ISSN 0276-8275

WTTLonline.com

Washington Tariff & Trade Letter®

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

Publisher: Martin Kalin • Editor: Meredith Gilston • Associate Editor: Melissa Apter

Vol. 36, No. 32 **August 8, 2016**

EU-U.S. Privacy Shield Formally Up and Running

After much anticipation, the European Union (EU)-U.S. Privacy Shield Framework became fully operational Aug. 1, as Commerce officially started accepting self-certifications of voluntary compliance. That same day, the European Commission published a short guide for citizens, "explaining how individuals' data protection rights are guaranteed … and what remedies are available for individuals, if they consider their data has been misused and their data protection rights have not been respected," the EU said in a press release.

> "The Privacy Shield ensures easier redress for individuals in case of any complaints. I am therefore confident that the Privacy Shield will restore the trust of Europeans in the way their personal data are transferred across the Atlantic and processed by companies there," EU Justice Commissioner Věra Jourová said in a statement. Commerce Secretary Penny Pritzker and Jourová announced the framework's formal approval July 12 (see **WTTL**, July 18, page 7).

Commerce published a standalone website, privacyshield.gov, allowing companies to self-certify. The agency also explained the new requirements for participating companies. "A participant must inform individuals of their rights to access their personal data, the requirement to disclose personal information in response to lawful request by public authorities, which enforcement authority has jurisdiction over the organization's compliance with the Framework, and the organization's liability in cases of onward transfer of data to third parties," the Commerce site noted.

Singapore Prime Minister Offers TPP Warning During U.S. Visit

Singapore's Prime Minister Lee Hsien Loong urged the U.S. to meet its obligations to its allies and negotiating partners in Asia regarding the Trans-Pacific Partnership (TPP) while speaking at a press conference alongside President Obama Aug. 2. Lee reminded reporters that U.S. negotiating partners have already moved forward on TPP despite

WTTL is published weekly 50 times a year except last week in August and December. Subscriptions are $697 a year. Additional users pay only $100 each with full-priced subscription. Site and corporate licenses are also available. Phone: 301-460-3060 Fax 301-460-3086

domestic pressures. "And if, at the end, waiting at the altar, the bride doesn't arrive, I think there are people who are going to be very hurt, not just emotionally but really damaged for a long time to come," he said, singling out Japan's Prime Minister Shinzo Abe as an example.

Should Congress fail to pass and implement TPP, "while it hurts Mr. Abe is one thing, but it hurts your relationship with Japan, your security agreement with Japan. And the Japanese, living in an uncertain world, depending on an American nuclear umbrella will have to say, on trade, the Americans could not follow through; if it's life and death whom do I have to depend upon. It's an absolutely serious calculation, which will not be said openly, but I have no doubts will be thought," said Lee.

> When pressed at the same press conference on how he plans to convince Congress to take up a vote on TPP when both major party presidential candidates oppose the agreement, Obama said, "Well, right now, I'm President, and I'm for it."

"We are part of a global economy. We're not reversing that. It can't be reversed, because it is driven by technology, and it is driven by travel and cargo containers, and the fact that the demand for products inside of our country means we've got to get some things from other places, and our export sector is a huge contributor to jobs and our economic wellbeing," he continued.

The following evening at the State Dinner, Lee, without saying the words TPP, subtly encouraged Congress to move forward with the trade deal. "I'm happy to see many of Singapore's old friends here tonight, such as Ambassador Steve Green, who you may not know played a crucial role in teeing up a certain midnight golf game between a lame-duck President, Bill Clinton, and our Prime Minister, Mr. Goh Chok Tong, on a rainy night in Brunei during an APEC meeting, which led to the U.S.-Singapore Free Trade Agreement. Which shows what can be done even during lame-duck periods."

Despite Lee's optimism and administration officials from Commerce, U.S Trade Representative (USTR) and the White House making the rounds to lawmakers, House Speaker Paul Ryan (R-Wisc.) said Aug. 4 he doesn't plan on holding a TPP vote during the lame-duck session. "As long as we don't have the votes, I see no point in bringing up an agreement only to defeat it," Ryan said in an interview with Wisconsin Public Radio.

Former BIS Official Indicted for Bribery

After the Bureau of Industry and Security (BIS) was hacked in 2006, the agency had to replace most of its computers and migrate employees' old data to the new machines. BIS employee Raushi Conrad was designated the project manager in charge of overseeing the BIS data migration project.

Ten years later, he was arrested Aug. 1 on charges of conspiracy to pay and receive bribes, and acceptance of bribes by a public official, relating to services provided to BIS but allegedly benefitting Conrad and his chicken restaurant (Corporation A). His official title was BIS director of system and security operations.

"To conceal the corrupt nature of the bribe payments, Conrad created false and fictitious invoices that purported to be from an abbreviated version of Corporation A's name, addressed to Corporation D, for services purportedly rendered by Corporation A. Conrad did so to create the false appearance that the payments from Corporation D to Corporation A were for legitimate services that had been rendered by Corporation A. The false and fictitious invoices purported to be for items including 'Support services,' and 'Engineering services,' when in fact, as Conrad knew, no such services had been or would be provided," the indictment noted.

In late 2015, Commerce's Office of Inspector General (OIG) found BIS had "significant deficiencies" in its security practices and how it scans its systems for viruses and other intrusions and remediates problems. Due to these shortcomings, "BIS systems are more likely to be vulnerable to cyber attack," the OIG said in the report (see **WTTL**, Nov. 30, page 4).

Court Sustains Remand Ruling on Korean OCTG

Korean exporters of oil country tubular goods (OCTG) failed Aug. 2 to get the Court of International Trade (CIT) to reject Commerce's remand determination in the antidumping (AD) case against imports of those products. CIT Judge Jane Restani sustained the department's new ruling, which she ordered in an earlier decision, including its method for determining a constructed value (CV) profit and its interpretation of "same general category of products" in the Trade Act.

> In her remand order, Restani had told Commerce to explain its selection of mandatory respondents and its use of financial data submitted by petitioner U.S. Steel after the negative preliminary decision was issued. In the final affirmative determination, the department set AD rates of 9.89% for NEXTEEL and 15.75% for HYSCO. On remand it lowered the margins to 3.98% and 6.49%, respectively.

Restani said Commerce "was in compliance with the statute" in selection of the two respondents because of their size. She also supported the department's decision to reopen the record to receive comments on the new financial data. "By permitting the parties to comment on the Tenaris data, Commerce has compensated for and adequately ameliorated the prejudice to respondents. It was well within Commerce's discretion to reopen the record on remand," she wrote.

"Commerce's interpretation of same general category of products in this case as excluding non-OCTG products is reasonable. First, Commerce's explanation in the Remand Results that different market demand in the oil exploration and construction industries during the POI was not expressly relied upon in making the same general category of products determination, but underscored the dissimilarity in the industries in which OCTG and non-OCTG pipe are used, was reasonable," Restani explained (slip op. 16-76).

"Second, with respect to testing and certification requirements, Commerce reasonably explained that those requirements were not expressly relied upon but helped to analyze the physical characteristics of the products at issue. OCTG is unquestionably a premium product that is used in unique and often harsh environments such that OCTG products must be of sufficiently high quality to withstand significant pressures," she added.

> "Neither the statute nor the regulations define the phrase 'same general category of products'," she noted. The Uruguay Round Statement of Administrative Action "indicates that the phrase 'encompasses a category of merchandise broader than the "foreign like product"'," she wrote.

"Commerce correctly noted that the statute indicates a preference in calculating CV Profit for data sources reflecting production and sales in the foreign country of the foreign like product. None of the data sources on the record, however, reflected both of these preferences. Commerce was thus forced to choose among imperfect choices and the court will not undermine such decision so long as it is reasonable," Restani ruled.

New Report Highlights Trouble Spots in Potential U.S.-China BIT

In a new report published Aug. 1, the U.S.-China Economic and Security Review Commission paints a less than rosy picture for lawmakers weighing the potential benefits of a U.S.-China Bilateral Investment Treaty (BIT) against considerable concerns.

U.S. and China have undergone 24 rounds of BIT negotiations as of June 2016, but significant challenges remain, including restricted market access, localization requirements, treatment of foreign investors and "discretionary and opaque" national security review procedures. Despite these challenges, the push to reach a BIT persists because of the potential to meaningfully expand bilateral investment. According to the report, China comprised 2.5% total foreign direct investment (FDI) flows into the U.S. in 2014. U.S. had 2% share of FDI flows into China in the same time frame.

Report co-authors Lauren Gloudeman and Nargiza Salidjanova carefully outlined the benefits and concerns of a U.S.-China BIT U.S. policymakers should consider. Among the (obvious) benefits is the possibility of leveling the playing field, increased market access, the potential for China's domestic reform, and opening the door to future trade and investment liberalization. The authors believe a BIT "presents the most significant opportunity since China's WTO [World Trade Organization] accession for U.S. companies to address long-standing Chinese investment barriers."

But the list of concerns runs far longer. For starters, the Chinese government plays an outsize role in "promotion and approval" of outbound FDI, which raises questions about the motivation for deals. Would such deals be concluded for economic reasons or to achieve a goal of the Chinese government? Gloudeman and Salidjanova further contend that the potential economic impacts of a U.S.-China BIT on U.S. employment are "not well studied," but recent research links greater imports from China following that country's WTO accession to "significant" job loss in the U.S. The authors also raised questions about the scope of investor-state dispute-settlement (ISDS) provisions, FDI screening, and reciprocal investor treatment.

Assuming negotiators succeed in drafting the most comprehensive, high-standard BIT, China's willingness to comply is a huge concern. In its last annual report to Congress on China's WTO compliance (December 2015), USTR highlighted "a wide range of Chinese policies and practices continued to generate significant concerns among U.S. stakeholders."

These concerns included serious problems with intellectual property rights enforcement in China, including in the area of trade secrets; the Chinese government's wide-ranging use of industrial policies favoring state-owned enterprises and domestic national champions in many sectors; troubling agricultural policies that block U.S. market access; numerous continuing restrictions on services market access; and inadequate transparency.

ITA Releases Reports Ahead of New Global Steel Trade Monitor

China accounted for nearly half of all steel production in 2015, with Japan a distant second at only 6.5%, according to a series of reports Commerce's International Trade Administration (ITA) released Aug. 1. The publication of these reports, which detail current steel trade flows of the top 20 importing and exporting countries, is the first step toward implementing a new interactive Global Steel Trade Monitor due out in 2017.

> Steel production has remained steady at approximately 100 to 125 million metric tons more than demand since 2005, while global steel-making capacity has grown so much, particularly in Asia and Oceania, that it outpaces demand and crude steel production every year, ITA noted. According to the report, "capacity is over 700 million metric tons larger than production in 2015 and over 800 million metric tons larger than demand, though these gaps were exacerbated by production and demand declines in 2015."

Global steel mill exports have grown over the last decade, despite a dip during the global financial crisis in 2008-2009. According to the report, 2015 exports rose .5% from 2014 to 456.1 million metric tons. Unsurprisingly, China was the top exporter of steel mill products in 2015; Chinese companies exported 110 million metric tons. The U.S. ranked 14th in exports at 9.5 million metric tons and was the top importer for 2015 at 35.3 million metric tons. (China, by contrast, imported 13 million metric tons in the same year.)

"The Obama Administration understands the impact of unfair trade practices on our steel industry, and has taken strong action to mitigate the effects of global excess capacity on our businesses, our communities, and our workers. The reports we are releasing today are in direct response to our industry's desire for more comprehensive and transparent information about global steel trade trends, which will strengthen our companies and our government's ability to address challenges facing this critical sector," said Commerce Secretary Penny Pritzker in a statement.

* * * Briefs * * *

<u>TRADE FIGURES</u>: Merchandise exports in June fell 5.5% from year ago to $120.4 billion, lowest level since March 2011, Commerce reported Aug. 5. Services exports dipped 0.35% to $62.8 billion from last June. New monthly export records were set in telecommunications, computer and information services -- $3.1 billion; maintenance and repairs services -- $2.3 billion; and insurance services -- $1.6 billion, Commerce noted. Goods imports dropped 3.3% from June 2015 to $186.4 billion, as services imports gained 1.6% to $41.2 billion.

<u>AFGHANISTAN</u>: Afghanistan joined WTO as 164th member July 29 after 12 years of negotiating terms of its accession. Afghanistan also accepted WTO's Trade Facilitation Agreement. "We hope that Afghanistan's WTO Membership will provide a foundation that increases economic growth, opens new opportunities for trade with other WTO Members, and enhances the potential for future development and prosperity," USTR Michael Froman said in statement.

<u>BRAZIL</u>: U.S. beef and beef products can be exported to Brazil for first time since 2003, USDA announced Aug. 1 after reaching agreement with Brazil's Agriculture Ministry. U.S. beef exports had been restricted due to bovine spongiform encephalopathy (BSE aka "mad cow") concerns. U.S. beef industry has negligible risk classification for BSE from World Organization for Animal Health (OIE). "We are pleased that Brazil … has aligned with science-based international standards, and we encourage other nations to do the same," said Agriculture Secretary Tom Vilsack in statement.

<u>UK</u>: New UK government announced Export Control Joint Unit (ECJU) began operating July 18. ECJU "brings together operational and policy expertise from the Department for International Trade's Export Control Organization, the Foreign & Commonwealth Office and Ministry of Defense to promote global security through strategic export controls and facilitate responsible exports," notice to exporters said. "The decision to grant or refuse an export licence in any individual case has become the responsibility of the Secretary of State of the newly formed Department for International Trade," it added.

<u>ANTIGUA</u>: Antigua and Barbuda could implement WTO-approved retaliation against U.S. for failure to satisfy dispute over online gambling, country's prime minister said July 25 on state media broadcast. Antigua won arbitral award against U.S. in 2004 and has been negotiating since then (see **WTTL**, Aug. 3, 2015, page 9). U.S. had unilaterally declared internet gambling from Antigua illegal in violation of General Agreement on Trade and Services. Antigua claims 12-year dispute cost them $200 million. In 2009, WTO gave island nation right to collect revenues on U.S. copyright materials without paying licensing and copyright fees to bring in estimated $21 million.

<u>TRADE PEOPLE</u>: Michaela Chen, senior trade advisor at EU delegation in Washington, will take role as director, international government affairs at Boston Scientific starting Aug. 8. Chen had been with EU delegation since 2008.

<u>EAR</u>: In Federal Register Aug. 8, BIS adds certain targets "specially designed" for production of tritium and related "development" and "production" technology to its "holding" Export Control Classification Numbers (ECCNs) 0A521 and 0E521. Transfer is effective immediately and will be valid for year or until "the item is re-classified under a different ECCN, under an EAR99 designation, or the 0Y521 classification is extended," BIS explains. Rule covers "targets made of or containing lithium 'specially designed' for the production of tritium by insertion in the core of a nuclear reactor," it added. BIS added x-ray blocking and scattering epoxy system to ECCN 0C521 in 2015 (see **WTTL**, Nov. 16, page 10). Comments on interim final rule are due in 60 days.