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ADMINISTRATION OPPOSES CHINA RESTRICTIONS IN DEFENSE BILL

House passage May 20 of the National Defense Authorization Act (NDAA) (H.R. 4200) will put the Bush administration at odds with Congress over export controls on China. Along with many other concerns about the bill, the White House opposes provisions which would require licenses for all goods and technologies on the Militarily Critical Technologies List (MTCL) and also restrict trade with countries that sell defense items to China.

> The licensing requirement in Section 1404 of the bill for MTCL items would apply to requirements under the Export Administration Regulations (EAR) and the International Traffic in Arms Regulation (ITAR). Most of these technologies are subject to some level of control already.

A second provision, Section 1405, is aimed at U.S. allies that want to sell defense items to China. It would require licenses under EAR and ITAR for exports to any foreign person or country that has previously exported "any such item to the military, intelligence, police, or internal security services of the Government of the People's Republic of China that would be prohibited for export to China if subject to United States export control laws." The measure would require Defense concurrence in the approval of any such license and require foreign customers to agree "in writing not to transfer title to or possession of, or otherwise provide access to, the licensed items, unless the President provides written consent thereto."

COURT AFFIRMS ITC VIEWS ON SAME-PERSON RULE IN PRIVATIZATION CASES

The U.S. Court of Appeals for the Federal Circuit has ruled that the International Trade Administration (ITA) must treat the sale of stock and the sale of assets the same in determining whether the privatization of a formerly state-owned company eliminates the subsidy in a countervailing duty case. In *Alleghany Ludlum* issued May 13 (cases 03-1189 and 1248), the court relied heavily on its 2000 decision in *Delverde III* to sustain Court of International Trade (CIT) Judge Judith Barzilay's rejection of the ITA's old "same-person" methodology for considering privatization (see **WTTL**, March 8, page 2).

ITA changed its privatization methodology and established a new one because of the CIT's previous rulings and because of a World Trade Organization (WTO) panel decision which found the old approach, which treated a new owner to be the "same person" as the pre-privatization entity, to violate the WTO subsidy agreement (see story page 2). With this new ruling, a Commerce source said, ITA will begin applying its new methodology retrospectively as well as prospectively to CVD cases. "Because Congress has spoken directly to the issue of whether

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Commerce may treat sales of stock differently from sales of assets, this court need not defer to Commerce's interpretation," wrote Judge Randall Rader on behalf of the three-judge panel. Radar referred to the court's interpretation of Section 1677(5)(F) of the Trade Act in *Delverde III* to support his opinion. "A change in ownership neither necessarily extinguishes nor necessarily carries over a countervailable subsidy. Instead, this statute requires a fact-intensive inquiry into the circumstances surrounding the transfer of ownership, beyond the simple inquiry into whether the transaction occurred at arm's length," he wrote.

> While rejecting the old same-person rule, the appellate court may have opened the door to future litigation over ITA's new methodology, which relies on a "fair-market value" test. The court said its was specifically refraining from ruling on the new methodology, but it include derogatory comments about it any way.

"Simply put, Commerce's remand determination in light of *Alleghany I* appears to have substituted one inadequate methodology for a second inadequate methodology not taking into account the full and complete analysis under *Deleverde III* requiring an evaluation of whether the post-privatized entity continues to enjoy pre-privatization subsidies," Rader declared.

Losing parties now may claim ITA hasn't adequately conducted the required fact-intensive review of residual subsidies. Such challenges could produce a dual system of privatization tests. Fair-market value could become the standard for European industries, which are the main subject of privatization disputes now, where open, regulated stock markets accurately reflect company values. A different type of review may evolve for developing countries, including Brazil, Mexico and India, as well as former communist countries such as China, Russia and Vietnam, where the terms of privatization may not be as transparent and corruption-free.

CHARMING BETSY SUPPORTS COMMERCE COMPLIANCE WITH WTO RULING

A federal appellate court has reached back 200 years to find Supreme Court support for its argument that Congress, unless it states differently, intends U.S. trade law to be consistent with WTO rules. In *Alleghany Ludlum*, the Court of Appeals for the Federal Circuit May 13 cited the 1804 decision in *Charming Betsy* to support its interpretation of countervailing duty (CVD) law in privatization cases (see story above). This issue isn't closed, however, and will be revisited in current WTO cases against the U.S. practice of zeroing in antidumping cases.

> The court's interpretation of the trade law "avoids unnecessary conflict between domestic law and the international obligations of this country," wrote Judge Randall Rader for the court. He cited a 2002 ruling in *Luigi Bormioli*, which said the CVD law "must be interpreted to be consistent with [international] obligations absent contrary indications in the statutory language or its legislative history."

Charming Betsy requires U.S. laws to be construed as not violating the law of nations if any other possible construction remains. A WTO panel had previously ruled that the old ITA "same-person" methodology for determining continuing subsidies after privatization violated the Agreement on Subsidies and Countervailing Measures. "Accordingly, where neither the statue nor the legislative history supports the same-person methodology under domestic countervailing duty law, this court finds additional support for construing 19 USC Section 1677(5)(F) as consistent with the determination of the WTO appellate panel," Rader stated. "In so doing, this court recognizes that the *Charming Betsy* doctrine is only a guide; the WTO's appellate report does not bind this court in construing domestic countervailing duty law," he wrote.

CANADIAN GOVERNMENT SEARCHING FOR NEW LUMBER OFFER

Canadian Trade Minister Jim Peterson wants to make a new offer to the U.S. to settle the ongoing softwood lumber dispute, but no one in Canada – neither the provincial governments nor industry – can agree on what the new offer should be. There are plenty of options being

floated in Canada, but most are likely to be rejected by the U.S. Coalition for Fair Lumber Imports. Canadian Associate Deputy Trade Minister Elaine Feldman met with Commerce Under Secretary Grant Aldonas May 20 to discuss some of these ideas, but no progress was reported.

> Peterson met with provincial representatives May 17 and Canadian lumber producers May 18. Those meetings produced no consensus, sources reported. U.S. officials have said they have been waiting for a formal response and counteroffer from Canada to an offer Washington made in December.

With many Canadians feeling they are winning the battle over lumber in the NAFTA binational panel and at the WTO, some industry sources are wondering why Ottawa wants to negotiate an interim deal now. Skeptics in Canada say Peterson has shown renewed interest in the talks because Canadian Prime Minister Paul Martin is expected to call for elections in Canada and the government needs to show it is trying to resolve the lumber dispute. An announcement on elections could come over the May 22-23 weekend, with elections possible on June 28.

Canadian lumber producers and provinces have raised several concerns they want addressed in a counteroffer. First of all, they want assurances that provinces that eliminate the current stumpage fee system for lumber in Canada will actually have countervailing duties on their lumber dropped under the terms of a draft Commerce Policy Bulletin. Some firms don't trust Commerce to make the "changed circumstances" determination that is promised in the bulletin and fear an interim agreement will become a permanent Softwood Lumber Agreement V.

Thus, one proposal calls for creation of an independent binational panel to judge whether the provincial actions meet the conditions in the bulletin. No one expects the Coalition to accept that idea, which also would circumvent U.S. trade law. British Columbia has offered to raise its stumpage fees to eliminate the subsidy the U.S. claims it currently gives its industry. That idea reportedly has gotten a negative reaction from the Coalition and other Canadian provinces. A second major issue is the $2 billion in cash deposits importers have paid under the current CVD order. The Coalition wants to get about half of that money under the Byrd Amendment. Many in Canada want all the money returned, if Canada prevails in the NAFTA dispute process.

Meanwhile, the NAFTA panel has rejected an International Trade Commission (ITC) request for an extension of time until mid-July to respond to the second remand ruling on its threat-of-injury finding in the case. The remand determination was due May 10. The panel gave ITC until close of business May 27 to submit its revised determination. It also reject the commission's request to be allowed to reopen the record. Thus, the determination will have to be made on the exist-ing record (see **WTTL,** May 3, page 2). There is now a growing expectation that the U.S. will seek an Extraordinary Challenge Commission of NAFTA trade ministers to review conflict-of-interest charges aimed at one of the NAFTA panelists, Louis Mastriani.

ITA REJECTS CHINESE INDUSTRY PLEA FOR MARKET-ORIENTED STATUS

ITA has turned down a request from Chinese furniture makers to have their industry considered a market-oriented industry (MOI) in the current antidumping case against wooden bedroom furniture from China (see **WTTL**, May 3, page 1). "At this stage in the investigation, the department has not received any substantial evidence on behalf of the Chinese wooden bedroom furniture industry to support the initiation of an MOI inquiry," ITA Deputy Assistant Secretary Joe Spetrini told the furniture sub-chamber of the China Chamber of Commerce May 14.

"Before the department can consider whether to initiate such an inquiry, it must receive information which substantiates the claim that the Chinese wooden bedroom furniture industry fulfils the requirements of the MOI test," he explained. Without such information, the industry will continue to be treated as part of a nonmarket economy, Spetrini said. His rejection came as ITA was starting to receive comments on its review of China's NME as part of the process initiated following the meeting of the U.S.-China Joint Commission on Commerce and Trade (JCCT) in April. China's Ministry of Commerce submitted comments noting that Singapore and

New Zealand have given China market-economy status. The ministry claimed China meets the six criteria in U.S. trade law for being designated a market economy, including allowing the free convertibility of its currency and enacting laws to allow independent unions. "China observes that governments worldwide are involved and intervene in their economies," the comments stated. This includes other countries that the U.S. treats as market economies.

> "In assessing whether the Chinese economy is market driven to the necessary 'extent', the central questions with respect to alleged distortions should not be whether distortions exist, as distortions exist in all economies, but rather whether each alleged distortion is of the type intended to be addressed by the Subsidies Code and Antidumping Agreement," the Chinese stated. These remedies are adequate for China, they suggested. The use of surrogate countries in NME cases to avoid distortions in pricing produces its own distortions, the comments argued.

Comments from the Committee to Support U.S. Trade Laws pointed out that China's WTO accession agreement allows the U.S. to maintain its NME status for up to 15 years. "CSUSTL also reminds the department that the fifteen-year period during which NME methodology would apply to China was identified as a reason why members of Congress should vote to pass the legislation implementing China's WTO accession and the associated U.S.-China bilateral agreement," the group wrote. Commerce should not truncate this period and "undermine the bargain reached in the U.S. Congress," it added.

* * * BRIEFS * * *

SYRIA/LIBYA: BIS Assistant Secretary Peter Lichtenbaum May 20 told advisory committee that agency is aware of some "glitches" industry has identified in recent Syrian and Libyan trade rules. Industry has complained about dual-licensing requirement for vessels trading with Libya. Libya rules are interim with opportunity for comment, he pointed out. "I'm sure there'll be some modifications," he told PECSEA. Regarding Syria, however, any changes would be up to State.

CHLORINATED ISOCYNURATES: Clearon and Occidental Chemical filed antidumping complaints at ITA and ITC May 14 against chlorinated isocynurates, chemical used to chlorinate pools and other cleaning products, from China and Spain.

CUBA: Lawmakers in House and Senate May 20 introduced bills (S. 2449) to require current Cuba trade sanctions to expire in year and require congressional approval to continue on year-by-year basis.

CHINA: Returning from visit to China, BIS Under Secretary Kenneth Juster said May 20 that U.S. and China have agreed to schedule several of 20-plus post-shipment verifications on BIS high-priority list. U.S. and China in April agreed to improve PSV cooperation (see **WTTL**, April 26, page 3).

COPPER: Comments and oral statements on pending BIS short-supply investigation of copper and copper-alloy scrap debated whether export sanctions were WTO-legal. Attorneys at Patton Boggs, representing Institute of Scrap Recycling Industries, contend restrictions would violate GATT Article XI. Skip Harquist of Collier Shannon Scott, representing petitioners in foundry industry, argued GATT Article XI:2(a) does permit export prohibitions temporarily to prevent or relieve shortages.

MISCELLANEOUS TARIFFS: House named conferees May 20 to meet with Senate on annual miscellaneous tariff bill (H.R. 1047). "I hope the Senate will follow suit and appoint conferees as soon as possible," said Senate Finance Committee Chairman Chuck Grassley (R-Iowa).

EXPORT ENFORCEMENT: Based on administrative law judge's recommendations, BIS Under Secretary Kenneth Juster issued order in May 18 Federal Register imposing 10-year denial of licensing privileges on Arian Transportvermittlungs of Cologne, Germany. Firm failed to respond to charging letter.

AUSTRALIA: U.S. and Australia signed FTA May 18. Key support for accord came from House Democrats Reps. Charles Rangel (D-N.Y.) and Sander Levin (D-Mich.), but chances remain uncertain that Congress will vote on agreement before elections (see **WTTL**, May 10, page 1).

MUNITIONS LIST: State in May 21 Federal Register issued final rule amending ITAR to reflect changes in controls for Category IX for military training and Category X for protective equipment, including commodity jurisdiction shift to BIS for certain protective equipment (see **WTTL**, May 10, page 4).