

## Ex-Im Lending Dropped 39% in Lapse-Shortened Year

The lapse of the Export-Import Bank's (Ex-Im) authority in July contributed to a 39% drop in its financing in fiscal year 2015, which ended Sept. 30, 2015, and a 36% decline in its contribution to the U.S. Treasury, according to figures in Ex-Im's 2015 annual report released Jan. 14. With its operations shortened to nine months, Ex-Im provided \$12.5 billion in aid to U.S. exporters compared to \$20.5 billion in 12 months in FY 2014. It returned \$431.6 million to the Treasury last year vs. \$674.7 million the year before.

Even with a shorter year, support for aircraft exports at \$5.8 billion accounted for 46% of Ex-Im financing in fiscal 2015. That compares to a year earlier when it financed \$8.4 billion in trade for these products or 41% of total aid.

Ex-Im boasted that it provided \$3 billion in support for firms that qualified as small business. That represented 24.5% of its total aid and 90% of individual transactions. The bank claimed its default rate was only 0.235% for the whole year.

With Ex-Im rechartered, President Obama moved Jan. 11 to get its board back up to the number needed for a quorum and to placate bank critics. He sent to the Senate the nomination of J. Mark McWatters, who once served as counsel to Rep. Jeb Hensarling (R-Texas), who led the fight against reauthorizing the bank (see **WTTL**, Dec. 7, page 4). McWatters is now a member of the board of the National Credit Union Administration Board and earlier served as director of graduate programs and adjunct professor at Southern Methodist University's Dedman School of Law. At the same time, Obama withdrew the nomination of Patricia M. Loui-Schmicker to another term on the board.

## Court Enjoins Customs Power to Change Scope Determination

In what she herself called "an extraordinary form of equitable relief," Court of International Trade (CIT) Judge Claire R. Kelly issued a preliminary injunction Jan. 8, barring

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Customs and Border Protection (CBP) from requiring cash duty deposits on imports of solar panel components from China. “It is inconceivable that the regulatory scheme would permit CBP, which is charged with implementing Commerce’s instructions, to suspend liquidation and collect cash deposits prior to a scope determination when Commerce itself cannot do so,” she wrote in her ruling (slip op. 16-2).

Kelly granted the motion for relief filed by Sunpreme Inc., a Sunnyvale, Calif., firm that imports solar modules produced by Jiawei Solarchina. The modules are composed, in part, of solar cells that it designs, develops and tests at its facility in California. Sunpreme had earlier won a temporary restraining order from Kelly while its suit was pending.

At issue is the scope of the antidumping and countervailing duty orders on crystalline silicon photovoltaic cells from China. After examining products that Sunpreme was importing, Customs claimed the cells fell under the scope and directed the firm to post a cash deposit equal to the amount of the AD and CVD duties. Sunpreme argued that its modules are made of amorphous silicon that fall outside Commerce’s scope determination.

“Congress gave the role of determining the scope of an antidumping or countervailing duty order to Commerce,” Kelly noted. “CBP has no authority to modify Commerce’s determinations, in this case, the scope of the Orders,” she wrote. “If there is a question as to the meaning of an antidumping or countervailing duty order, however, then it is for Commerce to answer that question,” Kelly stated.

“Therefore, CBP’s conclusion that Plaintiff’s products, which it conceded contain thin films, did not fall within the exclusion was not based upon observed factual information that brought Plaintiff’s products within the scope of the Orders, but rather represented an interpretation of ambiguous scope language. CBP lacks the authority to interpret ambiguous scope language in the Orders,” Kelly ruled.

“Plaintiff has shown that it is very likely to succeed on the merits because it has demonstrated that the Court has jurisdiction and that CBP acted beyond the scope of its authority in interpreting the scope of the Orders,” she stated. “While CBP has a public interest in protecting the revenue of the United States, there is also a public interest in ensuring the accurate and effective, uniform and fair enforcement of trade laws,” she added. Kelly ordered Sunpreme to post bonds on its imports, while Commerce completes its response to the firm’s scope inquiry, which has a Feb. 15 deadline.

## House Panels Hear Debate over Wassenaar Cyber Rules

While they have no jurisdiction over agreements at the Wassenaar Arrangement or any pending legislation on cybersecurity export controls, two House committees brought in State and Commerce officials and industry members Jan. 12 to discuss the controversial proposed rule on implementing controls on cyber-intrusion products and technology. At the joint hearing of the House Oversight Committee subcommittee on information

technology and the Homeland Security Committee cybersecurity, infrastructure protection and security technologies subcommittee, all the panelists agreed the administration needs to revisit the proposed rule. The administration witnesses repeated assurances that no decision has been made on whether to rework the proposed rule and repropose it or to go back to Wassenaar and renegotiate its provisions.

“Everything is on the table,” Bureau of Industry and Security (BIS) Assistant Secretary Kevin Wolf told the subcommittees. “I want to make clear that the administration has not made any decisions regarding what the next step will be, other than that the next step will not be a final rule,” Wolf said.

Administration officials have been resistant to renegotiate, since 31 countries have implemented the new controls (see **WTTL**, Nov. 2, page 3). “The cyber control is included on the least sensitive portion of the Wassenaar list. This provides us with substantial flexibilities we can employ in the process of implementing that control nationally, just as most other Wassenaar members have done in already having implemented the cyber control for over a year without apparent controversy,” Principal Deputy Assistant Secretary of State for International Security and Nonproliferation Vann Van Diepen told the committees.

Lawmakers questioned the process of drafting the proposal that went to Wassenaar, as well as the proposed implementing rule. The original Wassenaar proposal was circulated to BIS technical advisory committees (TACs), who did not present any concerns. But industry representatives questioned the lack of cybersecurity companies on the TACs.

“The process piece of this is critically important and while the TACs were consulted on this issue, no cybersecurity industry was consulted on this issue. There were none that were sitting on the advisory groups to our knowledge at the time,” Cheri Flynn McGuire, vice president, global government affairs and cybersecurity policy at Symantec, testified. “Our understanding was that the language that was part of the original proposal that the TACs saw was not the language that was ultimately adopted at Wassenaar. While they may have said we don’t think there’s going to be a lot of problems, what ultimately became enacted was not what was put in front of them,” she added.

## **Administration Pushes for Trade Legacy with TPP**

Now that the business community has suddenly come alive and expressed broad support for the Trans-Pacific Partnership (TPP), the Obama administration is also pushing Congress to approve the trade deal before the president leaves office. Officials acknowledge, however, that it won’t be easy given the political environment.

At the Wilson Center Jan. 13, U.S. Trade Representative (USTR) Michael Froman brushed off reports that congressional leadership won’t bring the pact to a vote before the 2016 elections. “Our expectation is that as we move forward and continue to build support, that when the political environment is such that it’s conducive to bring it forward, that we’ll work with the leadership” to do so, he said. Froman also addressed business com-

munity skepticism (see *WTTL*, Jan. 11, page 1). “On the whole, the business community has been broadly positive, even if there are particular issues that they’d like us to follow up on, and we’re continuing to do that,” he added. “On all of these issues, we take the concerns of the stakeholder community very seriously. We want to make sure we’re doing everything we can, whether it’s answering questions or addressing outstanding concerns. As concerns arise, we do pursue them,” Froman said.

President Obama also pushed for the deal in his final State of the Union speech Jan. 12, admonishing Congress to vote for the deal when it is sent up. “With TPP, China doesn’t set the rules in that region, we do. You want to show our strength in this century? Approve this agreement. Give us the tools to enforce it,” he said.

As expected, both TPP opponents and supporters responded to the speech by repeating their positions. “President Obama made clear tonight that he intends the TPP to be a lasting legacy of his administration. Unfortunately, the TPP fails working people. It will intensify downward pressure on wages and threaten jobs, food safety and even our democracy—undermining his legacy instead of enhancing it,” AFL-CIO Trade Policy Specialist Celeste Drake said in a statement.

“We applaud the President’s remarks,” said National Foreign Trade Council President Bill Reinsch in a statement. “NFTC believes firmly that the TPP is in our national interest – from generating economic growth to supporting jobs – and we call on the administration and Congress to address remaining issues to ensure that the agreement provides the most benefits possible across the whole of the U.S. economy,” he added.

Agriculture groups, while supporting the deal, acknowledged the difficult vote. “We understand that the Trans-Pacific Partnership is going to be a heavy lift this year, but we are excited to continue our press to see it passed by our Congress and ratified. The promise of the TPP for soybean farmers is too great to accept anything less, and we are very encouraged to hear the president continue his focus on the TPP in the year to come,” the American Soybean Association said in a statement.

## **Opponents Ask for New Economic Models in TPP Analysis**

At a three-day hearing on the Trans-Pacific Partnership’s (TPP) likely economic impact Jan. 13-15, the International Trade Commission (ITC) learned that those opposed to the deal want a new economic model of analysis, while supporters are just fine with the old models. The ITC’s analysis, mandated by fast-track trade promotion authority (TPA), is certain to become cited by supporters and opponents regardless of how it comes out.

House Ways and Means Committee Ranking Member Levin (D-Mich.) asked for “a thorough and nuanced analysis of the TPP. We need new models – and new thinking,” he testified. “In the context of growing income inequality,” Levin said the commission “will need to cut through the simplistic and prevalent generalizations in the debate today that

trade is categorically good or bad. It will need to move beyond the old models.” Sen. Sherrod Brown (D-Ohio), another opponent of past trade deals, echoed that call. “Given the uniqueness of the TPP and the fact that it is the first agreement designed to expand beyond its current members, I am hopeful you will consider altering the way you model this agreement’s economic impacts,” Brown said.

In addition to the ITC analysis, members of Congress “are working to understand what the agreement’s short-, medium-, and long-term effects will be. And we are considering whether changes should be made to the agreement before it is voted on,” Brown added.

Trade deal opponents argued that old analytic models fail to project the negative impact of the pacts. “For working people, top line figures such as GDP growth are not particularly meaningful. We therefore ask the ITC to add meaningful projections regarding inequality, such as labor share of income, to help workers to understand why their slice of the pie is getting smaller,” AFL-CIO’s Celeste Drake testified.

Other witnesses wanted their particular sector’s concerns reflected in the analysis. Representing the Sweetener Users Association (SUA), Tom Earley, vice president of Agralytica, testified that although the SUA supports the deal, the U.S. sugar program reduces the potential positive economic impacts of trade deals. “Unfortunately, once the United States tells other countries that the sugar program is sacrosanct, those countries have a ready-made excuse to hold out against market access concessions on their own specially protected agricultural sectors,” he testified.

Ashok Kumar Mirpuri, Singapore’s ambassador to the U.S., told the ITC that past trade deals have been successful, but previous analyses failed to anticipate new technology and new sectors, such as services. Non-tangible trade is a “lot harder to measure” than goods, he testified. “New agreements have to take into account new technology,” he said.

He cited the U.S.-Singapore Free Trade Agreement as an example. “The facts speak for themselves. We can see the impact of the USSFTA in both Singapore and the U.S., and the benefits it has brought to both our countries not just in our economic relations but also in being a cornerstone of our strategic partnership,” he said.

Other witnesses highlighted the negative economic impacts of specific provisions. The Software & Information Industry Association (SIIA), which supports the TPP’s digital trade provisions and the deal generally, expressed concern about the carve-out for financial services.

“Perhaps the biggest weakness in the e-commerce chapter is that the data localization requirements do not apply to financial services. The financial data can still flow internationally but countries can mandate that financial records be stored locally. Future trade agreements should not contain this exception,” noted SIIA’s Carl Schonander. **[Editor’s Note:** WTTL’s publisher, Gilston-Kalin Communications, LLC, is a member of SIIA.]

## Obama Gives South Africa New Deadline to Open Ag Markets

President Obama has given South Africa until March 15 to show that it is complying with an agreement it reached Jan. 6 with U.S. trade officials to open its markets to American poultry, beef and pork. Obama issued a proclamation Jan. 11 withdrawing South Africa from the benefits of the Africa Growth and Opportunity Act (AGOA) but delayed the effective date until mid-March (see **WTTL**, Jan. 11, page 5).

“This proclamation does not immediately suspend AGOA trade benefits for South Africa,” the U.S. embassy in Pretoria, South Africa, explained in a Jan. 12 statement, noting the Jan. 6 deal. “Now that the substantive points of disagreement have been resolved, we expect the resumption of trade in the three meats to take place smoothly and expeditiously,” it said.

“Under the proclamation, AGOA benefits will only be at risk of suspension if trade in poultry does not resume by March 15. U.S. and South African officials are working now to ensure the first imports of U.S. poultry arrive in South Africa as soon as possible, well ahead of the March 15 deadline,” it added.

“I have determined that South Africa is not meeting the requirements described in section 506A(a)(1) of the 1974 Act and that suspending the application of duty-free treatment to certain goods would be more effective in promoting compliance by South Africa with such requirements than terminating the designation of South Africa as a beneficiary sub-Saharan African country. Accordingly, I have decided to suspend the application of duty-free treatment for all AGOA-eligible goods in the agricultural sector from South Africa for purposes of section 506A of the 1974 Act, effective on March 15, 2016,” Obama proclaimed.

## House Bill Seeks to Restrain Iran Nuclear Deal

In the face of a presidential veto threat, the House Jan. 13 moved toward the adoption of restrictions on President Obama’s ability to implement the Iran nuclear deal. After voting strictly along party lines to pass a rule to bring the legislation (H.R. 3662) up for a vote and passing it 191-106, the House agreed to a request from Republican leadership to vacate the vote and resume debate Jan. 26. The House action came as the White House was about to mark “Implementation Day” of the nuclear deal because Iran had met its obligations under the accord.

The bill would bar the president from implementing the provisions of Joint Comprehensive Plan of Action (JCPOA) that could remove certain individuals, entities and financial institutions from the Specially Designated Nationals (SDN) list unless he certified that those parties were not involved in any terrorist activities or supported terrorist activities. The bill drew a strong Statement of Administration Policy (SAP) from the Office of Management and Budget (OMB), warning that, “If the President were presented with H.R. 3662, he would veto the bill.” It said the administration strongly opposes the Iran

Terror Finance Transparency Act because it would prevent the U.S. from implementing the JCPOA “by tying the administration's ability to fulfill U.S. commitments under the deal to unrelated, non-nuclear issues.”

Certain provisions of the measure “would effectively preclude delisting of individuals or entities on Implementation Day of the JCPOA – the day on which the International Atomic Energy Agency verifies that Iran has completed key nuclear-related steps that significantly dismantle and constrain its nuclear program – based on activity that may have taken place and ended long before Implementation Day and involving persons or activity that will no longer be sanctioned post-Implementation Day,” it said.

“By preventing the United States from fulfilling its JCPOA commitments, H.R. 3662 could result in the collapse of a comprehensive diplomatic arrangement that peacefully and verifiably prevents Iran from acquiring a nuclear weapon,” the SAP added.

During the House floor debate on the bill, Rep. Eliot Engel (D-N.Y.), ranking member on the House Foreign Affairs Committee, noted what he called a “misperception” about the roughly 700 Iranian entities on U.S. sanctions lists. “Of those, only 200 are removed from sanctions and those are those who were involved in the nuclear program. It is not true that the JCPOA removed sanctions on entities that are engaged in terrorism or proliferation or human rights violations. This is black and white in the JCPOA,” said Engel, who opposed the JCPOA.

\* \* \* **Briefs** \* \* \*

GEOGRIDS: Tensar Corporation filed countervailing and antidumping duty petitions Jan. 13 at ITA and ITC against certain biaxial integral geogrid products from China. Products covered by this petition are used for reinforcement in roads and other construction.

ITC: Michael Anderson was named ITC investigations director Jan. 15. He has served as acting director of industries since March 2015. Anderson was chief of advanced technology and machinery division in office of industries from 2005 to 2015 and previously worked at USTR Office of Economic Affairs.

NOT SO SWEET: As battle over TPP's sugar provisions continues, Coalition for Sugar Reform issued release Jan. 13 citing recent Census job data that show 18.5% decline in employment in sugar-using industries from 1997 to 2014, most recent year for which data are available. Report says number of jobs industry declined by 132,467 to 584,725.

NORTH KOREA: In wake of some type of explosion in North Korea, House passed bill (H.R. 757) Jan 12 that would require president and Treasury to investigate credible claims of Pyongyang's proliferation, money-laundering, cyber warfare and counterfeiting activities and human rights abuse and would give president new authority to sanction those activities. Measure passed by 418-2 vote, with Reps. Justin Amash (R-Mich.) and Thomas Massie (R-Ky.) only no votes.