

Vol. 35, No. 29

July 20, 2015

Russia Fails to Block Ukraine from Government Procurement Pact

Members of the World Trade Organization's (WTO) Government Procurement Agreement (GPA) appear to have brushed aside Russia's opposition to Ukraine's accession to the accord and circulated July 9 a draft decision memo to accept Kiev's membership. The decision will now be reviewed by home governments with no fixed deadline for final approval of Ukraine's membership.

Russia caused an uproar at the WTO in June in a letter to the GPA committee chairman, urging the committee to reject Ukraine's application, which included procurement commitments for Crimea and Sevastopol. The Russian claimed that region was an integral part of Russia (see **WTTL**, July 6, page 1). Sources in Geneva noted that Russia only has observer status to the plurilateral GPA and as such has no power to block Kiev's accession.

Ukraine's proposed government procurement commitments received broad agreement among GPA members at their last meeting June 3. Once final approval is given to the offer, Ukraine will need to submit a letter of acceptance confirming that it has ratified the GPA and enact all legislative and regulatory steps necessary to the implementation of its commitments have been taken. It could be a GPA member 30 days later.

A similar process led to Montenegro's GPA accession July 15. New Zealand submitted its instrument of accession July 13 and will become a member Aug. 12. Nine other countries, including China, are seeking membership. Sources say China's last offer in December 2014 is still not considered adequate by several members, including the U.S.

Separately, Ukraine's diplomatic efforts succeeded in the signing July 14 of an Open Skies agreement with the U.S. On the same day, Canada announced that it has concluded free trade agreement with Kiev. On July 16, the U.S. and Ukraine co-hosted the first U.S.-Ukraine Business Forum in Washington along with the U.S. Chamber of Commerce.

Iran Deal Will Add Complexity to Sanctions Regime

U.S. exporters and investors may have to sit and watch European competitors take advantage of the deal reached July 14 to lift sanctions on Iran in exchange for Tehran capping its nuclear arms program for 10 years. While the U.S. has pledged to drop some of its

sanctions as part of the deal, it will still maintain most restrictions, while the European Union (EU) is set to end all its barriers to trade with Iran. For U.S. firms, many restrictions will remain in place. “This is really a body blow to U.S. companies,” says Christopher Wall, a partner with Pillsbury Winthrop law firm in Washington and a former Commerce assistant secretary for export administration. “I see this as very problematic from a business perspective,” he told WTTL.

Under the Joint Comprehensive Plan of Action (JCPOA) reached in Vienna, any change in U.S., EU or United Nations (UN) sanctions will come only when the International Atomic Energy Agency (IAEA) simultaneously has verified “implementation of agreed nuclear-related measures by Iran.” The IAEA “will be requested to monitor and verify the voluntary nuclear-related measures as detailed in this JCPOA,” the accord states.

“Only when international inspectors are able to verify that Iran has taken all of the necessary steps to ensure that it will not develop a nuclear weapon will we and the international community relieve sanctions,” a senior administration official told reporters on a background call July 14. “Not all sanctions are to be lifted. On the U.S. side, we’ve agreed to relieve nuclear-related secondary sanctions on Iran. Generally, what this means is the set of sanctions that have been imposed over the last five years that target foreign actors, not American actors, doing business with Iran, such as those transacting with Iran’s central bank or those who purchased Iranian oil,” the official explained.

“But let me be clear about what we will not be relieving,” the official added. “We are not removing our trade embargo on Iran. U.S. persons and banks will still be generally prohibited from all dealings with Iranian companies, including investing in Iran, facilitating cleared country trade with Iran. The only adjustment we will make to those sanctions at the implementation date will be to allow the import of food and carpets from Iran and the export of civilian aircraft and parts to Iran, which has one of the worst airline safety records in the world,” the official stated.

“In addition, we are not lifting our sanctions that target Iran’s support for terrorist groups like Hezbollah, its regional interventions in Syria or Yemen, or its abuse of human rights back home. Indeed, we have made clear to Iran that we will continue to impose sanctions aggressively to combat these activities. And while Iran can expect to see real relief when nuclear-related secondary sanctions are lifted, some entities, including certain Iranian banks and energy firms will still remain off limits because of their past support for terrorism or because they are owned by groups like the IRGC or the Quds Force,” the senior official told reporters.

“A few important points on the timing or phasing of relief. For those who are focused on sanctions compliance, what was prohibited yesterday remains prohibited today. All that we have done this morning is to extend the interim measures that have been in place since January 2014,” the official added.

“The first adjustments to our core sanctions will only occur in several -- on what is being called implementation day. That is, once the IAEA confirms that Iran has taken all of its key nuclear steps, we will suspend the nuclear-related secondary measures I was describing. And only many years later, once Iran has demonstrated that it is living up to its commitments for a significant period of time will those suspended sanctions be terminated,” the official advised. In addition to aircraft sales, the U.S. will also “license

non-U.S. persons that are owned or controlled by a U.S. person to engage in activities with Iran consistent with this JCPOA.” It also agreed to remove 19 specific sets of sanctions, including several executive orders imposing sanctions on Iran and specific individuals and entities.

A separate 16-page attachment to an annex lists scores of specific individuals and entities that will be removed from the Specially Designated Nationals (SDN) list. The U.S. also said it would seek revisions to legislation where necessary to remove other sanctions. The EU pledges to take similar steps.

Even with the removal of those names, the U.S. identified many with whom trade is still barred. “U.S. persons and foreign entities owned or controlled by a U.S. person will continue to be prohibited from transactions with these individuals and entities, pursuant to the Iranian Transactions and Sanctions Regulations,” it stated.

Among those that would come off the SDN are Bank Melli Iran, Iran Air, IRISL, Iran’s shipping company, other banks and oil companies. The list also includes dozens of specific airplanes and ships. Administration officials urged caution in using the list and urged verification of specific entities because some names sound similar.

The deal would require the countries negotiating the agreement with Iran – the U.S., China, France, Germany, Russia, the United Kingdom and the EU – to introduce a resolution in the UN to lift UN sanctions on “implementation day,” which is the date the IAEA verifies Iran’s compliance with promised nuclear-related measures. “Promptly after the conclusion of the negotiations of this JCPOA, the proposed UN Security Council resolution referred to in Section 18 of this Annex will be submitted to the UN Security Council for adoption without delay,” the plan states.

“President Obama should immediately halt any plans to seek the United Nation’s approval of the Iran nuclear deal before Congress reviews it,” said Sen. John Thune (R-S.D.), chairman of the Senate Republican Conference, in a July 16 statement. “Circumventing elected members of Congress to gain approval from an international organization before Congress has had a chance to review the agreement shows the president holds the opinion of the United Nations in higher esteem than that of the American people,” he complained. Several other lawmakers expressed similar views.

The Senate Foreign Relations Committee will hold a hearing on the deal July 23 with Secretary of State John Kerry, Energy Secretary Ernest Moniz and Treasury Secretary Jacob Lew. There is a general expectation that the House and Senate will vote to disapprove the Iran deal when lawmakers return from the summer recess in September. The White House has already begun scrambling to garner enough votes among Democrats to sustain a presidential veto of any such measure.

CAFC Upholds Injury Finding on Hardwood Flooring

The Court of Appeals for the Federal Circuit (CAFC) rejected an appeal by importers of hardwood flooring from China and confirmed the International Trade Commission’s (ITC) finding that the imports were the cause of injury to domestic U.S. floor manufacturers. The appellate court’s July 13 ruling upheld the Court of International Trade

(CIT) decision, which also agreed that the ITC in a remand determination had correctly concluded that domestic firms were injured “by reason” of the imports. The importers claimed the ITC erred in determining that imports were a “but for” cause of injury. “The Commission performed a proper but-for analysis in making its affirmative injury determination and fully complied with applicable law,” wrote CAFC Judge Evan Wallach for the three-judge panel in *Swift-Train Co. v. U.S.*, the third ruling on this dispute.

Wallach disagreed with the argument that the ITC erred in asserting its discretion in applying the causation standard. “The court declines to entertain Appellants’ unjustified hyperbole. The Commission did not improperly exercise its discretion in making its causation analysis; rather, it adhered to the statutory requirements,” he wrote.

In addition, the appellate court rejected the claim that the CIT had imposed a “substantial factor” test in its ruling as a means of bypassing the threshold requirement of ‘but-for’ causation. Nowhere in the case did the CIT introduce the substantial factor test of causation, Wallach concluded. “The CIT provided a detailed discussion of this court’s cases to illustrate the interplay between but-for causation and the substantial-factor analysis to support its observation that” that substantial factor analysis subsumes but-for causation analysis, Wallach stated.

Former Officials Push for U.S.-Japan Defense Trade Treaty

As President Obama continues his “pivot” to Asia with the Trans-Pacific Partnership (TPP) and other initiatives, former officials from both Democratic and Republican administrations are advocating for the negotiation of a U.S.-Japan Defense Trade Cooperation Treaty (DTCT) in the mode of previous treaties with the United Kingdom (UK) and Australia. The proposal comes as Japan, the largest buyer of U.S. defense goods and services in 2014, is undergoing changes in its policies on exporting defense products and the use of Japanese military forces outside of Japan.

At a Hudson Institute program in Washington July 14, Christopher Wall, former assistant secretary of Commerce for export administration, and Brandt Pasco, former member of Obama’s Export Control Reform Initiative team, called for a defense treaty with Japan. Wall said a DTCT is “a good idea whose time has come” and would anchor the U.S. Pacific pivot.

Wall, now a partner with Pillsbury Winthrop, acknowledged that the UK and Australia treaties held “great promise, but the promises have not been fulfilled.” Exports under those treaties are only allowed to members of approved “communities” and still need licenses, with many items excluded from coverage. The treaties have been so restrictive that they “haven’t been all that effective,” he noted. Despite the gripes and criticism of previous treaties, there’s “not a company that would abandon them,” he added.

Pasco also suggested a multilateral DTCT, which would allow trade among and between treaty partners. He questioned U.S. extraterritorial control on reexports by treaty partners. With the rise of China in recent years, the current administration could find a positive reception in Congress to closer defense ties with Japan, speakers suggested. Members of the House are “overwhelmingly positive,” one said. Pasco hoped that a Japan treaty is something “the next administration picks up fairly early on.” In fiscal 2014, the

Directorate of Defense Trade Controls (DDTC) approved \$7.2 trillion in defense goods and services exports to Japan and actual defense shipments were \$567 million, according to DDTC. Japan is also the largest customer for defense products that have been moved from the U.S. Munitions List (USML) to Commerce jurisdiction. Since October 2013, over 10,800 shipments worth \$775 million were shipped to Japan under the 600 series or under satellite rules (see **WTTL**, June 15, page 7).

The treaty idea coincides with major changes underway in Japanese defense policies. The lower house of the Japanese Diet July 16 approved a series of bills to allow Japanese troops to be deployed outside of Japan for the first time since World War II to help allies and for humanitarian reasons. Upper house approval is still needed. In May 2014, Japan for the first time allowed the export of defense items under certain conditions.

*** * * Briefs * * ***

TPP: USTR sources say they are being sent to Hawaii for TPP ministerial meeting July 24-27 with instructions to try to reach deal. Ahead of meeting, critics have stepped up opposition to agreement (see **WTTL**, July 13, page 1). After viewing draft TPP text as member of USTR advisory committee, AFL-CIO Trade & Globalization Specialist Celeste Drake issued statement: “The Trans-Pacific Partnership continues to fall far short of the labor movement’s expectations in regards to labor protections, international investment and setting firm rules for state-owned enterprises.” She and other advisors who saw text are barred from giving details.

TIRES: ITC in 3-3 final vote July 14 found U.S. industry is injured by dumped and subsidized imports of certain passenger vehicle and light truck tires from China. Vice Chairman Dean Pinkert and Commissioners Irving Williamson and Rhonda Schmidlein voted yes. Chairman Meredith Broadbent and Commissioners David Johanson and F. Scott Kieff voted no. Tie goes to petitioners. Complaint, which was brought by United Steelworkers, was first antidumping and CVD case filed by workers without support of any domestic manufacturer since 1983, according to Terrence Stewart, whose firm, Stewart and Stewart, represented USW.

HAND TRUCKS: In 6-0 “sunset” vote July 14, ITC determined revoking antidumping duty order on hand trucks and certain parts from China would renew injury to U.S. industry.

STEEL: In 6-0 preliminary vote July 16, ITC found U.S. industry may be injured by allegedly dumped and subsidized imports of certain corrosion-resistant steel products from China, India, Italy, Korea and Taiwan.

USTR: Senate Finance Committee will finally hold confirmation hearing July 23 on nomination of Marisa Lago to be deputy USTR. President Obama nominated her Nov. 12, 2014 (see **WTTL**, Nov. 17, 2014, page 6). Deputy post has been vacant for 18 months since Miriam Sapiro resigned. Job has been filled on acting basis since then by Wendy Cutler.

GARLIC: CIT Judge Richard Eaton July 16 upheld Commerce’s final 17th administrative review of antidumping duty order on fresh garlic from China. He agreed with use of broader UN Food and Agriculture Organization (FAO) average data to determine surrogate value than specific level of trade data from other published source. “In other words, while specificity as to the level of trade and contemporaneity may be equivocal or even favor the FI data, the broad market average factor (coupled with tax exclusivity) argues so strongly in favor of the FAO data that the Department cannot be said to have erred by preferring it as the source of the surrogate value for raw garlic. Therefore, when proper weight is given to each of the factors, it is apparent that the FAO data is the best available information,” Eaton wrote (slip op. 15-77).