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# Washington Tariff & Trade Letter®

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## ITAR Self-Disclosures Jump 80% in Two Years

The number of industry voluntary self-disclosures (VSD) to State's Directorate of Defense Trade Controls (DDTC) is expected to hit 900 in the current fiscal year, which started Oct. 1, 2007, an 80% increase from two years ago and a 20% increase from 2007 when it received 759 VSDs. DDTC this year expects to issue 100 "directed disclosure" orders to defense exporters compared to 47 it issued in 2007, reported David Trimble, the DDTC director of compliance.

The DDTC compliance staff increased its support for criminal investigations by 50% in 2007 and plans to provide 20% more support this year, Trimble said. In 2007, U.S. government agents and representatives conducted 705 Blue Lantern end-use checks overseas and found 143 (23%) to have "unfavorable" results, he noted. This was the highest level of checks and unfavorable or derogatory results ever. "All across the board the numbers are on the rise," Trimble said.

So far in 2008, DDTC has reached consent agreements with two firms, Northrop Grumman and Boeing (see WTTL, July 7, page 3). Another case is close to settlement and "there will be lot this year," Trimble told an American Conference Institute program. Trimble also highlighted areas of concern for DDTC in enforcement. These include brokering, information technology (IT) protection, supply chain controls, the disavowal of past disclosures, employment of foreign nationals, and the acquisition of defense firms by proscribed parties.

In IT, the agency is concerned about foreign nationals who are employees gaining unauthorized access to controlled technology or data on computers by accident because of the lack adequate controls. It is also worried about the hacking of computer systems and whether or not there are firewalls and appropriate protection. "This is going to be an area of heightened attention in coming years," Trimble said. DDTC is also concern about companies that disavow previous voluntary self-disclosures, claiming past reports were made in error.

## Doha Round Talks Head Down to the Wire

As WTTL was going to press on Friday, July 25, trade ministers attending Doha Round negotiations in Geneva were just leaving a so-called Green Room meeting to assess the progress that had been achieved after a week of talks. Reactions to the meeting were mostly upbeat, with expectations that a deal was increasingly possible. Even at that late hour, it was uncertain

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whether the progress made on Friday among the seven largest WTO members would lead to an agreement over the weekend on agriculture and non-agriculture market access (NAMA) or a breakdown. Plans were being made for the talks, which began informally on July 19 and formally on July 21, to be extended into the week of July 28. As the conclusion of the meeting kept being put off, the scheduling of a “signaling” conference on services also was delay until Saturday (see story below).

At the end of the week, the focus was on talks being held by the U.S., European Union, Japan, Australia, Brazil, India and China – collectively being called the G-7 or G-6 plus 1, because of China’s addition to the sessions. In the Green Room, the G-7 presented a one-page outline of a compromise they had worked out on agriculture and NAMA issues.

“The G-7 proposed elements package is a major first step in moving the process forward,” Manuel Teehankee, Philippine Ambassador to the WTO told WTTL. “The developed G-7 members must now be prepared to listen with an open mind to what will certainly be asked of them by developing countries -- further enhancements to address their remaining sensitivities and ensure a balanced outcome,” he added. An agreement on special safeguard measures (SSM) “will certainly have to be improved before final convergence can be reached,” he said.

After the meeting, U.S. Trade Representative (USTR) Susan Schwab issued a statement saying: “We have a tentative agreement on a path forward.” She cautioned, however, that “There are a number of significant issues to be resolved, and each one of us have to see how the final modalities package concludes before we can pass judgment on whether to support a final modalities package.” Schwab also complained that “a handful of large emerging markets threaten this round for the rest of us.” Under the G-7 compromise, the U.S., which opened the week of talks by announcing a new offer to reduce Overall Trade Distorting Subsidies (OTDS) in agriculture to \$15 billion, further reduced its offer to \$14.5 billion. For the last year, the U.S. offer had been \$17 billion. The EU offered to cut its OTDS to \$22 billion. Developed countries also are offering to limit the number of agriculture sensitive products, which could be excluded from full tariff cuts, to 4% of tariff lines, with tariff-rate quotas expand to 4% of domestic consumption.

In exchange, developing countries were offering to limit the number of “special products” that would be exempt from full cuts in agriculture tariffs. Their new offer would limit special products to 12% of their tariff lines, with only 5% eligible for zero cuts, and an overall overage of 11%. This is at the far lower end of the range that Ambassador Crawford Falconer, chair of the agriculture talks, had in his last draft text. Falconer’s text put the potential range for special product exclusions at 10-18%, with 6% zero and an average of 10-14%.

In NAMA, the G-7 proposed three alternative modalities for developing countries: a 20 coefficient with a flexibility that could exempt 14% of tariff lines from full tariff cuts; a 22 coefficient with a flexibility of 10% and a 25 coefficient with zero flexibility. Developed countries would offer an 8 coefficient, and an anti-concentration clause would allow no more than 20% of tariff lines or 9% of value in one category to be excluded from cuts. The proposal also includes language on industrial sectoral talks. It proposes to add to the negotiating text a statement saying: “Recognizing the non-mandatory nature of sectoral initiatives, at the time of establishment of modalities, the Members listed in Annex Z have committed to participate in negotiating the terms of a least two sectoral tariff initiatives likely to achieve critical mass.” [Editor’s Note: Copy of the G-7 proposal will be sent to WTTL subscribers on request.]

## Doha Talks Were Hard Slog Through Deep Mud

Through the first seven days of Doha Round talks in Geneva July 19-25 progress was painfully slow with ministers showing little movement on a laundry list of agriculture and NAMA issues. As expected, Washington’s push for commitments from members on industrial sectoral agreements met resistance from countries seeking greater flexibilities to avoid the full burden of tariff-

cutting modalities. The week started with the U.S. announcing a new offer to cut its overall farm subsidy cap to \$15 billion and the EU hinting that it could offer to cut its farm tariffs by 60% rather than the 54% it had offered in the past. The U.S. OTDS offer was "very good," one developing country ambassador said. The move "was welcomed, but they could do more - or they should do more," he said; saying "they still have room to go to 13." The last draft text by agriculture negotiating group chairman Crawford Falconer had suggested a range of \$13 to \$16.4 billion for the U.S. "The U.S. hit the middle, so theoretically, we could agree on all the middle numbers in the text," one ambassador said.

At mid-week on July 23, USTR Susan Schwab stepped up pressure on developing countries to make commitments to join sectoral agreements on cutting industrial tariffs to zero. Schwab wanted to "be assured that Brazil, India, and China, would join at least two sectorals," one diplomat reported. China and Brazil said they could do a sectoral deal, if they can choose their own sector, a Latin American diplomat said. If others choose the sectoral, then they would not go along, he said.

Although the draft NAMA text produced by Ambassador Don Stephenson identified 14 potential sectors for zero-for-zero tariff cutting, the U.S. has focused its attention on getting agreements on chemicals, industrial machinery, electric and electronic products, and wood and paper. U.S. industry is also seeking negotiations on environmental goods and non-tariff barriers (NTB) for the auto industry. "We have some buy-on from Japan and Korea and a few other countries so we have hopes for that one," NAM Vice President Frank Vargo told WTTL. "There's a huge amount of interest in" environmental goods, he said. "I think we'll get it," Vargo told us.

In the G-7 talks, the U.S. and EU renewed their call for market access comfort from the three major developing countries, China, Brazil and India, a developing country ambassador reported. As the talks progressed, Brazil, India, Argentina and China continued to seek increased flexibilities in NAMA. "We could be close by now, if they weren't asking for such a big flexibility," a developing country ambassador said at one point.

During the week, Brazil resisted calls for joining sectoral talks. A sectoral on chemicals would be the equivalent of a coefficient of 12 for Brazil, one source noted. That would mean far deeper cuts than required under the proposed NAMA modalities for developing countries. "There is no way" Brazil could do a sectoral on chemicals, he said.

Talks also were held on trade-related intellectual property rights (TRIPS) and possible new deals on geographic indications (GI), the Convention on Biodiversity (CBD) and bananas. News reports suggesting these issues might be trip wires that could kill the talks are overstated, according to a high-ranking source. Parties involved in the banana dispute were not expected to block any Doha package, he said. "If there was progress and this was seen as being the last sticking point, both the EU and the U.S. could put pressure on them and they would feel under pressure to come to an agreement," he said.

Because of the slow progress in the talks, the signaling conference on services was pushed back twice, but was expected to be held on Saturday, July 26. Services interests "are really concerned that it might not happen, but a lot of progress has been made in getting at least tentative signals from our 11 key developing country markets that we've targeted," said Bob Vastine, president of the U.S. Coalition of Service Industries. "It would be nice and very good to harvest those at a signaling conference," he said. A developing country diplomat said the U.S. and EU have indicated there will be some movement at the signaling conference on services Mode 4, which allows the movement of service workers across borders.

## **Defense Issues Interim DFARS Rule on Export Controls**

A proposal, which was dormant for two years, to impose export control compliance conditions in defense acquisition contracts resurfaced as an interim final rule in the July 21 Federal Register. After meeting strong opposition to previous proposals, the Defense Department (DoD) was forced

to issue the changes to the Defense Federal Acquisition Regulations Supplement (DFARS) by a provision in the 2008 National Defense Authorization Act (NDAA) which gave the department until July 26, 2008, to address requirements for DoD contractors to comply with laws and regulations applicable to goods or technology subject to export controls. DoD's first proposed changes to the DFARS in 2005 drew 145 negative comments. Its second effort in August 2006 attracted 167 comments, particularly from the university research community which felt the proposed rule would infringe on the application of the "fundamental research" exception to export controls (see **WTTL**, Dec. 11, 2006, page 3).

The new rule will require a clause in future acquisition contracts to say "the Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including the requirement for contractors to register with the Department of State in accordance with the ITAR." It also will require the contractor to consult with State on any questions relating to the International Traffic in Arms Regulations (ITAR) and with Commerce regarding the Export Administration Regulations (EAR).

"The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items exists independent of, and is not established or limited by, the information provided by this clause," the rule states. "Nothing in the terms of this contract is intended to change, supersede, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations," it adds.

In contrast to earlier proposals, the interim rules provides a new definition of the word "items" with respect to the EAR "to clarify that access to an 'export-controlled item' is not necessarily subject to the EAR. Only technology and software source code (and not commodities) are subject to the EAR when released to a foreign national inside the United States." It also excludes a definition of "fundamental research" to avoid confusion with an existing presidential directive and definitions elsewhere in the DFARS.

"Most DoD contracts awarded for conducting fundamental research do not involve export-controlled information or technology," Defense said. "However, there are rare instances in which export-controlled information or technology may be used to conduct fundamental research. In such cases, the entity must be in compliance with the applicable export control laws and regulations. Also, there is a borderline where fundamental research meets more advanced applied research and development. One purpose of the DFARS rule is to remind universities that they must notify the contracting officer when they have reason to believe this line may be crossed," the notice explained.

The rule says it is DoD policy that "(a) It is in the interest of both the Government and the contractor to have a common understanding of export-controlled items expected to be involved in contract performance; (b) The requiring activity shall review each acquisition to determine if, during performance of the contemplated contract, the contractor is expected to generate or require access to export-controlled items." Defense agencies will have to inform contractors in the contract solicitation if any controlled items will be involved in the work.

## **Colombia Pledges More Protection for Union Members**

Efforts to get Congress to vote this year on the U.S.-Colombia Free Trade Agreement (FTA) may get a boost from a joint statement the Colombian government issued July 16 with three of the country's main unions, pledging stronger protection for trade unionists and requiring investigations and reports from local governments on violence against union members. "We urge agencies and judicial investigators to continue working with the rigor and speed to get early results on investigations of recent crimes against union leaders. To that end, the group of specialized prosecutors will be strengthened to combat criminal gangs and especially the cases against trade unionists," the statement said. The statement by the government and three unions, known by their Spanish acronyms as CUT, CTC and CGT, also said there "will be an inventory of actual

cases of attacks on union members for the judicial authorities to determine their true motives.” An early warning mechanisms for identifying critical cases will be strengthened. “Regional police commanders are required to present monthly reports to DAS, Prosecutor General Office, Government and union leaders on the risk and protection situation of union members in their jurisdictions,” it stated. Among additional measures, the government said it “reaffirms its policy of promoting freedom of association and to achieve this it will initiative a media campaign, defending the union rights established in the Constitution and ratified by the ILO Conventions.” Another step will be the convening of a meeting between businessmen, union leaders and government to establish a “joint mechanism to avoid the constraint on freedom of association and take measures to punish violators.”

Although the U.S. Congress doesn’t appear likely to hold hearings on the Colombian pact this year, the International Trade Commission (ITC) July 22 held what might be considered a surrogate hearing. The hearing was part of its annual review of the impact on the U.S. economy of the Andean Trade Preferences Act (ATPA) and drug eradication programs in the region.

Witnesses from industries that import from ATPA countries Peru, Colombia, Ecuador and Bolivia praised the programs and urged approval of the Colombia FTA. They noted that the drug eradication program has helped increase imports of asparagus and fresh-cut flowers. This has lead to a reduction of drug cultivation and increased job growth in the region. There was disagreement, however, over whether these imports have led a decrease in U.S. cultivation and jobs, with some speakers claiming other factors were responsible.

## **International Deal on Collecting Duties Unlikely, GAO Says**

There is little chance that the U.S. could get other countries to negotiate an international agreement to impose stricter rules on the collection of antidumping and countervailing duties (CVD), the Government Accountability Office (GAO) told House and Senate appropriations committees in a July 24 report. The committees had asked for the report as a follow-up to a March 2008 GAO report that found the U.S. has lost some \$600 million in unpaid penalty tariffs. Based on interviews with U.S. trade officials, the GAO concluded other countries would not want to negotiate such a deal because they don’t face the same problem of unpaid duties.

“Unlike the United States, other major trading partners have AD/CV duty systems that establish the final amount of AD/CV duties when goods enter the country,” said the GAO, the investigatory arm of Congress. “As a result, the existence of significant uncollected AD/CV duties is unique to the United States, so other countries do not have a shared interest in improving collections after products have entered the country,” it said (GAO Report GAO-08-876R).

Customs and Justice told the GAO that some countries will not enforce a claim based upon the revenue laws of another country. “According to agency officials, if the United States negotiated an international agreement to strengthen its ability to collect duties owed by importers whose assets are overseas, there may be unintended consequences,” the report cautioned. “For example, since the agreement would likely be reciprocal, some agency officials expressed concern that this could require the United States to enforce decisions it found arbitrary,” it noted.

The earlier GAO report found \$600 million in unpaid AD/CV duties and identified several factors for the lost funds. One main factor is the retrospective nature of AD/CVD payments under which importers pay a deposit on estimated duties, but the final amount due often isn’t settled for years until after Commerce completes an administrative review of the case. It also cited “new shipper” reviews, insufficiency of Customs bond requirements for importers, and minimal information required from importers. “By the time CBP is able to take collection action, illegitimate importers (foreign or domestic) may have disappeared in order to evade the duties, and legitimate importers may be financially unable to pay the duties,” the GAO pointed out. “As a result, Justice has advised CBP that claims involving a foreign company with no discernable

U.S. assets may be classified as uncollectible and do not need to be referred to Justice. CBP has not referred any cases to Justice involving the collection of AD/CV duties from importers with no attachable assets in the United States in the past 5 years,” it said.

## **Kritzer Moving Posts at BIS as Other Personnel Changes Are Made**

Bernard Kritzer, the highly regarded director of the Bureau of Industry and Security’s (BIS) Office of National Security and Technology Transfer Controls will be swapping jobs with Eileen Albanese, the director of Office of Exporter Services, BIS announced July 23 along with several other key personnel changes. The change, which reportedly was made while Kritzer was on vacation and without his agreement, has stirred concerns in industry. “This is not a good thing,” one industry source said. Part of the anxiety is the expectation that Albanese will be retiring soon, leaving a gap at the top of the key licensing office in BIS.

Also announced was the naming of Tom Madigan to be permanent director of the Office of Export Enforcement, a post he has held on an acting basis. Alex Lopes has been promoted from director of the Deemed Export and Electronics Division to be the director of the Office of Nonproliferation and Treaty Compliance. That job was held by Steven Goldman until his retirement in 2007.

In another change, Elizabeth “Beth” Scott is leaving the post of director of the Chemical and Biological Controls Division to work on a masters degree at the National Defense University. Dennis Krepp will be acting director of the division. BIS named Valerie McCreary to head the executive secretariat in Under Secretary Mario Mancuso’s office. The agency also revealed that Mark Foulon, the former deputy under secretary who was on temporary assignment to the Treasury Department, won’t be returning. He has taken another detail outside BIS as a professor of economics at the Industrial College of the Armed Forces.

### **\* \* \* Briefs \* \* \***

LAWYERS’ RELIEF: OFAC July 21 issued guidance that will allow lawyers to get paid by clients whose funds have been subject of Treasury blocking action. “This policy provides for the issuance of specific licenses, on a case-by-case basis, to authorize the release of a limited amount of blocked funds for the payment of legal fees and costs incurred seeking administrative reconsideration or judicial review of the designation of a U.S. person or the blocking of the property and interests in property of a U.S. person under the authority of Executive orders and regulations administered by OFAC (any such U.S. person hereinafter referred to as a ‘Blocked Party’), where alternative funding sources are not available,” OFAC advised.

TAA: Senate Finance Committee postponed markup of Trade Adjustment Assistance (TAA) legislation from July 23, but new schedule is uncertain. “I have worked for some time with my Finance Committee partner, Senator Chuck Grassley, and with the White House to develop a robust renewal and expansion of America’s Trade Adjustment Assistance program, and today we are on the cusp of an excellent agreement,” Finance Chairman Max Baucus (D-Mont.) said in statement July 25. “I had hoped to finalize offsets for the bill and bring it to the Finance Committee for formal consideration next week. However, the resistance of some Senators to consideration of TAA absent a guarantee of action on the Colombia Free Trade Agreement is preventing the process from moving forward,” he said.

BURMA: Senate Finance Committee July 23 by unanimous voice vote approved S.J. Res. 41, providing for annual renewal of import sanctions on Burma under Burmese Freedom and Democracy Act of 2003. This extension is required annually and is non-amendable.

CAFTA: USTR Susan Schwab July 22 implemented two textile provisions in DR-CAFTA involving textile cumulation provision and pocket materials under pact’s rules of origin. Agreement will now allow limited quantity of woven apparel from CAFTA countries containing Mexican or Canadian inputs to enter the United States duty-free. Under pocketing amendment for apparel items containing at least one pocket, pocket bag fabric must be formed and finished in territory of one or more of CAFTA-DR parties using yarn wholly formed in territory of one or more of CAFTA-DR parties before apparel can qualify as originating good and, therefore, duty-free treatment under accord.