

# Washington Tariff & Trade Letter®

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

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## REP. MARKEY ASKS BIS TO STOP GRANTING VEU AUTHORIZATIONS

Rep. Edward Markey (D-Mass.) has urged the Bureau of Industry and Security (BIS) to stop approving new Validated End Users (VEUs) or making new countries eligible for VEU treatment until it answers his continuing questions about the selection of VEU candidates. In a March 20 letter to BIS Under Secretary Mario Mancuso, Markey indicated he was unhappy with Mancuso's response to an earlier letter he had sent to Commerce raising concerns about two Chinese firms that were among the first VEUs approved (see **WTTL**, Feb. 25, page 2).

"I strongly recommend that you take no action to expand the VEU program until Congressional concerns have been allayed," Markey wrote. "Specifically, I expect that no new companies will be awarded VEU status and no new countries will be made VEU-eligible for the time being," he told Mancuso.

Even without congressional concerns, the VEU process at BIS has been frozen since October 2007 when the agency approved the first five and only VEUs for China. Some private-sector sources have suggested there is Chinese government resistance to allowing more firms to get VEU status. BIS, meanwhile, has been trying to encourage Indian firms to apply for VEU treatment. "If BIS follows Markey's guidance, the Indian VEU is a null set," says Don Weadon of Weadon & Associates in Washington.

Although Mancuso had provided Markey a 7-page response to questions the lawmaker had asked about the VEU program, BIS refused to share confidential information it had used to make its VEU decisions. The agency, citing Section 12(c) of the Export Administration Act (EAA), claimed it could only share such information with "committees of jurisdiction" in Congress, indicating that the House Energy and Commerce Committee's subcommittee on telecommunications and the Internet, which Markey chairs, isn't one of them.

Markey responded by saying 12(c) doesn't authorize BIS to withhold information from Congress. "This provision makes clear that the EAA does not provide a statutory basis for your refusal to respond to questions in my January 29 letter," Markey wrote.

## CLOSENESS OF DOHA DEAL ISN'T CERTAIN, GENEVA SOURCES SAY

A statement by Brazilian President Lula da Silva March 19 – saying a Doha Round deal is closer than people think – may or may not be accurate, depending on whom you talk to in Geneva. Diplomats and sources close to the talks continue to have differing views on the potential for a breakthrough in the negotiations, although many agree the scheduling of a

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possible mini-ministerial to workout a preliminary deal keeps getting pushed further away. Some suggest there won't be enough progress for ministers to discuss until the last week of April, but others say a meeting might not be possible until May, June or even July.

Lula's statement came after talks with European Union (EU) President Manuel Barroso. The two reportedly tried to reach agreement on how to handle sensitive products – those that developed countries such as EU members want to protect – in any agriculture deal.

"We have been reading so many of these stories....I don't know if you can read that much into it," one source said. Yet a developing country ambassador to the WTO told WTTL that Lula's observation is true. Some sources claim progress is being made in the agriculture negotiations, while talks on non-agriculture market access (NAMA) are beginning to focus on potential options for balancing industrial tariff cuts and flexibility to protect some sectors (*see story below*). Agriculture negotiations in Geneva have been positive, a trade negotiator said. "The negotiations are going very well," he noted. Negotiators are pragmatically engaged on sensitive products, he added; saying: "We expect an outcome very soon."

The main concern about sensitive products in the farm talks is what Switzerland, Norway and Japan are doing, said Ravi Bangar, India's deputy permanent representative in Geneva. Domestic consumption data that are needed to set tariff-rate quotas (TRQs) are still incomplete, he said. India is waiting to see what is going to happen, he added. "That will have a great deal of bearing on where we go, how far we go" in the other negotiating areas, Bangar said. Consumption data and TRQs need to be clearly defined, he said (see WTTL, March 17, page 5).

Despite optimistic statements, many in Geneva remain skeptical about the chances for a breakthrough in the coming months or a final deal by the end of the year. "There has been progress, but we have been saying that on many subjects for a long time," one observer in Geneva told WTTL. "We all see the deal; it's just that nobody wants to announce it," he said. The general feeling is that nobody is daring enough to say there is no chance for a deal, so they have given World Trade Organization (WTO) Director General Pascal Lamy the authority to continue to prepare for a meeting of the ministers, the observer said.

About 80% of diplomats in the room when they agreed to plan for a ministerial didn't believe it was going to happen. "Nobody wanted to say anything negative because nobody wants to be blamed for having been pessimistic or not willing to do the deal," he added. Unless someone has something hidden up the sleeve, "I don't see the deal coming," the observer said.

## **DOHA TARIFF TALKS NARROW FOCUS TO BALANCE CUTS AND FLEXIBILITY**

Doha Round negotiations on non-agriculture market access (NAMA) are converging on eight options to balance the demands of developed countries for deep cuts in industrial tariffs and those of developing countries for flexibility to protect certain sectors. Of the eight, three are gaining the most support, diplomats in Geneva report; setting the stage for a potential breakthrough in one pillar of the Doha Round. When Canadian Ambassador Don Stephenson in February issued his last draft paper on a potential NAMA deal, he increased the uncertainty in the negotiations, one Asian trade official told WTTL. The options now being discussed appear to have eased those concerns, although a final framework is not yet agreed upon, sources say.

With varying formulas, the options offer to give developing countries the flexibility to exempt up to 15% of their tariff lines from final tariff cuts in exchange for lower coefficients – meaning deeper cuts – in their remaining tariffs. The options provide a menu approach, the Asian trade official said. Some countries are against the idea, but most seem to accept it, he reported. Some of the eight options have been rejected, while others have been accepted as more likely, said an official close to the talks. Stephenson plans to hold more talks on the options the week of March 24. Three options have gained the most support since they were floated in February. The first is called "flexibilities within flexibilities." The second is

"sliding-scale," and the third is "combining flexibilities." A variant of the "sliding-scale" option has gained the most support, said one official. Under it, a coefficient of 24 would have flexibilities for no tariff lines. Choosing a coefficient of 21 would include less than formula cuts for 10% of tariff lines provided the cuts are no less than half the formula cuts and the tariff lines do not exceed an as-yet-to-be determined percentage of the total value of a country's non-agricultural imports. Also under this plan, a coefficient of 21 would permit up to 5% of a country's non-farm tariff lines to be kept unbound as an exception provided they do not exceed a yet-to-be-determined percentage of the total value of a country's non-agricultural im-ports.

[**Editor's Note:** Copy of outline of eight options will be sent to WTTL subscribers on request.]

At least one of the options may address the concerns of Mercosur, the South American trade block, over tariff-cutting requirements that might undermine the benefits of its common external tariffs and the benefits other customs unions offer members. A proposal to link tariff-cutting formulas with sectoral tariff negotiations has drawn objections from many countries, especially developing nations. Because the sectoral talks are voluntary, they say there should be no tie to other tariff-reduction commitments, said one official close to the talks.

## TWO APPOINTMENTS MAY SHAPE EXPORT POLICY IN BUSH'S LAST YEAR

Export control policies in the last year of the Bush administration could be shaped significantly by appointments the president made to key positions the week of March 17. The president on March 18 said he intends to nominate veteran trade attorney Christopher Wall to be BIS assistant secretary for export administration. He named Assistant Attorney General for National Security General Kenneth Wainstein on March 19 to be his assistant for homeland security and counterterrorism. Wall's nomination, once submitted, is subject to Senate confirmation.

Wall, who is a partner with the law firm of Pillsbury Winthrop Shaw Pittman in D.C., has specialized in export control laws, including dual-use and military, for several years, and also has represented companies undergoing review by the Committee on Foreign Investment in the U.S. (CFIUS). In November, he participated in a WTTL audio-briefing conference on changes in CFIUS rules. An avid outdoors man, he climbed Mount Kilimanjaro in Tanzania in December.

Wainstein, a former U.S. Attorney for the District of Columbia, was one of the driving forces behind the launching of Justice's counterproliferation initiative last October. The program is supposed to coordinate the export law enforcement activities of several federal agencies, including BIS, and help train U.S. attorneys around the country on export laws. "He tied the whole package together and was able to publicize it," said former BIS Deputy Assistant Secretary Wendy Wysong, who is now with the law firm of Clifford Chance. "Ken was able to get it done because he had the gravitas and authority," she added.

Wall in May 2006 was caught in the middle of the controversy over export licensing requirements for the QRS-11 aviation sensor when his then-client, Goodrich, reached a consent decree with State's Directorate of Defense Trade Controls (DDTC) for exporting the sensor without a license. In an usual step, the DDTC charging letter to Goodrich specifically mentioned Wall and his partner, Thomas deButts, and detailed the legal advice they gave Goodrich, suggesting that the advice wasn't proper. In an article in the April 2006 issue of *The Export Practitioner*, our affiliated publication, Wall and deButts refuted the implications in the DDTC letter.

"The State Department's Goodrich/L-3 draft charging letter is, not surprisingly, one-sided," they argued. "We provided legal advice to our client based on DDTC's own regulations and published guidance and the facts known to us at the time, and we stand by that advice," they continued. "Because of the public controversy over the QRS11, those who practice in the area now know what DDTC's position is and will follow it in the future, even if the position has not been established by legal means. Companies settle cases for many reasons, not the least of which is the power DDTC exercises over licensing and the reprisals that could be exacted if

they do not accede to State's position. The fact remains, however, that enforcing an unpublished rule retroactively is not consistent with due process," they asserted.

### **AMICUS BRIEF CLAIMS EURODIF RULING CREATES "ENORMOUS LOOPHOLE"**

The ruling of the Court of Appeals for the Federal Circuit (CAFC) in the *Eurodif* case will create an "enormous loophole" in the antidumping law if it is not reversed, argued an amicus curiae brief filed March 17 by the Committee to Support U.S. Trade Laws (CSUSTL) and the United Steel Workers Union in support of the government's petition to the Supreme Court for a writ of certiorari to review the appellate court's decision. CSUSTL, which represents several industries whose members have often been domestic petitioners in antidumping cases, said the "decision by the federal circuit is not only erroneous – elevating form over substance – but outright dangerous because it provides a means for foreign manufacturers to engage in dumping with impunity merely by restructuring contracts."

The CAFC in *Eurodif* had ruled that imports of low enriched uranium (LEU) which had undergone enrichment under separate work unit (SWU) contracts represented a service and thus were not covered by the antidumping law which applies only to goods imports. The appellate court had upheld an earlier ruling by the Court of International Trade (CIT) (see **WTTL**, March 10, page 1).

"After conferring with the key administration agencies involved in international trade and national defense issues and obtaining their support, the Solicitor General has for the first time in history asked the Supreme Court to hear an antidumping case," noted the brief prepared by CSUSTL Executive Director David Hartquist with the firm of Kelley, Drye and Warren in Washington. "The request by the Solicitor General demonstrates the significance of the issues raised in the petitions for writs of certiorari and the importance of having the Federal Circuit's decision reviewed and reversed to preserve the efficacy of the U.S. antidumping law," it said.

"This broad holding by the Federal Circuit means that even if merchandise is imported as the statute contemplates, the merchandise will not be subject to the law so long as the transaction is structured essentially as a toll processing transaction. A variety of products, including in particular steel and other metal products, chemicals, and textiles, are often sold under toll processing arrangements," it noted. Under the CAFC's holding, "structuring a sale as a toll sale would permit the evasion of antidumping duties, creating a serious loophole to the law."

#### \* \* \* BRIEFS \* \* \*

EXPORT ENFORCEMENT: WaveLab, Inc., of Reston, Virginia, pled guilty March 7 in Alexandria, Va., U.S. District Court to violating EAR with exports of microwave amplifiers to China without approved licenses from BIS. It agreed to forfeit \$85,000 in profits from sales. "WaveLab admitted at its guilty plea that notwithstanding its knowledge of the licensing requirement, it failed to obtain a license for the export of more than 2,400 power amplifiers," a Justice statement noted. In separate administrative settlement with BIS, company accepted five-year denial order, which BIS immediately suspended and said it would waive, if WaveLab stays in compliance with export rules.

MORE EXPORT ENFORCEMENT: Allied Telesis Labs, Inc. (ATL), subsidiary of Japan's Allied Telesis Kabushi Kaisha, entered guilty plea March 18 in Raleigh U.S. District Court to conspiracy to violate IEEPA by attempting to negotiate contract with Iranian Information Technology Company to rebuild telecommunications systems in approximately 20 Iranian cities, including Tehran. As part of plea agreement, ATL agreed to pay \$500,000 fine. Iranian deal never went through.

FCPA: AB Volvo, Swedish maker of trucks, buses and construction equipment, reached agreements with Justice and SEC March 20 to resolve charges that it violated FCPA with illegal payments to Iraqi officials to obtain business under UN Oil for Food Program. In deal with SEC, it agreed, without admitting or denying allegations, to disgorge \$7,299,208, in profits plus \$1,303,441 in prejudgment interest, and pay civil penalty of \$4,000,000. It agreed to pay \$7,000,000 penalty as part of deferred prosecution agreement with Justice. "Volvo is not the company that currently makes the 'Volvo' brand car," SEC noted.