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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

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Pentagon Advisory Panel Urges Reform of Export Controls

The Defense Department should take the lead in pressing for reform of the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), a Pentagon advisory committee urged in a July 25 report. "While the industrial world has welcomed globalization, security legislation, policies and practices, such as ITAR and the Export Administration Regulations (EAR) have not adjusted to the reality of the contemporary commercial marketplace. This has negatively impacted military effectiveness, U.S. competitiveness and the national security industry," said a Defense Science Board (DSB) task force report, "Creating an Effective National Security Industrial Base for the 21st Century."

> While export controls represented just part of the findings and recommendations of the task force, the report said, "DoD must understand and realize the benefits of globalization." It cited several unimplemented changes to export controls that were recommended in a previous 2000 report on defense trade and security. "DoD should take a leadership role in getting changes made in ITAR and EAR in order to take full advantage of potential benefits of globalization," it urged. Defense needs to work with State, Commerce and Congress "in this critically important, but politically difficult security and competitiveness area," it said.

"With appropriate risk-based consideration of security and vulnerability concerns, significant changes must be made in the ITAR, Export Controls, Berry Amendment, specialty metals clause, etc., to change the current realities of the global defense and commercial markets," the report stated. "While there must be recognition of the need for U.S. control of mission capability and for military superiority, foreign dependence need not mean vulnerability," it said.

"Despite globalization, U.S. policy continues to not allow the nation to gain the security and economic benefits that could be realized; instead focusing on 'Buy American'; the Berry Amendment, obsolete International Traffic in Arms Regulations (ITAR), and export controls and restrictions on foreign scholars, students, and S&T workers; all of which limit flexibility in acquisition options and cost savings," said the task force.

Foreign Gambling Firms Support Joint Regulation of Industry

Foreign operators of online gambling websites say they support a plan to offer the U.S. authority to license and regulate the industry jointly with Antigua and Barbuda and tax its income as a way to reopen offshore gambling sites to the U.S. market. "The U.S. is currently failing to

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derive any revenues from online gaming but a licensing system would provide a way for it to do that. Many of our members would readily come up to U.S. regulatory standards and would be willing to be licensed and taxed in the U.S., if the opportunity arose," Clive Hawkswood, the chief executive of the Europe-based Remote Gambling Association (RGA), told WTTL

> "Antigua has offered to jointly regulate with the U.S. government to allow U.S. oversight and made many other offers to ensure that the services are provided fairly and responsibly," WTTL was told by Mark Mendel, counsel to Antigua and the Antigua Online Gaming Association. Mendel aided Antigua in its World Trade Organization (WTO) complaint against the U.S. for violating its commitments when it barred foreign gambling sites in the U.S. The WTO sided with Antigua, but settlement talks have been deadlocked (see **WTTL**, Feb. 4, page 3).

European Union (EU) officials were scheduled to come to the U.S. the week of July 21 to discuss these proposals with U.S. trade officials and members of Congress. "The USTR asked for the visit to be postponed to give USTR more time to prepare," RGA spokesman Ben Brofman told WTTL. "My understanding is that the visit is now scheduled to take place in September," he said. Also to be discussed were the Justice Department's prosecution of several EU gambling firms for allegedly violating U.S. laws against interstate online gambling.

Antigua and other countries that host online gambling sites have complained that the U.S. applies a double standard to gambling because federal law permits interstate betting on horse racing. The "complaint is partly based on the fact that the Department of Justice is pursuing enforcement action against EU interests. The DoJ chooses to pursue EU businesses while turning a blind eye to what is going on in its own backyard," Hawkswood told WTTL.

"It is the clear position of the DoJ that companies…which offer Internet horse race betting across state borders violate precisely the same U.S. laws as the EU companies that offered Internet gambling across international borders," Brofman said. "The DoJ has repeated its position on numerous occasions in Congress and in the WTO. Yet the DOJ undertakes no action against U.S. companies," he argued.

Mandel told WTTL that Justice's prosecution is selective in two ways. "First, by prohibiting all foreign remote gambling while permitting many kinds of domestic remote gambling, and second, by focusing on foreign operators located in Antigua," he said. "Although the U.S. has gone after other foreign operators as well, Antiguans are targeted more than any others," he added. Apart from the question of whom the U.S. is prosecuting, is the question of why, Mendel said. "The guiding force against remote gaming in America is the existing gaming industry, including state lotteries and monopolies," he contended. "Existing monopolies would probably favor remote gaming…but only on the basis that will preserve their existing market shares or monopolies. The primary basis on which much remote gaming is prohibited in America is simply to avoid competition," he charged.

Dispute Arises over NAMA Agreements at Doha Ministerial

Although trade officials claimed they had reached "convergence" in many areas of negotiations on non-agriculture market access (NAMA) during their July 21-30 mini-ministerial, a dispute has arisen over what actually was agreed upon or even presented to ministers (see **WTTL**, Aug. 11, page 1). An Aug. 12 report on the outcome of the NAMA talks, written by NAMA negotiations group chair Don Stephenson, has drawn criticism that it doesn't accurately reflect the negotiations or the state of the talks when they broke down. How negotiators view the report may determine whether it can form the basis for the resumption of talks in September.

A key concern is whether countries will accept the progress made at the meeting as the starting points if negotiations resume. One area of difference is over the status of sectoral negotiations. "The NAMA modalities are not agreed," Stephenson says in his report. "Having said this, there is much in that text on which there is very substantial convergence" he asserts. On sectorals,

his report says a group of countries "have agreed to participate in negotiating the terms of at least two sectoral tariff initiatives of their choosing, with a view to making them viable." Participating in a sectoral talk won't commit a country to joining a final agreement in that sector. "Any developing country Member participating in final sectoral initiatives will be permitted to increase its coefficient...commensurate with its level of participation in sectoral initiatives," the report states. Countries would "incorporate their sectoral commitments on an unconditional basis for sectors that reach a critical mass," it adds.

> "Sectoral agreements...are not likely to get 100 percent of countries participating and 100 percent of world trade covered, so there will be some free riders," Stephenson told WTTL. "At some level of world trade ... in the 80 and 90 percent of world trade kind of numbers, members would be willing to proceed" with the sectoral, he said; adding, "But it's their call; there's no rule." The U.S. has said a high level of world trade needs to be captured by a sectoral agreement to ensure equity and to minimize trade that would circumvent remaining tariffs.

What Stephenson reported as being agreed on "is not true," claimed a source close to the negotiations. "What Stephenson proposed in his package to senior officials is not the same thing" that's in the report, said the source, who asked not to be identified. For example, Stephen-son retained clearly the critical mass concept for the sectorals during meetings of senior officials, but then he left it out of the report after the Chinese "yelled and screamed" at the WTO trade negotiations committee meeting, said the source. China had many misgivings about the sectorals language, but the U.S. has been concerned about leaving China, with its growing industrial base, out of key sectorals.

"Not only is he saying he presented text and that text was agreed to but the text isn't even the same as what he had proposed to senior officials," said the source. Critical mass isn't expressed in the way it's now written, the source added. The errors go beyond merely editorial problems, the source added. "I can confirm this is not consistent with the July 25th package," said USTR spokesperson Gretchen Hamel. "The U.S. has not seen nor agreed to this text. Ambassador Schwab has and will take this up privately with Director-General Lamy," she said.

National Association of Manufacturers (NAM) President John Engler protested more strongly against the report. "The NAM is dismayed at the chairman's report, which represents a further and unacceptable weakening of ambition in the Doha Round," he said in a statement. "Moreover, the report is a sharp departure from what was discussed at the July WTO mini-ministerial in Geneva. Rather than finding a way forward for the Doha Round, the chairman's report diminishes the chances for any convergence of views," he said. Engler said he has told U.S. Trade Representative (USTR) Susan Schwab "to make it clear the United States does not see the report as providing a basis for negotiations."

"The sectoral language in my report ... never got back to ministers ... so we did not conclude anything with respect to sectorals," Stephenson told WTTL. He said a group of countries tried during the ministerial to hammer out language comfortable to both sides of the issue. Certain countries wanted assurances of serious engagement in sectoral market access negotiations to reach agreement on a couple of sectoral agreements, Stephenson said. Other countries didn't want to be forced into agreements of no interest to them, he explained. "The real question when we come back in September is exactly what do we do with this convergence on some of the issues," he said. Some countries will want to review and reassess certain issues, said Stephenson, who is leaving the NAMA chairmanship and returning to Canada in August.

Doha Farm Talks Set to Break Free of Grim Reaper

A WTO report Aug. 11 on the state of agriculture negotiations at the end of the Doha Round mini-ministerial July 30, chalked the outline of the failed talks and set the stage for a quick resumption of negotiations in the fall. "Overall, there was a credible basis for conclusion on very many (and possibly one could have said nearly all) issues," said the report written by

Crawford Falconer, chairman of the agriculture negotiations committee. But also "as a matter of plain fact, there was decisive disagreement on certain matters while other very significant issues were not even dealt with," Falconer wrote. The most important of these disagreements was over the Special Safeguard Mechanism (SSM) (see **WTTL,** Aug. 11, page 2).

> "Clearly, we need to revisit the SSM as part of that effort," he said. "But in doing so we must recognize that it was not, for any of the participants involved (and those participants include Members that were not in the G7, it should be added), a purely technical breakdown. It was a political divide," Falconer noted.

"In fact there was progress made on it politically, and technically, during that week. But it was simply not sufficient to bridge a political divide that had been enduring since at least Hong Kong," he observed. "So illusion number one to guard against is that it can be resolved essentially technically. The technicalities will need to be addressed but will only work with the same level of political investment that was evident in many other issues where technical and political are inseparable," he wrote.

One diplomat in Geneva reacted to Falconer's report by saying the lingering question "is whether people will come to the table and actually negotiate on this and not want to roll back trade policy." People have to get over the idea that China can roll back its WTO accession commitments and roll back 30 years of trade policy, the source said. "We are not going to have new measures of protectionism," the source added.

In addition to SSM, cotton, tariff quota creation, and tariff simplification issues were still not resolved at the meeting, the report acknowledged. It was Falconer's informal assessment that negotiators want to get back to work on these and other unresolved issues. "Substantive disagreement remains and there are others where we did not get to substance at all," he wrote. "Members were, accordingly, prepared to accept compromises that were not generally their preferred options. That was a mind-set that applied as of yesterday. As of today that remains at best moot," Falconer stated.

Because of the state of the talks, Falconer said it would not be useful for him to prepare a new draft text. "On the contrary, it is precisely because Members might yet be prepared to live with those positions that it would be counter-productive to oblige them now to react to precise text which alleges their agreement," he wrote. "Such precise texts are, of course, still on the hard drive. But that is where they do and must remain, at least for the time being," he wrote.

State Rejects Jet Engine Makers' Objections to 17(c) Rules

State's Directorate of Defense Trade Controls (DDTC) in the Aug. 14 Federal Register refused to amend its final revisions to the International Traffic in Arms Regulations (ITAR) to satisfy the objections of jet engine makers to the agency's interpretation of Section 17(c) of the Export Administration Act (EAA). The final changes to the ITAR are intended to clarify licensing jurisdiction for aircraft parts that are certified by the Federal Aviation Administration (FAA), but engine firms complained that DDTC had extend the regulation to cover certain jet engine hot sections that were not subject to ITAR before (see **WTTL**, May 12, page 1).

> Despite the rejection of comments from engine makers, other firms making aircraft parts and components said they welcomed the new rules because they alleviated 40 years of doubt and ambiguity over whether DDTC or Commerce has licensing jurisdiction for these products. "I think it's a significant improvement over the current rule and reflects the original spirit of 17(c)," said Kevin Wolf, an attorney with Bryan Cave, who has represent firms in the aircraft industry.

"It's practical and greatly facilitates compliance," Wolf noted. The new rules will be especially helpful for firms that make products that have been around for many years and where there are no records to indicate whether the items were designed for civilian or military use and "the

original intent is lost to history," Wolf said. The final regulations establishes three questions firms must answer to determine license jurisdiction for an aircraft part or component.

> In comments on the proposed rule, jet engine firms and their component suppliers objected to other provisions of the regulation which would change the status of specially designed engine hot-section parts and make them "significant military equipment"(SME) under Category VIII (b) of the U.S. Munitions List (USML).

"The Department believes that the designation of these military hot section components and digital engine controls as significant military equipment is necessary to safeguard the national security of the United States, because these components and controls fulfill the definition of significant military equipment in 22 CFR 120.7 in that they have the 'capacity for substantial military utility or capability'," DDTC said to explain the final rule.

It said it "will not, as a matter of process, require DSP-83 nontransfer and use certificates for the export of spare parts for hot sections and digital engine controls previously authorized for export." A "grandfather clause" added "for military hot section components and digital engine controls manufactured to engineering drawings dated on or before January 1, 1970 was also intended to address the concerns raised by the ten commenting parties," DDTC said.

Exporters Enjoying Booming Season, Trade Figures Show

U.S. manufacturers in 2008 are on track to see exports grow at nearly twice the rate as in 2007, according to trade figures Commerce released Aug. 12. For the first six months of 2008, exports of manufactured goods increased 19.2% over the same period in 2007 to $655.6 billion. Exports of services rose 17.7% in that period to $277.3 billion. In comparison, goods imports increased 12.8% to $1.1 trillion, with about two-thirds of the increase from crude oil imports alone. Services imports increased 9.7% to $202.6 billion. The $3.7 billion increase in the surplus of services trade helped reduce the overall trade deficit for the first half by nearly 2%.

> A strong element in the improvement of U.S. exports in the last two years has been the decline of the dollar against the currencies of Europe, Canada and Australia. With the dollar appearing to rebound in July, some economists are saying the dollar has bottomed and will now begin to rise again. Such an increase in its value probably would not begin to show in trade data until 2009.

Strong export growth in the first half was shown by agriculture products and industrial supplies, reflecting higher prices for energy, commodities and materials and such products as fertilizer, precious metals, diamonds, pulpwood, excavating and farm machinery, and telecommunications equipment. "The strong growth of U.S. exports reaffirms the international competitiveness of American goods and services," said USTR Susan Schwab in a statement. She noted that exports accounted for two-thirds of U.S. economic growth in the past 12 months.

In an area of political focus, exports to NAFTA partners Canada and Mexico in the first six months of 2008 were up 12.6%, while imports increased 105%. Exports to China through June jumped 20% over the same period in 2007 as imports increased just 4%. Trade with the European Union, where the strength of the euro against the dollar has been the big story, U.S. goods exports grew 37.6%, while imports increased 9%.

Firm to Plead Guilty to Training on Software For Use in Cuba

Platte River Associates of Boulder, Colo., is close to an agreement with Denver U.S. Attorney's office to settle a criminal information that charged it with violating the Trading with the Enemy Act (TWEA) by providing computer software and training that could be used for mapping oil and gas deposits in Cuba's territorial waters without obtaining a license from Treasury's Office of Foreign Assets Control (OFAC). "Notice is hereby given that a disposition has been reached

in this case," firm's attorney, Lee Foreman, told Denver U.S. District Court July 25. Details of the settlement are to be presented to the court on Oct. 3, he reported. "We are still in the process of working out the agreement," Foreman told WTTL (see **WTTL,** July 21, page 4). Platte River, which produces software and supporting services for the oil industry, including for oil and gas exploration, sold the software to Repsol, a Spanish oil firm, according to Foreman. Repsol sent an employee to Platte River for three days of training in October 2000.

> Part of the training involved seismic data that Repsol provided for the Caribbean region, including Cuba, he explained. Platte River did not know the software was going to be used in Cuban territory nor did it have any direct dealings with anyone in Cuba, Foreman said. Court records do not show that the software was actually used off Cuba. When the Repsol employee was leaving the country, his laptop computer was seized by Customs agents who found the Cuba-related seismic data on it. That led to the July 15 charges against Platte River.

* * * Briefs * * *

BIS: Commerce Office of Inspector General notified BIS in July that it was initiating evaluation of the agency's certification and accreditation procedures "with a specific focus on continuous monitoring of security controls." The evaluation is part of OIG's assessment of Commerce compliance with Federal Information Security Management Act and deficiencies found at BIS during 2006 evaluation.

EXPORT ENFORCEMENT: Ingersoll Machine Tools (IMT) of Rockford, Ill. has agreed to pay $126,000 civil penalty to settle BIS charges that it violated deemed export regulations on eight occasions by releasing controlled data to Italian and Indian nationals without license. Allegedly released data was for vertical fiber placement machines and production technology for five-axis milling machines and were controlled for National Security and Missile Technology reasons to Italy and India and for Nuclear Nonproliferation reasons to Inda, BIS said. Agency will allow firm to make initial payment of $21,000 and then five monthly payments of $21,000 each. IMT neither admitted nor denied the BIS charges.

MORE EXPORT ENFORCEMENT: Under terms of previous plea agreement, federal judge in Elizabeth City, N.C., July 25 imposed $500,000 criminal fine on Allied Telesis Labs, Inc., for violating IEEPA by negotiating with Iranian telecommunications company to design equipment and systems, including high capacity Multiservice Access Platforms (iMAPs) and related items capable of routing large volume of messages, information and data in 20 Iranian cities, including Tehran (see **WTTL**, March 24, page 4). Contract negotiations eventually collapsed, Justice Department reported.

MORE EXPORT ENFORCEMENT: Reson A/S of Slangerup, Denmark, and three of its subsidiaries have reached separate settlements with BIS to resolve 29 charges that they exported underwater navigation equipment to South Africa, Singapore, the United Arab Emirates, Mozambique, Taiwan, Russia, and India between June 2002 and September 2006 without approved licenses. Company voluntarily self-disclosed exports to BIS. Under agreements, Reson will pay $119,250 civil penalty; Reson Incorporated of Goleta, Calif. will pay $83,000 fine; Reson Offshore Limited of Aberdeen, United Kingdom, will pay $9,900, and former subsidiary of RAS Underwater Surveys of Cape Town, South Africa will pay $29,700. Reson Incorporated also settled allegations concerning two deemed export violations involving foreign nationals from France and the United Kingdom.

MORE EXPORT ENFORCEMENT: BIS July 18 extended TDO it imposed in March on Blue Airways of Yerevan, Armenia, and several related firms to Blue Airways FZE and Blue Airways of Dubai, UAE. Agency claims firms "knowingly engaged in conduct prohibited by the EAR by re-exporting three U.S. origin aircraft to Iran and were attempting to divert an additional three U.S. origin aircraft to Iran."

RAW FLEXIBLE MAGNETS: ITC Aug. 15, after clarifying decisions announced Aug. 12, made final determination that U.S. industry is injured by imports of raw flexible magnets from China and Taiwan.

SODIUM NITRATE: ITC in final ruling Aug. 11 made determination on 6-0 vote that imports of subsidize sodium nitrate from China and dumped imports from China and Germany are injuring U.S. industry.

LAWN GROOMERS: In preliminary finding Aug. 7, all six ITC members agreed that allegedly subsidized and dumped imports of tow-behind lawn groomers from China may be injuring U.S. industry.

EDITOR'S NOTE: In keeping with our regular schedule, there will be no issue of ***Washington Tariff & Trade Letter*** on Aug. 25, 2008. Our next issue will be Sept. 1.