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Mancuso Says BIS May Suspend VEU Program for China

Bureau of Industry and Security (BIS) Under Secretary Mario Mancuso Dec. 17 said the agency is considering formally suspending the Validated End User (VEU) program for China because of the inability of the U.S. to reach a new agreement with Beijing on plant visits and audits of Chinese VEU holders in China. Mancuso's statement came in response to an article in the *Washington Times* which said BIS has already drafted a Federal Register notice to suspend the program and quoted an unnamed agency official saying the notice would be issued before the Bush administration leaves office Jan. 20, if no new agreement is reached with the Chinese.

WTTL reported in May that BIS had put the program on the shelf, and since then BIS has issued no new VEUs. Agency officials have reported that they have received applications for VEUs from Indian entities, but those too have languished. The VEU program has faced strong criticism from the Wisconsin Project, a conservative think tank, as well as from Rep. Edward Markey (D-Mass.) and the Government Accountability Office (see **WTTL**, Nov. 3, page 4).

"We continue to work on an agreement that would formalize procedures for VEU-specific on-site reviews," Mancuso said in a statement. "The absence of such procedures does not pose a security risk. However, the lack of an agreement diminishes VEU's trade enhancing benefits, and Commerce is evaluating all options related to the program for China, including suspension," he said. "It is incorrect to report that the Commerce Department has been unable to conduct checks of facilities in China. Commerce does have the ability to conduct checks and recently conducted such checks under a pre-existing framework," he stated.

USTR-Designate Kirk Backs "Values-Driven Trade Agenda"

President-elect Barack Obama Dec. 19 said he will nominate former Dallas, Texas, mayor Ron Kirk to be his U.S. Trade Representative. Kirk, now a partner with the law firm of Vinson and Elkins, served as mayor from 1995 to 2001 and ran unsuccessfully for the U.S. Senate in 2002, losing to John Cornyn. At the press conference where he was named, Kirk said that like Obama, "I believe a values-driven trade agenda that stays true to our commitment to America's workers and environmental sustainability is not only consistent with a pro-trade agenda but is also necessary for its success." Obama added very little new light into what his trade policy will be. Kirk "is going to be responsible for assuring that there is reciprocity in all our trade agreements; that, if we are trading with a country and they are sending their goods into the United States, we better be able to sell American goods in their country; that on both sides of



the border, we end up having labor and environmental agreements that are enforceable, so we don't have a race to the bottom, but instead the standards of living of all workers are raised," Obama said at the press conference.



Ron Kirk

Earlier in his career, Kirk was Texas Secretary of State in 1994 and a Dallas assistant attorney. According to the law firm's Web site, he is on the board of directors of Brinker International, Dean Foods Company and PetSmart, Inc. and a national trustee for the March of Dimes. His only time in Washington appears to have been a stint as an aide to the late Sen. Lloyd Bentsen (D-Texas) in the Senate and when Bentsen became secretary of the Treasury.

Kirk's nomination comes late in the Obama Cabinet-filling exercise and may reflect the low priority the president-elect will give trade early in his administration. Kirk was not among the names mentioned early in the process as a possible USTR. Rep. Xavier Becerra (D-Calif.), who was widely considered Obama's first choice for the trade post, bowed out of contention Dec. 16 (see **WTTL**, Dec. 8, page 4). Speculation on potential USTR candidates suggested three types of candidates: one who was a close confidant of Obama; a political appointee with ties to Congress; or a bureaucrat or trade wonk. Kirk appears to match none of those categories.

With trade being a controversial and divisive issue among Democratic Party constituents, trade sources say Obama does not want to open that wound in the early days of his administration. They do not see new talks on bilateral trade agreements getting much attention, although the Doha Round would remain on the agenda. Pending FTAs with Colombia, Panama and South Korea are likely to remain languishing for a while. Instead, the focus for Kirk may be to fulfill Obama's campaign pledge to do a comprehensive review of trade policies and existing agreements to see what steps are needed to address the complaints of trade critics.

Business Has Lots of Advice on Trade for Kirk and Obama

Even before President-elect Barack Obama and USTR-designated Ron Kirk take office, they are getting lots of advice from the business community on what their trade agenda should be. Chamber of Commerce Vice President Daniel Christman Dec. 16 said the Chamber's proposed agenda has already been "used in two meetings with the Obama transition team at the USTR and Department of Commerce." Transition team members "are very careful and primarily in a listening mode," he added. "They wanted to know our role and effect in the last administration, our priorities, and our relationship with the agencies and world governments. The meetings were primarily focused on listening to us," Christman said.

Chuck Dittrich, vice president at the National Foreign Trade Council (NFTC) said getting Senate approval for the free trade agreements with Colombia, Panama and South Korea should be top priorities. "The risk is that the most commercially significant and valuable of all the recent FTA's may be the least likely to come to fruition in 2009 without strong and steady pressure on both the administration and Congress to act," he told reporters Dec. 12.

Dittrich predicted that the Panama FTA may be the first to be acted on by Congress, perhaps in the first six months. He said the Colombia agreement is likely to be reintroduced and passed in 2009 after an additional commitment or measurable milestone on labor union violence is negotiated with the new Obama administration. "Korea is less easily predicted given the current state of the U.S. auto industry," he said.

Industry also has renewal of fast-track negotiating authority, also known as trade promotion authority (TPA), on its agenda, along with completion of the Doha Round and renewal of Trade Adjustment Assistance (TAA), a must-have legislative priority for Senate Finance Committee Chairman Max Baucus (D-Mont.). "We support modernizing the TAA and support what Senator Baucus has on the table," Christman said. Chamber Vice President John Murphy said, "It is

important to move forward on TAA. It will be a goodwill gesture that will help get other deals.” Christman also stressed dealing with China. “China needs to depend on the markets for currency evaluation. The renminbi needs to be a currency dictated by the international currency markets,” Christman said.

Justice Moves to Seize Manhattan Office Building under IEEPA

In a rare – and certainly unprecedented for its size – suit for forfeiture, the Justice Department Dec. 17 file a complaint in the Manhattan U.S. District Court to seize an office building that the government claims is part-owned by a firm operating as a front for Iran’s Bank Melli. The government claims that Assa Corporation and Assa Company Limited, which own 40% of the 36-story office building at 650 Fifth Avenue in New York City, are operating for the benefit of Bank Melli, which had its assets frozen in 2007 by Treasury’s Office of Foreign Assets (OFAC) for being owned or controlled by the government of Iran. Separately, OFAC on Dec. 17 designated Assa Company in New York and Assa Company Ltd., in the Channel Islands as owned and controlled by Tehran.

The complaint for forfeiture claims Assa acted to funnel money to Bank Melli from the profits from rentals on the office building, which was constructed in the 1970’s by the Pahlavi Foundation, a non-profit organization operated by the Shah of Iran. After a series of name changes and financial deals following the shah’s fall from power, the foundation became known as the Alavi Foundation, which transferred 40% of the ownership in the building to Assa after Bank Melli cancelled a loan on the property, the government claims.

The complaint alleges that Assa violated the International Emergency Economic Powers Act (IEEPA) and the Iranian Transactions Regulations (ITR) by dealing with a designated entity. “Following issuance of the ITRs, but without an OFAC license to do so, Assa Corporation and Assa Company Limited continued to provide services to Bank Melli by maintaining Bank Melli’s interest in 650 Fifth Avenue Company and transferring income from 650 Fifth Avenue Company to Bank Melli,” a Justice press release alleged.

Full WTO Ministerial May Address Doha’s Future

In the wake of the failure of negotiators to reach key agreements in the Doha Round this year, some World Trade Organization (WTO) members are calling for a full-blown ministerial conference for all member countries to assess the talks and their future direction. The last regular ministerial was held in Hong Kong in December 2005. Ministerials are supposed to be held every two years, but three years have lapsed since the last one because of the concentration on the Doha negotiations and because no country has been willing to host a ministerial given the violence and destruction that marked the conferences in Hong Kong, Cancun and Seattle, as well as during other international trade and finance meetings.

Many delegates at a Dec. 17 meeting of the Doha Round’s Trade Negotiations Committee (TNC) “were pleading for holding our next regular ministerial meeting in the course of next year to take a strategic look at the future steps to advance the goals of the organization,” WTO Director General Pascal Lamy reported to the WTO General Council Dec. 18. At the TNC, Lamy said this would be discussed in the new year. “My own sense is that this need not be the big jamboree we have seen in the past,” he said. “On this issue, the General Council Chairman will consult with members to get their views and take this forward,” Lamy added.

But completing the Doha Round “remains our priority for '09,” Lamy told the General Council. He added, however, that the WTO is “more than the Doha and that we need to ensure that the organization remains relevant and attuned to the wider trading scene. The WTO has a particular responsibility to follow up on the trade measures that have been taken in the wake of the

financial crisis, Lamy said. The first report of a newly established task force was expected Dec. 19 or in the following week.

The global financial crisis could reduce chances for progress in the services leg of the Doha Round and especially on proposals for liberalizing financial services. The services talks could be victim of not concluding the round by now, one Latin American diplomat said. Some of the services offers may be revised downwards, he suggested.

Pascal Kerneis, managing director of the European Services Forum, said there is “no doubt” that countries will reconsider or revise services offers that are either now on the table or ready to go. China and India likely will change their posture on securities, Kerneis said. Demands to reduce regulatory powers in the financial area should go down because of the financial crisis, the Latin America ambassador said. The services offers so far haven't gone too deeply into financial regulation in part because of developing countries' concerns, said another developing country ambassador to the WTO. “There has always been a strong resistance to binding overly free financial regulations,” he said.

Intra-Company Transfer Proposal Will Need Major Rewrite

Broad industry objections to the burdens that would come with BIS' proposed Intra-Company Transfer (ICT) license exception will force the agency to undertake a major rewrite of its proposed regulations, BIS officials say. The dilemma for BIS, however, is how to revise the proposal to satisfy industry complaints while still being able to get interagency approval for a new rule. Many of the requirements for getting an ICT approved were included in the proposed rules at the insistence of State and Defense.

BIS has received 18 comments on the ICT proposal that was published in the Oct. 3 Federal Register (see **WTTL**, Nov. 3, page 1). Most of the comments supported the idea of the ICT but objected to the requirements imposed on getting approval from BIS for the license exception and burdens that come with an approved ICT. The comments suggested that because of the burdens imposed, the ICT “didn't seem worth it,” said Eileen Albanese, director of the BIS office of national security and technology transfer controls.

The comments said the regulation “was much more burdensome than it should be,” she told the Practicing Law Institute (PLI). Albanese said BIS will take the comments to heart and the next version “will probably not look like it does now.” She said it might take BIS some time to come out with a new rule, but BIS Assistant Secretary for Export Administration Christopher Wall, also speaking to the PLI conference, was more optimistic about coming out with a final rule early in 2009. The proposed ICT regulation was “not what Commerce would have proposed on its own,” he admitted.

Siemens Paying \$1.6 Billion in Penalties for FCPA Violations

In the largest penalty settlement ever under the Foreign Corrupt Practices Act (FCPA) and under German anti-corruption laws, Germany's Siemens Ag and three of its subsidiaries Dec. 15 agreed to pay \$1.6 billion in fines and forfeitures for paying \$1.36 billion in illegal bribes starting in the early 1990s. The bribes went to obtain contracts related to Oil-for-Food Program in Iraq and in separate deals in Argentina, Venezuela and Bangladesh.

At a hearing in D.C. U.S. District Court, Siemens pleaded guilty to a two-count information charging criminal violations of the FCPA's internal controls, books and records provisions. Siemens S.A.- Argentina, Siemens Bangladesh Limited, and Siemens S.A. - Venezuela each pled guilty to separate one-count informations charging conspiracy to violate the anti-bribery and books and records provisions of the FCPA. Under the plea agreement with the Justice Depart-

ment, Siemens agreed to pay a \$448.5 million fine; and Siemens Argentina, Bangladesh, and Venezuela each agreed to pay a \$500,000 fine. In a separate settlement with the Securities and Exchange Commission (SEC), Siemens agreed to pay \$350 million in disgorgement. Siemens also reached a deal with the Office of the Prosecutor General in Munich, Germany, to pay a fine of approximately \$569 million for violations of Germany's anti-corruption law. This fine is in addition to the \$285 million fine it paid the Munich Prosecutor in October 2007.

The government claimed Siemens became subject to the FCPA when it was listed on the New York Stock Exchange in March 2001. It said the bribery began before then and lasted to 2007. The complaints against Siemens said it made payments totaling approximately \$1.36 billion through various mechanisms, including approximately \$554.5 million for unknown purposes and about \$341 million in direct payments to business consultants for unknown purposes. Another \$805.5 million went in whole or part to foreign officials through such payment as cash desks and slush funds.

The illegal payments to government officials directly and indirectly in Argentina were aimed at winning contracts as part of a \$1 billion national identity card project. In Venezuela, the payments went to get favorable treatment on two major metropolitan mass transit projects called Metro Valencia and Metro Maracaibo. In Bangladesh, the payments between 2001 and 2006 were made through purported business consultants to various Bangladeshi officials in exchange for favorable treatment in the bidding process on a mobile telephone project.

Bailouts and Subsidies Could Lead to WTO Complaints

The loan program announced Dec. 19 for the U.S. auto industry, along with other bailouts and subsidies already approved or planned for the financial, energy and environmental sectors, could open U.S. exports to countervailing duty (CVD) complaints in other countries and challenges at the WTO, trade experts warn. "The bailouts are subsidies according to the WTO," said Christopher Parlin, one of the lead U.S. negotiators in the Uruguay Round, who is now an attorney with the firm of Miller & Chevalier in Washington. "There will be no safe harbors, even if one believes it can be structured. There is no protection in place for subsidizing greener and cleaner industry, which some think provides a fig leaf of protection," he told a Global Business Dialogue program Dec. 18.

"In the past, subsidies had to be qualified as giving the industry time to develop long term solutions and avoid injury to the public," Parlin noted. "This is legally irrelevant since now there are no such qualifications made now. Existing U.S. subsidies are to cover industry losses. Clearly this is WTO prohibited."

"There is no subsidy agreement in GATT," he noted. "There is always Article 21 of the GATT, on national security, but I think there is a reason it has not been evoked. It is using nuclear weapons, everything will be destroyed," Parlin said. "There is a lot of meat on these bones for lawyers looking for how best to attempt to prevent the mess or lawyers that plan to use it to their advantage," Parlin predicted.

"A negotiated solution is possible, look at semiconductors and steel," Parlin added. "There is nothing in the WTO charter to prevent a waiver. It would need a two-thirds vote in the WTO," he noted. Gary Hufbauer of the Peterson Institute for International Economics said "waivers are the last thing we want. We've had one on agriculture for fifty years and we are just now getting out of it." Hufbauer suggested "some governments should be putting together some model cases, so we all know these cases are out there. This could lead to restraint among other countries." Daniel Griswold of the Cato Institute said, "Subsidies often go to the least capable and competitive industries." Most cars sold in the U.S. today are not made by the Big Three but by foreign nameplates as a result of independent American consumer choices, he noted. "Maybe Ford and General Motors would be in better shape had we let Chrysler go out of business 28 years ago," Griswold argued. "Think of the precedent this will set. We already

have 19 federal agencies subsidizing exports – shipbuilding, aircraft engines; and we have already had our hands slapped on agriculture. What happened with Brazilian cotton could be applied to other agricultural and non-agricultural industries,” he said.

BIS Working with UAE to Ease Boycott Requirements

BIS has been able to work with the Ministry of Commerce in the United Arab Emirates (UAE) to have conditions that might trigger antiboycott reporting requirements removed from tender offers for construction projects, reports Ned Wendt, director of the BIS Office of Antiboycott Compliance. “We have been able to work with them to have these restrictions removed,” he told the Practising Law Institute’s annual conference on export controls Dec. 8. The UAE remains the leading source of boycott-related trade restrictions, although most anti-Israel conditions are imposed at the emirate level rather than by the UAE government, he said.

Wendt also reported that Syria has revised the conditions on trademark registrations to remove language that had prompted boycott reports to Commerce. Syria no longer requires the eight point conditions on trademark registrations, he said. In addition to the UAE, BIS has seen an increase in the number of boycott-related requirements in deals with Libya, coinciding with the increase in U.S.-Libya trade since the lifting of the U.S. trade embargo in 2004. It has also seen boycott requirements in tender offers issued in Qatar.

David Joy, who serves in the general counsel’s office in Treasury, also noted problems U.S. firms have dealing with boycott-related conditions in Lebanon. Treasury enforces Internal Revenue Service (IRS) penalties under the antiboycott law. Joy said the department does not consider vessel-eligibility statements, which confirm that a ship arriving in an Arab port has not stopped in Israel, to be boycott-related. “We consider that a war-risk clause,” he said, pointing out that Israel imposes similar restrictions on ships that have called at Arab ports. In Iraq, Joy said Treasury is waiting to see how new oil construction projects are handled. Even though Iraq is not listed as a participant in Arab League Boycott of Israel, some of its ministries have added boycott language to tender offers, he said.

*** * * Briefs * * ***

BROADCOM: ITC has decided not to seek en banc review of Court of Appeals for Federal Circuit’s ruling in Broadcom’s Section 337 case against Qualcomm (see **WTTL**, Nov. 24, page 4). Commission ALJ has reopened patent cases appellate court remanded to ITC. Broadcom is still considering options on what to do about exclusion order that court rejected, attorney for firm told **WTTL**.

SOFTWOOD LUMBER: ITA sent Congress report Dec. 15 on softwood lumber subsidies provided by major exporters to U.S. It said it found subsidies only in Canada and Brazil, but not in Chile or German (see **WTTL**, Dec. 8, page 4). “A subsidy’s presence in or absence from this report is not an indication of whether the subsidy is countervailable under U.S. law, is in accordance with the relevant WTO agreements, or is actionable under any other international agreements,” wrote Assistant Secretary for Import Administration David Spooner.

BLACKWATER: DDTTC in Dec. 18 Federal Register imposed restrictions on ITAR licenses issued to EP Investments, LLC, also known as Blackwater. “The Department of State has determined that a policy of denial regarding EP Investments, LLC (a/k/a Blackwater and hereafter referred to as EPI), including its subsidiaries or associated companies, is necessary to provide the U.S. Government with assurance that EPI is both capable and willing to comply with the AECA and ITAR and will do so,” notice said. “The Department recognizes the recent steps taken by EPI to improve its compliance program, for example setting up the Export Compliance Committee (ECC), and has tailored the policy of denial accordingly to leverage these measures by permitting certain exceptions to be made.” it added.

EDITOR’S NOTE: In keeping with our regular schedule of 50 issues a year, there will be no issues of *Washington Tariff & Trade Letter* on Dec. 29, 2008. Our next issue will be Jan. 5, 2009. Until then, we wish all our readers a HAPPY HOLIDAY and a HEALTHY AND PROSPEROUS NEW YEAR.