

# 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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## OC GETTING FEWER DISPUTES, BUT MORE ARE BEING ESCALATED

The Bureau of Industry and Security's (BIS) Operating Committee (OC), which is responsible for settling interagency disagreements over export licensing decisions, is handling fewer cases than in recent years but more of those disputes are being escalated to the political level for resolution, according to Brian Nilsson, the new chairman of the OC. In the last 10 months, the OC has received 123 cases to review and is on track to receive 150 for all of fiscal 2005, which ends Sept. 30. This compares to the 269 it reviewed in 2004 and 170 in 2003.

At the same time, more cases that can't be resolved at the OC are being escalated up to the Advisory Committee for Export Policy (ACEP), the political-level group of assistant secretaries from Commerce, State, Defense and Energy. No cases are being escalated above that to the Cabinet-level Export Administration Review Board (EARB), Nilsson reported. For assistant secretaries, making Cabinet members get involved in export cases "is not in their career interest," Nilsson told the BIS Sensors and Instrumentation Technical Advisory Committee (SITAC) July 26.

More cases are getting referred to the ACEP because Nilsson is trying to get the OC to operate within Presidential Executive Order 12981, which sets deadlines for all stages of the export licensing process. To do that, Nilsson has pressed OC members to prepare better packages for discussion of disputes. He also said he is trying to get decisions issued more quickly than before. In the past, difficult cases often were allowed to remain pigeon-holed at the OC for lengthy periods in a war of attrition. "The other agencies complain were moving too fast," he said. "I anticipate we'll see more cases at the ACEP," he told SITAC.

In the last 10 months, Chinese cases were the leading subject of OC reviews, although in the last three months, cases for India and Pakistan have become more prevalent, Nilsson reported (see story below). To date the OC has completed 39 China cases (21 were approved, 8 denied, 10 returned without action(RWA)); 25 India cases (14 approved, 10 denied, 1 RWA); 9 Russia cases (7 approved, 1 denied, 1 RWA); and 6 Pakistan cases (3 approved, 1 denied, 1 RWA). Overall, the OC has approved 82 (67%), denied 23 (19%) and RWA 18 (14%).

## AGENCIES BLOCKING EAR99 EXPORTS TO INDIA AND PAKISTAN

Some companies are continuing to file export license applications for exports of EAR99 items to Indian and Pakistani organizations that were previously on the BIS Entity List but have been taken off, and in some cases those licenses are being denied, reports Brian Nilsson, chairman of the BIS Operating Committee. Objections to the approval of the licenses are coming from State

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and Defense. Under current regulations, licenses are still needed for exports of EAR99 items, products not subject to specific controls on the Commerce Control List, to organizations or firms on the Entity List. Some exporters are continuing to file applications for Indian and Pakistani organizations that have been taken off the list in the last three years.

“People are cautious in their due diligence and a little apprehensive about dealing with a previously listed entity,” Nilsson told the BIS Sensors and Instrumentation Technical Advisory Committee (SITAC) July 26. “Even if the item is EAR99, they have a right to come in for a license,” he explained. In many cases, these applications will be returned without action (RWA). “And sometimes we process the license; it depends on the item,” he said.

“Our regulations say there is a presumption of approval for EAR99 items, but the practice at the other agencies has been a blanket policy of denial,” he said. As a result more and more cases are the subject of interagency dispute and being escalated above the OC to the assistant-secretary level Advisory Committee on Export Policy (ACEP) for review. The issue was scheduled for discussion at the ACEP’s July 29 meeting. The ACEP was supposed to review three cases that “address our licensing practice versus our licensing policy for listed and delisted entities in India and Pakistan,” Nilsson told the SITAC.

## **DEMOCRATS LOSE SECOND SHOT AT LINKING TRADE AND LABOR**

House Democrats tried to refight a battle they lost three years ago over the role of labor rights in trade agreements, and they lost it again at 12:03 A.M. July 28 when the House approved the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA). As predicted, the deal won approval by only two votes, 217-215, and gained the support of 15 Democrats (see **WTTL**, July 25, page 1). The vote and scenario were almost identical to the 215-212 vote by which the House passed the conference report on legislation renewing the president’s fast-track trade negotiating authority on July 27, 2002.

Although GOP leaders had to keep the vote open 45 minutes beyond the 15 minutes allotted so they could gather the last straggling Republican members, some Democrats as early as 4:30 P.M. told **WTTL** they expected to lose. In the end, there were 27 nays in the Republican ranks, mainly among members from sugar, textile or big union districts. Strong-arm tactics and a few more promises probably could have saved one or two of them, if they were needed.

The Democrats’ main argument against DR-CAFTA was its failure to require the Central Americans to adopt internationally recognized labor standards and to make enforcement of those standards subject to the same dispute-settlement tools used to protect intellectual property rights or the application of anti-dumping and countervailing duty laws. This was the same issue that blocked congressional approval of fast-track negotiating authority for President Clinton for six years. Democrats tried to put labor and the environment on a par with other trade issues and failed. The Clinton administration also tried to get the WTO to make labor part of international trade agreements and was rebuffed at the Singapore Ministerial in 1996.

When the Bush administration came in, it sided with congressional Republicans and backed a fast-track bill whose negotiating objectives merely called for trade pacts to ensure that parties don’t fail to enforce their labor and environment laws in a sustained and recurring manner. No enforcement mechanism was required. Bush trade officials contend the trade accords they have reached in the last four years meet the requirements established in fast-track legislation.

It is uncertain whether the DR-CAFTA vote marked the high-water mark for organized labor’s fight against trade deals that don’t include strong labor provisions or just the latest skirmish in a long trench war that will continue for years. With the AFL-CIO deconstructing as member unions withdraw from the organization, labor’s future clout on trade and other legislation is in doubt. The next big test that opponents of DR-CAFTA will face will come in 2006 when trade

pacts with Thailand and the Andean region are likely to come to Congress for approval. Those deals will be *deja vu* all over again on the same issues of labor rights, sugar and textiles.

### **GUTIERREZ GIVES ASSURANCES TO REVIEW CHINA CATCH-ALL PROPOSAL**

Among the unpublicized promises the Bush administration made to lawmakers to get votes for the DR-CAFTA implementing bill was an assurance that Commerce Secretary Carlos Gutierrez made that he would carefully review any new "catch-all" requirement on exports to China. Rep. Don Manzullo (R-Ill.) raised the issue with Gutierrez before the House vote July 26 on the Central American pact because of concerns he has about how potential new controls would affect makers of electronic components in his district (see **WTTL**, June 27, page 1).

Manzullo said Gutierrez made no promise to him on plans for a new catch-all rule that would require exporters of items that normally would not require an export license to get one for exports to China if they know the item would make a material contribution to Chinese military capabilities. "The only assurance we have is that he would take a good and long look at any new export controls," Manzullo said. The secretary also assured him that he would "implement any new export controls fairly," the Illinois Republican added.

Manzullo said he was impressed by Gutierrez's knowledge of trade, manufacturing and machinery. The former chairman of Kellogg, the breakfast food firm, Gutierrez was "absolutely" aware of export control issues and industry concerns about the catch-all plans, Manzullo said.

### **COMMERCE BEGINS SURVEY OF CONDITIONS IN NIGHT VISION INDUSTRY**

The economic and technological health of the U.S. night vision industry will be assessed in a new survey that the BIS Office of Strategic Industries and Economic Security has just launched. The office is sending survey forms to over 600 manufacturers, distributors and exporters of night vision products to determine the state of the industry, the impact foreign competition is having and whether U.S. export controls are causing it to lose sales.

The three-part survey is sending questionnaires to retailers and distributors, producers and integrators and federal and private research labs. It is expected to be completed in early 2006, BISers say.

Night vision export licenses now represent nearly a quarter of the licenses handled by BIS annually. The agency expects to review some 3,000 cases in fiscal year 2005, which ends Sept. 30, 2005, according to Bernie Kritzer, director of the BIS Office of National Security and Technology Transfer Controls. The average processing time for these applications has dropped to 29 days from the high 50s and low 60s three years ago, he reported. The quicker review of these cases is due to the high quality of applications submitted by industry and work BIS has done with State and Defense on night vision issues, he said.

### **DOHA ROUND TALKS TAKE SUMMER COOLER**

No last-minute heroics were able to push progress on Doha Round negotiations, and the World Trade Organization's (WTO) General Council ended its July 29 meeting with no major breakthroughs in the talks (see **WTTL**, July 25, page 2). U.S. Trade Representative (USTR) Rob Portman flew to Geneva to the council shortly after the vote on DR-CAFTA July 28. European Union (EU) Trade Commissioner Peter Mandelson and ministers from Japan and Hong Kong also came to Geneva to boost morale among negotiators.

With talks breaking off for Europe's annual August vacation time, many negotiators "felt like the last day of school semester," one source reported. "They were happy to be leaving but

unhappy about the bad grades they were getting.” The council meeting was the valedictory meeting for several key players in the Doha talks. WTO Director General Supachai will be leaving in September and will be succeeded by former EU Trade Commissioner Pascal Lamy. New Zealand Ambassador Tim Groser, who has chaired the key agriculture talks, has been recalled by his government. Several other ambassadors also are ending their terms.

The final reports from Groser and Supachai warned negotiators of the need to stop talking and to start making decisions. In his final report to the Council, Supachai said that on the positive side of the ledger “our ambitions remain high.” He said there has been “a good level of engagement, both in Geneva, which is the backbone of the negotiations, as well as among ministers and senior officials when they gather around the world.”

The political choices in agriculture and non-agriculture market access (NAMA) are now clearer, he added. “I regret that the negative side of the ledger outweighs the positive. My frank assessment is that we have a long way to go to achieve the goals I recalled earlier,” he said.

When the talks resume in the fall, several new participants will be involved. In addition to Lamy, Deputy USTR Peter Allgeier is moving to Geneva to be USTR deputy there. The arrival of both men is expected to bring a new energy to the talks. Lamy July 29 also announced the names of his four deputy directors general. Rufus Yerxa, who is also a former deputy USTR, will remain in his current deputy post. The others are Chile’s WTO ambassador, Alejandro Jara; Rwanda’s WTO ambassador, Valentine Rugwabiza; and Harsha Singh, a former member of the WTO secretariate staff who is now secretary of India’s Telecom Regulatory Authority.

## **CHINA BILL’S FUTURE IN DOUBT, BUT IT DID ITS JOB**

House-passed legislation (H.R. 3283) that would expand the oversight and regulation of trade with China may have a tough time getting Senate approval, but the bill succeeded in its main objective: helping to win votes for DR-CAFTA. No one has been willing or able to say how many votes, except for Rep. Phil English (R-Pa.), the sponsor of the bill, were won by White House and GOP leadership support for the legislation, which passed the House July 27 on a 255-168 vote, but the bill may have given political cover to several Republicans from industrial districts. Sen. Susan Collins (R-Maine) has introduced English’s bill in the Senate.

The English bill would amend U.S. trade law to make imports from nonmarket economies subject to countervailing duty action. In light of China’s revaluation of the yuan, it would require Treasury to report to Congress every six months on Beijing’s application of the new exchange rate system. It also would require Treasury to submit a report defining currency manipulation. While the measure is aimed at China, it would require all new shippers to post cash deposits instead of bonds for any dumping or CVD duties on their goods.

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

HMT: CIT Chief Judge Jane Restani July 27 issued order (Slip Op. 05-89) setting schedule of deadlines for cleaning up last cases seeking refunds of Harbor Maintenance Taxes and dismissing unpursued cases. Government claims all refunds and interest due have been paid.

CUBA: Sen. Max Baucus (D-Mont.) July 29 won Treasury agreement to allow U.S. food shipments to Cuba, if payments have been received in third countries. Department’s proposal to require cash payment to seller in advance drew protest from farm groups and Baucus, who had place “hold” on all Treasury nominations in retaliation. With deal, Baucus lifted his hold and Finance Committee approved five nominees for Treasury posts plus Shara Aranoff to be ITC commissioner.

TRADE MONITORING: Pointing to proliferation of trade deals and new WTO members, GAO report (GAO-05-537) says government hasn’t provided sufficient staff and resources to monitor how trading partners comply with these deals. It claims better coordination and communication is needed among agencies on enforcement. It called for interagency strategy to deal with barriers facing U.S. exporters.