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Counterintelligence Agency Warns About Joint Research Ventures

U.S. firms conducting joint research with foreign partners, especially in China, need to be aware of the threat from foreign espionage agents stealing controlled U.S. technology, the chief U.S. counterintelligence agency warns. U.S. technology is also vulnerable to theft at international sporting events and when foreigners visit U.S. plants and laboratories, according to the latest report to Congress on foreign economic collection and industrial espionage from the National Counterintelligence Executive (NCIX) in the office of director of national intelligence.

> "Although most government organizations and private-sector firms employ mitigation strategies to protect against illegal technology transfers and loss of trade secrets, the volume of joint research underway presents a prime targeting opportunity, either through human-to-human contact or via technical means," said the report. In fiscal 2007, which ended Sept. 30, 2007, over 10,000 foreigners visited Energy Department facilities, of which over 4,500 were Chinese, it noted.

"Other large scale international events, particularly athletic events, have also emerged as venues for increased economic espionage against the United States," said the report, which covered activities in fiscal 2007. "U.S. corporations often sponsor such events and send thousands of employees to the festivities. This year's Summer Olympic Games in China, the 2010 World's Expo in Shanghai, and the 2014 Winter Olympics in Sochi, Russia, will all take place in high-threat environments," it warned. "Such events offer host-country intelligence agencies the opportunity to spot, assess, and even recruit new intelligence sources within the U.S. private sector and to gain electronic access to companies' virtual networks and databases through technology brought to the events by corporate personnel," the report added.

Cyber threats continued unabated in 2007, it said. "Since 2002, the United States has identified China-connected computer network intrusions that have compromised thousands of hosts and hundreds of thousands of user accounts and exfiltrated terabytes of data from U.S., allied, and foreign government, military, and private-sector computer networks," the report noted. "Actors conducting a subset of intrusion activity affiliated with China have used socially engineered e-mails to compromise the computers of cleared defense contractors," the report said.

CIT Decisions Split on Application of Bratsk to Sunset Reviews

Two judges of the Court of International Trade (CIT) have issued directly contradictory opinions on the application of appellate court rulings in *Bratsk* and *Mittal* to sunset reviews. CIT

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Judge Judith Barzilay Dec. 29 in *NSK Corporation v. U.S.* (Slip Op. 08-145) reaffirmed an earlier ruling that the International Trade Commission (CIT) must apply the causation analysis required by *Bratsk* to sunset reviews and that the decision of the Court of Appeals for the Federal Circuit (CAFC) in *Mittal* didn't change her opinion. On Dec. 23, CIT Judge Gregory Carman in *Nucor Corp. v. U.S.*(Slip Op. 08-141) took the exactly opposite view, ruling that *Bratsk* could not be applied to sunset reviews because of *Mittal*.

> In her ruling, Barzilay rejected a government motion – based on *Mittal* – for a rehearing of her September remand decision ordering the ITC to apply *Bratsk* to the second sunset review of ball bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom. "Contrary to the Defendant's [government] claim, the Federal Circuit did not expressly reject the application of *Bratsk* to sunset reviews in *Mittal,*" she wrote.

The government had asked Barzilay for a rehearing of her first *NSK* ruling to take into account the CAFC's *Mittal* decision, which said the ITC had misapplied its *Bratsk* ruling on how to conduct injury reviews in investigations of commodity products where non-subject imports might replace goods that come under an antidumping order (see **WTTL**, Dec. 1, page 1). "That the Federal Circuit uses language to discuss causation principles in the setting of an investigation does not mean those principles are inapplicable to a sunset review," Barzilay stated. "However, even if the text is as limiting as Defendant reads it to be, the cited language would only indirectly suggest that *Bratsk* should be limited to investigations. The court cannot accept that with a single paragraph the Federal Circuit would foreclose the application of *Bratsk* to sunset reviews without expressly and affirmatively stating that conclusion," Barzilay declared.

Carman's decision upheld an affirmative ITC ruling in the sunset review of orders on corrosion-resistant carbon steel from Australia, France, Japan, Germany, Korea and Canada. "Any language within the text of *Bratsk* arguably implying it should have been extended to sunset reviews now seems foreclosed in light of the holding and reasoning of *Mittal Steel*," he wrote.

Carman addressed Barzilay's first *NSK* ruling and acknowledged that "Whenever this Court considers the holding and reasoning of a previous opinion rendered by a different Judge of the CIT, it regards such opinions as persuasive, of course, but not binding precedent." The CAFC's intervening *Mittal* views on the governing law, however, "necessarily affect the persuasive authority of previous decisions of the CIT," he wrote. "If the Commission was required to apply the *Bratsk* analysis in a sunset review, it would necessarily have to do so counterfactually, i.e., without any data on the price, volume, and effect of subject and non-subject imports that would possibly re-enter the market upon revocation of the antidumping duty order. Attempting to complete a *Bratsk* analysis under such conditions would be predicated upon conjecture and speculation. It would therefore be untenable,"Carman ruled.

New Doha Rules Text Points to Wide Gaps in Negotiations

If and when Doha Round talks ever resume in 2009, negotiators will have to grapple with the wide divisions that remain in proposals to change the rules governing antidumping cases, sunset reviews, subsidies and other trade remedy laws, according to new draft texts released Dec. 19 by the chairman of the Doha rules negotiating group, Uruguay's Ambassador to the WTO, Guillermo Valles Galmes. The new texts update the paper Galmes issued in May 2008 and also include a conceptual "roadmap" on fisheries subsidies (see **WTTL**, June 2, page 3). Galmes said his new draft is based on a new, bottom-up approach. Rules negotiators will use the text when talks recommence in February.

"A great deal of work remains to be done in order to ensure that we have rules texts reflecting the greatest convergence possible," Galmes said in the text. Large gaps remain and no solutions have been proposed on important outstanding issues, said Galmés, who said he only provided text where some convergence has appeared. For more controversial issues, Galmes explained the disagreements in a bracketed summary at the end of each section of text. The

antidumping text, for example, identifies 11 outstanding issues, including sharp divisions over "zeroing", a crucial U.S. issue in the talks. Positions range from insistence on a total prohibition to a demand that zeroing be specifically authorized in all contexts. Countries also are divided on whether to take into account the views of domestic interested parties such as retailers, importers and consumers in antidumping cases. Many delegations also strongly support making an existing lesser duty provision mandatory, if it would adequately remove the injury to the domestic industry. Other delegations oppose the idea.

> Import-sensitive U.S. industries have reacted negatively to the new draft. The text "shows how far removed the negotiations are from anything acceptable to Congress or to those who must rely on U.S. trade remedy laws," said a statement by David A. Hartquist, executive director of the Committee to Support U.S. Trade Laws. The ideas in the rules paper fail "to achieve any of the mandates from Congress and, in fact, would make cases to enforce U.S. trade remedy laws more difficult to launch and increase their costs," Hartquist said.

According to Galmes, delegations also disagree on "anti-circumvention" provisions and whether antidumping orders should be subject to automatic termination after a given period of time. Some delegations favored automatic termination after five years without any possibility of extension and others rejected the idea of automatic termination, Galmes noted. He also said no consensus has been found for changing Subsidies Agreement provisions on the "Calculation of the Amount of a Subsidy," "Special and Differential Treatment of Developing Country Members," and the "Illustrative List of Exports Subsidies." One significant difference is over a proposal to introduce a new provision "that would establish a benchmark for determining the existence of a benefit in the case of government loans or guarantees provided by institutions incurring long-term operating losses, and/or financing to state-owned enterprises that are not creditworthy or equity-worthy," Galmes wrote.

Galmes also issued a conceptual "roadmap" on fisheries subsidies. The crisis of industrial overcapacity and over-fishing is recognized in the negotiating group, the text said. The roadmap attempts to reconcile widely different approaches on how to identify and discipline problematic subsidies. Another "fundamental issue is how to ensure adequate implementation, monitoring and surveillance," Galmes wrote. The roadmap is a productive way for negotiators to move forward on an effective agreement, said Courtney Sakai, a senior campaign director for Oceana, a group pressing to reduce pollution and prevent a fisheries collapse.

BIS Ends 2008 with Flurry of Enforcement Settlements

Bureau of Industry and Security (BIS) export enforcement officers in December were busier than sales clerks at Macy's the day before Christmas, completing settlement agreements with seven firms in the waning days of 2008. The settlements imposed nearly $900,000 in fines on firms that were accused of exporting a wide array of products, including crime control equipment, software, lubricants, digital convertors and printer parts, to destinations such as Cuba, India, Mexico, Iran, Pakistan and China.

> Syrvet Inc., a veterinary supply wholesaler in Waukee, Iowa, agreed to pay a $250,000 civil penalty to settle BIS allegations that it exported electric cattle prods from the U.S. to Mexico, Chile, South Africa, Dominican Republic, Columbia and El Salvador without approved export licenses.

Engineering Physics Software Inc., of Houston, Texas, also known as COADE Inc., a provider of plant design and engineering software for the process industries, paid a $130,000 civil penalty to settle charges that it exported software to Iran through the United Arab Emirates and to companies in India and Pakistan on the BIS Entity List without licenses. Buehler Limited of Lake Bluff, Ill., was fined $200,000 for allegedly making 81 unlicensed exports of Coolmet, a lubricant containing triethanolamine (TEA), a controlled Schedule 3 chemical precursor, to seven countries, including Iran. "Companies should be mindful of the chemical make-up of

their exports," said BIS Under Secretary Mario Mancuso in a statement. Redmond, Washington, based Interpoint Corporation paid a $200,000 civil fine to settle charges that on two occasions it exported DC-to-DC converters and/or electromagnetic interference filters to the 13th Institute in the People's Republic of China (PRC), an end-user on BIS's Entity List, without the required BIS export licenses.

PC Universe of Boca Raton, Florida agreed to pay a $37,000 civil penalty for one unapproved shipment to Iran of digital audio tape drives. Electronics For Imaging (EFI) of Foster City, Calif., as successor to VUTEk, Inc, agreed to a settlement for allegedly selling printer parts classified as EAR99 to Syria. EFI paid a $32,000 civil fine for four unlicensed shipments. Gunnar Petzel Medizintechnik of Tangstedt, Germany, agreed to settle charges that it had caused the export to Cuba via Germany of ten Station Microplate Processing Conveyor Systems that it ordered from the United States. It paid a $50,000 civil fine.

* * * Briefs * * *

FCPA: James Tillery, 49, former executive of Houston-based Willbros Group, Inc., and Paul G. Novak, 41, a former consultant to firm, were charged in indictment unsealed Dec. 19 in Houston U.S. District Court with conspiring to make more than $6 million in corrupt payments to Nigerian and Ecuadorian government officials. Bribes were allegedly paid to obtain and retain gas pipeline construction and rehabilitation business from state-owned oil companies in Nigeria and Ecuador in violation of FCPA. Willbros reached separate settlement with government in case in May (see **WTTL,** May 19, page 4).

CHINA: "Looking back on 2008, the many developments in the U.S.-China trade relationship demonstrated that the Administration's policy of serious dialogue and resolute enforcement is delivering real results," USTR's office told Congress in report released Dec. 23 on China's compliance with its WTO accession obligations. "However, despite the progress achieved in 2008, several specific issues continued to cause particular concern for the United States and U.S. industry, given China's WTO obligations. These outstanding issues arose in a range of areas, including principally intellectual property rights, industrial policies, trading rights and distribution services, agriculture and services," report said.

MORE CHINA: USTR Dec. 19 said it has asked China for WTO consultations on U.S. complaint that China's "Famous Brands" export promotion program includes export subsidies prohibited by WTO rules. "We were disturbed to find that China still appears to be using WTO-illegal measures to promote its exports, ranging from textiles and refrigerators to beer and peanuts," said USTR Susan Schwab in statement. A Chinese Foreign Ministry spokesman said, "It's true that the two countries have some different views and even frictions over trade, but these issues should be properly settled though friendly consultation on an equal footing. With the financial crisis sweeping across the globe, we should make positive response, and meanwhile, keep alert to all sorts of trade barriers and protectionism."

OMAN: After two-year delay, President Bush signed order Dec. 29 bringing U.S.-Oman FTA into effect as of Jan. 1. Oman had trouble implementing requirements under accord, which U.S. Congress approved in July 2006 (see **WTTL**, July 24, 2006, page 3).

COSTA RICA: Costa Rica formally joins U.S.-DR-CAFTA FTA Jan. 1 following President Bush's signing of implementation order Dec. 23. Costa Rica was able to enact final implementing law in November after constitutional court ruled measure didn't violate country's constitution (see **WTTL,** Oct. 6, page 3).

POULTRY: U.S. and Russia Dec. 29 dampened clash over Moscow's restriction on imports of U.S. poultry, signing protocol to the 2005 U.S.-Russia Agreement on Trade in Certain Types of Poultry, Beef, and Pork. Agreement modifies in-quota quantity and out-of-quota tariff on imports. "This protocol will provide certainty to our trade in poultry and pork in 2009," said USTR spokesman Sean Spicer.

LEGAL FEES: OFAC in Dec. 23 Federal Register amended rules on when lawyers can obtain legal fees from blocked parties. OFAC amended its licensing policy to add to list of services "for which payment may be specifically licensed [for] the representation of agents of foreign terrorist organizations detained within the jurisdiction of the United States or by the U.S. government, including, but not limited to, the conduct of military commission prosecutions and the initiation and conduct of federal court proceedings."

ANTIDUMPING: CIT Judge Judith Barzilay Dec. 29 in latest ruling in Corus Staal litigation upheld ITA's use of zeroing in administrative review but granted firm's motion to remand case to ITA to reverse its treatment of Corus Staal's U.S. arm as "affiliate" in duty absorption investigation (slip op. 08-144).