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Export Violators Could Face Mandatory Minimum Sentences

Exporters who violate the International Emergency Economic Powers Act (IEEPA) could face a five-year minimum jail sentence under legislation introduced in the Senate to reform the criminal justice system. The Senate bill (S. 2123), the Sentencing Reform and Corrections Act of 2015, which was introduced Oct. 1, includes a five-year minimum sentence for those guilty of "provision of controlled goods or services to terrorists or proliferators of weapons of mass destruction." The export control provision is a small part of a broad proposal to revise criminal sentencing rules.

> A parallel House bill (H.R. 3713) introduced Oct. 8 does not include this provision, setting up the need for a conference committee to resolve these differences if the measures ever get passed out of their respective chambers. The Senate Judiciary Comittee was planning on holding a hearing on its bill Oct. 19, while its House counterpart has not yet scheduled anything.

Specifically, the Senate bill would amend IEEPA to add the minimum sentence for crimes involving the provision of controlled goods or services to a state sponsor of terrorism, foreign terrorist organization, or person on Treasury's list of specially designated nationals (SDN) and blocked persons (see **WTTL**, June 16, 2008, page 4).

The minimum sentence would apply to exports to "any person in connection with a program or effort of a foreign country or foreign person to develop weapons of mass destruction," and the provision of defense articles or defense services without a license to a country subject to a U.S. arms embargo. IEEPA was amended in 2007 to increase the maximum criminal fine under the statute to no more than $1 million per violation or no more than 20 years in prison or both but with no mandatory minimum. The legislation also increased the potential civil fine up to $250,000 or twice the transaction value per violation. Few export violation convictions have led to five-year sentences.

U.S. Pushes EU for Quick Revision of Safe Harbor Data Deal

While the U.S. is seeking quick action to revise the Safe Harbor data protection agreement with the European Union (EU) following a European court ruling invalidating the 2000 accord, EU officials say they intend to demand strong safeguards, including

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legislation, to preclude widespread surveillance programs such as those revealed by Edward Snowden. Just a week after the EU Court of Justice threw out the agreement, U.S. officials rushed to Brussels for Oct. 15-16 talks with the EU to complete an update of the agreement (see **WTTL**, Oct. 12, page 6).

> Before the new talks, one U.S. official complained about the EU's "lack of urgency" in addressing the court decision and in finishing talks that have been going on for two years. He admitted that "nobody anticipated this ruling" from the court even though it was known that the court was reviewing the pact. "It's a brave new world as to what it means," he said.

EU Justice Commissioner Vera Jourova told the European Parliament Oct. 14 the Safe Harbor agreement "can no longer serve as a legal basis for transatlantic data transfer." Some 4,500 U.S. firms have made Safe Harbor commitments to protect European data and now could face legal liability in the EU if they continue to transfer personal information on EU citizens to the U.S. Business needs "clear guidance on the remaining legal ways to be doing so with appropriate safeguards and conditions to be fulfilled," she said.

While EU and U.S. officials have been working for two years to update the Safe Harbor accord, most of the talks have addressed enforcement issues, including a separate "umbrella" agreement on enforcement of the rules, but not national security, which was the main concern of the EU court ruling. "My objective remains on a renewed and robust arrangement on transatlantic data flows taking into account the requirements set by our highest court," Jourova told the Parliament.

"The U.S. side needs to address these requirements also in its own legal order and in practice," she said. "I am encouraged by reform steps such as the U.S. Safe Freedom Act and the draft judicial redress bill which specifically addresses the situation of EU citizens," Jourova said.

The Freedom Act (H.R. 2048), which curbed the National Security Agency's ability to conduct widespread surveillance of phone records, was signed into law June 2. The House Judiciary Committee reported out the redress bill (H.R. 1428) Sept. 17 and it is still awaiting full House action. The measure would authorize Justice to designate foreign countries or regional economic blocs whose natural citizens may bring civil actions under the Privacy Act of 1974 against certain U.S. government agencies to redress unlawful disclosures of records maintained by an agency.

"We will be clear in our discussions with the U.S. partners, we need guarantees that the right to data protection is respected when data is transferred to the U.S.," Jourova told the Parliament, whose members strongly protested U.S. surveillance practices. "We want to achieve a strong commitment from the United States that the data of Europeans will be highly protected at least in the way we do it in the European Union," she added.

Jourova, who met Oct. 14 with a group of EU business leaders who raised concerns about the court ruling, said the EU Commission sees a three-stage plan for addressing the decision. The short-term goal is issuing guidance to business about the rules for data transfers. A mid-term aim is to complete what she called an updated "safer safe harbor" agreement. She said she would visit the U.S. in mid-November to have those discussions with Commerce Secretary Penny Pritzker. In the long term, the EU needs to "impose more pressure on the United States in the direction of their reform of national intelli-

gence and higher protection of privacy," she said. Pritzker addressed the EU court ruling in a speech Oct. 15 when she received an award from National Foreign Trade Council. "I have expressed the need for urgent resolution with Minister Jourova and today my team met with our counterparts in Brussels," she said. "We're prepared to move forward quickly so that thousands of U.S. and EU businesses that complied with and relied on the safe harbor framework can continue to grow the world's economy," Pritzker said.

BIS Faces Deadline for Cybersecurity Decision

U.S. officials face a short deadline if they want to ask the Wassenaar Arrangement to revise the controversial rules on cybersecurity technology. A U.S. proposal for changing the rules would have to be ready by next February to get on the regime's 2016 agenda. While a late submission is possible, any long delay could keep the issue unresolved until 2017. Bureau of Industry and Security (BIS) Assistant Secretary Kevin Wolf told the BIS Emerging Technologies and Research Advisory Committee (ETRAC) Oct. 15 that no decision had been made in any direction, contrary to reports he had heard.

> "It's not that we've retracted the rule, it's not that we've decided to go back to the Wassenaar room, it's not that we've decided to stop the idea, it's not that we've decided to go forward with the rule with only minor tweaks. We haven't made any decisions," he told ETRAC. Except one: BIS will not go straight to a final rule with any changes to the proposed rule. That's "the only thing that's certain," Wolf said (see **WTTL**, Aug. 3, page 1).

The proposed rule, which received some 250 mostly negative public comments, also will be the subject of discussion of two more TAC meetings between now and December. "We won't have any decisions reached within the U.S. government about what we're going to do, up down left right [before those meetings]. But nonetheless because of the complexity and the number of people involved, and the number of people involved who aren't ordinarily involved in the export control space, we want to give as much opportunity as possible for folks to weigh in, as we think about how to implement the rule we agreed to," Wolf added.

Most of the comments took issue with the very idea that government controls can distinguish between "offensive" cyber attacks and "defensive" efforts to test network vulnerability, a criticism that BIS had anticipated. "We expected to hear from industry that the license requirements and licensing policy were problematic. What we didn't really expect to hear was that the technology control in particular would have much larger consequences than we anticipated. And we have identified this particular issue about the technology and the scope of the technology as an issue for discussion," Randy Wheeler, director of BIS' information technology controls division, told ETRAC.

As part of the decision process, ETRAC heard six presentations from industry. In addition to going back to Wassenaar, recommendations from industry include removing certain controls or adding multiple carveouts or license exceptions.

In his presentation, Jim O'Gorman, president of Offensive Security Inc., listed some of the many license exceptions that would be required, including education and training, intra-company transfers, exports to U.S. subsidiaries, exports to certain friendly countries, and technology exchanges related to security research and development. "The

best approach is to remove technology controls altogether," he said. Neal Martin of Google suggested exceptions for technology to software manufacturers if the intent is to disclose and fix vulnerabilities, and for transfers of vulnerable products or code back to those who reported it. He cited Executive Order 13691 of February 2015, which says private companies and entities "must be able to share information related to cybersecurity risks and incidents and collaborate to respond in as close to real time as possible."

> Meredith Rathbone, partner at Steptoe & Johnson, recommended going back to Wassenaar. There would have to be so many carve-outs, it would make the rule "incomprehensible," she said. "There are ways to focus on intent," she added. Rathbone's firm represents the Coalition for Responsible Cybersecurity, which formed in July 2015 in response to the proposed rule.

Written comments to the committee echoed the suggestion to focus on intent and end-user. "The main issue, in our opinion, is that a large part of the regulation's wording aims to technically differentiate between 'good' and 'bad' intent for software tools. But Penetration Testing tools are by design as closely built as possible to intrusion tools. What differentiates them is not some magical feature set but who uses them, and against whom," wrote David Aitel, CEO and founder of Immunity, Inc., which sells penetration testing products and conducts security assessments.

U.S. Industry Seeks New Softwood Lumber Deal with Canada

With the expiration of the 2006 Softwood Lumber Agreement (SLA) with Canada Oct. 12, the U.S. lumber industry is calling for the negotiation of a new agreement with tougher provisions. The industry has begun pressing the U.S. Trade Representative's (USTR) office to enter into new talks with Ottawa, but sources say it will take a long time to reach a deal if one is possible and chances for that are still uncertain.

> While the U.S. industry supported the 2006 deal, it says the accord stopped working. The 2008 housing crash slowed all lumber trade. The current rebound in construction has helped the domestic industry, but the rise in the value of the U.S. dollar and the fall of the Canadian dollar have hurt U.S. exports, especially to Asia, and made Canadian imports more competitive.

Representatives of some U.S. and Canadian lumber firms reportedly met privately for two months to come up with the outline of a new deal but those efforts collapsed, according to one source. Meanwhile, it is unclear how much enthusiasm the U.S. government has to negotiate a deal. The SLA was a product of the George W. Bush administration, and the Obama administration has no stake in it, one attorney suggested. Moreover, the U.S. and Canada may be more interested in campaigning for TPP than in reopening a 20-year bilateral squabble over lumber.

"Unfortunately, world timber and lumber markets have evolved and the 2006 agreement is now outdated," said Charlie Thomas, chairman of the U.S. Lumber Coalition and vice president of Shuqualak Lumber Company, said in a statement. "The Coalition intends to continue working with the U.S. Government to reach a new agreement that will resolve this issue effectively in the future," he said. A coalition press release claimed the Canadian government has so far been unwilling to enter into negotiations on a new trade agreement. "If Canada continues to stay away from the negotiating table, the U.S. indus-

try will eventually have no choice but to use our rights under U.S. trade laws to offset the unfair advantages provided to Canadian industry," Thomas said. The coalition has committed to not filing another antidumping or countervailing duty case against Canadian lumber until October 2016, but one source called that only a "good faith" commitment that could be voided if the coalition feels more leverage is needed to get talks moving.

> In a new SLA, the coalition will want stronger rules on calculating lumber production costs, stronger enforcement measures and restrictions on a so-called "exit ramp" that would allow a Canadian province to come out from under the accord if it can show it has adopted market-based lumber prices, one source explained. While Canada has proposed mechanical steps to show the adoption of market-oriented prices, the coalition wants to see actual changes in the marketplace, the source explained.

Canada's resistance to new talks is based in part on the sharp divide among Canadian provinces over entering into another long-term pact to reduce the volume of sales to the U.S. and to place a floor under lumber prices. British Columbia reportedly is willing to enter into a new accord because the lower Canadian dollar has made its exports to China and Asia more competitive against U.S. products and it relies less on the U.S. market.

The Atlantic Maritime Provinces, which were exempt from the 2006 SLA, want a deal because they are afraid they might face restrictions in the U.S. market otherwise, one source said. Alberta would support an accord if it got a larger quota allocation. Quebec appears to be alone in opposing a new agreement and would support one only if it had an exit ramp to get out from under its provisions.

Representatives of the Canadian industry doubt the U.S. industry has the muscle it once had to bring successful antidumping and countervailing duty complaints as it has in the past. The U.S. industry is smaller, with fewer resources to fund a legal battle, one source claimed. With the SLA supposedly preventing injury for the last nine years, a petition would have to rely on a threat-of-injury argument. Threat may be harder to prove this time because production in Ontario has largely ended and many mills in Quebec have closed permanently, he contended.

Services Negotiators Look Toward Ministerial to Spur Talks

Trade ambassadors at the 14th round of talks on a Trade in Services Agreement (TISA) in Geneva Oct. 13 claim they made progress on rules for financial services, domestic regulation and telecommunications, but are looking toward the World Trade Organization's (WTO) ministerial in Nairobi in December and a possible mini-ministerial of TISA participants to give the talks momentum going into 2016. Although bilateral talks on specific market access requests have also started, they are expected to take a long time to complete, diplomats report.

One issue getting more attention, they say, is how to expand any final TISA on a multilateral basis to countries that have not participated in the talks. Just as they have in negotiating expansion of the Information Technology Agreement (ITA), trade officials are trying to define what would constitute a "critical mass" of TISA participation to warrant multilateralizing the accord. Sources say negotiators are trying to put pressure on China, which is not participating in TISA talks. The definition of the critical mass would have

to combine a minimum threshold of trade covered by TISA plus a certain number of countries, one negotiator said. Even a critical mass as high as 94% could exclude China, which now only accounts for 6% of trade in services, he said. China's share of world trade in 10 years will likely be much higher, he said. A European Parliament Committee has urged European Union (EU) negotiators to limit benefits to signatories until the critical mass of international trade in services is covered.

> Also addressed in the talks is whether TISA should have a separate dispute-settlement mechanism or fall under the WTO's dispute-settlement process, which the EU would prefer. All WTO members would have to agree to allow TISA members to use the WTO mechanism, a service industry representative noted. "That's not going to happen," he said.

The only option is a separate TISA mechanism, he suggested. A separate TISA mechanism likely wouldn't allow retaliation outside services, the executive said. Retaliation in services alone won't work except in Mode 4, which covers movement of business personnel across borders, he added.

The EU Parliament's Committee on International Trade has weighed into the services talks with recommendations on what the EU's positions should be in the talks. European negotiators should "exclude cross-border financial services from the EU's commitments until there is convergence in financial regulation at the highest level, except in very limited and justified cases," a draft recommendation from the committee said.

The committee has also attempted to quantify tariff-equivalents to barriers in trade in services. It calculated that services barriers amount to 15% for Canada, 16% for Japan, 25% for South Korea, 44% for Turkey and 68% for China, while EU restrictions amount to only 6%, the assessment released Oct. 15 said.

The TISA meeting discussion of market access for financial services was very good, one negotiator told WTTL. Various offers were analyzed and compared, he noted. Negotiators also addressed proposals to revise the WTO Telecom Reference Paper. The WTO paper is two pages long, while the TISA chapter is 30 pages. The proposals deal with non-discriminatory allocation of telephone numbering resources, access to essential network facilities and spectrum, he said. Progress was made on access and interconnection issues, he said. Offered at the session but not discussed was a proposal the U.S. circulated on state-owned enterprises. The next round is scheduled for Nov. 30 to Dec. 4.

USTR Speeding to Release Full TPP Text

The USTR's office is rushing to release the text of the Trans-Pacific Partnership (TPP) reached Oct. 5, with the publication possible as soon by Oct. 23, according to sources. The longer the document remains under wraps, the more it is open to criticism from opponents who base their comments on speculation or partially revealed information.

Almost half of the text was already in final form when trade ministers from the 12 TPP countries met in Atlanta. The most complicated portion still needing drafting was the one dealing with dairy products, sources note. If the USTR's office can make the text public by the end of October, President Obama should be able to give Congress the required 90 days advanced notice before he signs it, probably in early February. Although

there is increasing skepticism about the chances of Congress voting in 2016 to implement the accord, congressional sources see the possibility of action in late spring or in a lame-duck session after the November elections. Spring or early summer would be after primary filing deadlines for many House and Senate seats and would dodge any potential opposition based on a trade vote, one aide suggested.

> Business representatives are also questioning how much enthusiasm they will be able to muster from corporate headquarters for the pact. Without many details revealed yet, industry groups have been very restrained in expressing support for the agreement. While many tariffs and trade barriers will be eliminated under the accord, the phase-out periods for many of these changes are extremely long, dampening the excitement that may be needed to lobby Congress to approve the deal.

With only sketchy details being released so far, USTR Michael Froman has already embarked on a promotion campaign for the deal. On a conference call sponsored by the Council on Foreign Relations Oct. 15, he stressed the strategic importance of TPP as part of the Obama administration's "rebalancing" toward Asia. He also defended TPP provisions on protection of biologics data, which has drawn sharp criticism from members of Congress (see **WTTL,** Oct. 12, page 1). The provision was "one of the most difficult issues in the whole negotiations," he said, but it "strikes a very important balance."

Froman demured in responding to a question about the currency manipulation provisions in the pact. He said Treasury has negotiated those provisions and "will be rolling this out over time as we move forward with the agreement overall." He said he will "let Treasury do the details of the rollout at the appropriate time and we are finalizing that now." While not providing details, Froman said TPP will be the first agreement to have a currency arrangement. "It will lay out criteria for addressing the issue for responsible exchange rate policies," he said. It also will have provisions providing for consultations on currency policies, Froman added.

EU Aims to Answer Critics in New Trade Strategy

Just as USTR Michael Froman has promised more transparency in trade policy, the EU is also pledging to be more open in its trade relations. In response to public criticism of EU trade negotiations, especially with the U.S., and its effect on EU regulations, the European Commission Oct. 14 released "Trade for All," a 36-page trade and investment strategy that addresses effectiveness, transparency and values in EU trade policies.

> "We've listened to the debate," said EU Trade Commissioner Cecilia Malmström in a statement. "Europeans know that trade can deliver jobs, growth and investment for consumers, workers and small companies. And they want more of those results. But they don't want to compromise on core principles like human rights, sustainable development around the world or high quality regulation and public services at home. And they want to know more about the negotiations we carry out in their name," she said.

The next day, Malmstrom defended the strategy to the International Trade Committee of the European Parliament. "The commission makes a clear pledge in this communication

that no trade agreements will ever lower levels of regulatory protection. Any change to levels of protection can only be upward. And we will never give up our right to regulate. We also give some of the next steps for our new approach to investment protection –which guarantees the right to regulate and sets the scene for a long-overdue reform of the global system of investment treaties," Malmstrom said.

> The timeline for implementation of the strategy was unclear. "On the basis of these discussions, the Commission will assess how implementation should proceed over the course of the current mandate. Some actions – such as those on transparency – can move ahead without delay. Others will take the form of Commission proposals and therefore be subject to normal consultation and decision-making," the EU said. The plan still needs to go to the EU Foreign Affairs Council Nov. 27 for adoption.

Specific steps the commission promised to take include: incorporate certain benefits of the intra-corporate transfers (ICT) directive into trade and investment agreements; step up the protection and enforcement of intellectual property rights; strive for simplicity and consistency of rules of origin; enhance cooperation between customs authorities; and cooperate with member states to employ the most efficient electronic systems including electronic payments.

In addition, the commission said it will extend its practice in Transatlantic Trade and Investment Partnership (TTIP) talks of publishing EU texts online during all negotiations and make it clear to all new partners that negotiations will have to follow a transparent approach. After finalizing negotiations, it said it will publish the text of the agreement immediately without waiting for the legal revision to be completed. The plan also proposes "an ambitious modernisation of the EU's policy on export controls of dual-use goods, including the prevention of the misuse of digital surveillance and intrusion systems that results in human rights violations," it said.

Moreover, it will actively push for the conclusion of the Doha Round; continue negotiations for an ambitious, balanced and comprehensive free trade agreement with Mercosur, the South American trade bloc; and aim to conclude an ambitious, comprehensive and mutually beneficial TTIP. It also will open FTAs, including TTIP and customs agreements, to third countries willing to join them, provided they are ready to meet the high level of ambition, the commission said.

On the environment, the commission wants to maintain access to imported energy and raw materials. "Trade agreements can improve access by setting rules on nondiscrimination and transit; by tackling local-content requirements; by encouraging energy efficiency and trade in renewables; and by ensuring state-owned enterprises compete with on a level playing field according to market principles. Such provisions must fully respect the sovereignty of each country over its natural resources and must not prevent action to protect the environment, including the fight against climate change," it said.

* * * Briefs * * *

MTCR: India failed in first attempt to gain membership in Missile Technology Control Regime (MTCR) during plenary in Rotterdam Oct. 9. "Broad support for Indian membership in #MTCR but regrettably no consensus yet. I remain optimistic," MTCR Chair Roald Naess tweeted after

meeting. At same time, "partners welcomed the fact that Estonia and Latvia have declared, in the past year, their adherence to the MTCR Guidelines as a basis for their national export controls concerning missile technology," said public statement issued after plenary meeting. U.S. affirmed its support for India's membership in MTCR during first meeting of U.S.- India Strategic and Commercial Dialogue meeting in September (see **WTTL**, Sept. 28, page 6).

PIGMENT: In 6-0 "sunset" vote Oct. 14, ITC said revoking antidumping duty orders on carbazole violet pigment 23 from China and India and countervailing duty order on product from India would renew injury to U.S. industry.

BARIUM CHLORIDE: ITC decided Oct. 14 in 6-0 "sunset" vote that revoking antidumping duty order on barium chloride from China also would renew injury to U.S. industry.

ECR: DDTC Oct. 9 extended for one year validity period of agreements that include products transitioning from its jurisdiction to BIS under export control reform. Original transition plan from October 2013 allowed agreements two-year grace period. In addition, "licenses or authorizations that would otherwise expire at the conclusion of the referenced two-year period will remain valid for 48 months from the date of issuance, or as otherwise indicated on the license or authorization," it said.

TRADE PEOPLE: As predicted, Brian Nilsson was named head of State's Directorate of Defense Trade Controls (DDTC) Oct. 13 (see **WTTL**, Aug.10, page 1). Nilsson has spent the last eight years on "temporary" detail to White House National Security Council (NSC) as director for national security and export controls and has been key manager of export control reform intiative. At DDTC, he replaces Ken Handelman, who returned to the Defense Department in July. Acting chief Tony Dearth will return to post as DDTC licensing director.

MORE TRADE PEOPLE: Bill Reinsch will retire in April 2016 after 15 years as NFTC president, group announced Oct. 16. "It is time for me to do something different. I don't know what that will be, but I look forward to finding out," said Reinsch in statement. He previously served as Commerce under secretary for export administration in Clinton administration and earlier was long-time congressional aide on trade, including for late Sen. John Heinz (R-Pa.).

FCPA: James Rama, former vice president of IAP Worldwide Services Inc., Florida defense and government contracting company, was sentenced Oct. 9 in Alexandria, Va., U.S. District Court to four months in prison followed by two years' supervised release for conspiracy to violate Foreign Corrupt Practices Act (FCPA). He pleaded guilty in June to charges related to scheme to bribe Kuwaiti officials to secure government contract (see **WTTL**, June 22, page 4). At same time as guilty plea, IAP agreed to pay $7.1 million as part of three-year non-prosecution agreement with Justice.