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Defense Treaties Will Face Tough Questioning at Hearing

State Department officials are expected to encounter strong skepticism from members of the Senate Foreign Relations Committee May 21when they testify in support of defense cooperation treaties the U.S. has negotiated with the United Kingdom and Australia. The treaties aim at reducing licensing requirements for defense goods and services subject to the International Traffic in Arms Regulations (ITAR), but senators reportedly are concerned about how the U.S. would take enforcement actions against violations of the treaties' implementation arrangements.

> Under the implementing arrangements, certain items on the U.S. Munitions List (USML) could be exported without licenses to approved members of the "trusted community" in the U.K. and Australia. Lawmakers reportedly question the ability of State's Directorate of Defense Trade Controls (DDTC) to monitor and enforce compliance with the conditions placed on trusted community firms in those two countries and the legal authority the U.S. would have to take action against a violation in court (see **WTTL**, March 31, page 3).

Congressional sources say "there is nervousness" among some members of the Foreign Relations Committee. Even if State officials are able to calm those concerns, they will also need to settle the concerns of other members of the Senate. In the past, objections to export control legislation from just a few senators have been able to delay Senate floor action.

Partially Revised Doha Rules Proposal to be Ready for Ministerial

The chairman of the Doha Round negotiating group on rules has said he will float a new document aimed at clarifying recent talks and providing "comfort" to members before ministerial-level talks aimed at reaching horizontal trade-offs between agriculture and non-agriculture market access (NAMA) The rules negotiations are part of a second tier of talks that are not suppose to be part of the horizontal talks on farm and industrial trade. Although in the background for now, rules negotiations could become a major sticking point to any Doha deal, based on the experience from the Uruguay Round (see **WTTL,** Feb. 25, page 1).

The next rules document won't revise entirely the chairman's November 2007 text, said a source following informal meetings the week of May 12. Those talks focused mainly on fishery subsidies. Rules chairman Guillermo Valles Galmes of Uruguay doesn't think negotiations are ripe for a revised text, the source said. The next rules paper could capture recent progress on antidumping, fishery subsidies, technical assistance and other areas, a developing country

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ambassador told WTTL. It will "increases the comfort level" and responds to requests for a revised text, he said. In the talks on fishery subsidies, delegations supported general disciplines on the use of subsidies, which is one the main goals of the U.S. Countries raised questions about the treatment of fisheries located in the territories of two or more WTO members and fish stock that migrate across sea borders.

While developed and advance developed countries voiced support for disciplines on fishery subsidies, some developing countries wanted assurance that the principles of "special and differential" treatment would still apply to them. Developing countries, particularly the countries of Africa, the Caribbean and Pacific and those known as "small and vulnerable" economies, also said they would need technical assistance to adopt the new rules. Valles Galmés said least developed countries would be unconditionally and completely out of disciplines prohibiting fishery subsidies, a source said.

Chamber Supports Review of FCPA Court Ruling

The Foreign Corrupt Practices Act (FCPA) "was never meant to transform every public corruption issue, worldwide, into a crime under U.S. law," the U.S. Chamber of Commerce argues in an amicus curiae, friend of the court, brief it filed in the Supreme Court May 12 in support of a petition for a writ of certiorari filed by two businessmen convicted of violating the bribery statute (see **WTTL**, April 14, page 4). David Kay and Douglas Murphy, two former executives of Rice Corporation of Haiti have asked the High Court to reverse a Fifth Circuit ruling from October 2007, upholding their conviction under the FCPA for bribing Haitian officials to get reductions in the taxes and customs duties the company was paying. The court has given the Solicitor General an extra month to file its response brief.

> The Chamber says the appellate ruling addresses the "business nexus" of the FCPA and whether the law applies only to bribery of foreign officials intended for "obtaining and retaining business" or also to action not aimed at obtaining and retaining business. "The Fifth Circuit's decision, and the expansive enforce-ment efforts it has spawned, threaten American executives with prison for conduct not criminalized by the plain language of the statute," the Chamber argues.

"The Fifth Circuit's refusal to apply the rule of lenity in this case—despite concluding that the Act was ambiguous even *after* considering legislative history—essentially nullifies that vital and historic canon of construction," the brief states. "The rule of lenity is essential to the fair and orderly administration of justice," it adds. "The Fifth Circuit's dismissive treatment of the rule is grounded in a misinterpretation of this Court's recent cases that only this Court can correct."

The brief says the appellate decision raises concerns about the proper interpretation of the FCPA's business nexus requirement and laws governing business conduct overseas. "The FCPA can often transform what would be a relatively minor violation under local law into potentially enterprise-threatening U.S. criminal liability," it contends. "Setting aside the risk of criminal liability itself, FCPA investigations and compliance efforts are extraordinarily expensive and disruptive, frequently involving the need for large teams of U.S. lawyers and forensic investigators to interview witnesses, review documentary evidence, and analyze financial transactions on the far side of the world, and in unfamiliar languages," the Chamber says.

Groups Seek More Balance in USTR Advisory Committees

The Ninth Circuit Court May 16 was set to hear oral arguments in a suit seeking to force the U.S. Trade Representative (USTR) to add public health community representatives to its indus try advisory committees. Public health groups claim the Federal Advisory Committee Act (FACA) requires the government to seek a "fair balance" of interests on advisory committees, and because the USTR committees advise on issues that affect public health, such as tobacco, alcohol and generic drugs, the panels should include public health representatives. The appeal to the

circuit court hinges on a narrower legal question of whether the FACA is justiciable. The San Francisco U.S. District Court in 2006 said the statute could not be enforced in court because there is no standard defining fair balance. The groups bringing the suit include the Center for Policy Analysis on Trade and Health (CPATH), the California Public Health Association-North, Physicians for Social Responsibility, the American Nurses Association, and the Chinese Progressive Association. They were represented by attorneys from Earthjustice.

> The suit seeks to put public health members on six industry trade advisory committees; ITAC-4 (Consumer Goods), ITAC-5 (Distribution Services), ITAC-8 (Information and Communications Technologies, Services, and Electronic Commerce), ITAC-10 (Services and Finance Industries), ITAC-14 (Customs Matters and Trade Facilitation), and ITAC-16 (Standards and Technical Trade Barriers).

"At the district court, CPATH established that the ITACs in question address and influence public health issues and are constituted solely by industry representatives with no public representatives," the CPATH coalition argued in one brief. "It is difficult to imagine a situation more obviously unbalanced," it claimed. A government reply brief contended that the president was following the instructions of the Trade Act of 1974, which established the ITACs and defined their mission. "The Trade Act establishes a comprehensive structure for obtaining advice and addresses the composition of the advisory groups," the government asserted. "There can be no contention that the government abused its discretion when it created committees in accordance with Congress's guidance," it stated.

CSIS Study Calls for "Cohabitation" of Export Control Agencies

A Defense-funded study by the Center for Strategic and International Studies (CSIS) has recommended that interagency friction over export licensing might be reduced through "cohabitation" of agencies. Report suggests that export functions of State, Defense and Commerce could be melded in a "virtual" relationship that would leave policy and management control with existing departments and under existing statutes, but with licenses getting reviewed by interagency teams and increased electronic interlinking of data and cases. The proposal argues against older proposals for creating a single licensing agency to handle both defense and dual-use licenses. It says maintaining multiple agency views on licenses benefits the system.

> At a May 15 program where the report's results were summarized, Deputy Secretary of Defense Gordon England asked whether the Arms Export Control Act, which he said is grounded in the Cold War, is effective today. "I tend to think it's not," he said. England also questioned whether current control systems are appropriate. "When I look out to the world I see hundreds and perhaps thousands of rivers of technology that flow across this global," he said. "So the way I think about this is that a lot of the controls we exercise in Washington to me is tantamount to damming up the Potomac while all the other rivers flow freely," England said.

The report came as the House May 15 approved by a voice vote a bill (H.R. 5916), which includes extensive administrative changes to the AECA. Even House staffers concede the bill probably has little chance of action in the Senate. "The Senate will look at the bill, eventual-ly," one Senate staffer said (see **WTTL,** May 5, page 4).

Farm Bill Becomes 2008 Trade Bill with Host of Amendments

The little known key to success for quinquennial Farm Bills is their ability to cobble together high subsidies for agriculture, which represents less than 2% of the U.S. economy, with food stamps for the poor, creating an unbeatable farm-urban coalition. This year's legislation (H.R. 2419), which passed the House May 14 and Senate May 15 by wide margins, added a package of trade bills with benefits for sugar growers and the lumber industry along with an extension of the Caribbean Basis Initiative (CBI) and liberalization of apparel trade rules for Haiti. It also extends

the Caribbean Basin Initiative preference program to September 2010 from 2008. The bill will require softwood lumber importers to declare that prices they are paying comply with export prices on export permits issued by Canadian provinces and other rules under the U.S.-Canada Softwood Lumber Agreement. Another provision liberalizes rules of origin for apparel imports from Haiti and extends the Haiti trade preference program to September 30, 2018. "The ten-year duration is aimed at fostering a more stable investment climate for businesses seeking to use HOPE I or II preferences," the bill's conference report explains. The measure adds a sense of Congress resolution that Customs should not change its first-sale import valuation rules until after January 1, 2011.

* * * Briefs * * *

INTRA-COMPANY TRANSFERS: Although BIS officials have said they planned to propose rule to create license exception for intra-company transfers by end of May, BIS Under Secretary Mario Mancuso May 15 sent signal that proposal may be further away. Agency is "evaluating the contours of an intra-company transfer license exception which would better account for how cutting-edge R&D occurs today," he told CSIS conference. BIS had revised draft proposal several times to satisfy Defense objections, most recently week of May 5 (see **WTTL** March 17, page 2).

ANTIBOYCOTT: Anviall Pte. Ltd. of Singapore has agreed to pay $3,600 civil fine to settle two BIS charges that it violated antiboycott rules. It made voluntarily self-disclosure.

RECTANGULAR PIPE: In final determination, ITC May 14 voted 5-0 that dumped imports of light-walled rectangular pipe and tube from Turkey are injuring U.S. domestic industry.

LINE PIPE: ITC on 6-0 vote made preliminary determination that U.S. industry may be suffering injury from allegedly dumped imports of certain circular welded quality steel line pipes from China and Korea and allegedly subsidized imports from China.

SACCHARIN: Cumberland Packing Corp. May 13 asked ITC to conduct Section 751 "changed circumstances" review and to revoke antidumping order on saccharin from China.

FCPA: Willbros Group Inc. and Willbros International Inc., its wholly owned subsidiary, agreed May 14 to pay $22 million criminal penalty in deferred prosecution agreement with Justice to settle charges that they paid bribes to Nigerian and Ecuadoran government officials in violation of Foreign Corrupt Practices Act (FCPA). In separate settlement with SEC, they agreed to pay $10.3 million in disgorgement of all profits and pre-judgment interest (see **WTTL,** Nov. 12, page 4).

EX-IM BANK: In latest court action that is part of larger case involving scheme to defraud Ex-Im of some $80 million in export financing guarantees, Edward Chua of Montebello, Calif., was sentenced May 14 to 37 months in prison in connection with his $10 million part of deal (see **WTTL**, April 28, page 4).

UKRAINE: Became 152nd member of WTO May 16.

EAA: Rep. Ileana Ros-Lehtinen (R-Fla.), ranking Republican on House Foreign Affairs Committee, is expected to introduce House version of Export Enhancement Act, which would renew lapsed Export Administration Act but with new enforcement powers for BIS and higher penalties. Senate Banking Committee Chairman Chris Dodd (D-Conn.) introduced Senate bill (S. 2000) last August by request for administration. Congressional staffers, however, admit neither bill has much chance of action this year.

CAROUSEL RETALIATION: CIT Senior Judge R. Kenton Musgrave May 14 issued ruling allowing suit to continue against USTR's implementation of "carousel retaliation" against EU for its ban on imports of hormone-treated beef. Gilda Industries, Inc., claims 100% duties on its imports of toasted bread from EU should have been lifted under law that directed USTR to change targets of retaliation periodically.

APPAREL: N.Y. District Court May 13 approved civil settlement agreement between Justice and three apparel importers and their principles under which firms will pay $2,798,872.50 to resolve charges that they circumvented safeguard import quotas on apparel from China by claiming goods were from Russia and Korea on their import documentation. Investigation was launched after Justice received tip from whistle-blower in one of companies. Whistleblower could get 15-30% of settlement, according to whistleblower's attorneys at Cullen Law Firm. Goods reportedly went to retailers such as Wal-Mart, J.C. Penney, Kohl's, Family Dollar Store and Marshall's.