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UK, Australia Defense Treaties Ratified

The Senate Sept. 29 ratified the U.S. defense trade treaties with the United Kingdom and Australia after the Senate Foreign Relations Committee endorsed the pacts and both the House and Senate passed separate implementing legislation (S. 3847) (see **WTTL**, Sept. 27, page 1). The Senate passed the implementing bill on Sept. 27, and the House followed on Sept. 28.

In addition to implementing the defense treaties, the implementing bill includes unrelated provisions that give Israel the same status as NATO allies, Australia, Japan, New Zealand and South Korea for expedited congressional review of U.S. arms sales. Another provision authorizes the transfer of excess naval vessels to India, Greece, Chile, Morocco and Taiwan.

“Passage of these treaties is in concert with the Obama administration's plan to modernize export controls,” said Aerospace Industries Association President Marion Blakey in a statement. “The approval of the treaty by the Senate is most welcome news,” said Ian Godden, chairman of A|D|S, the UK defense industry trade group. “The long-term significance of this new defense export control regime should not be underestimated,” he said in a statement.

Currency Bill Offers Weak Medicine for Bigger Disease

The China currency legislation (H.R. 2378) passed by the House Sept. 29 by a sweeping bipartisan margin of 348-to-79 gets the diagnosis of the problem with U.S.-China trade partially right, but provides weak medicine for a cure. While most economists agree the Chinese currency is undervalued by estimates of 20-to-40%, strengthening the countervailing duty (CVD) law is unlikely to do anything to solve the problem because fewer U.S. industries than in the past are using trade remedy laws to offset unfair foreign imports. The major users of the laws are producers of steel, steel products, chemicals and minerals.

The lawmakers correctly identifying the undervalued renminbi as a major factor in the imbalance of trade between the U.S. and China, but the currency is just one of a myriad of Chinese industrial policies that support exports, favor domestic industries and restrict foreign import competition. Thus, the legislation may have more political than economic impact. It's improbable that enough CVD cases would be filed under the proposed law to make a dent in Chinese imports. Members of the trade bar have mixed views of the currency legislation. “The bill does clarify the standard for initiation,” one lawyer for petitioners told **WTTL**. “Some legislative clarification is necessary,” he added, noting that “a lot of criteria have to be met



before a case can be filed.” An attorney who has represented respondents said the trade laws are being used less because many imported products are no longer made in the U.S. or U.S. manufacturers also produce in China and import some of their products. While there are fewer trade petitions in the U.S., “there are plenty in India, Brazil and the EU,” and U.S. firms would be hurt if those countries start to apply the policy proposed in the legislation, he said. “A lot of people think the U.S. dollar is undervalued because we print money,” he added.

The legislation doesn’t address the recent Court of International Trade (CIT) ruling in *GPX International Tire*, which said Commerce could not impose both a CVD and antidumping duty on imports of tires from two Chinese companies because the current methodology for calculating dumping and subsidies fails to prevent double counting of the same benefit (see **WTTL**, Aug. 9, page 1).

The ruling means petitioners will need to decide whether to pursue an antidumping or CVD case, since application of both remedies would likely lead to another court challenge, one attorney suggested. Petitioners are likely to go the antidumping route in cases against Chinese imports because they get the benefit of Commerce’s use of its nonmarket economy (NME) rules, which tend to produce high dumping margins on subject Chinese goods.

In its Sept. 3 remand determination in the GPX case, Commerce narrowly interpreted the CIT decision, withdrawing the CVD order for the two Chinese tire firms that filed the suit, Hebei Starbright and Tianjin (TUTRIC), but not other Chinese producers. “We do not agree that the Department must forego application of the CVD law to Starbright and TUTRIC until we develop new methodologies to determine whether, and to what extent, ‘double counting’ occurs when we concurrently apply the CVD law and the NME AD methodology,” the remand decision said. “Nevertheless, we shall, under protest, comply with the Court’s order,” it said.

Customs Withdraws Proposed Change in “First Sale” Rule

Importers don’t usually get much respect or attention in Washington, but Customs and Border Protection (CBP) listened to the retailing industry’s complaints about its proposed change in the so-called “First Sale” method of calculating import tariffs and withdrew the proposal in the Sept. 29 Federal Register. The original January 2008 proposal of a new interpretation of the phrase “sold for exportation to the United States” drew more than 100 comments, almost entirely negative, from importers.

After CBP published its proposal, Congress passed legislation requiring the agency to collect data on its impact and the International Trade Commission to analyze the data before a final regulation could be issued. It ordered CBP not to issue a final rule before Jan. 1, 2011. The ITC report found the impact of the proposed rule to be small (see **WTTL**, Jan. 4, page 3). Even before the ITC report came out, Customs in August 2008 promised to withdraw the proposal.

“Under this proposed interpretation, in a transaction involving a series of sales, the price actually paid or payable for the imported goods when sold for exportation to the United States would be the price paid in the last sale occurring prior to the introduction of the goods into the United States, instead of the first (or earlier) sale,” Customs explained. “Accordingly, the transaction value would typically be determined on the basis of the price paid by the buyer in the United States,” it said. Importers complained that the proposal would have led in an increase in the valuation of the goods they import and, hence, higher duties.

The ITC found that 23,520 U.S. importers (8.5% of all importers) used the First Sale rules and accounted for only 2.4% of the value of all imports. On the other hand, “transaction value” was found to be the most common method of import valuation, accounting for an estimated \$1.411 trillion (86.4%) of U.S. imports. It said the First Sale rule appeared to have greater use among importers of high-tariff apparel and footwear, which may explain why apparel and retail groups were among the most vociferous opponents of the proposed rule

change. “Analysis of First Sale use across tariff classifications and in particular sectors suggests that tariff rates can explain a portion of First Sale use,” the report said.

“The First Sale rule is very important to many retailers and for over 20 years, the courts and CBP have recognized the First Sale rule as an appropriate customs valuation methodology,” said Stephanie Lester, vice president for international trade at the Retail Industry Leaders Association. “After much delay, the formal withdrawal of CBP’s proposal to eliminate the First Sale rule finally provides some certainty,” she said.

WTO Says U.S. Violated Rules with Bar to Chinese Chickens

A WTO dispute-settlement panel Sept. 29 closed the barn door even though the chickens were already gone in a ruling that said the U.S. violated the WTO Sanitary and Phytosanitary (SPS) Agreement when Congress enacted legislation blocking the U.S. Agriculture Department (USDA) from approving the import of chicken products from China. The legislative restriction preventing USDA from recognizing China’s chicken inspection practices as “equivalent” to U.S. practices expired in September 2009, but the panel, quoting a previous Appellate Body ruling, said the WTO needed to rule on expired measures as well as permanent measures to prevent the circumvention of WTO rules through enactment of “moving targets.”

The Chinese complaint was aimed at 2009 USDA appropriations legislation which barred the department from using any of the funds to follow U.S. poultry import rules for determining whether Chinese inspection procedures are equivalent to U.S. practices. The legislation maintained a restriction in the 2008 funding law. The U.S. claimed it needed to prevent imports of chicken from China because of several incidents of consumer deaths and injuries from other Chinese products.

The panel found the U.S. was guilty of many of the same violations of the SPS that Washington has complained other countries have committed. The panel report said the U.S. acted inconsistent with SPS rules because its action was not based on appropriate risk assessment; was maintained without sufficient scientific evidence; did not apply the appropriate level of protection for poultry products from China as it did for poultry products from other WTO members; was arbitrary or unjustifiable; and discriminated against China.

“The most important aspect of this dispute is that the measure at issue only applied in fiscal year 2009,” said USTR Spokesperson Nefeterius McPherson in an e-mail. “The measure was replaced in fiscal year 2010 with language permitting the use of funds under certain conditions, those conditions have been met, and so there is no current funding restriction affecting USDA’s consideration of poultry from China,” she pointed out.

U.S.-Korea Set to Start Talks on FTA

After a slow warm up, talks between the U.S. and Korea may start soon on finding a way to address criticism of the U.S.-Korea Free Trade Agreement (FTA) and get the pack ready for congressional consideration in the spring. Officials of the two countries are trying to set up a meeting between U.S. Trade Representative (USTR) Ron Kirk and Korean Trade Minister Kim Jong-hoon, the USTR’s office reported Sept. 27. Assistant USTR for Japan, Korea, and APEC Affairs Wendy Cutler discussed plans for the ministerial meeting with Korean Deputy Trade Minister Choi Seok-young in Japan Sept. 23, the office said.

President Obama has directed U.S. negotiators to have a plan ready for settling the outstanding issues in the FTA in time for the Nov. 11-12 meeting of the G-20 in Seoul. Although that deadline is fast approaching, U.S. officials claim they are on track to meet it. “I’m comfortable with where we are, and I’m confident that we’re going to accomplish what the president has asked us to do,” Deputy USTR Demetrios Marantis told WTTL. “We have to develop active

proposals; we're in consultations with stakeholders and all interested parties," Marantis said. He also said he doesn't expect the congressional recess to interfere with efforts to prepare a U.S. position, as much of the discussion with lawmakers and their staffs is by telephone.

WTO Praises U.S. for Largely Resisting Protectionist Pressure

While generally praising the U.S for resisting protectionism in the face of a recession, the World Trade Organization (WTO) in its biennial review of U.S. trade policy found a few programs that have favored domestic producers over imports. The WTO secretariat specifically highlights the stimulus bill and the 2009 decision on tire imports from China, as well as support for U.S. agriculture under the Farm Act. The U.S. largely resisted "pressures to respond to the global economic recession by tightening restrictions on imports. The restraint shown by the United States helped forestall a worldwide slide into protectionism," it said Sept. 29 with the release of the Trade Policy Review of the U.S.

The WTO said some "anti-recession measures included provisions that favoured domestic suppliers of goods and services." These measures "included sizeable assistance to selected sectors, particularly the financial and automotive sectors, with provisions to avoid 'leakage' of assistance outside of the United States."

The report noted the Obama administration's export promotion initiative. "Export promotion should be complemented by continued reduction in remaining restrictions on market access and other distorting measures, in line with Members' observations during the previous Review of the United States, including with respect to U.S. tariff peaks, support for agriculture, and remaining barriers to services trade and investment," it said. The WTO also questioned the Buy American provisions of the 2009 stimulus bill. "These domestic preferences, which must be applied in accordance with U.S. international commitments, are more restrictive than long-standing domestic preferences used in federal procurement under the Buy American Act of 1933," it noted.

* * * Briefs * * *

C-TPAT: Number of firms participating in CBP's Customs-Trade Partnership Against Terrorism has surpassed 10,000 members, Customs reported Sept. 23. About half of C-TPAT members are small or mid-sized firms, having fewer than 50 employees, CBP says. C-TPAT partners are responsible for about 50% by value of all imported merchandise into the U.S., it says.

TUNA: USTR's office Sept. 24 said U.S. has invoked its rights under NAFTA and asked for establishment of NAFTA dispute-settlement panel to review Mexico's complaint against U.S. rules for "Dolphin Safe" labeling for canned tuna. Mexico has pursued complaint against labeling requirements through WTO dispute-settlement process since March 2009, but U.S. claims NAFTA dispute process is proper route to hear complaint. U.S. had asked NAFTA Free Trade Commission, which comprises trade minister from three NAFTA countries, to address issue, but commission met on May 7, 2010 but was also unable to resolve the dispute, USTR reported.

FCPA: Two subsidiaries of ABB Ltd, giant Swiss provider of power equipment, agreed to pay more than \$58 million penalty in deal with SEC and Justice Sept. 29 to settle FCPA charges involving Mexican and Iraqi utility officials. Last year, John Joseph O'Shea, ex-ABB Network Management general manager, was arrested and charged for alleged role in Mexican bribery scheme (see **WTTL**, Nov. 30, 2009, page 4).

MORE FCPA: In another case involving alleged bribery of officials working for Mexico's Comisión Federal de Electricidad (CFE), two Mexican citizens were indicted in Los Angeles U.S. District Court Sept 15 for their alleged role in bribery scheme reportedly for benefit of Lindsey Manufacturing in Azusa, Calif. Enrique Aguilar was charged with conspiracy to violate FCPA. His wife, Angela Aguilar, was charged with money laundering and conspiracy.

CUSTOMS: Report on first half of FY 2010, which ran from October 2009 to June 2010, says random sampling found 98.6% of imports materially compliant with all U.S. trade laws and regulations; slightly higher than recent years. By mid-year, there were 13 million entries, with 27 million expected by year end, up 5% from 2009. CBP says only 29% of imports were dutiable and paid \$15 billion in tariffs.