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Cuba Dropped from U.S. Terrorism List

With the mandatory 45-day waiting period after notification to Congress having lapsed, Cuba came off the list of state sponsors of terrorism May 29, State announced. President Obama notified lawmakers of his intent to end Cuba's listing April 14.

> "The rescission of Cuba's designation as a State Sponsor of Terrorism reflects our assessment that Cuba meets the statutory criteria for rescission. While the United States has significant concerns and disagreements with a wide range of Cuba's policies and actions, these fall outside the criteria relevant to the rescission of a State Sponsor of Terrorism designation," said Jeff Rathke, State's press relations director, in a statement.

President Obama's opening of relations with Cuba "provides new opportunities for Americans to travel to Cuba, and for U.S. businesses, which for too long have been unable to compete in Cuba or to bring U.S. products and services to improve the lives and living standards of the Cuban population," said a White House blog posted by Bernadette Meehan, the spokesperson for the National Security Council. "Our new direction will allow us to better promote our values, including support for basic human rights, as attention within Cuba and the international community is no longer focused on opposition to U.S. policy," she added (see **WTTL**, April 20, page 1).

When the president sent Congress the original notification, the Bureau of Industry and Security (BIS) issued a frequently asked question reminding U.S. businesses that Cuba remains subject to a statutory embargo and licenses are still required for most exports. Within existing authority, Treasury has modified restrictions on some Cuba-related financial transactions and travel rules, and BIS has established a new License Exception for Support for the Cuban People (SCP) and expanded the previous license exception for Consumer Communications Devices (CCD).

IMF: Chinese Currency No Longer Undervalued

A major argument for including currency manipulation as a negotiating objective in trade talks and under countervailing duty (CVD) law was significantly undercut May 26 by statements from International Monetary Fund (IMF) officials who declared the Chinese

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renminbi to no longer be undervalued. The IMF assessment had been expected after its findings were leaked several weeks ago and came as other economists also were revising their estimates of the level of undervaluation downward from about 33% to about 10%. The Obama administration is certain to use the new calculations to lobby against the inclusion of currency provisions in pending Customs enforcement legislation when the House takes it up in early June.

> While undervaluation of the Chinese currency was a major factor in causing China to have a large current account imbalance in the past, "our assessment now is that substantial real effective appreciation over the past year has brought the exchange rate to a level where it is no longer undervalued," IMF First Deputy Managing Director David Lipton told a press conference in Beijing May 26. Lipton was in China with other IMF staff for the IMF's annual review of the Chinese economy.

China's continuing strong external balance "highlights the need for other policy reforms, which are, indeed, part of the authorities' agenda to reduce excess savings and achieve a sustained external balance," Lipton noted. "This will also require that going forward the exchange rate adjusts with changes in fundamentals and, for example, that the currency appreciates in line with faster productivity growth in China relative to its trading partners," he added.

"On the exchange rate system, we urge the authorities to make rapid progress toward greater exchange rate flexibility, a key requirement for a large economy like China's that strives for market-based pricing and is integrating rapidly in global financial markets. Greater flexibility, with intervention limited to avoiding disorderly market conditions or excessive volatility, will also be key to prevent the exchange rate from moving away from equilibrium in the future. We believe that China should aim to achieve an effectively floating exchange rate within 2–3 years," Lipton said.

The IMF also expects China's growth rate to be slower than in the past. "We project China to grow at 6.8% this year, consistent with the authorities' growth target of around 7%, and well within the 6½–7% range we consider appropriate for this year," he stated.

Court Upholds Byrd Amendment Constitutionality, Again

The Court of Appeals for the Federal Circuit (CAFC) upheld the constitutionality of the Byrd Amendment again May 19, but in a concurring opinion, Appellate Judge Evan Wallach called for *en banc* reopening of the court's 2009 ruling in *SKF v.U.S.* In its new decision, the CAFC affirmed a Court of International Trade (CIT) ruling that the retroactive application of the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) and distribution of funds to domestic firms that supported trade complaints did not violate the Due Process clause of the Fifth Amendment.

The ruling is the latest case in which the courts have upheld the constitutionality of the Byrd Amendment, including claims that it violated First Amendment free-speech rights. "Because we conclude that the retroactive application of the petition support requirement of the CDSOA rationally relates to the government's interest in rewarding members of the domestic industry that supported antidumping petitions, we affirm the CIT's determination that the petition support requirement does not violate the Due Process Clause of

the Fifth Amendment," CAFC Judge Kathleen O'Malley wrote for the three-judge panel in *Schaeffler Group USA v. U.S.* "Rational basis review of economic legislation under the Due Process Clause is highly deferential to Congress, and we hold that Schaeffler has failed to demonstrate that the retroactive application of the petition support requirement was not 'supported by a legitimate legislative purpose furthered by rational means'," she wrote. "We conclude that the retroactive application of the petition support requirement of the CDSOA is justified by a rational basis sufficient to meet the requirements of the Due Process Clause of the Fifth Amendment," O'Malley declared.

> In his concurring opinion, Wallach questioned reliance on *SKF* as a precedent in Byrd cases. "Because antidumping and countervailing duties already help to restore conditions of fair trade by raising the price of imported goods to their fair value, an argument could be made that CDSOA distributions do not promote the restoration of fair trade but instead constitute a double remedy, an issue not addressed by the *SKF* court," Wallach wrote.

Wallach noted the World Trade Organization's ruling against the Byrd Amendment. "The problem with the CDSOA is that the asserted explanation of how the retroactive portion of the legislation rationally furthers the government's legitimate interest in restoring conditions of fair trade borders on the frivolous," he stated. "Because the *SKF* court incorrectly applied the rational basis test to the facts before it, that case should be overruled en banc," he opined.

"The restoration of conditions of fair trade might have been rationally furthered by the retroactive portion of the CDSOA had Congress chosen to either compensate all injured industry members or allocate funds in some colorable relation to injury. However, petition support as a proxy for injury is far too inaccurate a measure if indeed it relates to injury at all," he argued.

Wallach also cited a Government Accountability Office report that found five companies, including Timken Company, a defendant-appellee in the case, and two firms that it later acquired, received nearly half of the total CDSOA payments or about $486 million, while the remaining half was distributed among 765 beneficiaries. "Since the GAO report, over $100 million in additional CDSOA funds were received by Timken alone," he added, citing a Timken SEC filing that said it had received $112.8 million in CDSOA distributions for years 2006 through 2010.

Wallach also noted that among CDSOA co-sponsors were two Ohio lawmakers. "It may not be coincidental that the original House and Senate sponsors of the CDSOA were Rep. Ralph Regula and Sen. Mike DeWine, both of Ohio, where Timken has been incorporated since 1904," he wrote.

Related-Party Trade Remains High Share of Exports, Imports

The old dictum that trade follows investment is confirmed in new U.S. statistics that show trade between related parties accounted for 42.3% of U.S. exports and imports in 2014. On the import side, 50.9% of all goods trade went to parties related to the foreign exporter, according to Census Bureau figures released May 5. Related-party exports were 30.% of all shipments, it said. To paraphrase Pogo, we have met our competitors and they is us. As would be expected, the percentage of related-party trade by value was

highest with NAFTA partners Canada and Mexico, reflecting the growing integration of the North American supply chain. For Mexico, 67.3% of U.S. imports in 2014 were from related parties, either subsidiaries or parents, while 40.4% of exports went to such parties. For Canada, 52.8% of imports and 41.4% of exports were with related parties.

> A large share (29.2%) of imports from China are from related parties, while 19% of exports go to business affiliates there. Imports of Japanese autos by U.S.-based Japanese car firms helped boost the related-party share of imports from Japan to 77%. Related-party U.S. exports to Japan reached 30.7% last year. The off-shoring of pharmaceutical production by American companies to Ireland contributed to 90.8% of U.S. imports from the Emerald Island being from related parties.

A drive down any highway in the U.S. will show why transportation equipment, mainly autos, was the sector that scored the largest share of related imports and exports. In 2014, 73.8% ($261 billion) of transportation imports were to related parties. On the export side, 33.5% ($83.6 billion) went to related firms. Large shares of imports of computers, electronics, chemicals and oil and gas went to related parties, while chemicals, petroleum product and non-electrical machinery exports went to such parties.

Restani Orders Commerce to Revise Cash Deposit Rate

Commerce cannot limit challenges to antidumping and countervailing duty (CVD) orders to procedures it follows to implement World Trade Organization (WTO) rulings, Court of International Trade (CIT) Judge Jane Restani ruled in a May 18 decision. In the case, the department had attempted to set a cash deposit rate based on the results of a Section 129 decision, a mechanism used to bring the U.S. into compliance with WTO rulings it has lost, rather than on a separate CIT decision. Restani ordered Commerce to revise the deposit rate to the level set in the CIT order.

> As part of the Section 129 procedure, which was part of the Uruguay Round Agreements Act (URAA), Commerce calculated a CVD rate of 6.85% on imports of off-the-road tires from China. In a separate suit challenging the CVD order, however, Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC) had won a CIT ruling that the rate should be 3.93%.

Commerce "is attempting to collect cash deposits at a rate the court has already determined to be invalid," Restani ruled (slip op. 15-46). "TUTRIC did not have notice of Commerce's intent to interpret the Section 129 Implementation as rendering moot any court determination of a new cash deposit rate sufficient to warrant denying TUTRIC's current motion," she wrote.

"The words of the Remand Results and the context demonstrate that the effect of the court's sustaining of the Remand Results was not, as Commerce contends, to sustain the use of an erroneous 6.85% cash deposit rate for TUTRIC, but rather to set the rate for TUTRIC at 3.93%, as determined in the Remand Results. Accordingly, Commerce shall issue a revised Timken Notice setting the cash deposit rate for TUTRIC at 3.93%," she stated in *GPX v. U.S.* The WTO Appellate Body ruling that prompted the Section 129 action addressed separate issues than TUTRIC had raised in its CIT complaint. "Neither Section 129 nor the SAA [Statement of Administrative Actions] compels Commerce's

interpretation that any argument not raised in the Section 129 proceedings is essentially waived and any ongoing domestic litigation concerning that argument is essentially mooted," Restani wrote. She cited a Court of Appeals for the Federal Circuit ruling that Section 129 is ambiguous and does not explicitly require or prohibit Commerce from addressing issues not raised before the WTO.

> "Even if Commerce's interpretation of Section 129 ultimately would be reasonable, TUTRIC was not on notice that it could and was in fact required to bring its rate challenge based on the loan repayment during this particular Section 129 proceeding. Commerce's past practices indicated that Section 129 proceedings are limited to the issues raised before the WTO," she wrote.

Poor Reporting by UN Members Stymies N. Korean Sanctions

Many United Nations (UN) members are not filing required reports on their implementation of multilateral sanctions against North Korea and, in some cases, failing to observe UN imposed sanctions, the Government Accountability Office (GAO) found in a report submitted to the Senate Foreign Relations Committee. "While the United States has recently taken steps to provide more flexibility to impose sanctions, and thereby possibly impose more sanctions on North Korean persons, the United Nations is seeking to address the challenge posed by many UN member states not providing the UN with implementation information," the GAO report (No. 15-485) said.

> The GAO also found that U.S. imposition of sanctions against North Korea has been hampered by the limited amount of information available about activities and persons inside the reclusive nation. "U.S. officials informed GAO that obtaining information on North Korean persons has hindered the U.S. interagency process for imposing sanctions," the May 13 report said.

The interagency U.S. process for identifying targets for sanctions was improved by President Obama's January 2015 executive order (EO 13687), which was issued after North Korea's hacking into Sony Pictures' computers (see **WTTL**, Jan. 5, page 6). The new rules gave agencies greater flexibility to sanction persons based on their status as government officials rather than evidence of specific conduct.

Since 2006, the United States has imposed sanctions on 86 North Korean persons, including on 13 North Korean government persons sanctioned under the new rules. The UN's Panel of Experts has designated 32 North Korean or related entities for sanctions since 2006, including a company found to be shipping armaments from Cuba in 2013.

More than 80% of the UN's 193 member states have not submitted implementation reports in response to three UN Security Council Resolutions, the GAO found. "Members that have not submitted one or more reports include member states with major international transit points (such as the United Arab Emirates) or that have reportedly been used by North Korea as a foreign intermediary (such as Thailand)," it said. Even countries that file reports often submit only partial or incomplete information, it noted.

The UN panel has reported that some members have not complied with sanctions because they are not well informed about the rules. "For example, the panel discovered that the Ugandan government had contracted with North Korea to provide police force training.

Ugandan government officials purported that they did not realize that UN sanctions prohibited this type of activity," the report noted. "U.S. officials and representatives of the committee told us that many member states lack the technical capacity to enforce sanctions and prepare reports," the GAO reported.

U.S. Continues to Protest WTO Ruling on COOL

The WTO Dispute-Settlement Body (DSB) agreed May 29 to accept the report and recommendations of a dispute-settlement panel and the WTO Appellate Body that found the U.S. has continued to violate its WTO obligations by failing to revise requirements for country-of-origin labeling (COOL) for beef and pork (see **WTTL**, May 25, page 3). At the session, a U.S. representative continued to protest the findings against the law.

> The U.S. official said the U.S. was "particularly disappointed" with the rulings because they had failed to recognize how the U.S. has come into compliance with previous panel rulings against COOL rules. "Unfortunately, the Appellate Body's somewhat cursory analysis did not reverse these findings," the official said.

"The Appellate Body makes no real evaluation of why the amended measure impacts the competitive opportunities for Mexico and Canada in the U.S. livestock market at all, which, indeed, is what the panel ultimately should have been examining when answering the question of whether the detrimental impact reflects discrimination," the official said, according to talking points prepared for delivery. The U.S. also complained about the lengthy time the Appellate Body took to issue its report. Although WTO rules call for issuance of a report in 90 days, the Appellate Body took 172 days to issue its report.

Canada and Mexico, of course, said they were pleased with the adoption of the report. "Should the United States fail to bring itself into compliance with the recommendations and rulings of the DSB that will be adopted today, Canada will seek authorization from the DSB to suspend concessions to the United States," a Canadian representative's statement said. The official noted that Canada had already published a list of U.S. products that could face potential retaliation in 2013.

That list includes cattle, pork, apples, rice, corn, maple syrup, pasta and wine, plus jewelry, office chairs, wooden furniture and mattresses. The official also lamented the long time it has taken the WTO to address the complaints against COOL, noting that the initial case started in 2009.

House Ready to Take Its Shot at Fast-Track Legislation

With the Senate having completed its work, the House now faces the challenge of enacting fast-track trade promotion authority (TPA) plus measures renewing Trade Adjustment Assistance (TAA), Customs enforcement and trade preference programs. With the legislation not expected to reach the floor until mid-June, House leaders will need to resolve two problems: getting enough votes to pass the four bills and amending pending House versions of the legislation to mirror those that have already passed the Senate (see **WTTL**, May 25, page 10). After the Senate passed its TPA bill May 22, House Speaker John Boehner (R-Ohio) called enactment of the legislation a "no-brainer," saying it

would hold President Obama accountable. "The House will take up this measure, and Republicans will do our part, but ultimately success will require Democrats putting politics aside and doing what's best for the country," he said in a statement.

> Congressional sources say they expect the House to pick up the Senate-passed TPA bill (H.R. 1314) and pass it without amendment. That will avoid the need for a House-Senate conference committee to resolve any differences. The one main difference, the Senate's inclusion of Sen. Robert Menendez's amendment on human trafficking, will likely be softened by a change in the Customs bill so the language wouldn't bar Malaysia from being part of the Trans-Pacific Partnership (TPP). Menendez and Senate Finance Committee Ranking Member Ron Wyden (D-Ore.) reportedly have agreed to that change.

A more complicated scenario faces the Customs legislation on which the House and Senate have significant differences. Sources say there will be no way to avoid needing a House-Senate conference committee to resolve those differences. "We knew all along we would need a conference," one source said. With much advance work already done on the two versions, sources say they hope that conference could go quickly.

One notable problem is the Senate's inclusion of a provision making currency manipulation subject to countervailing duty (CVD) remedies. There also is some House opposition to a section creating a new mechanism to deal with miscellaneous tariff bills. On the other hand, the Ways and Means version includes tough new rules for enforcement of antidumping and CVD orders that are not in the Senate bill.

A conference also will likely be needed to combine House and Senate versions of trade preference legislation, including provisions on the African Growth and Opportunity Act (AGOA) and on clothing, footwear and outerwear. The House, however, will accept the Senate-passed Trade Adjustment Assistance (TAA) bill, which is the same as the version the House Ways and Means Committee approved.

Meanwhile, announcements of Democratic support for TPA have trickled out slowly, with many members likely to keep their vote secret until the last minute. Some 17 Democrats have already said publicly that they will support TPA. Rep. Rick Larsen (D-Wash.) was among the latest to get on board.

"Over the last several months, people across Northwest Washington have shared their perspectives with me about why I should or should not support TPA," he said in a May 27 statement. He noted that trade supports more than 68,320 jobs in his district. "That is a sizeable piece of our economy that we simply cannot ignore," said Larsen, who has supported trade deals in the past.

Some sources suggest 40 to 50 other Democrats would have to support TPA to make up for the loss of conservative Republican votes against the measure. That goal seems far from reachable, with best estimates for Democratic support being around 30 votes.

Although Congress has been out for a week on its Memorial Day recess, the White House has continued its heavy lobbying effort, including among members of the Congressional Black Caucus. TPA supporters say they hope more Democrats will back the bill. The president's party "should show strong support for his trade policy," one source said.

* * * Briefs * * *

FIJI: Citing elections held in September 2014, DDTC May 29 updated ITAR to allow exports of defense articles and services to Fiji. "A Multinational Observer Group of over 90 international observers, representing 14 countries including the United States, characterized the election as credible and having represented the will of the people of Fiji," DDTC said in Federal Register notice. Agency had issued policy of denial after military coup in December 2006.

EX-IM BANK FRAUD: Julian Martin Gaspar Vazquez, owner of Mexican water treatment company, was sentenced May 22 in Miami U.S. District Court to 41 months in prison, followed by five years' supervised release for his role in $4 million Export-Import (Ex-Im) Bank fraud scheme. Gaspar pleaded guilty in February. From March 2006 to August 2010, he attempted to obtain Ex-Im insured loans, credit lines and disbursements from Espirito Santo Bank by "materially false and fraudulent representations," Justice sentencing memo noted.

TRADE DATA: Census will begin issuing advance report on export and import data ahead of full report starting July 30, agency announced. Report will be released 4 to 7 business days before monthly FT-900 report and will include statistics for international trade in goods on a Census basis by principal end-use category and both seasonally and not seasonally adjusted statistics. No data on services will be provided. "The new report will present two sets of statistics: 'Advance' statistics, which reflect partial coverage, and 'Final' statistics, which reflect complete coverage and correspond to the most recently published statistics in Exhibits 6 and 13 of the FT-900," Census explained.

TRADE PEOPLE: Philip Katz, former director of finance and budget at International Trade Commission, died May 22 after lengthy battle with cancer. He was 76.

HIZBALLAH: U.S. praised Saudi Arabia for imposing sanctions on two Hizballah leaders, Khalil Harb and Muhammad Qabalan, for their role in violent operations across the Middle East. U.S. had designated pair in 2013. "Today's step taken by Saudi Arabia reflects the close counter-terrorism and information sharing cooperation we enjoy and look forward to extending further. The United States will continue to work with partners around the world to combat Hizballah's activities, both within Lebanon and beyond," Acting Treasury Under Secretary Adam Szubin said in May 27 statement.

RUSSIA: President Obama signed Executive Order May 26 terminating emergency nuclear proliferation sanctions against Russia. Sanctions had been imposed in 2012 because of concerns Russia might accumulate large volume of weapons-usable fissile material as it decommissioned its nuclear weapons stockpile. That situation "has been significantly altered by the successful implementation of the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons" from 1993, Obama's order stated.