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DEFENSE REPORT CITES EUROPEAN SALES OF MILITARY ITEMS TO CHINA

The Pentagon's annual report on China's military strength claims for the first time that European nations are selling defense items and technology to China despite restrictions Europe put in place after the Tiananman Square massacre 15 years ago. "Over the past decade, Russia has been the primary source of foreign military technology, although China has also benefitted significantly from transfers and sales of defense-related technologies from Israel, France, Germany and Italy," says the report released May 30.

> Exporters are concerned that House Armed Services Committee Chairman Duncan Hunter (R-Calif.) will use the report to gain support for restrictions on trade with allies that sell defense products to China (see **WTTL**, May 24, page 1). The White House has said it opposes such provisions in the Defense authorization bill (H.R. 4200), but the Pentagon sometimes has a legislative agenda of its own.

"Most recently, China has lobbied European Union nations to lift the Tiananmen-era arms embargo," the Defense report notes. "The measure could pave the way for China to gain increased access to European suppliers of modern weapon systems and technologies, providing Beijing increased bargaining power with, and reduced dependency on, suppliers in Russia and other nations of the former Soviet Union," it adds.

The potential change in EU policies was also raised at State's daily press briefing June 1. "The U.S. has repeatedly expressed its concerns to European Union member states regarding possible lifting of the arms embargo against China," State said in a formal response. "In our view, lifting the ban would not contribute to regional stability and would send the wrong signal to China regarding its continued poor human rights record," the statement added.

COURT GIVES PRESIDENT DISCRETION IN CHINA SAFEGUARD CASES

In a precedent-setting ruling on Section 421 special safeguard rules for restraining import surges from China, the Court of International Trade (CIT) June 3 said the president is not required to follow the Administrative Procedure Act (APA) in deciding whether to accept or reject International Trade Commission (ITC) advice. In his ruling (Slip Op. 04-58), CIT Judge Timothy Stanceu upheld President Bush's decision to reject the ITC's advice to provide import relief for Motions Systems Corp., the U.S. manufacturer of pedestal actuators (see **WTTL**, Jan. 27, 2003, page 4). At the same time, he rejected the government's claim that the CIT doesn't have jurisdiction to review presidential decisions in Section 421 cases. This opinion will keep the courthouse door open for further potential legal challenges in the future. "Section 421 does

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not indicate congressional intent to subject the president's determinations thereunder to an APA 'abuse of discretion' or similar standard," the judge wrote. In reviewing Section 421 decisions, "this court will uphold the president's action absent 'a clear misconstruction of the governing statute, a significant procedural violation or action outside delegated authority'," Stanceu ruled, quoting an appellate court ruling in *Maple Leaf Fish Co.*

> The judge also denied the plaintiff's claim that Bush's decision was subject to "political factors." "Neither the record before the court nor the text of the president's decision establishes that trade relations between the United States and China were a factor in the president's decision," he found.

TIGHTER VISA RULES ARE BECOMING TECHNOLOGY TRANSFER CONTROL

The tightening of the U.S. visa processing system – aimed at fighting the war on terrorism – has become instead a war on technology transfer, an industry survey suggests. Rather than focusing on countries where terrorists have been known to operate, the system has primarily burdened citizens from China, Russia and India, survey respondents reported. "This is not a terrorism issue, it's a spy issue," said Bill Reinsch, president of the National Foreign Trade Council (NFTC), one of the eight trade groups that sponsored the survey.

> Visa applications from these countries are getting increased scrutiny when applicants report that their visit involves access to technology on the Technology Alert List (TAL), an internal government list of dual-use and military technology that could trigger export licensing requirements. U.S. embassy staff abroad often refer visas involving TAL technologies back to Washington for review through the interagency Security Advisory Opinion (SAO) process.

The survey found the burden of the new requirements falling mainly on small and medium size companies. Larger firms with operations around the world often work around the visa problem by sending U.S. employees overseas for meetings, training and sales, rather than trying to bring foreign nationals into the U.S. Based on estimates made by respondents about the extra costs caused by the new visa policies – either through lost sales, delays or other steps needed to deal with the system – the new requirements have cost industry between $24.16 billion and $34.2 billion, contends the Santangelo Group, the organization that conducted the survey.

Imposed after Sept. 11, 2001, the stricter rules on B1 business visas have required 100% of applicants to have a personal interview with a State consular official in their home country before a visa can be granted. When special concerns are raised about an applicant, particularly when TAL technology is involved, U.S. embassy staffers are afraid to okay the visas; so they send them to Washington for interagency review. This referral has added lengthy delays to the process, often forcing firms to cancel meetings, training or sales programs, the survey found.

INDUSTRY CALLS FOR REVISIONS OF LIBYAN EXPORT RULES

While U.S. exporters are extremely pleased with the Bush administration's decision to ease export controls on trade with Libya, they say the Bureau of Industry and Security's (BIS) implementing regulation needs to be revised to eliminate unnecessary burdens and legal risks it has created, industry has told the agency (see **WTTL**, May 3, page 4). In written comments on the interim Libya rule and in direct meetings with BIS and State officials, industry representatives have raised concerns about requirements applied to the "installed base" of equipment already in Libya, continuing antiterrorism (AT) controls, encryption restrictions, computer licensing requirements and licensing requirements for vessels carrying goods to Libya.

The most significant problem being raised is the requirement for exporters to report to BIS when they find controlled equipment in Libya that got there without a license. Although the interim regulation doesn't explicitly require such reporting, BIS officials have told exporters

that finding such goods constitutes "knowledge" of a violation under General Prohibition 10 of the Export Administration Regulations (EAR). BIS expects exporters to conduct an investigation to determine how unlicensed items got to Libya and report the results to the agency.

> "The potential application of this broad prohibition to U.S.-origin items already in Libya has already created considerable confusion among U.S. exporters and contractors, particularly those who may be requested to repair, upgrade or otherwise deal with these items or the systems in which they are incorporated," commented the Industry Coalition on Technology Transfer (ICOTT). Industry wants BIS to amend the interim rules to treat installed-base equipment found in Libya the same way it treated such goods found in the former East Germany after the unification of Germany and in other former Warsaw Pact countries.

Though industry complained about the continuation of AT controls on exports to Libya, particularly on computers, source say they expect the administration to lift these restrictions in the coming months if Libya cooperates in providing intelligence on the global proliferation of nuclear products and technology. Until them, the requirements "will place U.S. firms at a significant disadvantage in competing in Libya with suppliers from other countries – including many U.S. allies – that do not impose similar licensing requirements," ICOTT contended.

IT'S PREMATURE TO CHANGE CHINA'S NME STATUS, COMMERCE TOLD

The lack of transparency in China's legal, regulatory and financial systems and government control of the economy will make it impossible for the International Trade Administration (ITA) to determine whether China meets the criteria to have its status as a nonmarket economy (NME) changed, witnesses told a June 3 hearing held by an ITA working group on China's status (see **WTTL**, April 26, page 3). Representatives of industries that have filed unfair trade complaints against China urged ITA to maintain China's NME status for the full 15 years allowed under China's accession agreement with the World Trade Organization (WTO).

> In opening comments, Commerce Assistant Secretary for Import Administration James Jochum said the goal of a special ITA group wasn't to change China's status, but instead was to examine the NME issue as part of an agreement by the U.S.-China Joint Commission on Commerce and Trade (JCCT). "Neither this hearing nor the Structural Working Group constitute a review of China's nonmarket economy status under U.S. antidumping law, " he said. "Any decision to graduate China to market economy status – whenever that decision is made – must be made in the context of a formal, quasi-judicial proceeding," he added.

Witnesses, however, were still concerned about the motive and ultimate result of the review. "I am concerned that the process is being used more for negotiating purposes than as a standard of performance that must be met by China," testified Robert Cassidy, the former Assistant U.S. Trade Representative who negotiated the U.S.-China bilateral agreement on China's accession to the WTO. "China's opaque economic system of interference at local, provincial and central levels, coupled with the lack of transparency, makes it difficult, if not impossible, for U.S. companies to identify all the measures that need to be addressed in order for China to gain market economy status," he said. Now with Collier Shannon Scott, Cassidy testified on behalf of the Committee to Support U.S. Trade Laws.

U.S. DEFENDS "ZEROING" METHODOLOGY IN WTO LUMBER APPEAL

The World Trade Organization (WTO) Appellate Body (AB) should not use its decision in the *EC-Bed Linen* case as a precedent in deciding whether ITA's use of its "zeroing" methodology in the antidumping case against softwood lumber from Canada violated WTO rules, attorneys from the U.S. Trade Representative's (USTR) office argued in a brief filed with the AB May 24. In its *EC-Bed Linen* decision, the Appellate Body ruled that the European Union's (EU)

use of zeroing violated the WTO Antidumping Agreement. In a split decision, with a sharp dissent, the WTO dispute-settlement panel in the lumber case cited the *EC-Bed Linen* opinion to support its ruling against the U.S. The EC has already used the decision to bring a direct complaint against ITA's zeroing methodology to the WTO (see **WTTL**, Feb. 23, page 2).

> The softwood lumber ruling and reasoning behind it "substantially depart from the Appellate Body's reasoning in *EC-Bed Linen*," the USTR staff wrote. "The United States was not a party to the *EC-Bed Linen* dispute, nor was a U.S. measure at issue in that dispute. Moreover, principles of *stare decisis* are not applicable to WTO dispute settlement," they argued.

G-20 AGRICULTURE PROPOSAL LACKS NEEDED SPECIFICS, U.S. SAYS

The U.S. has welcomed a proposal from the so-called G-20 countries (actually 19) for a formula for providing increased market access for agriculture products in the WTO Doha Round, but it says the paper lacks the needed specifics that will tell how much liberalization it will produce. The G-20 paper and proposals from the G-10 developed nations and G-33 developing countries were the primary topic of discussion at the June 2-4 meeting of the Doha Round Agriculture Committee. At the end of the session, Chairman Tim Groser of New Zealand called the market access issue "by far the most difficult" in the farm negotiations.

> U.S. Chief Agriculture Negotiator Allen Johnson said the G-20 proposal shows that those countries have been working hard on the issue, but the paper doesn't have the level of specificity offered in the last draft text in Cancun or in the talks on export subsidies and domestic support. "We need to work with the G-20 and others to either adjust the Cancun text or some approach so that we can see that really after this we're down to filling in the numbers and negotiating some criteria," he told reporters after the meeting.

While lacking the specifics the U.S. wants, the G-20 paper showed a willingness to deal with many of the issues Washington has raised in the round. It supports broad coverage of all products, using a formula approach that mixes bigger cuts of higher tariffs with strait line cuts for lower tariffs, expanding tariff-rate quotas, and shifting all tariffs to an ad valorem basis. But the paper also stresses the need for flexibility to allow developing countries to identify Special Products that will face little liberalization and for a Special Safeguard Mechanism.

* * * BRIEFS * * *

FSC/ETI: Ways and Means Chairman Bill Thomas (R-Calif.) June 4 introduced revised bill (H.R. 4520) to repeal and replace export tax rules. New measure adds many provisions, including aid for tobacco farmers, to broaden support. Thomas plans to markup bill June 10. Proposal got quick support from House Majority Leader Tom DeLay (R-Texas). Rep. Don Manzullo (R-Ill.), who has been at odds with Thomas over FSC/ETI, issued statement saying "bill is moving in the right direction." But it "still contains a major flaw – it discriminates against small manufacturers who need our help the most," Manzullo charged.

AUSTRALIA: Senate Finance Committee plans to hold hearing on U.S.-Australia and U.S-Morocco FTAs on June 15. House Ways and Means Committee has scheduled hearing on Australia FTA for June 16.

TIFAs: USTR Robert Zoellick June 1 signed Trade and Investment Framework Agreements (TIFAs) with Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.

MEXICO: Just as WTO Dispute-Settlement Body June 1 was adopting report saying Mexico is violating WTO Telecommunications Agreement, U.S. and Mexico reach deal to settle American complaints. Mexico has agreed remove discriminatory tariffs and allow international carriers to offer resale services consistent with Mexican law. U.S. agreed to recognize Mexico's right to restrict International Simple Resale.

STAINLESS STEEL: No-injury-injury-no-injury antidumping remand seesaw for hollow stainless steel products from Japan stopped June 2 with Court of Appeals for Federal Circuit ruling upholding CIT Judge Restani's decision that last ITC no-injury decision is sustained.