Council Highlights

NATIONAL FOREIGN TRADE COUNCIL

Council Highlights is a bi-monthly summary of news and events of the National Foreign Trade Council exclusively for its members.

January 2010 Issue

A Word From the President

Trade Challenges on the Road to Copenhagen and Senate Action

Last month I participated in the World Economic Forum's annual conference in India and spoke on the trade aspects of climate change. It was a useful session and a good opportunity to learn more about European and Indian thinking on the subject. The latter appears to be evolving slowly in a positive direction. Following are the remarks I prepared for the conference.

Trade has not had as high a profile as it should in the debate over Waxman-Markey. Nor has it been a prominent factor in international fora such as the UNFCCC. However, as debate over how to proceed sharpens in the Congress and Copenhagen approaches, trade issues are looming larger – and for good reason. Depending on the trade policies we choose, our actions on climate could have a tremendously positive or negative impact on global trade, jobs, and the global economy.

The United States is hardly the only actor, but the Obama administration has an important opportunity to lead and to persuade Congress both to create new clean energy jobs in the United States and to avoid taking steps that could lead to a green trade war and harm the global economy.

There are several climate policy issues that would impact on international trade. The National Foreign Trade Council, which is a trade association that represents large global companies, has been focusing on two, which I would characterize as the "two sides of green trade."

1. On one side you have the challenge of navigating between policies which threaten to disrupt the international trading system.

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NFTC President Underscores Need for Multilateral Approach to Climate Change During WEF Panel in New Delhi

NFTC President Bill Reinsch

NFTC President Bill Reinsch called on nations to reaffirm the need for a multilateral approach to climate change during a World Economic Forum (WEF) India Summit panel on "Trade and Climate Change: Economic Imperative or Green Imperialism?" in New Delhi November 10th. To follow is an excerpt of Reinsch's remarks:

"There are a lot of challenges here that are surmountable but have to be dealt with one by one by all of us. I think for the Americans and the Europeans in particular, the challenges are first to not only agree to but to implement meaningful emission reduction targets. I think also the challenge is going to be to avoid adding on protectionist measures and trade barriers that are intended to limit imports of carbon-intensive products from countries that perhaps *haven't adopted the targets.*

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For example, Waxman-Markey contains border adjustment measures and free allowances aimed at leveling the playing field for U.S. manufacturers who face higher costs from putting a price on carbon.

2. On the other side, there is an opportunity to take positive steps to incentivize the adoption and financing of clean energy technologies to developing countries. Common-sense policies can create high-paying green collar jobs in the United States and around the world, though care must be taken to make sure that incentives comply with global trade rules and spur the creation of new technologies.

Waxman-Markey: The challenge of leveling the playing field

To the extent that Congress has talked about trade in the debate over domestic climate legislation, it has been in the context of if and how to address the competitiveness of U.S. energy-intensive manufacturers and the possibility of "carbon leakage" -- that production of energy intensive products will move from the United States to countries with a competitive advantage because of their weaker regulations.

Until now, the European Union and other countries contemplating cap-and-trade systems have relied on giving away credits for free to energy-intensive industries that are hit hardest by climate policies. U.S. legislation contemplates similar assistance to domestic manufacturing industries including steel, aluminum, cement and chemicals.

Some, lately including economist and New York Times columnist Paul Krugman, argue that it is also necessary to impose a "carbon tariff" or equivalent "border adjustment measure" that would place an additional cost on energy-intensive imports into the United States from countries which have not taken sufficient steps to combat climate change.

The best way to integrate a global climate framework into the international trading system is to encourage an understanding among major emitting countries about the use of trade-related climate measures like emissions allowances and border adjustment measures. Congress has called for such an understanding in the version of Waxman-Markey that passed the House. We believe it is in the world's interest to negotiate an international framework agreement on the use of trade-related climate change measures such as free emission allowances and border adjustment programs.

But even if the world cannot agree on such a framework, it is not in the U.S. economic or environmental interest to impose border adjustments or carbon tariffs on other countries.

They are blunt instruments which are unlikely to incentivize foreign companies to green their production. This will in turn make it more difficult for such a measure to pass muster at the World Trade Organization.

Even if you could design a trade measure that satisfied global trade rules, the threat or imposition of a border measure would cause serious friction with developing countries, who have already threatened to retaliate. This causes us to worry that border adjustment mechanisms would have a negative effect on the global trading system. There is also the possibility that these measures would be used against the United States, which is something that France has hinted at.

For all these reasons, President Obama has said that, in order to create a level playing field for American manufacturers, "there may be other ways of doing it than with a tariff approach."

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While we believe that free allowances could also be scrutinized for their compatibility with global trade rules, the reality is that these allowances are substantially less likely to be challenged internationally than a new tariff. As trade expert Gary Horlick points out, "In practice…import restrictions are much more likely to be challenged in the WTO than is financial assistance to producers, such as offsetting costs or giving away permits." He notes that thousands of pages of subsidies are reported to the WTO, but only a handful have been challenged, while countries have raised objections to hundreds of border measures. In short, carrots are easier to swallow than sticks.

Green trade = Green jobs and a cleaner environment

While it is imperative to ensure that competitiveness issues don't threaten the trading system, we shouldn't overlook the tremendous opportunity in climate change discussions to promote green jobs in the United States and around the world.

One way to jumpstart the U.S. clean energy economy is to lower trade barriers to exports of environmental goods and services. U.S. businesses and workers would benefit from the removal of barriers that U.S. exporters face on green goods and services in what is a large and rapidly growing market.

There is also an environmental benefit. The World Bank notes that, "it is widely accepted that trade liberalization of [environmental goods and services] would benefit the environment by contributing to lowering the costs of goods and services necessary for environmental protection, including those beneficial for climate change."

The United States, along with the EU, has proposed an "Environmental Goods and Services Agreement" as part of the Doha Development Round of trade negotiations under the World Trade Organization. We believe the Obama administration should elevate the priority of these negotiations and pursue an agreement on green trade without waiting on the rest of the Doha Round.

Another policy priority should be to make certain that other countries protect the innovation and intellectual capital behind technologies to promote the development of breakthrough innovations that will help address climate change in the future.

Congress has acknowledged the importance of intellectual property protection for promoting innovation and delivering clean technologies to developing countries. But developing countries have staked out positions in the UNFCCC negotiations that would distort trade and weaken global rules on intellectual property. The UNFCCC is not the proper forum for rewriting trade rules, and the new exemptions that are being proposed there would stifle the development of the next generation of clean energy technologies. Ultimately, this will also work to the detriment of developing countries who themselves are building innovative capacity in green technology and who put their own inventors at risk by insisting on loose standards for technology transfer.

There are numerous other incentives that Congress, the Administration and international negotiators are considering which have the potential to create jobs and help the environment. Eco-labeling schemes, clean technology funds, government procurement policies favoring climate-friendly goods, and incentives for research, development and production of clean technologies have all been discussed in various contexts.

NFTC addressed the compatibility of a number of these proposals with global trade rules in a paper released in December 2007. Without getting into detail on each of the specifics, which would take much more time than I have, I would say that policies are less likely to violate global trade rules to the extent that they are transparent, apply the same rules to foreign and domestic entities, do not needlessly restrict trade and are not designed to enhance the export performance of domestic industry.

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Based on these criteria, emissions trading may be one of the most WTO-compatible policy instruments available. But details matter. It is too early to draw a firm conclusion, but right now the impact of the subsidies, border measures and other requirements of legislation under consideration here and elsewhere provides good cause for worry that in the interest of short term protection we may be taking steps that ignite global trade conflict and at the same time make it more difficult to achieve our collective climate change goals. This is a situation that we will be watching carefully, and I hope you will be as well.

NFTC Participates in U.S. Business Community Push for Colombia FTA

Sunday, November 22nd marked the three-year anniversary of the signing of the U.S.-Colombia Free Trade Agreement (FTA). In an effort to press the Administration to submit the implementing legislation to Congress for an up-or-down vote, the NFTC joined other U.S. business community associations in a coordinated online advocacy effort on Monday, November 23rd. We used our Facebook page to publicize the statement we issued, which urged the Administration to work with the Colombian Government to resolve remaining issues standing in the way of approval of the agreement.

The FTA, upon its entry into force, will open the door to a number of important economic benefits for both the United States and Colombia, including leveling the playing field for U.S. exporters. In addition, the agreement will increase U.S. exports, create jobs and solidify already strong economic and diplomatic relations with a key ally in an increasingly unstable region. Colombia has made tremendous strides in growing its economy and strengthening its democratic institutions. It is time for the United States to take a prudent and proactive step toward expanding trade relations with Colombia, and the NFTC will continue to aggressively advocate approval of the FTA.

NFTC Welcomes U.S. Commitment to Join TPP Negotiations

During his first presidential visit to Asia last month, President Obama reaffirmed the United States' commitment to bolstering economic ties with the Asia-Pacific region. The President's decision to join the Trans-Pacific Strategic Economic Partnership Agreement (TPP) negotiations came after several meetings of the Asia-Pacific Economic Cooperation Summit and represents the Administration's first major support of a free trade agreement since taking office.

The TPP is designed to build on the "P-4" agreement already in force among Chile, New Zealand, Singapore and Brunei, and initial negotiations will be among these countries as well as the United States, Peru, Australia and Vietnam. The Bush Administration had announced its intention to enter these negotiations, with the first organizing round slated for March 2009, but this new Administration had effectively put the beginning of negotiations on hold while it undertook a comprehensive review of both its overall trade policy and its comprehensive strategy in Asia.

President Obama's carefully parsed announcement have led some skeptics to wonder when the U.S. will actually move forward with this negotiation, but Australian Trade Minister Simon Crean's announcement that the first round of the TPP negotiations will take place on March 15, 2010 has imposed a milestone to judge the Obama Administration's true commitment.

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NFTC Welcomes U.S. Commitment to Join TPP Negotiations

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If the Administration were to continue the tradition of following the Congressional notification protocol of the lapsed TPA (Trade Promotion Authority) granted by Congress, it would likely formally notify Congress by December 15 of its intention to enter into these negotiations.

The NFTC has actively urged the Administration to pursue the negotiations and has raised attention to the economic significance of U.S. participation in the development of the plurilateral trade pact. In a November 4 letter to the president, U.S. Trade Representative Ambassador Ron Kirk and U.S. Commerce Secretary Locke, we highlighted the opportunity for the United States to increase exports, produce jobs and advance trans-Pacific economic relations through a commitment to the TPP. In March, NFTC Vice President for Regional Trade Initiatives Chuck Dittrich testified before the interagency U.S. Trade Policy Staff Committee to express the NFTC's strong support for the initiation of TPP negotiations.

It was, therefore, with great enthusiasm that we welcomed President Obama's recent announcement. We look forward to working with the Administration as the United States moves forward with the negotiations. Among the most contentious issues already identified by free trade skeptics are U.S. market access for New Zealand dairy as well as the labor and human rights record of Vietnam. However, declining U.S. market share in the Asia Pacific and ever rising U.S. unemployment seem to have prevailed upon this Administration to realize that we cannot move forward unless we engage the region in a substantive way.

As the NFTC moves forward in support of the TPP negotiations, we are especially interested in hearing from members about their support for the negotiations, the issues they especially want addressed, and indications of you're the economic significance of the region to your business. Please address any comments to Chuck Dittrich at cdittrich@nftc.org.

Export Controls

The NFTC, along with CEE, continues to lead the largest working group on export controls in Washington. The group is composed of associations, companies, law firms, and anyone who has an interest and expertise in this niche policy. Since the Administration and the House Foreign Affairs Committee (HFAC) both announced plans this summer to begin an overhaul of the current export control rules, the Export Control Working Group (ECWG) and the Coalition for Security and Competitiveness, two groups NFTC is involved in, have been putting together a list of strategic recommendations.

The recommendations and common principles are primarily broad policy concepts focused on simplicity, transparency, and efficiency. The adage, "higher fences around fewer items" is at the core of the working paper. Other organizations and companies are moving forward with detailed mechanism recommendations, but the ECWG felt it better served the process by focusing on working principles. The group does not support large-scale changes such as a single agency and the specifics of particular policies are left to other organizations. The goal is to have an effective and adaptable export control process that not only fosters a positive working relationship between the various agencies, but provides workable guidelines for companies.

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Export Controls

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The group recently met with Ed Rice of the HFAC as well as staffers from Manzullo's and Sherman's office to present the paper. It was well received and follows similar ideas the House Committees are using to formulate legislation. Ed expects to have a draft bill ready for introduction at the end of January with appropriate full committee hearings. The bill will be EAA only with nothing on munitions.

The Senate Foreign Relations Committee recently stripped ITAR revamp legislation from S. 1716, which is the 2010/2011 Reauthorization bill for the State Dept and Peace Corps. The language would have removed commercial satellites and components from the munitions list and returned it to the Commerce control list. The House version (H.R. 2410) passed in June, but the Senate Committee removed the language so as to have a clean bill if a vote takes place. That, however, is unlikely due to the time constraints on the Senate Calendar.

In terms of the Administration, an inter-agency working group has been formed following the President's announcement of a review, and the push for significant reform is coming from high above, particularly Secretary of Defense Gates. In addition, Secretary Locke has mentioned the need for reform and weighed in with some proposals of his own. Undersecretary of State Ellen Tauscher has also made this one of her priorities. In the coming weeks, we will meet with NSC staff as well as key people at the Departments of Commerce and State.

As both the Hill and the White House seem intent on moving some sort of reform forward, the NFTC and the groups it coordinates have a small amount of time to ensure any changes are helpful and not harmful to U.S. business and trade policies. We have positioned ourselves to ensure we maintain a leadership role.

NFTC Urges Senate to Bolster U.S. Climate Agenda With Robust Green Trade Component

On November 17, NFTC Vice President for Global Trade Issues Jake Colvin testified before the Senate Committee on Energy and Natural Resources, and encouraged Congress to more fully incorporate green trade into climate policy, as a means to boost U.S. economic growth and advance global environmental goals. Noting the challenge of addressing competitiveness issues in cap-and-trade legislation, Colvin also warned policymakers against including well-intentioned, politically popular measures such as carbon tariffs that could undermine U.S. competitiveness abroad and global cooperation.

"The Administration and Congress can promote green jobs at home and advance global environmental objectives by incorporating a more robust green trade component into the international climate agenda. In particular, efforts to expand overseas markets for U.S. climate technologies by reducing trade barriers are critical for creating new green collar jobs in the United States and can aid global climate goals," Colvin stated in his testimony.

Colvin pointed out that green trade "has not received a great deal of attention in international climate negotiations despite the clear environmental benefits," and highlighted that the NFTC and eight other leading U.S. business organizations sent a letter to the president in July, urging the Administration to lower green trade barriers and pursue a green trade agreement "through all appropriate international economic and environmental forums."

In contrast, he stated, "Two issues that have received a great deal of attention in international climate discussions are intellectual property rights and financing. Ensuring the global protection of intellectual property rights and addressing funding and capacity needs in developing countries will promote investment environments abroad that are better able to adopt and develop clean technologies."

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NFTC Urges Senate to Bolster U.S. Climate Agenda With Robust Green Trade Component

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With respect to U.S. competitiveness, Colvin cautioned, "As Congress seeks to address competitiveness and carbon leakage concerns from implementing an emissions reduction program, one popular option – the use of border adjustment measures – could damage the ability of American companies to compete in key markets and global environmental cooperation. Given the increasing reliance on exports to grow the U.S. economy and create new jobs, it is essential to avoid introducing measures that could cause unnecessary friction with U.S. trading partners." He noted that the international reserve allowance program included in the House-passed American Clean Energy and Security Act, which could lead our trading partners to argue that "such a program is as likely to be fueled by a desire to protect domestic industry as by an interest in protecting the environment."

Colvin concluded his testimony by stating, "Aggressive and innovative green trade policies can assist efforts to advance U.S. economic priorities and environmental goals, but attempts to impose new tariffs could harm both," said Colvin. "Efforts to open markets abroad for U.S. businesses and workers in the clean technology arena will be essential to rebalance the global economy and create the next generation of green manufacturing jobs in the United States."

NFTC President Underscores Need for Multilateral Approach to Climate Change During WEF Panel in New Delhi

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"One way to avoid that of course is if everybody agrees to targets and we have a multilateral approach to the problem. Even in the absence of that though, having those kinds of trade barriers is going to make the achievement of all of our goals a lot more difficult, and one of the things we're [the NFTC] working very hard on is to try to make sure that that doesn't become a big impediment as far as the American legislation is concerned.

"In turn, I think the challenges for the developing countries, including India and China, but also many others, are first also to agree to targets that are meaningful and give global confidence that we're all working together to deal with a global commons problem. And also I think their challenge, where a lot of progress has been made very recently, I think in particular reflected in the statement the Prime Minister made here, is on the intellectual property area.

"I think there is a growing appreciation amongst all parties, particularly in developing countries, that strong intellectual property protection is actually an enhancement to investment, an enhancement to R&D in their countries, and is a way for developing countries to protect green innovation and green technology that are very much going to be the products of India and China and not simply of Europe and the United States. So, I'm optimistic that we're moving in the right direction on that front although there have been a lot of statements in the past that have suggested that this was going to be a rocky area."

Reinsch also called on the international community to produce an environmental goods and services trade agreement that will lower tariffs and market-access barriers to green technology.

News for Our Members

NFTC Leads U.S. Business Delegation to Copenhagen Climate Summit

The National Foreign Trade Council (NFTC) is leading a delegation of U.S. businesses to participate in the United Nations Framework Convention on Climate Change Conference of Parties (COP-15) in Copenhagen. The delegation, which is being led by NFTC Vice President for Global Trade Issues Jake Colvin, will participate in a series of high-level meetings with environmental negotiators and trade officials, including from the World Trade Organization (WTO). The goal of the visit is to highlight the intersection between efforts to address climate change and the global economy.

"It is important for policymakers and other stakeholders to pay attention to the connection between the environment and the global economy," said Colvin. "One area that deserves more focus is green trade. Lowering trade barriers and promoting solid investment climates can help achieve our environmental goals."

While in Copenhagen, the NFTC-led delegation will participate in a number of events and will host a series of briefings for key officials, which will focus on trade and competitiveness aspects of international action on climate. In addition, the NFTC is partnering with the U.S. Council for International Business (USCIB) on an event focused on trade and climate change.

On Tuesday, the NFTC will participate in an all-day event organized by the International Centre for Trade and Sustainable Development (ICTSD), during which Colvin will deliver remarks as part of a panel discussion on "Clean Energy Generation and Lean Energy Use: Interweaving Trade and Regulatory Frameworks."

As an organization focused solely on international trade and tax policy, the NFTC advocates multilateral cooperation on climate change, supports open and transparent trade in green goods and services, and urges that U.S. climate policies be compliant with WTO rules.

NFTC Leads Meeting at State Department on Alien Tort Statute; U.S. Government Files in Apartheid Lawsuit

On November 18, 2009 the NFTC led a meeting for companies and trade associations on the State Department's position on the alien tort statute. The group met with officials from the Legal Advisor's office, the Economic and Business Bureau, and the Africa Bureau. The immediate subject was the request from the Second Circuit Court of Appeals for a statement of interest in the apartheid case (*Balintulo, et al., v. Daimler, et al.*) and more broadly, the Obama Administration's position on alien tort lawsuits on which the Department is likely to be asked to comment.

Deputy Legal Advisor Jonathan Schwartz said that the issue before the Second Circuit in the apartheid case is jurisdictional, i.e., whether the District Court's decision to proceed is appealable. He then reviewed the approaches that the administration could take on the ATS broadly. One is to take a case-by-case approach, dealing with each case individually, which is the approach taken in recent administrations. A second approach would be to tackle the legal issues common to many cases, such as comity and the political question, thereby limiting the issues on which the USG would speak. Finally, he talked about the possibility of amending the statute and mentioned Senator Feinstein's short-lived interest in crafting amendments to the ATS a few years ago. Schwartz gave no indication of the direction of the Obama Administration. He also raised the fact that the USG has also been asked to comment on the alien tort case against Pfizer in Nigeria.

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NFTC Leads Meeting at State Department on Alien Tort Statute; U.S. Government Files in Apartheid Lawsuit

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Business participants pointed to the importance of the Executive Branch's response to the Second Circuit as a precedent for responses in future cases, of which there are certain to be a substantial number. They cited the reputational and financial damage to U.S. companies of ATS cases being filed, let alone having adverse rulings, and emphasized the critical importance of the USG standing up for American companies charged under the ATS. The importance of clarifying corporate liability for aiding and abetting and extraterritoriality were also emphasized.

On November 30th the U.S. government submitted its statement of interest to the Second Circuit Court of Appeals in the South Africa case. The statement opposed the defendants' motion to appeal the District Court's decision to proceed with the litigation. Significantly, the U.S. statement took note of South African Justice Minister Radebe's letter last summer to Judge Scheindlin of the Federal District Court for the Southern District of New York, saying that South Africa approved of the case being heard in U.S. federal court. This reversed the previous government's emphatic position that the litigation infringes South African sovereignty.

In its statement the U.S. government acknowledged that filings it had previously expressed concern about the impact of the case on U.S. foreign policy and foreign relations, but asserted that "at no time has the United States informed the courts that the foreign policy consequences of this litigation are so grave as to call for dismissal on that basis." This position is especially regrettable in that it may encourage future alien tort lawsuits against U.S. companies' international commercial activities.

In its communication to the Court the South African government demurred, stating "the Republic of South Africa has not determined whether it intends to make a further submission to the Court in this matter." The Court's deadline having now passed, one assumes the South Africans will not respond, at least until the next round.

Global Innovation Forum

GIF to Host Regional Innovation Workshops in Centers of Technology Excellence Across the United States

To further constructive dialogue on innovation policy, the Global Innovation Forum (GIF) aims to help inform America's discussion and analysis of the key drivers of innovation through interactive workshops in regional centers of technological excellence across the United States. This initiative is designed to facilitate an ongoing dialogue with a diverse group of stakeholders and to carry that message beyond the Washington Beltway to local communities that benefit, or stand to benefit, from policies that encourage innovation. Through this series of workshops, NFTC aims to facilitate an ongoing conversation about the importance of local, national and international policy choices in encouraging innovation and solving global challenges. We believe these workshops are timely, newsworthy and will be attractive to a variety of business leaders, entrepreneurs, academics, politicians and community leaders that will help influence policy decisions for years to come. The development of a group of informed, thoughtful opinion leaders in regional centers of excellence should help to inform and uplift the national policy debate over these issues as well.

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Global Innovation Forum

GIF to Host Regional Innovation Workshops in Centers of Technology Excellence Across the United States

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GIF is partnering with local institutions in these technology centers to help coordinate the workshop and facilitate outreach to the local community and the region. Each workshop will feature a prominent keynote speaker to provide regional context and framing of the challenges facing regional innovation ecosystems. Workshops will also include working group sessions to address "creation, trade and solutions" issues through robust roundtable discussions among local businesses, policymakers, and stakeholders as well as select national thought leaders. We aim to deliver from these sessions a set of high-level recommendations to promote American competitiveness, in particular as the United States aims to lead the world in the development of solutions to global challenges such as job creation, poverty, climate change, public health and food security.

The event schedule is currently in development. Support for this project comes from a generous grant by the GE Foundation.

USA*Engage

Iran Sanctions Update

In November, the House Foreign Affairs Committee (HR2194) and the Senate Banking Committee (S. 2799) passed unanimously further unilateral economic sanctions on Iran. The House bill, The Iran Refined Petroleum Sanctions Act of 2009, follows on HR 1327, The Iran Sanctions Enabling Act of 2009, to permit state divestment legislation with respect to Iran, which was passed unanimously earlier in the year by the Financial Services Committee. The Senate bill, The Comprehensive Iran Sanctions Accountability and Divestment Act of 2009, includes both state divestment and petroleum product sanctions, and also targets foreign subsidiaries of U.S companies and third countries that provide transshipment of embargoed goods to Iran.

Despite ample expert comment pointing out the substantive and diplomatic reasons why the sanctions legislation is at best irrelevant and at worst counterproductive, Congress as a body seems hell bent on proceeding with the legislation. This, despite the fact that in his testimony before the Senate Banking Committee, Undersecretary of State Jim Steinberg indicated that Congressional legislation is unwarranted.

Indeed, subsequent Administration signals have focused on the necessity of multilateral sanctions, should diplomatic negotiations fail. The domestic politics of the Islamic Republic, coupled with those of the United States, appear to all but guarantee that failure.

As George Friedman, CEO of the consulting firm, STRATFOR, has reminded his readers, sanctions, while counterproductive, do provide those who adopt them a face-saving alternative to force of arms. That seems to be where things stand, collateral damage to U.S. economic interests and the practical inutility of sanctions notwithstanding.

USA*ENGAGE has consistently pointed out the substantive and diplomatic reasons not to pass additional U.S. unilateral economic sanctions, not least because their passage compromises the ability of the Administration to secure a multilateral sanctions regime.

Perhaps the best that can be hoped for is that the health care debate begun on the Senate floor will preclude floor action on S. 2799 this year.

Tax Policy

Senate Foreign Relations Examines Tax Treaty Issues

The Senate Foreign Relations Committee held a hearing on November 10, 2009 on the pending tax treaties and protocols with France, New Zealand, and Malta. Sen. Ted Kaufman (D-DEL) was the lone Senator to participate in the hearing.

Manal Corwin, International Tax Counsel at the Treasury Department, testified in support of the tax treaties on behalf of the Administration. The French Protocol is the fourth tax treaty to contain a mandatory arbitration provision. A mandatory arbitration provision is also contained in the tax protocols with Germany, Belgium and Canada. Ms. Corwin told the Committee that the use of arbitration is one way in which Treasury has tried to equip the United States Competent Authority with additional tools to resolve disputes promptly. Treasury has examined the experience of countries that have adopted mandatory binding arbitration provisions with respect to tax matters and found that many report that impending mandatory arbitration creates a significant incentive for compromise, she said. Ms. Corwin said Treasury considers the inclusion of arbitration provisions on a case-by-case basis, looking to what the other treaty country thinks about the provision and the history and difficulty of disputes the U.S. has experienced with such country.

Sen. Ted Kaufman (D-DE), who chaired the hearing, asked whether making the provision standard in all treaties is under consideration. Ms. Corwin said arbitration is something Treasury thinks is appropriate as a dispute resolution tool. Treasury has no plans to make it part of the model treaty, but will continue to study the provision, she said.

Thomas Barthold, Chief of Staff of the Joint Committee on Taxation (JCT), also provided testimony to the Committee, including a discussion of differences between the three treaties under discussion and the U.S. model treaty.

In response to Kaufman's questioning, Barthold said that the Joint Committee on Taxation's concerns about arbitration are more questions of direction and consistency. In two of the cases in which arbitration provisions apply, arbitration will be available with respect to any aspect of the treaty; in two others, it will be available more narrowly, he said. That leads to a question of why that is and, going forward, if it is used as an additional tool to resolve disputes, how broadly or narrowly should it be applied, Barthold said. The French Protocol provides for the option of a taxpayer providing a position paper on the challenged issues. Mr. Barthold said that the JCT also has some questions about the precise role of the taxpayer position paper in the arbitration process. He said that it is somewhat unclear what benefit the position paper brings to the process since the two countries would be fully explaining the position they took. Mr. Barthold opined that it is conceivable the taxpayer might provide some additional insight.

Asked whether there should be a standard arbitration provision, Mr. Barthold said if the thinking by Treasury is that arbitration is an important tool in providing dispute resolution, it may be important to outline that as part of the model treaty. In practice, you never get a result that looks exactly like the model because in any negotiation the other country may not have the same goals, and it could not be expected to work uniformly across all provisions. The model stating what could be a good reasoned approach could be beneficial, he said.

Barthold said the additional reporting requirement imposed by the Senate last year only applies to treaties with Canada, Belgium, and Germany. The requirement would have to be broadened to bring in France, and doing so may be valuable given the differences in scope among the treaties, he said. That said, it is the hope of the countries involved that they may never get to arbitration, Barthold said.

Tax Policy

Senate Foreign Relations Committee Reports out the French Protocol

On Tuesday, November 17, the Senate Foreign Relations Committee held a business meeting and reported out the French Protocol. Once the Committee report is completed, the Protocol will be sent to the Senate floor for a Senate vote. Given the busy Senate floor schedule on the health care reform package, finding time for other legislative issues, will be difficult. If the Senate is able to act on the French protocol in a timely fashion, the protocol then goes back to the White House, Treasury and State Departments for their final action. Only after the Administration completes its action can the instruments be officially exchanged, and the protocol go into affect.

The tax treaty with Malta and the protocol with New Zealand were not acted on by the Senate Foreign Relations Committee in the November 17 meeting. Given that the French protocol contains a retroactive effective date for the withholding provisions, it was considered a higher legislative priority to be acted on in 2009. The Malta and New Zealand tax treaty and protocol which contain prospective effective dates are likely to be acted on by the Senate Foreign Relations Committee in 2010.

The NFTC provided written testimony for the record to the Senate Foreign Relations Committee. If you would like more information on any of the pending tax treaties, please contact Catherine Schultz at cschultz@nftc.org. For a copy of the testimony sent to the Senate Foreign Relations Committee http://www.nftc.org/default/Tax%20Policy/2009%20Final%20NFTC%20testimony%20for%20November%2010%20SFRC%20hearing.pdf

NFTC Tax Lunch Forum Welcomes Mary Bennett, Head of the Tax Treaty, Transfer Pricing and Financial Transactions Division of the OECD

Mary Bennett, the Head of the Tax Treaty, Transfer Pricing and Financial Transactions Division of the OECD spoke to the NFTC Tax Committee at its December Tax Lunch Forum. Ms. Bennett is the former Deputy International Tax Counsel at the U.S. Treasury, and is also a former partner in the Washington office of Baker McKenzie. She has held her current job at the OECD since 2005.

Ms. Bennett explained that several new countries are likely to join the OECD in the next 6-9 months, including Israel, Chile, Estonia and Slovenia. Russia would like to join, but lags behind the other countries in readiness. The OECD also is trying to strengthen the dialogue with countries through an enhanced engagement relationship. These countries include Brazil, India, China, Indonesia and South Africa.

A semi-independent group has been formed under the umbrella of the OECD, but the members of the group are not all OECD member countries. This Global Tax Forum has 100 members and is the first organization of its size established to deal with tax issues. Many of the members of this group also are part of the G-20 and the countries are working together to enhance information reporting requirements and transparency.

On the issue of transfer pricing, Ms. Bennett explained that many non-governmental organizations (NGO) have seized on the idea that transfer pricing is a scam under which developed countries are manipulating profits to rip-off developing countries. According to Ms. Bennett, the NGO's have started to recommend changes to accounting rules, and are requesting that companies report both profits and taxes paid on a country-by-country basis. The NGO's have surprisingly gained the support of the U.K. government who has asked the OECD to look into the validity of the NGO claims. Many of the NGO's would like to see formulary apportionment adopted by the OECD member countries, and the OECD would like to see the business community get more involved in these discussions. There is a great deal of discussion by the NGO's as to how the developed countries can help the developing countries grow economically, and they are being very vocal about this at the OECD.

News for Our Members

CD Secretary General Angel Gurria visits NFTC

OECD Secretary General Angel Gurria

On December 9th the NFTC hosted OECD Secretary General Angel Gurria for an exchange of views with member companies about current world economic conditions and the direction of OECD programs. Gurria discussed the macro-economic situation, including his view that Europe is likely to come out of the recession before the United States and was optimistic about the United Kingdom's prospects for restoring health to their financial sector. The OECD has placed a priority on international tax issues, anti-corruption efforts and capital markets reform. Gurria laid out the OECD's plans for expanding membership. He expects Chile to accede in January and Slovenia and Estonia to follow in the near term. Israel is laying the groundwork for joining, although the Golan Heights dispute is likely to delay their membership. The OECD also expects Russia to join by 2011 and while they are expanding outreach to China and India, they don't expect them to take steps for membership for quite some time. Gurria did point out that China is more willing to change its policies if working with the rest of the world is in their best interest. He will be visiting China in January to continue this work.

He laid great stress on the importance of raising the OECD's profile in the United States and several participants made suggestions about how that could be done. OECD committee reports and research products are seen as having considerable value to U.S. companies and should be given greater visibility here. He is particularly concerned to counter the widely-held view of the OECD as a "rich nations' club". Other topics touched on were the expansion of the "green economy", work on capital markets, and strengthening anti-bribary/corruption laws. He also mentioned that he will be the keynote speaker at this year's Ex-Im Bank's Annual Conference in the Spring. Gurria has been a long-time friend of the NFTC which has worked closely with the OECD on a number of issues, most prominently international tax policy where NFTC vice president for tax, Cathy Schultz, serves on OECD tax committees. Bill Reinsch and Gurria agreed to continue to collaborate on tax, trade and affiliated issues.

As OECD Secretary-General, since June 2006, he has reinforced the OECD's role as a 'hub" for global dialogue and debate on economic policy issues while pursuing internal modernization and reform. Under his leadership, OECD has agreed to open membership talks with Chile, Estonia, Israel, Russia and Slovenia and to strengthen links with other major emerging economies, including Brazil, China, India, Indonesia and South Africa, with a view to possible membership. The OECD is now an active participant in both the G-8 and the G-20 Summit processes.

The National Foreign Trade Council is a leading business organization advocating an open, rules-based global trading system. Founded in 1914 by a broad-based group of American companies, the NFTC now serves hundreds of member companies through its offices in Washington and New York.

Bill Sheridan Addresses the Forum for Expatriate Management

On November 5, 2009 Bill Sheridan, Vice President-International Human Resource Services, addressed the members of the New York City chapter of the Forum for Expatriate Management (FEM). The forum has over 40,000 members globally and chapters in London, New York, Dallas, Dubai, Moscow and Shanghai. Bill provided the audience with an overview of the NFTC's mission and current activities on trade policy, trade sanctions, corporate international tax and international human resource management.

During 2009 the NFTC has focused on the impact of the current global economic situation on cross-border business and related expatriate assignment management. Bill shared some of the findings of NFTC sponsored surveys and anecdotes on what companies are doing. Beyond global mobility management NFTC working committees have also been addressing such issues as heightened global compliance that affects international business travelers and expatriates including greater enforcement of the Foreign Corrupt Practices Act (FCPA). The audience was very surprised to learn that FCPA penalties in 2008 totaled over $1.7 billion. The expectation is that the penalties will continue to rise as more resources are allocated to the Department of Justice and other enforcement agencies, and as greater cooperation is made with DoJ and SEC counterparts in other countries.

Bill also discussed the impact of demographic trends on global workforce management. These trends significantly affect employer cost structures in countries such as France, Italy and Japan where birth rates are dropping, longevity is increasing, social insurance programs are under- or unfunded, and immigrants are not generally welcomed. Additionally, expansion into some countries in Africa can be problematic from a local talent pool perspective where high rates of HIV/AIDS or diseases such as malaria reduce life spans, consequently resulting in the long term utilization of expatriates.

The NFTC will continue to monitor the above issues and trends.

Annual International Human Resource Management Forum Houston Set for March 10th & 11th 2010

The NFTC will host its annual IHR forum at The Houstonian on March 10-11, 2010. In addition to subject matter experts from Aetna Global Benefits, AIRINC, International SOS, Jackson Lewis LLP and KPMG LLP, the Faculty will include corporate IHR colleagues from such companies as: Bechtel, Chevron, CH2M Hill, ConocoPhillips, GE, and McDermott and others.

The agenda is being finalized at this time but it will include sessions on:

- Global Talent Management-Building Workforce Capacity in the Middle East and Northern Africa
- Corruption! Bribery! Major Financial Penalties! Jail Time!
- Corporate Social Responsibility
- Protecting Business Travelers and Cross-Border Assignees (Duty of Care)
- Wellness Programs Going Global
- Understanding Host Country Employment and Labor Law Applications to Reductions in Force outside the U.S.
- Updates on IHR Management in Africa, China, Latin America and the Middle East
- Managing Expatriate Program Costs-The Opportunity For Policy Change and Process Improvement
- In-Bound and Outbound Immigration Issues

Details on the agenda and registration will be posted to the NFTC website- www.nftc.org

Calendar of Events

Date	Event	Location
Winter 2010	Board of Directors Meeting	TBA
March 10-11, 2010	International Human Resource Forum	Houston, TX
Fall 2010	Annual World Trade Dinner and Award Ceremony	TBA

** Note: The WTO Committee Meetings, Expatriate Management, Global Compensation, International Assignment Management, and International Benefits Committees are by invitation only. For information about them please contact NFTC at (202) 887-0278 or e-mail nftcinformation@nftc.org.*

New Members

Novartis Corporation is a pharmaceutical company that produces patent-protected medicines, vaccines and diagnostics, generic medicines, and over-the-counter drugs. Its offices and research centers are worldwide with its headquarters in Basel, Switzerland. Novartis was the highest ranking pharmaceutical in Fortune Magazine's "World's Most Admired Companies" survey in 2007. Its website www.novartis.com has more information.

Graebel Relocation Services Worldwide provides household and commercial relocation services in the US and internationally. Graebel specializes in companies needing to arrange the transfers of their employees, but is also active in single household moving services and storage and freight forwarding. Graebel has service centers throughout the US and international forwarding offices at major US ports. It provides transportation services in Europe, the Middle East, and Africa. Its website is https://www.graebel.com/Public.

Bank of New York Mellon Corporation is a global asset management and securities services company that formed with the 2007 merger of Mellon Financial Corporation and The Bank of New York Company. It operates in 34 countries with $926 billion in assets under management. It serves a wide variety of clientele which includes corporations, consultants, and private investors. For more information, visit http://www.bnymellon.com/index.html.

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This issue of Council Highlights brought to you by:

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