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DEAC WILL QUESTION ARGUMENTS FOR TOUGH DEEMED EXPORT CONTROLS

Members of Commerce's Deemed Export Advisory Committee (DEAC) won't accept intelligence and Pentagon arguments for tough "deemed export" controls without close scrutiny of the evidence behind those claims, DEAC Chairman Norman Augustine told WTTL in an exclusive interview. The DEAC July 31 received its first secret, closed-door briefing from intelligence witnesses on the need for deemed export controls. The briefing came after the DEAC held five public hearings, including one July 30 at the University of Chicago, where it heard business and academic speakers raise concerns about changes in the regulation that might make it harder to hire foreign nationals or allow foreign students and teachers to participate in university research (see **WTTL,** June 25, page 1).

> Industry sources have been concerned that the secret, unchallengeable intelligence briefings might negate the testimony the committee had previously received. Augustine, the former chairman of Lockheed Martin, acknowledged industry concerns. "The problem you point to is real," he told WTTL.

"This is one of those areas where you're going to have to trust what we do," he said. "We intentionally comprised the committee not only to have people with different perspectives based on their backgrounds, but, also, most of the members of the committee have lived on both sides of this issue as individuals," Augustine told WTTL. "Our role is to be independent here. Most of us have served in government and industry and academia and are skeptical enough. None of us is reluctant to ask tough questions," he argued.

Augustine also stressed that the committee's final report, which is due in early fall, will be presented to Commerce without any government pre-review which might alter its findings. "I want to emphasize that there is no review between the time the committee does its work and the time it is handed to the department. The report is ours," he declared.

DEEMED EXPORTS CONTROLS ON BIORESEARCH OUTDATED, PANEL TOLD

Deemed export controls on some biological and pathogen technology are out of date because the knowledge is widespread and publicly available, the Deemed Export Advisory Committee (DEAC) was told at its July 30 public hearing at the University of Chicago. Ben Griffiths, legal counsel for the University of Wisconsi, told the DEAC that controls imposed on Export Control Classification Number (ECCN) 1E351 cover technology "we are teaching in our college courses." He argued that restrictions on technology for producing and controlling biological agents don't make sense since knowledge about biological production is widespread. Griffiths

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pointed out that the National Institute of Health publishes publicly available guidelines for the construction and operation of Level-3 biosafety facilities, providing information that is controlled under ECCN 2E301 in the regulations. He suggested that controls be limited to "select agents" that have been identified as the "nastiest bugs on earth."

> Robert Rarog, manager of export policy for Sun Microsystems, urged the panel to considered License Exception ENC as a model for applying deemed export rules to the intra-company transfer of technology. The ENC exception for the export of encryption products and software allows companies to share encryption technologies with employees both inside and out of the United States.

In an exclusive interview with WTTL, DEAC Chairman Norman Augustine said the committee has discussed special rules for intra-company transfers. "We've talked about that at some length," he told WTTL. He said he was interested in the ENC idea and would seek more information on how it works.

PRESIDENTIAL VETO LOOMS OVER CHINA CURRENCY LEGISLATION

Although no one in the Bush administration has explicitly threatened to recommend a presidential veto of legislation to hit China's alleged currency manipulation, statements and letters from Cabinet officials suggest such a recommendation would come, if pending proposals are not modified significantly. With several China trade and currency bills already proposed and more likely to be introduced, it is not yet clear how those measures would be reconciled and what final China legislation would look like.

> In a letter to Senate Majority Leader Harry Reid (D-Nev.) July 30, three Cabinet members said the administration opposes China bills that have been approved by the Senate Banking and Finance Committees because they would be "counterproductive" and could violate World Trade Organization (WTO) rules and invite retaliation. "Such legislation is not in the best interest of the United States," wrote U.S. Trade Representative (USTR) Susan Schwab, Treasury Secretary Henry Paulson and Commerce Secretary Carlos Gutierrez.

Finance approved its wide-ranging China bill (S. 1607) July 26 by a 20-1 vote. Banking cleared a narrower measure (S. 1677) on Aug. 1 on a 17-4 vote. Banking's legislation would set new criteria by which Treasury would have to judge whether a country was manipulating its currency. These new benchmarks would be a country's global current account, its bilateral trade surplus with the U.S. and its prolonged one-way intervention in currency markets. Finance and Banking face a jurisdiction dispute over which committee has authority to amend statutes dealing with international currency issues.

The administration's technical objections to pending China bills were explained by USTR, Treasury and Commerce officials at a House Ways and Means trade subcommittee hearing Aug. 2. "Using currency calculations that admittedly lack precision and reliability to determine trade remedies, which appear to raise serious concerns with respect to U.S. compliance with WTO rules, underscores the weakness of some of the legislative approaches," testified Treasury Deputy Assistant Secretary Mark Sobel. Commerce Assistant Secretary David Spooner said the department "is deeply concerned that the other legislative proposals that have been advanced to date raise serious concerns under international trade remedy rules and could invite WTO-sanctioned retaliation against U.S. goods and services, as well as foreign 'mirror legislation' and trigger a global cycle of protectionist legislation."

RISK OF RETALIATION GROWS FOR FIRMS COMPLYING WITH U.S. SANCTIONS

A new study commissioned by the National Foreign Trade Council (NFTC) says firms that comply with U.S. trade sanctions overseas face an increased risk of violating foreign laws –

so-called blocking statutes – that prohibit adherence to those sanctions. The report, prepared by attorneys with the law firm of Dewey Ballantine in Washington, chronicles recent legal actions against companies that have refused to do business with Cuban firms and individuals because of U.S. anti-Cuba trade laws.

> "Today, as highlighted by the recent hotel/Cuba embargo cases, foreign governments are much less hesitant to apply domestic laws and other tools to ensure domestic noncompliance with U.S. extraterritorial sanctions," the report states. These countermeasures have been enacted by America's closest allies, including the European Union, Mexico and Canada, and legal actions have been taken against firms in Norway and Austria.

The report, written by Harry Clark and Lisa Wang, supports the business community's fight against pending legislation to tighten sanctions against foreign firms doing business in Iran and Sudan. "Just this week we saw the House approve a measure that would expand the scope of sanctions against Iran to reach foreign subsidiaries of U.S. companies in Europe and Asia," said USA*Engage Director Jake Colvin. "If, at the end of the day, those governments block the sanctions, or lodge complaints with us or the WTO, you start to become concerned that the good intentions of Congress might lead to an unproductive outcome," he said in a statement.

SECTION 201 DUTIES NOT TO BE DEDUCTED FROM EXPORT PRICE, COURT RULES

U.S. industries that have won both Section 201 safeguard and antidumping relief from foreign imports may see lower dumping margins on the imports under a Court of Appeals for the Federal Circuit (CAFC) ruling July 25 (cases 2006-1524, 15250). The court sided with the International Trade Administration's (ITA) reading of Section 1677a(c)(2)(A) of the 1974 Trade Act and reversed Court of International Trade (CIT) Judge Gregory Carmen's ruling which held that 201 duties are deductible from the export price in calculating an antidumping duty margin.

> In *Wheatland Tube v. U.S.*, the CAFC ruled in favor of the appeal by the U.S. and a Thai maker of steel pipes and tubes that had been the subject of a 201 order. "It was reasonable for Commerce to conclude that Section 201 safeguard duties are more like antidumping duties in purpose and function than they are like ordinary customs duties," the appellate court said, quoting from *SWR Korea.*

"There is no support for the trial court's conclusion that Commerce's interpretation of Section 1677a(c)(2)(A) negates the effect of Section 201 safeguard duties or upsets the balance between Section 201 safeguard duties and antidumping duties," the CAFC ruled. To the contrary, it said, if deducting the 201 duties from the export price increased dumping margins, "Commerce would be punitively collecting additional antidumping duties," it stated.

LATE FILING LOSES LARGER SHARE OF BYRD AMENDMENT MONEY

The late protest of a Customs notice on the proposed distribution of Byrd Amendment anti-dumping money to U.S. ball bearing manufacturers has cost SKF a bigger share of the Byrd pie. CIT Senior Judge Nicholas Tsoucalas upheld the Customs' and International Trade Commission's (ITC) decision to pay the firm only a share of collected duties on ball bearings from Japan and not on ball bearing imports (Slip Op. 87-116). SKF won a CIT ruling in 2006 that overturned an ITC determination that it wasn't entitled to any money from the Byrd pool.

After the ITC issued a revised order granting SKF a share of the duties of Japanese bearings, the company filed its complaint for a share of all duties at the CIT. Tsoucalas sided with Customs, which said SKF should have filed an amened certification within 60 days after Customs published its list of Byrd candidates and duty claims in July 2005. "SKF failed to timely file its amended certification, and Customs thereby did not err in its refusal to consider said documentation," the judge ruled. Although the actual amount granted to SKF was slightly

incorrect, Tsoucalas refused to remand the case to the ITC. The error was only $16.47, and "a remand would be a waste of time, effort, and taxpayers' funds," he said.

In another Byrd Amendment case, *PS Chez Sidney v. U.S.*, CIT Judge Evan Wallach agreed to sever his previous ruling on the First Amendment rights of a nonparticipant in the antidumping case against crawfish from China from the underlying status of the Byrd Amendment (see **WTTL**, July 17, 2006, page 1). "The court will not vacate its prior decision, but this opinion will amend it to resolve the issue of severability and damages," he wrote (Slip Op. 07-115). "The court finds severability and remands to the agency concerning damages."

* * * BRIEFS * * *

BIS: Deputy Assistant Secretary for Export Enforcement Wendy Wysong leaving BIS and government Aug. 31 to enter private practice with Clifford Chance law firm in Washington. Coming to BIS Aug. 6 as director of Office of Export Enforcement is Kevin DelliColli, who was deputy assistant director at ICE in charge of money laundering and commercial import fraud.

EXPORT ENFORCEMENT: Federal agents July 19 arrested Jilani Humayun, who heads his own company, Vash International, Inc., on charges of exporting parts for F-5 and F-14 fighter jets and the Chinook Helicopter to Malaysia without approved licenses from DDTC.

MORE EXPORT ENFORCEMENT: Plast-O-Matic, Inc., of Cedar Grove, N.J., has reached settlement with BIS to resolve charges that on 13 occasions it exported valves and controls without approved licenses to Taiwan, Israel, Peru and Thailand. It agreed to pay $55,000 civil fine in four quarterly payments of $13,750 each over next 12 months. Firm neither admitted nor denied BIS charges.

MORE EXPORT ENFORCEMENT: After making voluntary self-disclosure, Sercel, Inc., of Houston, Texas, agreed to pay $8,000 civil fine to settle BIS charges that it exported marine acoustic equipment to China and Brazil without approved licenses.

MORE EXPORT ENFORCEMENT: Samuel Shangteh Peng, 56, of Yorba Linda, California, former international sales manager and export control officer at Endevco Corporation, pled guilty July 30 in Santa Ana, Calif., Federal Court to exporting vibration testing equipment without license to Hindustan Aeronautics Limited, Engine Division, in Bangalore, India, which was on BIS Entity List at time.

WIRE GARMENT HANGERS: Although President Bush in April 2003 rejected its Section 421 petition for safeguard action, M&B Metal Products Company, Inc., is making another try for relief (see **WTTL,** May 5, 2003, page 4). On July 31, it filed antidumping petitions at ITA and ITC against steel wire garment hangers from China.

TRADE ENFORCEMENT: Sens. Max Baucus (D-Mont.) and Orrin Hatch (R-Utah) reintroduced legislation (S. 1919) to strengthen U.S. trade law enforcement. Measure, among many provisions, would limit president's ability to reject Section 421 safeguard petitions, clarify that countervailing duty law can be applied to non-market economies, and create new post of USTR chief of enforcement.

NIPPON STEEL: In never-ending legal battle over imports of grain-oriented electrical steel from Italy and Japan, Court of Appeals for Federal Circuit (CAFC) reversed (Nippon VII?) CIT Judge Richard Eaton's interim order (Nippon V) to ITC to reopen record in "sunset review" case or issue negative determination (case 2006-1502). ITC's original 2001 affirmative injury finding was on 3-3 vote. CAFC said ITC's second affirmative remand determination was supported by substantial evidence.

NORTH KOREA: BIS Assistant Secretary Chris Padilla told a House hearing July 26 that agency could not confirm *Wall Street Journal* article July 20 which claimed United Nations Development Program (UNDP) violated U.S. export controls with shipment of computers and GSP equipment to North Korea. Padilla confirmed that certain equipment had been exported. "What we do not know with specificity is exactly what the technical specifications were for those items and whether they required a Commerce Department license or not," he said. UNDP had filed license application for exports to North Korea in 1999 and license had been denied, Padilla reported. He said BIS doesn't know if products shipped in last year are same as those from 1999. "Also, we don't know whether the equipment was U.S.-origin and subject to our jurisdiction," Padilla said. He noted that BIS is working with State and U.S. mission to UN to talk with UNDP at a minimum and "make sure they understand what our regulations require."