

Washington Tariff & Trade Letter®

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

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301-570-4544 Fax 301-570-4545

Vol. 28, No. 8

February 25, 2008

INDUSTRY FEARS BIS WILL REPROPOSE DEEMED EXPORT RESTRICTIONS

The exporting community is concerned that the Bureau of Industry and Security (BIS) intends to repropose a change in its deemed export regulations to tighten restrictions on the access foreign nationals have to controlled technology. BIS the week of Feb. 18 reportedly started interagency discussions on the implementation of recommendations in the December report from its Deemed Export Advisory Committee (DEAC). Industry sources, however, are afraid BIS will only seek to implement the DEAC's recommendations for tougher controls on foreign nationals but ignore the rest of the report's call for reducing the number of items on the Commerce Control List that are subject to deemed export controls (see **WTTL**, Feb. 18, page 3).

Industry sources expect BIS to go back to its controversial March 2005 request for comments on the Commerce Inspector General's recommendations, which called for basing deemed export requirements on the country of birth of foreign nationals rather than their most recent country of citizenship. The IG's recommendations reportedly responded to concerns raised by Defense about the access Chinese-born Canadian citizens have to controlled U.S. goods and technology.

The DEAC had recommended, "Expanding the determination of the national affiliation of potential licensees to include consideration of country of birth, prior countries of residence, and current citizenship, as well as the character of a person's prior and present activities, to provide a more comprehensive assessment of probable loyalties." Although BIS is not likely to shift entirely to a country-of-birth standard for deemed exports, it may use the DEAC's advice to require applicants to provide more information on their backgrounds, sources say.

Academia also has concerns about the DEAC report. In a joint Feb. 20 letter to Commerce Secretary Gutierrez, the Association of American Universities and the Council on Government Relations urged the department to reject the DEAC's proposed flow chart for deciding on the need for a deemed export license. "Based on discussions with individual DEAC members, it is not clear to us that the Committee's intent was to recommend that the decision process necessarily be conducted sequentially through the seven steps depicted in Figure 1 of the report," the groups said. "We would be very concerned if Commerce were to view the loyalty assessments discussed in step one as normally initiating the process," they added.

DOHA TALKS ON RULES, NAMA SHOW WIDE DIFFERENCES

Hopes for a breakthrough in Doha Round negotiations by Easter, which falls on March 23 this year, aren't likely to be realized, talks in Geneva the week of Feb. 18 suggested. Although the

Copyright © 2008 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail is \$647 a year. Combo subscription of print and e-mail is \$747. Additional print copies mailed with full-price subscription are \$100 each. Circulation Manager: Elayne F. Gilston

U.S. is pressing for a mini-ministerial around Easter, negotiations at the World Trade Organization (WTO) to prepare for the ministers' meeting are not likely to make enough progress until sometime in April at the earliest, sources indicate. Informal meetings held during the week on draft texts dealing with WTO rules, agriculture and non-agriculture market access (NAMA) showed wide differences remain over key provisions in each of the draft texts.

At a Feb. 20-21 meeting, members for the first time had the chance to react to the Feb.8 revised draft on NAMA issues presented by Ambassador Don Stephenson, the chairman of the NAMA talks. A number of speakers reportedly complained that the text was a "step backward" from his July 2007 draft. Stephenson defended his paper by saying it accurately reflects the state of the negotiations, which have not made much progress in seven months. The mood at the meeting "was not overwhelmingly negative, but very negative," one source told WTTL.

Speakers objected particularly to Stephenson's suggestion that countries had to negotiate a balance between the flexibilities that developing countries are seeking and the lower coefficients and deeper tariff cuts developed countries want. Stephenson told the group he would not serve as facilitator trying to bridge the differences of members over the provisions in the text. He said it was up to the members to negotiate a compromise. He announced plans to hold additional talks on his text with a small group of countries Feb. 25-27.

A meeting Feb. 18 on the draft rules text offered in November by the Ambassador Guillermo Valles Galmes, chairman of the rules negotiations committee, also saw broad disagreement, with several countries complaining about provisions in the paper that would allow the U.S. to restore its zeroing policy partially in antidumping cases (see **WTTL**, Dec. 17, page 1). "Zeroing has become such a big issue because so many countries are not in favor of it," one source told WTTL. Valles said he had tried to balance the text by including provisions other countries wanted such as a 10-year permanent sunset rule on antidumping and countervailing duty orders, opening trade cases to interested parties, and restricting subsidies for fisheries. The first two of these are provisions that import-sensitive industries in the U.S. have strongly opposed and which Commerce officials say they will fight to have amended in the talks.

Although the U.S. wants any ministerial meeting to focus on agriculture and NAMA, other countries, particularly Japan, want the rules text to be part of any "horizontal" negotiations. WTO Director General Pascal Lamy is warning members to avoid "overloading" the ministerial. The rules negotiations have not received as much publicity as agriculture and NAMA, but they could become a roadblock to any final Doha deal at the end of the year. At the end of the Uruguay Round in December 1993, U.S. opposition to the near-final agreement on rules almost scuttled the talks, and only last-minute revisions allowed ministers to reach a final accord.

MANCUSO DEFENDS SELECTION OF VEU CANDIDATES

Criticism of BIS approval of the first five Chinese Verified End Users (VEU) represents "not only a leap of logic...but is controverted by the facts," BIS Under Secretary Mario Mancuso told the Heritage Foundation Feb. 20. Mancuso defended the process the agency used to review and approve the initial VEUs against charges raised by the Wisconsin Project on Nuclear Arms Control, a Washington think tank and export control monitor, which specifically criticized two of the VEUs either because of their link to the Chinese military or because of export compliance problems of their affiliated companies.

Mancuso's defense of the VEU decisions was also included in a Feb. 15 letter to Rep. Edward Markey (D-Mass.), who had written to Commerce Secretary Carlos Gutierrez asking for a response to the criticism of the VEU selections (see **WTTL**, Feb. 4, page 2). Questions about the VEU selections were specifically aimed at BHA Aerocomposite Parts (BHA) and Shanghai Hua Hong NEC Electronic Company (HHNEC). BHA is a joint venture that includes Boeing Company, Hexcel Corporation and China Aviation Industry Corporation 1. The Wisconsin Project complained that firms related to these companies have a history of export control

violations and therefore BHA should not have been granted VEU status. It argued that HHNEC is a subsidiary of China Electronics Corporation, a large conglomerate whose subsidiaries are involved in Chinese military activities and hence should not have gotten VEU authorization.

Mancuso said the corporate affiliations of the VEU recipients was “very, very attenuated” from the activities the Wisconsin Project was concerned about. He conceded that the Chinese government plays a different role in China’s industrial structure than other governments, but said the selected VEUs had multiple owners and different management teams than their affiliates. “Of course we looked at corporate affiliations,” he said. The interagency committee that reviewed the VEUs and recommended their approval looked at public information and also “classified information that is not available to the public,” Mancuso said.

3COM’S CFIUS DECISION NOT SEEN AS PRECEDENT ON CHINESE INVESTMENT

The decision of 3Com Corporation Feb. 20 to withdraw its notice to the Committee on Foreign Investment in the U.S. (CFIUS) of its proposed merger with an investment group that includes a Chinese company isn’t a sign of broad government opposition to Chinese investment in the U.S., trade observers contend. They say 3Com had specific problems, related to its anti-hacking software business, which the company should have known had to be resolved before it even filed its notice with CFIUS. Among the software’s users are government agencies, including the Pentagon, which has been the target of hacking attempts from China.

Trade sources believe 3Com’s announcement coincided with the end of CFIUS’ 45-day review of its planned merger with Bain Capital Partners, LLC and Huawei Technologies of China. 3Com apparently faced a CFIUS decision to block the merger or the passing of the issue to President Bush, who would have been likely to block the deal if there were interagency disagreement; as there reportedly was.

“We are very disappointed that we were unable to reach a mitigation agreement with CFIUS for this transaction,” said 3Com CEO Edgar Masri in a statement. “While we work closely with Bain Capital Partners and Huawei to construct alternatives that would address CFIUS’ concerns, we will continue to execute our strategy to build a global networking leader,” he added.

“I don’t think a country in the world would have let that deal go through,” said Stephan Canner, vice president for international investment policy at the U.S. Council for International Business. Canner, who served as the first chairman of CFIUS while he was in government, said, “I would not see this as a stain on U.S. investment policy.” The 3Com situation “is not a new type of case,” argued Christopher Wall, a partner with the firm of Pillsbury Winthrop Shaw Pittman. He pointed to CFIUS cases dating back to 1988 where the government raised concerns about technology transfer and required companies to institute technology control plans or take other measures to prevent foreign access to sensitive technology. “There is a risk that this case can be misinterpreted in a way it shouldn’t be,” Wall said.

COURT BACKS COMMERCE OPPOSITION TO ITS OWN VICTORY

After winning a Court of International Trade (CIT) ruling sustaining its scope determination in the antidumping case against imported shrimp, Commerce’s International Trade Administration (ITA) won an appellate court ruling Feb. 15 overturning the CIT. “Commerce, although a defendant in this action, joins plaintiffs in arguing that the trial court erred in dismissing the action and has taken the unusual position of asking this court to grant the relief requested by plaintiffs — a remand to the trial court to determine on the merits whether Commerce erred in excluding dusted shrimp from its final determination,” the Court of Appeals for the Federal Circuit (CAFC) ruled (Case 2007-1230). “We agree with plaintiffs and Commerce,” the CAFC stated. “While we affirm the trial court’s holding that it was without power to order Commerce to amend the antidumping order itself, we reverse its holding that it did not have power to

review Commerce's final scope determination," it stated. The CAFC remanded the case to the CIT to review the scope determination. "Despite the clear statutory text, the trial court held that it had no authority to remand the final determination to Commerce because doing so 'might well prove to be a useless exercise' if the ITC refused to act voluntarily to modify its final injury determination, thus, preventing the amendment of the antidumping order," Circuit Court Judge Arthur Gajarsa wrote for the three-judge panel.

"Neither the statute, our case law, nor general principles of agency adjudication provide any support for such a novel legal theory," he stated. "A federal court cannot avoid ruling on the legality of a government action when review of the action is otherwise properly before the court simply because there is no guarantee that fixing the error will change the ultimate result," Gajarsa wrote.

STUDY CALLS FOR SHIFTING SATELLITE CONTROLS BACK TO COMMERCE

The shift of export control jurisdiction for commercial satellites to State from Commerce has caused serious injury to the U.S. aerospace industry and licensing responsibility for most these products and their components should be returned to Commerce, a study by the Center for Strategic and International Studies (CSIS) has concluded. The study, prepared for the Air Force on the health of the U.S. space industry and the impact of export controls, won't be published for several months, but members of the working group that prepared it gave an advance briefing on its contents Feb. 19. The CSIS working group, which included industry representatives and consultants, found that the U.S. share of foreign space markets has declined since 1999 when Congress mandated that satellites be regulated on the U.S. Munitions List (USML).

The working group recommended that commercial satellite systems, dedicated subsystems and components be moved from the USML to the Commerce Control List but with Defense identifying critical components and technology that should always require licenses and interagency referral. "The key here is to identify the critical space control – space technologies that you want to keep on the Munitions List and then move the satellites, the overall satellites, back off the munitions list onto a Commerce list," said CSIS Senior Associated Pierre Chao.

* * * BRIEFS * * *

FCPA: Flowserve Corporation reached deferred prosecution agreement with Justice Feb. 21 to settle charges that it violated FCPA by paying illegal kickbacks to Iraqi officials as part of U.N. Oil for Food Program. Firm agreed to pay \$4 million penalty as part of deal. In separate settlement with SEC, Flowserve agreed to disgorge \$2,720,861, in profits, plus \$853,364 in pre-judgment interest, and pay civil penalty of \$3 million.

RWANDA: While in Africa Feb. 19, President Bush signed Bilateral Investment Treaty with Rwanda. This is first BIT concluded between U.S. and Sub-Saharan African country since 1998.

OFAC: Agency Feb. 14 issued one-page guidance on what U.S. person must consider when complying with restrictions placed on blocked parties. "A person whose property and interests in property are blocked pursuant to an Executive order or regulations administered by OFAC (a "blocked person") is considered to have an interest in all property and interests in property of an entity in which it owns, directly or indirectly, a 50% or greater interest," OFAC advised.

ESPIONAGE: Lawyers for Dongfan (Greg) Chung and Santa Ana U.S. Attorney's office filed opposing motions Feb. 14 and 15 on whether Feb. 6 indictment of Chung on Economic Espionage Act charges should be considered "related case" to prosecution of Chi Mak who was convicted for violating export controls (see WTTL, Jan. 14, page 1). Chung was released on bail Feb. 19. His trial is scheduled for April 8. Case has been assigned to U.S. District Judge Cormac Carney, who also sat on bench in Mak case.

EXPORT ENFORCEMENT: Protective Products International Corp. of Sunrise, Fla., has agreed to pay \$65,000 civil fine to settle BIS charges that it exported ballistic helmets without approved licenses and failed to retain required records. It will pay fine in four quarterly installments of \$16,250 each.