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Borman: Little Impact from Cuba's Removal from Terrorism List

As the Obama administration readies the regulatory changes to drop Cuba from the list of state sponsors of terrorism (SSOT), officials are downplaying the immediate effects of the change. At one level it will make very little difference because there's still a trade embargo on Cuba, Matthew Borman, Bureau of Industry and Security (BIS) deputy assistant secretary for export administration, told an event in Washington June 18.

BIS is drafting changes to its Export Administration Regulations (EAR) that could be published in July (see **WTTL**, June 15, page 9). "We actually do have a regulation that's working its way through the internal process that will implement the removal of Cuba from the SSOT list," Borman said.

With the embargo, EAR controls for anti-terrorism (AT) reason would no longer be in place but those items "still require a license or a license exception to go to Cuba," he added. "There are some pieces of the regulations where this will make a difference; for example, the *de minimis* level," Borman noted. "Right now as an SSOT, the *de minimis* level, the U.S. control over a foreign-made item with 10% or more U.S. controlled content requires a U.S. reexport license from that foreign country of manufacture: that number, unless we do something different in the regulations, would go up 25%," he said.

The changes won't have a "dramatic impact from a trade perspective but certainly there'll be pockets of trade, primarily with License Exceptions AVS, RPL, those kinds of things," he noted. "Since January this year when we published these changes, there have been 46 exports to Cuba under the License Exception Support for the Cuban People worth about \$1.5 million," Borman also reported. "Not a high dollar value but expected because these are all lower-level transactions primarily going to private sector businesses in Cuba, which is exactly what the policy is," he said.

Obama Wins Trifecta on Key Trade Legislation

After much misreporting and hand-wringing over delays in congressional approval of three key trade bills, President Obama won passage of the legislation and was poised to sign the measures at press time. The passage of fast-track trade promotion authority (TPA), Trade Adjustment Assistance (TAA) and trade preferences demonstrated again

that it is a mistake to underestimate the power of the presidency and importance of one party controlling both the House and Senate. TPA's fate was probably foreordained last November when Republicans won control of the Senate and Sen. Harry Reid (D-Nev.) lost his post as majority leader and the ability to block the legislation. Passage of the three bills relied heavily on Senate Majority Leader Mitch McConnell (R-Ky.) and House Speaker John Boehner (R-Ohio) using their leadership powers to control the timing, debate and votes on the measures.

Obama's victory came despite a massive assault against fast track by unions, environmentalists, consumer groups and most of the progressive wing of the Democratic Party. The defeat of opponents marked the latest in a string of losses in their fights against NAFTA, China permanent-normal-trade relations, and free trade deals with Central America, Colombia and Korea.

TPA opponents were quick to say their fight isn't over and they will renew the battle when a Trans-Pacific Partnership (TPP) agreement comes back to Congress for a vote. Trade critics might find it hard to defeat TPP because some of their strongest arguments against TPA, including the secrecy of TPP negotiations and the unknown details of a final pact, will be undermined by TPA provisions that will require the public release of the text 60 days before the deal is signed.

Moreover, once TPP is publicly released, industries that will benefit from the accord will have more incentive to fight for it than they did for TPA. "Certainly, a number of people who were against TPA said they would look at what's in TPP because they know that this offers specific benefits that can be understood in a much more straightforward way," Sen. Ron Wyden (D-Ore.) said June 24.

TPP supporters say they hope a deal can be reached this summer so implementing legislation can be sent to Congress by the end of the year to avoid being caught in election politics in 2016. It isn't clear that negotiators will be able to move that quickly. TPP participants have been able to hide behind the lack of TPA to avoid making hard decisions in the talks. With TPA enacted, countries such as Japan will be forced to make concessions on autos and agriculture imports, Canada on dairy and egg supports, Vietnam on textile sourcing and Australia on foreign investment protections.

Although Obama and the White House were criticized for starting their lobbying for TPA late and being ineffective against Democratic opponents of the legislation, Wyden praised the president's efforts. "The president was all-in on this issue," Wyden told reporters. "There were times when I would talk to him twice a day; might have been one instance when we talked three times a day. He would call at 11 at night to talk about what needed to be done in the morning," he recalled.

The three-week drama over the trade bills came to a climax in quick succession, with the Senate voting on cloture to end debate on TPA (H.R. 2146) June 23 by a 60-37 vote and then passing it June 24 by a 60-38 margin and sending it to the president for his signature. On June 24, it also voted for cloture on the TAA-trade preferences bill (H.R. 1295) by a 76-22 vote and then minutes later passed it on a voice vote. A motion for cloture on the Customs enforcement bill (H.R. 644) was then immediately withdrawn and the Senate agreed by voice vote to go to conference with the House on the bill. When the TAA-trade preferences bill came back to the House June 25, it easily passed by a 286-138 vote. Democrats who had voted against TAA June 12 as part of a failed

AFL-CIO-backed ploy to defeat TPA, fell into line and voted for the Democratic-favored worker training program nearly unanimously and passed it with the help of 111 Republican votes (see **WTTL**, June 22, page 1).

The moments of greatest tension seemed to be when the Senate was voting on cloture on TPA. As the tally proceeded, Sen. Ben Cardin (D-Md.), who was one of 14 Democrats who had voted for TPA the first time it passed the Senate June 22, sat in deep conversation with Wyden and then was surrounded by Sens. John Cornyn (R-Texas), Rob Portman (R-Ohio) and Tom Carper (D-Del.), who appeared to be coaxing him to vote for cloture.

Cardin stood nervously in the well of the Senate as the vote got to 59 in favor of cloture and it looked like he might have to cast the deciding vote. At the last minute, he was saved from that choice when Sen. Dean Heller (R-Nev.) rushed into the chamber and became the 60th vote for cloture. Cardin then voted no.

Congress will now turn to the Customs bill, which would clarify the status of Customs and Border Protection (CBP) and provide new authorities for CBP and Commerce to prevent circumvention of antidumping and countervailing duty (CVD) orders. The conference committee on the legislation is expected to meet when lawmakers return from their July 4 recess and most sources predict a quick result. “The question is not should the provision be included but some of the details,” Wyden told reporters June 23.

One of the toughest issues facing the conference is language in the Senate version that would make currency manipulation subject to CVD rulings. It appears that Wyden is ready to drop the provision, which was sponsored by Sen. Chuck Schumer (D-N.Y.). In comments on the Senate floor and talking to reporters, Wyden cited several “markers” that Senate Democrats have laid down as must haves from the conference, and currency manipulation wasn’t one of them.

“I talked with [Ways and Means Committee] Chairman Ryan last night and said that the pro-trade Democrats feel very strongly about setting out markers for the conference with respect to enforcement,” Wyden told reporters. One of three provisions he mentioned was an amendment sponsored by Sen. Michael Bennet (D-Colo.) and to the bill in the Finance Committee to amend Section 301 of the Trade Act to give the U.S. Trade Representative (USTR) authority to enforce environmental sections of trade agreements. A second sponsored by Sen. Maria Cantwell (D-Wash.) to create a trust fund to pay for trade enforcement actions. A third not yet in any bill is a proposal by Sen. Jeanne Shaheen (D-N.H.) to help small businesses take advantage of trade deals.

EU Extends Russia Sanctions, U.S. Right Behind

Despite the economic pain some European firms are suffering from the loss of trade with Russia, the European Union (EU) agreed June 22 to extend economic sanctions against Moscow until Jan. 31, 2016. “This follows an agreement at the European Council in March 2015, when EU leaders linked the duration of these sanctions to the complete implementation of the Minsk agreements, which is foreseen by 31 December 2015,” an EU press release said. The measures, which were imposed in July 2014 and reinforced in September 2014, target Russian financial, energy and defense sectors and dual-use goods. The move comes just two weeks after the seven leading industrial nations (G-7) renewed

their commitment to Russian sanctions. “The duration of sanctions should be clearly linked to Russia’s complete implementation of the Minsk agreements and respect for Ukraine’s sovereignty. They can be rolled back when Russia meets these commitments,” said a joint statement released after the G-7 meeting in Germany.

Prior to the latest EU announcement, U.S. Treasury and Commerce officials emphasized the connection between U.S. and EU sanctions. “I expect you’ll continue to see us move in lockstep with the European Union, with our European partners, as much as possible,” John E. Smith, acting director of Treasury’s Office of Foreign Assets Control (OFAC), told an event in Washington June 18 (see **WTTL**, June 15, page 9).

“These measures are carefully calibrated, they’re tailored to target a relatively narrow set of transactions and to take advantage of Russia’s dependence on Western financing, technology and expertise,” Smith said. “In the future, you’ll see more of the targeted variety, which were developed to be less onerous on civilian populations than our previous countrywide embargos. We’ll continue to ensure that critical humanitarian transactions that align with our national security and foreign policy goals can continue.” he said.

“The U.S. and EU sanctions are not identical but they’re very similar, and I think the thing that’s most significant is how quickly they were developed,” BIS Deputy Assistant Secretary Matt Borman told the event. One of the differences is in licensing policies related to Arctic deepwater drilling. “Ours are more targeted. The license requirement in that respect is it has to be one of the HTS [Harmonized Tariff Schedule] that we have listed or a listed party, but it has to be for deepwater Arctic offshore or shale oil or gas. So in that respect, Europeans actually have a more extensive requirement,” Borman said.

Ex-Im Charter Will Expire June 30, Heitkamp Concedes

The Export-Import Bank’s (Ex-Im) charter will expire at the end of June and there is no clear path for its renewal or even its temporary extension, Sen. Heidi Heitkamp (D-N.D.), a major supporter of the bank, conceded June 24. “That’s exactly what’s going to hap-pen. That is exactly what we knew was going to happen when we didn’t get a vote in June,” she told reporters (see **WTTL**, June 22, page 5).

Heitkamp said she has not received any assurances from Senate Majority Leader Mitch McConnell (R-Ky.) on when another vote on Ex-Im might come up. “We expect we will see this bill in July. It might not be a bill. It might be an amendment,” she said. “I’m not saying whether I’ve gotten assurances. This is what I anticipate,” she added.

There have been suggestions that there might be an attempt to attach an Ex-Im reform bill or a short-term extension, to a highway funding measure that has stalled in Congress but could come up in July before the current Highway Trust Fund runs out of money. Sen. John Thune (R-S.D.), chairman of the Senate Republican Conference, told **WTTL** “that would probably be a big vehicle that’s going to be coming along that if somebody wanted to try and use that as an opportunity to get that amendment, it could happen.” He is skeptical about the success of such a move. “They got their showboat a couple of weeks ago, but I suspect in the Senate anybody can offer an amendment at anytime,” he said. If such an amendment did come up, there might be an effort to block it. “I’m

sure there could be members on our side, for example, that would object to it. I don't think we know exactly until we get closer to see how that will play out," he told WTTL. Meanwhile, Heitkamp is angry at the likely lapse of Ex-Im's charter. "There are a whole lot of people who think that doesn't matter. It does matter," she said.

"We have an \$11 billion pipeline at the Ex-Im Bank. That \$11 billion is now going to be stalled out. They cannot do any credits during the time the charter is expired. They will have to service old debt, obviously, but there is a huge disruption," Heitkamp said. "If you want to kill the Ex-Im Bank, get enough votes to kill the Ex-Im Bank. We know we have probably 67 votes in the Senate and we know we have a majority in the House, but in Washington, D.C., having the votes doesn't seem to make a difference," she said.

Sen. Brown Gets Consolation Prize with Enforcement Amendment

Sen. Sherrod Brown (D-Ohio), one of TPA's staunchest opponents, failed to stop the fast-track bill, but, according to one congressional staffer, "got what he wanted," with an amendment to the trade preferences bill, tilting U.S. antidumping (AD) and countervailing duty (CVD) rules even further in favor of domestic petitioners. The amendment, a new version of Brown's "Level the Playing Field" bill from 2014, was attached to legislation (H.R. 1295) extending several trade preference programs and Trade Adjustment Assistance (TAA). The consolidated measure passed the Senate on a voice vote June 24 and cleared the House June 25 by a 286-138 margin (see related story page 1).

During debate on the bill June 24, Sen. Ron Wyden (D-Ore.) noted that union witnesses at hearings he held when he chaired the Senate Finance Committee had favored Brown's amendment. "Leveling the playing field was a top priority for those in the unions – the steel unions and others – and it was also a top priority for their companies," he said. The legislation will ensure that trade remedies are "going to be available to workers and their companies earlier and in a more comprehensive way," he added.

The bill's Title V amends the Trade Act to give Commerce more discretion to use "facts otherwise available" to make adverse inference determinations and to limit the number of foreign voluntary respondents in a case. It also gives the department the ability to calculate higher AD and CVD margins based on previous cases. Commerce "is not required to determine, or make any adjustments to a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information," the new provision states.

In making an adverse inference, the department may use (i) "a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country, or (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use," it states.

In addition, the department will have the discretion to "apply highest rate" in AD and CVD rulings based on the adverse inference from facts otherwise available and has "no obligation to make certain estimates or address certain claims." It is not required (A)

“to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate under subsection (b)(1) had cooperated, or (B) to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.” The amendment changes the definition of “material injury” used by the International Trade Commission (ITC) regarding the profitability of domestic industries. “The Commission may not determine that there is no material injury or threat of material injury to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved,” it says.

Moreover, when Commerce decides to use constructed values because certain market situations exist, it “may use another calculation methodology” and “the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition that is remitted or refunded upon exportation of the subject merchandise produced from such materials.”

In nonmarket economy cases, Commerce will have the discretion “to disregard certain price or cost values” if it “has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.”

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Teledyne LeCroy, equipment manufacturer in Chestnut Ridge, N.Y., agreed June 16 to pay BIS \$75,000 civil penalty to settle two charges of exporting oscilloscopes to blocked entity without BIS licenses in 2010. Company shipped oscilloscopes worth \$15,602 and controlled for nuclear non-proliferation or AT reasons to Beihang University of Aeronautics and Astronautics (BUAA) in Beijing, China. Teledyne Technologies previously settled OFAC charges of indirectly exporting Acoustic Doppler Current Profilers (ADCP) to Sudan in 2007 (see **WTTL**, Feb. 13, 2012, page 4). Teledyne acquired LeCroy as wholly owned subsidiary in August 2012 and company became Teledyne LeCroy.

MORE EXPORT ENFORCEMENT: Kunlin Hsieh, Taiwanese national and sales manager for Junbon Enterprises Co., Ltd. pleaded guilty June 25 in San Antonio U.S. District Court to conspiracy to violate International Emergency Economic Powers Act and Iranian sanctions by exporting communications technology, including circuit boards with American-made laminates, to Iran without license. Co-defendant Agris Indricevs, Latvian citizen, is awaiting trial in August. Both have been in custody since their arrest in August 2014.

HYDROFLUOROCARBON BLENDS: American HFC Coalition filed antidumping duty petition June 25 at ITA and ITC against certain hydrofluorocarbon blends and components from China.

KAZAKHSTAN: After 19 years, WTO Working Party June 22 approved Kazakhstan’s accession terms to become 162nd WTO member. Accession package moves to General Council for formal adoption in December. Members congratulated delegation of Kazakhstan on their achievement in completing “longest accession negotiation in WTO’s history,” WTO said.

CHINA: On Bilateral Investment Treaty (BIT), China and U.S. “have reaffirmed that the negotiation of a high-standard BIT is a top priority in our economic relationship, committing to intensify negotiations and exchange improved negative list offers in early September,” Treasury Secretary Jacob Lew said at end of U.S.-China Strategic and Economic Dialogue June 24.