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

Washington Tariff & Trade Letter®

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Vol. 35, No. 23

June 8, 2015

DDTC Still Expects Large Number of Disclosures, Registrations

Export control reforms haven't reduced the number of firms the Directorate of Defense Trade Controls (DDTC) expects to register as defense manufacturers or the number of voluntary disclosures it will receive. The agency's expectations were revealed in a Federal Register notice June 2 as part of its compliance with government requirements to seek public comments on the burden imposed by several reports that industry must file.

Although administration officials had predicted a drop in registrations as thousands of items moved from the U.S. Munitions List to the Commerce Control List, the notice says DDTC expects to receive 12,500 registrations from 12,500 firms annually, a number close to past levels. It claims each registration should take only one hour to complete.

Separately, it foresees receiving 1,057 brokering reports, which will take just two hours to complete and 100 brokering license applications that also will take just two hours for companies to complete. It projects getting 3,000 notices of changes to end-use, end-user and destinations statements and 166 requests for advisory opinions yearly. It said it wants comments on the accuracy of its estimates of the time and cost to prepare all the reports, the utility of the reports and how it might minimize the burden on firms.

In the coming year, DDTC expects to receive 1,300 voluntary disclosures from 750 parties, with each disclosure taking 10 hours to complete. DDTC officials say the 10-hour estimate is an average, with many submissions stemming from minor errors on licenses or in shipping documentation. They also concede the workload could be much, much higher, involving days or months and millions of dollars for major problems. The number of disclosures is driven in many cases by prior consent agreements that have mandated audits and disclosure from large exporters. Some of those agreements have prompted up to 400 disclosures or more from one firm, a DDTC official told WTTL.

House Republicans More Confident on TPA Vote

Publicly, at least, House Republicans are expressing more confidence that they are closer to having the votes to pass fast-track trade promotion authority (TPA) in June. Their optimism is fed by several factors, including strong whipping by the GOP leadership, a

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WTTL is published weekly 50 times a year except last week
in August and December. Subscriptions are \$697 a year.
Additional subscriptions with full-priced subscriptions are
\$100 each. Site and corporate licenses also available.

deal to get the votes of Congressional Steel Caucus members and President Obama's strong lobbying and phone calling of the Congressional Black Caucus and other undecided Democrats. In addition, TPA supporters claim they won't need as many Democratic votes as originally demanded.

"I have never been as confident about it as I am right now," House Ways and Means Committee Chairman Paul Ryan (R-Wis.) told reporters June 4. "Two years ago we said we were going to need 50 Democrats to get this done. We won't need that many, but we are still going to need the president to deliver votes and more than right now. So we are not quite there," he said (see **WTTL**, June 1, page 6).

Ryan declined to give specific vote counts or say when the legislation would come to the floor, saying that was up to House Speaker John Boehner (R-Ohio) and Republican Whip Steve Scalise (R-La.). Nonetheless, "this is a June project," he declared. He also said the House Rules Committee would decide how votes would be taken on TPA, Trade Adjustment Assistance (TAA), Customs enforcement and trade preference programs.

For now, the goal would be to take up and pass the Senate-passed version of TPA to avoid having to hold a House-Senate Conference Committee to resolve any differences. On the other hand, Ryan conceded that different versions of Customs enforcement will likely need to be resolved in conference, as well as the preferences legislation to resolve so-called "pay-for" requirements to account for the bill's impact on revenue. A TAA conference will be needed because he expects the House to address objections to a cut in Medicare funds to pay for the job-training measure. "We're open to change the offset if it's felt to be necessary" to win votes, he said.

"We anticipate going to conference on Customs," he said. "We're pretty much in agreement on 85% of that bill, so I do not foresee a very long conference whatsoever," Ryan stated. "We all understand each others' positions and we've accepted each others' positions on some of the issues," he added. Some advance pre-conference staff work is already underway, he indicated.

Ryan said the Customs bill would be used to fix some differences that exist between the Senate TPA bill and the one passed by Ways and Means. One particular issue is a provision in the Senate bill that Sen. Robert Menendez (D-N.J.) sponsored to prevent countries that tolerate human trafficking to be part of a trade deal, with Malaysia its main target. Before the Senate acted on TPA, Menendez and Senate Finance Committee Ron Wyden (D-Ore.) announced a compromise that would give State the ability to invoke an exception to this restriction for countries that take "concrete actions to implement the principal recommendations" of State's annual report on trafficking.

"The compromise worked out with Wyden and Menendez, that I was involved with when I was over in the Senate, is something that the outside groups that care about this issue [say] it is good language. We think that it is good language. We have already agreed to put that in conference in the Customs bill," Ryan said.

He declared his opposition, however, to a Senate provision that Sen. Rob Portman (R-Ohio) sponsored to create a new mechanism for getting miscellaneous tariff bills reviewed and passed. "It violates our [House] rules," he told reporters. "Everyone understands it has to go out," he said. Ryan brushed off other differences as minor and

easily taken care of in conference. He also declared that no extension of the Export-Import Bank would be included in the legislation.

An agreement with the Congressional Steel Caucus, which includes some Republicans from blue states such as Ohio, will bring additional votes for TPA. Ryan said he has agreed to include in the Customs bill a version of legislation (S. 2994) that Sen. Sherrod Brown (D-Ohio) introduced in the last session of Congress. The bill, known as the Level the Playing Field Act, includes provisions that uphold Commerce practices in antidumping and countervailing duty cases, some of which have been challenged in court.

Among its provisions, the measure would give the department more authority to use adverse facts available and other factors that would benefit petitioners in these cases. “We are going to put that in the manager’s amendment,” he announced. Ryan said the bill has been scrubbed to make sure it would work, be legal and not “put ourselves up for a WTO challenge we wouldn’t be able to succeed and keep.” He conceded the addition of the bill was necessary to get the steel caucus votes.

WTO Upholds Ruling Against Indian Poultry Ban

Obama administration officials applauded a World Trade Organization (WTO) Appellate Body (AB) finding June 4 in favor of the U.S. challenge of India’s ban on various U.S. agricultural products. India had claimed restrictions on products such as poultry, meat, eggs and live pigs were intended to protect against avian influenza. In October, a WTO dispute-settlement panel agreed with every U.S. complaint against India’s ban, which was imposed in February 2007 (see **WTTL**, Oct. 20, 2014, page 4).

Among other decisions, the AB upheld the panel’s finding that India’s measures were “significantly more trade-restrictive than required to achieve India’s appropriate level of protection.” In addition, it said the panel “did not err in finding that the United States had identified alternative measures that would achieve India’s appropriate level of protection, and that the Panel did not fail to identify the alternative measures with precision.”

The AB also upheld the panel’s finding that India’s Avian Influenza (AI) measures are inconsistent with the Sanitary and Phytosanitary (SPS) Agreement because “they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail,” the WTO noted.

Call Merriam-Webster: BIS, DDTC Propose Harmonized Definitions

Since export control reform first began, export control officials have promised to harmonize definitions of the most often-used terms in their respective regulations. In parallel Federal Register proposals June 3, State’s Directorate of Defense Trade Controls (DDTC) and Bureau of Industry and Security (BIS) finally took a step toward fulfilling their pledges. In its notice, BIS proposed new or revised definitions of “technology,” “required,” “peculiarly responsible,” “proscribed person,” “published,” results of “fundamental research,” “export,” “reexport,” “release,” “transfer,” and “transfer (in-country)”

that are included in its Export Administration Regulations (EAR). At the same time, DDTC proposed amendments to the International Traffic in Arms Regulations' (ITAR) definitions of "defense article," "defense services," "technical data," "public domain," "export," and "reexport or retransfer." It also proposes to create definitions of "required," "technical data that arises during, or results from, fundamental research," "release," "retransfer," and "activities that are not exports, reexports, or retransfers." To keep it all straight, both agencies posted a 25-page comparison chart of the proposed rules on their websites.

"Harmonizing definitions does not mean making them identical. For example, under the EAR, technology may be 'subject to' or 'not subject to the EAR.' Technical data under the ITAR is subject to those regulations by definition. While the two terms have substantial commonality, they remain different terms used in different ways," the BIS notice said.

The most heralded change involves what constitutes an "export" and its effect on cloud computing. The common definition includes the requirement for end-to-end encryption. "The intent of this requirement is that relevant technology or software is encrypted by the originator and remains encrypted (and thus not readable) until it is decrypted by its intended recipient. Such technology or software would remain encrypted at every point in transit or in storage after it was encrypted by the originator until it was decrypted by the recipient," BIS noted.

"A key requirement of the end-to-end provision is to ensure that no non-US national employee of a domestic cloud service provider or foreign digital third party or cloud service provider can get access to controlled technology or software in unencrypted form," it said. Comments on whether "encryption standards adequately address data storage and transmission issues with respect to export controls" and all other provisions are due by Aug. 3 (see **WTTL**, March 30, page 1).

Another controversial definition covers "fundamental research." Current policy excludes most information resulting from fundamental research from the scope of the EAR. The proposal "would revise Section 734.8, but it is not intended to change the scope of the current Section 734.8. The proposed revisions streamline the section by consolidating different provisions that involve the same criteria with respect to prepublication review, removing reference to locus unless it makes a difference to the jurisdictional status, and adding clarifying notes," the agency added. Comments regarding whether the streamlined text is narrower or broader in scope than the current text are encouraged, it said.

In its notice, DDTC highlighted the new definition of defense services, which it proposed in two previous notices and received comments on in 2013. Some comments criticized the different treatment of assistance using "public domain" information versus the use of "technical data." In response, it "fully revised paragraph (a)(1) to remove the use of the 'other than public domain information' or 'technical data' from the determination of whether an activity is a 'defense service'," it explained.

A DDTC fact sheet clarified the definition further. "While it continues to control assistance in developmental and integration activities involving defense articles, it creates a class of U.S. persons who do not need to obtain prior authorization to do certain work on defense articles abroad (e.g., those persons who have not had access to technical data in the area they are currently working in)," it said. DDTC also clarified exclusions from the

definitions of export, reexport and retransfer “for the electronic transmission and storage of certain secured technical data,” the DDTTC fact sheet noted. “Specifically, the proposed language exempts from control on the ITAR the electronic transmission and the electronic storage outside of the United States of technical data when it is encrypted using end-to-end encryption that meets the FIPS 140-2 standard and the data is not stored in a 126.1 country or the Russian Federation,” it said.

CIT Upholds Negative Injury Determination on Welded Pipe

Court of International Trade (CIT) Judge Mark A. Barnett upheld May 29 an International Trade Commission (ITC) remand determination that U.S. industry isn't being injured by imports of circular welded carbon-quality steel pipe (CWP) from India, Oman, the United Arab Emirates and Vietnam. Barnett found the commission properly followed his remand instructions in addressing two shortcomings from its original negative determination (slip op. 15-51).

On remand, the ITC declined to reopen the record in the case and relied on earlier filings. Its second look at the petition responded to how it treated the failure of petitioners to file certain lost-sales information and its analysis of the impact on the business cycle on the domestic industry during the period of investigation (POI).

Barnett accepted the ITC's explanation that it does not use “the absence of lost sales allegations in its evaluation of subject imports' volume effects as Plaintiffs allege.” He noted that the commission had reassessed the domestic industry's performance in the context of the business cycle, and, in particular, whether the economic downturn in 2009 and subsequent recovery masked injury to the domestic industry by subject imports. “The ITC found that the domestic industry improved ‘markedly during the POI according to every measure except market share, capacity, and employment,’ although the domestic industry faced weak CWP demand due to the lackluster economic recovery,” he wrote.

“The court finds that the Commission satisfactorily accounted for the effects of the business cycle on the domestic industry's performance. The ITC's analysis cites to substantial evidence supporting its analysis of the effects of the business cycle as distinct from those of subject imports on the domestic industry,” Barnett ruled.

Ex-Im Faces Possible Charter Lapse

It looks increasingly likely the Export-Import Bank will see its charter lapse at least temporarily after June 30, as a path toward reauthorization remains uncertain. One path reauthorization probably won't take is through the Senate Banking Committee. After two days of hearings June 2 and 4, Chairman Richard Shelby (R-Ala.) is showing stronger opposition to Ex-Im than some industry representatives expected.

In between the Banking hearings, the House Financial Services Committee held another head-beating sessions with Ex-Im Chairman and President Fred Hochberg June 3. This time, however, a few more Republicans, including Stephen Fincher (R-Tenn.) and Frank Lucas (R-Okla.), strongly defended the bank and challenged the views of their GOP colleagues. Shelby, who had said he had questions about the bank's operations and how

much it was really needed, came out of his hearings without being satisfied by what he heard from Hochberg's testimony June 4 or industry representatives June 2. "I have deep reservations about reauthorizing the Export-Import Bank as it is now constituted or even with Kirk-Heitkamp," he told reporters after the second hearing, referring to legislation (S. 819) sponsored by Sen. Mark Kirk (R-Ill.) and Heidi Heitkamp (D-N.D.).

"I don't think there is a lot of reform in that proposal. I think the Export-Import Bank begs for reform," he said. If he did mark up a reauthorization bill, "I wouldn't mark up their bill," Shelby said.

Shelby demurred on whether he would try to amend that measure or introduce a bill of his own. "We'll see," he said. "I've tried to reform this bank a number of times" but the business community wants the status quo, he added, admitting that the powerful lobbying of bank supporters may be able to garner enough cloture votes to overcome an effort to block a vote on reauthorization in the Senate (see **WTTL**, June 1, page 1).

With neither House or Senate committees reporting out a bank reform bill, it looks likely the bank will get only a short-term extension, which could go until the end of the year. The extension might be attached to a pending spending bill or the transportation appropriations bill (H.R. 2577), which isn't expected to get final action until July.

Whatever reform legislation does eventually get enacted, the hearings suggested those changes could include an increase in the mandate to allot financing for small and medium-size companies to 25% from 20%, reversing the bank's policy against financing coal-powered plants in industrialized countries, statutory creation of a risk-management officer and tougher ethics rules, larger capital reserve requirements, a strong requirement for exporters to demonstrate that Ex-Im is lender of last resort, and continued calls for negotiations to curb export lending subsidies.

Despite the tough questioning he has faced, Ex-Im chief Hochberg has remained optimistic about the bank's chances. "My view is that there is a lot of support," he told reporters after his testimony in the House. "Mitch McConnell, the majority leader, has been very clear there will be a vote in the Senate. Speaker Boehner said very clearly there's going to be a vote in the House. I'm going to take them at their word," Hochberg said.

Effort to Resume Cuba Trade Stalls in House

President Obama's efforts to resume normalized relations with Cuba hit some hurdles the week of June 1 with House votes to keep language in two appropriations bills restricting trade and travel with Cuba as well as a proposal to bar funding of a U.S. embassy in Havana. In an example of the disconnect in Washington over trade with Havana, the votes came as the International Trade Commission (ITC) heard from 20 industry and academic witnesses who almost unanimously argued for the immediate lifting of the trade embargo against Cuba. Whether the appropriations' restrictions will remain in final legislation sent to President Obama remains uncertain.

In the House, a measure (H.R. 2577) funding Transportation, Housing and Urban Development (THUD) agencies contains language that would prevent licensing of new flights and cruise ship routes to Cuba if they land on or pass through property confiscated by the Castro regime. A June 3 vote on Rep. Barbara Lee's (D-Calif.) amendment to

eliminate the provision failed 176-247. Eighteen Republicans voted for the amendment, while 26 Democrats opposed it. An amendment also failed to strike language from the separate Commerce, Justice and Science appropriations bill (H.R. 2578) that prohibits use of funds “to facilitate, permit, license, or promote exports to the Cuban military or intelligence service or to any officer of the Cuban military or intelligence service, or an immediate family member thereof.” Only two Republicans voted for that amendment, while 32 Democrats voted against it. The final vote on the amendment was 153-273.

The Transportation language had been added by Rep. Mario Diaz-Balart (R-Fla.), a Cuban-American. “Certainly supporting the Cuban people does not include channeling goods to the oppressive Cuban military and intelligence services, nor does it include facilitating the unlawful use of stolen properties that were illegally confiscated from Americans,” he said in a statement after the two votes.

At the June 2 ITC hearing, Sen. Amy Klobuchar (D-Minn.) defended her bill lifting the embargo, Freedom to Export to Cuba Act of 2015 (S. 491), along with Sen. Jeff Flake’s bill Freedom to Travel to Cuba Act of 2015 (S. 299), of which she is a co-sponsor. “I think there’s a lot of thought that that bill may move first,” she told the commission.

“Well here’s the problem. If ours sits there for too long and we lift the travel restrictions and we don’t do anything about the embargo then all these Americans are going to start going there and they’re going to eat Chinese food. They’re going to stay in German hotels. Because at some point we’re going to have to lift that embargo close to when we open the travel restrictions,” she added.

Later she told reporters that any lifting of the travel ban or the trade embargo would have to wait until the embassies reopen. However, a State appropriations bill released by a House committee June 3 includes a provision banning funds for building an embassy or other diplomatic facility in Cuba, as well as restricting funds to facilitate the opening of a Cuban embassy in the U.S.

Separately, Treasury’s Office of Foreign Assets Control (OFAC) June 4 removed 66 entities related to Cuba from its Specially Designated Nationals (SDN) list. Entities include shipping companies in Cuba itself as well as Argentina, France, Greece, Hong Kong, Italy, Malta, Panama, Spain and United Kingdom.

Wikileaks Unveils Texts from Services Talks

Wikileaks, the Internet source of secret information, released 17 secret documents June 3 from talks on a Trade in Services Agreement (TISA), which the U.S. is currently negotiating with the European Union and 23 other partners. It contains drafts and annexes on issues such as air transport, delivery services, domestic regulation, e-commerce, maritime, professional services, telecommunications, transparency, as well as several documents on the positions of negotiating parties.

The text is classified as “confidential” and supposedly barred from being made public until five years after the agreement is reached or talks terminated. Previously, the organization leaked a draft of the TISA financial services annex (see **WTTL**, June 23, 2014, page 8). At the same time, Wikileaks is also offering a \$100,000 “bounty” for any

draft texts from the Trans-Pacific Partnership (TPP). Almost all of the text is inside brackets indicating that no final agreement has been reached on any of the provisions. For example, a U.S. proposal under electronic commerce reads, “Nothing in Section III (Electronic Commerce) shall be construed to prevent any Party from taking any action which it considers necessary for the protection of its own essential security interests.” However, Colombia, Japan and Korea asked to “clarify the meaning of ‘essential security interests’” in this chapter, the text reads.

Close reading of the texts reveals technical language and maneuvering that may unwind as the negotiations continue. In the draft text on domestic regulation, 18 countries including the EU proposed language that in implementing licensing, qualification or other technical standards (itself a debated phrase), countries should “ensure that such measures are based on objective and transparent criteria.” The U.S. opposes this language for reasons that may only emerge with the final agreement.

Wikileaks also released its own analysis along with some of the draft texts. It describes “Transparency” in the text as meaning it ensures that commercial interests, especially but not only transnational corporations, “can access and influence government decisions that affect their interests – rights and opportunities that may not be available to local businesses or to national citizens. They may want to stop or change government decisions they don’t like, or rally to support those that are being challenged,” it claimed.

Not surprising, the response of trade critics to the text was quick. The leaked text reveals “once again how dangerous Fast Track Authority is when it comes to protecting citizen rights vs. corporate rights. This TISA text again favors privatization over public services, limits governmental action on issues ranging from safety to the environment using trade as a smokescreen to limit citizen rights,” said Communications Workers of America President Larry Cohen in a statement.

“The secrecy charade has collapsed. TISA members trying to keep their publics in the dark as to the negative implications of the corporate TISA for financial stability, public safety, and elected officials’ democratic regulatory jurisdiction have been exposed to the light of day, in the largest leak of secret trade negotiations texts in history,” said Deborah James of Our World Is Not for Sale, an anti-trade organization.

USTR Outlines Tariffs on TPP Chopping Block

The Obama administration June 2 continued its sales pitch for the Trans-Pacific Partnership (TPP), issuing a report outlining specific sector tariffs that will be dropped if the agreement is concluded. The U.S. Trade Representative’s (USTR) report highlighted 15 types of manufactured goods, including autos, textiles, footwear and consumer goods, and 18 agricultural products, including rice, beef, dairy, corn and others that could see tariffs cut in TPP countries if a deal is reached (see **WTTL**, May 18, page 5).

For example, auto tariffs in some TPP markets range up to 70%, and footwear may face quotas and tariffs above 100%, the report said. Tariffs on beef and beef products can go up to 50% in TPP countries, and over-quota tariffs on rice range up to 778%, it added. In contrast, the U.S. has an average applied tariff of 1.4% and nearly 70% of all imports entering the U.S. face no tariffs, the USTR said. “With the elimination of TPP countries’

tariffs on manufactured products, including innovative and high technology products, such as industrial and electrical machinery, precision and scientific instruments, and chemicals and plastics, U.S. products will compete on a more level playing field with goods from TPP countries' other free trade agreement (FTA) partners – including China, India, and the EU,” the report said,

*** * * Briefs * * ***

STEEL: United States Steel Corporation, Nucor Corporation, Steel Dynamics Inc., California Steel Industries, ArcelorMittal USA LLC and AK Steel Corporation filed antidumping and countervailing duty petitions June 3 with ITA and ITC against imports of certain corrosion-resistant steel products from China, India, Italy, Korea and Taiwan.

TRADE FIGURES: Merchandise exports in April fell 4.84% from year ago to \$129.0 billion Commerce reported June 3. Services exports gained 2.4% to record-high \$60.9 billion from April 2014. Goods imports dipped 5.12% from April 2014 to \$189.7 billion, as services imports gained 4.4% to \$41.1 billion.

ENTITY LIST: In Federal Register June 4, BIS added Corporacion Nacional de Telecomunicaciones (CNT), Ecuador's state-owned telecommunications utility, to Entity List for “activities that are contrary to the foreign policy interests” of U.S. Licensing policy for CNT and items under ECCN 5D002 or 5A002 will be on case-by-case basis, BIS said.

COOL: As expected, Canada and Mexico June 4 asked WTO for authorization to retaliate against U.S. exports due to U.S. country of origin labelling (COOL) requirements (see WTTL, June 1, page 6). Canada asked for C\$3 billion in retaliation and Mexico for US\$653 million. “We continue to call on the United States to repeal COOL, cease this harmful policy and restore our integrated North American supply chain to the benefit of businesses and workers on both sides of the border,” Canadian Trade Minister Ed Fast said in statement.

TUNA: U.S. filed appeal June 5 with WTO Appellate Body asking it to overturn dispute-settlement panel report that found U.S. dolphin-safe labeling rules inconsistent with several WTO provisions, including Agreement on Technical Barriers to Trade, because it accords less favorable treatment to Mexico's tuna and tuna product exports (see WTTL, April 20, page 3).

SOUTH AFRICA: USTR June 5 announced framework agreement that provides for return of U.S. exports of bone-in chicken to South Africa. “While both sides recognize it may take some time for the South African government to complete its regulatory process, both sides are committed to expedite processes and resume shipments of U.S. chicken as quickly as possible,” statement from USTR's office said. Sanitary issues relating to poultry imports were sticking points in country's potential participation in African Growth and Opportunity Act (AGOA) (see WTTL, April 27, page 2).

EXPORT ENFORCEMENT: Mao Peng of Kenosha, Wis., agreed June 3 in Milwaukee U.S. District Court to plead guilty to misuse of Automated Export System (AES) to further criminal activity, wire fraud and identity theft. Peng admitted to using Native American straw buyers to purchase 71 luxury vehicles, including new Porsche, Mercedes Benz, and BMW, between June 2012 and June 2014. He then exported vehicles to overseas buyers and used AES to conceal crimes “in that the overseas buyer did not need to retitle the vehicles in the United States,” said information filed with plea agreement. Peng also agreed to pay restitution of \$515,964.04 to Wisconsin Department of Revenue and civil forfeiture of approximately \$1.2 million. He is in custody awaiting sentencing.