement. “As the leading carrier to the Caribbean and the leading U.S. airline to Cuba, we look forward to establishing scheduled service to Cuba in 2016, from Miami and other American hubs,” he said. Delta said it “looks forward to resuming service to Cuba as soon as approvals are granted.” It noted that began commercial service to Cuba in 1953.

Even without direct flights, travel to the island has increased. “In that regard, we have seen an increase in authorized travel by U.S. citizens by over 50%,” one senior State official told reporters. Another said that number has increased from “something like” 300,000 to 500,000 (see **WTTL**, July 27, page 5).

Over the past year, the two countries have discussed “concrete objectives on civil aviation, direct transportation of mail, the environment, regulatory changes, and counter-narcotics and have either reached understandings on those topics or continue to narrow our differences in ways that suggest we could soon conclude such understandings,” Jeffrey DeLaurentis, charge d’affaires at the U.S. Embassy in Havana, said on an earlier call with reporters.

“However, we still have areas of disagreement. On challenging matters such as property claims, fugitives, and human rights, we have started the process of exchanging views with Cuba and expect to continue in the new year,” he said.

In response to questions on the claims negotiations, a senior State official, speaking on background, said the subject is complex and will take some time. “But obviously, we view the resolution of outstanding claims as a top priority for normalization. We know that the Cuban side believes that they have billions of dollars of claims relating to human damage and economic damage resulting from the embargo, and I imagine we will hear more about that as we proceed with these discussions. But we’re just at a first step, and we expect to meet again sometime in the first quarter of 2016,” he said.

Customs Enforcement Bill Hits Roadblock in Senate

The quick track toward enactment of the Trade Facilitation and Trade Enforcement Act of 2016 (H.R. 644) turned out to be not as quick as many people hoped. After the House passed a House-Senate Conference Committee compromise Dec. 11, Senate action has been blocked by Democratic opposition to provisions in the measure, including a permanent bar to taxes on the Internet. With Congress rushing to leave for its Christmas vacation, further work on the bill may be put off until February 2016. Senate Majority

Leader Mitch McConnell (R-Ky.) confirmed Dec. 15 that Congress wasn't likely to vote on the legislation before it adjourned, but he didn't say the measure was dead.

"This is not the end of the Congress. It's only the end of the first session, and I don't know if we will do the Customs bill this year or whether it will wait until next year," he told reporters.

Although Senate Finance Committee Ranking Member Ron Wyden (D-Ore.) supports the House-Senate compromise, many of his Democratic colleagues still have problems with it. A cloture vote would have been required to overcome that opposition. With both chambers consumed with efforts to pass an omnibus appropriations bill and extension of temporary tax cuts, there would not have been enough time to act on the trade bill.

"If they want to call it up they can, but it will be subject to at least three votes: cloture vote, a point of order on inserting the permanent Internet Tax Freedom Act and final passage," Senate Democratic Whip Richard Durbin (D-Ill.) told reporters Dec. 15. "I think it is really questionable on all three votes what the outcome may be," he said. "It is possible the Republican leadership wants to hold this over so they have a chance to talk," he added.

Durbin said Democrats have offered a plan to put the Internet Tax Freedom and market-place fairness bill together. "The two compliment one another. One says state and localities cannot impose a tax on access to the Internet. The other says state and localities will be compensated and reimbursed for purchases over the Internet that involve sales tax," he explained. He said including a permanent Internet tax provision "is wrong and I am going to fight it."

Durbin claimed the Senate could drop the Internet tax provision from the conference report on the Customs bill and send the measure back to the House for another vote. "But to marry the two would take a separate effort" that would require going back to the conference, he noted.

Sen. Sherrod Brown (D-Ohio) told WTTL that he wants to have a separate vote on the Customs bill's Enforce Act provisions, which strengthen enforcement of antidumping and countervailing duty orders to prevent circumvention. He said there are also other problems with the bill. "I want to fix it," he told WTTL. "I care about the Enforce Act. I don't like some of the extraneous stuff. I don't like that they didn't do currency well. I'd like a separate vote on the Enforce Act, if there was a way of doing that," he said.

Lame-Duck Vote on TPP Is Increasingly Likely

Senate Majority Leader Mitch McConnell (R-Ky) has confirmed what many expected: a congressional vote on implementing the Trans-Pacific Partnership (TPP) won't come until a lame-duck session of Congress after next fall's elections. McConnell's assessment, which came in an interview published by the *Washington Post* Dec. 11, reflected previous predictions that a vote wouldn't come until after primary season ends in June, so members couldn't face challenges based on their vote on the trade pact.

A lame-duck vote would give lawmakers a chance to see how big an issue TPP is in the presidential election, as well as in Senate and House races. None of the Republican or

Democratic presidential candidates has endorsed the accord, and Hillary Clinton and Donald Trump have both come out against it (see WTTL, Nov. 16, page 4).

Senate Finance Committee Chairman Orrin Hatch (R-Utah) agrees that a TPP vote won't come until late next year. When asked when Congress would vote, Hatch told reporters, "We'll just have to see, but it's certainly not going to be before the elections next year." Democrats would also like to see the TPP vote postponed. When asked if he would support a delay of the vote, Senate Democratic Whip Richard Durbin (D-Ill.) thought for a few seconds and then told WTTL, "Sure."

USTR Michael Froman and other administration officials have reportedly have been talking with Hatch about what could be done to satisfy his concerns about TPP, particularly on biologics data protection. "He knows that he has to get that data exclusivity up from five years. He knows that," Hatch said.

"I don't care how he does it. He just has to do it because that is a very important thing. I don't want to be subsidizing the rest of the world," Hatch added. "There are some other things [in TPP], but I think we have that under control," he said.

Whoever wins in November, Congress would face the dilemma of voting on the deal in hand or one that might be worse, depending on who won the election. This wouldn't be the first time it has put off a trade vote until a lame-duck session. It approved the Uruguay Round implementing legislation after the November 1994 elections. While it wasn't a lame-duck session, the vote on NAFTA came in November 1993.

At his end-of-year press conference Dec. 18, President Obama sounded confident Congress would pass TPP next year. "I think Speaker Ryan would like to try to get it done. And there are both proponents and opponents of this in both Democratic and Republican parties, and so it's going to be an interesting situation where we're going to have to stitch together the same kind of bipartisan effort in order for us to get it done," he said.

TPP "meets the bar that I set. It is consistent with what I promised, which is the most pro-labor, pro-environment, progressive trade deal in history, that eliminates just about every tariff on American manufacturing goods in countries that up until this point have charged a tax, essentially, on anything that American workers and American businesses sell in these areas," Obama said. "It brings those taxes down to zero on basically all American-manufactured products -- a huge win for agriculture, because now the people of Japan are going to be in a better position to enjoy American beef and American pork, which up until this point, even though we're much more efficient producers, has been tagged with a tax that makes our products uncompetitive in Japanese markets. So this is a big deal," he added.

Appropriations Bill Addresses Oil Export Ban, COOL

The omnibus appropriations and tax bill (H.R. 2029) that Congress passed Dec. 18 not only ends the 40-year ban on crude oil exports but would make it very difficult for a future president to reimpose those restrictions. The measure includes several challenging requirements a president would have to meet to justify restoration of the controls,

which could only be imposed for one year (see WTTL, Dec. 7, page 2). To restore the ban, a president would have to declare a national emergency and issue a notice of the declaration in the Federal Register, identify specific countries, persons or organizations to which the ban applies and explain the national security reasons for the action.

In addition, Commerce would have to determine and report to the president that “(i) the export of crude oil pursuant to this Act has caused sustained material oil supply short-ages or sustained oil prices significantly above world market levels that are directly attributable to the export of crude oil produced in the United States; and (ii) those supply shortages or price increases have caused or are likely to cause sustained material adverse employment effects in the United States.”

Once the law goes into effect, the Bureau of Industry and Security (BIS) will have to amend the Export Administration Regulations (EAR) to remove export licensing rules for crude oil. “We are looking at the text of the language in the bill, and seeing what we need to do towards implementing what is there. At this point, we are digesting the information and developing a plan of action,” Eileen Albanese, director of BIS’ national security office, told the Practising Law Institute export conference in Washington Dec. 17. “We have to be prepared when the ban is lifted,” she said.

Along with lifting the oil export ban, the appropriations bill revokes the controversial Country of Origin Labeling (COOL) law for beef and pork imports, which the WTO has found to violate trade rules and could have led to nearly \$1 billion in retaliation by Canada and Mexico.

“Back in June, the House overwhelmingly passed language to repeal mandatory COOL for products challenged by our trading partners, and I am pleased to see similar language included in the omnibus package,” House Agriculture Committee Chairman K. Michael Conaway (R-Texas) said in a statement. “By including this language, we will be back in compliance with our WTO obligations, avoid more than \$1 billion in retaliation from Canada and Mexico,” he added.

“The outcome demonstrates the importance of the World Trade Organization as a dispute settlement body,” said a joint statement issued by Canada’s Trade Minister Chrystia Freeland and Agriculture Minister Lawrence MacAulay. “Canada will actively monitor to ensure that the incentives to discriminate against Canadian cattle and hogs are quickly removed from the marketplace,” they said.

Meanwhile, the U.S. Dec. 18 blocked the WTO Dispute-Settlement Body (DSB) from approving Canada’s and Mexico’s requests to take retaliation for the COOL rules. The U.S. reportedly objected to the DSB meeting during the Nairobi ministerial, claiming WTO rules only allow the group to meet after the ministerial. The WTO dispute will become moot once the COOL legislation become effective. The EU called the U.S. action “unprecedented” and “very worrying,” according to one source.

USTR Issues Annual Shame List of Notorious Markets

The sale of counterfeit and pirated goods and software continues to flourish around the world both at online sites and physical marketplaces, the USTR’s office complained in

its annual Special 301 Out-of-Cycle Review of Notorious Markets Dec. 17. The listing of sites, which is based on nominations submitted in public comments to the office, is aimed at shaming the governments where the sites exist into taking action to clean them up, but comes with no U.S. threat of sanctions.

No country has a monopoly on the existence of these markets. While five of the 14 identified physical markets are in China, others exist in Argentina, Nigeria, Paraguay, Brazil, Indonesia, India, Mexico and Thailand. The 14 identified online sites are spread around the world, including in Canada, China, Panama, Switzerland, Vietnam, Russia and Ukraine.

“The Internet has brought about a global revolution in the authorized and unauthorized distribution of films, music, software, video games, and books. In many markets, unauthorized online distribution of, or access to, copyright-protected content largely has replaced unauthorized distribution via physical media,” the report notes.

“In other markets, however, physical media (including CDs, DVDs, video game cartridges, and pre-loaded computer hard drives and other storage devices) continue to be prevalent, with widespread distribution, at times involving local manufacture, through markets such as those identified,” it adds. “China is reportedly the global hub for manufacturing counterfeits, and Guangdong province and the cities of Guangzhou and Shenzhen are its epicenter,” the report says. These markets sell low-quality, relatively inexpensive counterfeit versions of American and other branded apparel and footwear on a wholesale scale for export to Africa and the Middle East, in particular,” it notes.

“Numerous markets in India have appeared in past lists, with no identified meaningful, effective response by the Indian government. In the 2015 Notorious Markets process, India ranked first in terms of the number of nominated physical markets with an increase in reports of counterfeit apparel and footwear,” the report states.

“USTR highlights these markets not only because they exemplify global counterfeiting and piracy concerns, but also because the scale of infringing activity in such markets can cause significant economic harm to U.S. intellectual property rights (IPR) holders. Some of the identified markets reportedly host a combination of legitimate and unauthorized activities. Others reportedly exist solely to engage in or facilitate unauthorized activity,” it says.

The list isn’t an exhaustive list of all markets worldwide in which IPR infringement takes place, the report adds. “The list does not reflect findings of legal violations, nor does it reflect the U.S. Government’s analysis of the general IPR protection and enforcement climate in the countries connected with the listed markets,” it notes.

Industry Dives Deep on USML Vessel Transfers

While industry is generally pleased with the export control reform effort, companies are now getting down to the specific controls on their products. In public comments that Bureau of Industry and Security (BIS) and State’s Directorate of Defense Trade Controls (DDTC) posted Dec. 16, a handful of companies addressed the ongoing review of military vehicles, vessels and equipment on U.S. Munitions List (USML) categories VI, VII, XIII and XX. The two agencies had asked for comments on the first anniversary of

changes to the categories and the transition of some items from the USML to the Commerce Control List (CCL). Northrop Grumman noted places where “multiple USML category entries describe or control the same or similar commodities” in its comments to both BIS and DDTC. Duplicate entries cover fire control systems, active protection systems, underwater mine detection systems, cameras and radar target generators, it said.

The company also pointed out multiple confusing uses of the term “hydraulic” in the new 600-series entries. “The level of technology for these articles is the same irrespective of platform, but controls are inconsistently applied across categories. We therefore recommend ‘hydraulic’ be defined as all types of liquids and ‘.y’ controls regardless of end-item for all types of valves hoses, lines, fittings, couplings, brackets filters and filter assemblies for pneumatic and hydraulic systems,” Northrop Grumman wrote.

Unlike other companies, Airbus used the opportunity to comment on more general BIS policies. For example, it suggested improvements to License Exception STA, which BIS is addressing with aggressive outreach (see related story, page 7). “A more significant compliance risk occurs when the same items are received via different shipments with some using STA and some using a BIS license. In this case, the non-U.S. party must then establish two tracking mechanisms for the same part to ensure compliance with the conditions of STA. This is not only costly, but compounds the likelihood of compliance mistakes and results in a general reluctance to use STA.”

To alleviate this risk, the company recommends “that BIS allows use of de minimis for items received under STA. This will harmonize the conditions on 600 series content received either under a BIS license or under STA as well as the compliance conditions under which a non-U.S. company must manage its 600 series inventory. In any case, the restrictions on exports and re-exports to D5 countries remain,” it said.

In its comment to DDTC, Huntington Ingalls Industries pointed out a “gap in coverage” for armed coastal, patrol, roadstead, Coast Guard and other patrol craft with mounts or hard points for firearms of less than .50 caliber. “These types of armed vessels aren’t captured in ECCN 8A609.a which only includes unarmed patrol boats. Alternately, the USML does not positively list vessels capable of firing munitions <.50 caliber; VI(b)(3) specifically addresses .50 caliber or more,” it wrote.

Boeing identified a few USML sections where “additional clarification to the regulatory text would be helpful to prevent redundancy, vagueness, or inconsistent application.” These address: VI(b)(4), VII(c), and XX(a)(7) mission systems, VI(f)(4) control and monitoring systems for autonomous unmanned vessels, XIII(b) military or intelligence articles, XIII(d)(2) carbon/carbon billets and preforms, XIII(h)(2) thermal engine energy conversion devices, and the XIII(m) ten interpretations, the company noted.

DRS urged more clarity in certain definitions. For example, the listing in category VI(f)(4) reads “Control and monitoring systems and obeying rules-of-the-road without human Intervention,” it said. “Our concern with this entry is that ‘rules-of-the-road’ is undefined. We urge the department to add a clarifying note to this entry, providing some guidance as to what is meant by this listed positive criteria,” DRS told DDTC. UTC suggested revisions to the phrase “not elsewhere specified,” which can be interpreted as “not elsewhere enumerated,” it wrote to DDTC. “This interpretation can result

in the unintended capture in XIII(j) of items described, but not enumerated, on the USML. For example, subcategory XIX(f)(1) controls specially designed F135 engine parts, components accessories, attachments and equipment. Although the components in XIX(f)(1) are *described*, they are not *enumerated*, which could lead to confusion in applying the Order of Review,” UTC wrote.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Eyad Farah of Barrington, Texas, was sentenced Dec. 16 in Tampa, Fla., U.S. District Court to three years and one month in federal prison for conspiring to export firearms to Jordan without license. Firearms were allegedly concealed in vehicles that had been purchased at used car auctions in Central Florida. Farah pleaded guilty Sept. 22 and was arrested in Frankfurt, Germany, in June (see **WTTL**, Aug. 31, page 6). Codefendant Mahmoud Abdel-Ghani Mohammad Assaf previously pleaded guilty to his role in conspiracy and awaiting sentencing. Yasser Ahmad Obeid was sentenced to 51 months in prison in related case in December 2014 and also pleaded guilty.

MORE EXPORT ENFORCEMENT: Sihai Cheng, aka Chun Hai Cheng and Alex Cheng, pleaded guilty Dec. 18 in Boston U.S. District Court to conspiring to export MKS pressure transducers to Iran between November 2005 and 2012. Cheng was extradited from UK to U.S. in December 2014 to face charges and remains in custody (see **WTTL**, Dec. 15, 2014, page 12). Indictment of Cheng and Seyed Abolfazl Shahab Jamili, along with two Iranian companies, Nicaro Eng. Co., Ltd. and Eyvaz Technic Manufacturing Company, was unsealed in April 2014. Sentencing is set for Jan. 27, 2016.

HONDURAS: Labor Department with support from USTR Dec. 9 signed agreement with Honduras on labor rights that “addresses gaps in enforcement of Honduran labor law” in response to February Labor report on country’s labor violations of Dominican Republic-Central America-U.S. Free Trade Agreement (CAFTA-DR) (see **WTTL**, March 2, page 7). Report said it has “serious concerns” about Honduras government’s inspection of worksites, imposition of fines for violations and enforcement of remedial measures.

CAFTA: ITC Dec. 14 launched investigation on probable economic effects of proposed modifications to CAFTA-DR rules of origin. Request from USTR covers fishing lures, gaming machines, polyvinyl chloride, and certain products of chemical and allied industries. Commission will not hold public hearing but welcomes written submissions, it said.

ELECTRONICS: In Federal Register Dec. 16, DDTC extended temporary controls on certain intelligence analytics software under USML Category XI by reinserting words “analyze and produce information from” to paragraph (b). Changes will be effective until Aug. 30, 2017, “while a long term solution is developed,” notice said. Department will publish any permanent revision as proposed rule for public comment, it noted.

GUN BLUEPRINTS: Rep. Thomas Massie (R-Ky.) and 14 other House Republicans Dec. 17 filed amicus brief in *Defense Distributed v. U.S. Department of State* in U.S. Fifth Circuit Court (see **WTTL**, Aug. 10, page 5). In May 2013, Directorate of Defense Trade Controls Compliance (DTCC) asked Defense Distributed to pull gun blueprints off its website, saying it could violate Arms Export Control Act. Defense Distributed and Second Amendment Foundation filed for injunction to block DDTC action in May 2015 in Austin, Texas, U.S. District Court. District court denied injunction, but company has appealed ruling to circuit court. State’s “expansive interpretation of the AECA to permit regulating the online publication of unclassified public speech departs entirely from the statutory text and is due no deference whatsoever,” lawmakers’ brief argues. “It is doubtful that the AECA, which was promulgated

by Congress under the foreign commerce clause to regulate foreign commerce, can constitutionally be applied to purely domestic publication,” it notes. Nonprofit group Electronic Frontier Foundation (EFF) also filed brief in support of appeal on free speech grounds. “The licensing regime at issue in this case is a prior restraint that lacks the procedural safeguards required by the First Amendment to prevent discriminatory censorship decisions,” it wrote.

FCPA: Vicente E. Garcia, former executive at U.S. subsidiary of German software provider SAP, was sentenced Dec. 16 in San Francisco U.S. District Court to 22 months in prison for conspiracy to violate FCPA. He pleaded guilty in August (see **WTTL**, Aug. 17, page 7). At same time as guilty plea, Garcia agreed to pay SEC \$92,395 to settle related charges. Garcia and others conspired to pay \$1.5 million in bribes to government officials in Panama to win \$14.5 million contract from Panamanian government, including sale of approximately \$2.1 million in SAP software, Justice sentencing memo said.

ENVIRONMENTAL GOODS: USTR will conduct environmental review of WTO Environmental Goods Agreement (EGA) and “potential positive or negative environmental effects that might result from the trade agreement,” agency said in Federal Register notice Dec. 18. Comments on potential topics, appropriate methodologies and sources of data are due Feb. 1, 2016.

BURUNDI: OFAC Dec. 18 added four more individuals to its list of Specially Designated Nationals, including chief of staff for Burundi’s Ministry of Public Security, for “being responsible for or complicit in or for engaging in actions or policies that threaten the peace, security, or stability of Burundi.” President Obama Nov. 23 issued executive order imposing sanctions on government officials of central African country (see **WTTL**, Nov. 30, page 11).

HIZBALLAH: President Obama Dec. 18 signed Hizballah International Financing Prevention Act of 2015 (H.R. 2297), which “establishes statutory sanctions on foreign financial institutions that facilitate transactions or money laundering on behalf of Hizballah or its agents,” White House said (see **WTTL**, May 18, page 8).

EDITOR’S NOTE: In keeping with our schedule of 50 issues a year, there will be no *Washington Tariff & Trade Letter* issue Dec. 28. Our next issue will be Jan. 4, 2016. As always, we wish all our readers a **HAPPY HOLIDAY** and a **HEALTHY AND PROSPEROUS NEW YEAR**.