

# Washington Tariff & Trade Letter<sup>®</sup>

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. 26, No. 45

November 13, 2006

## FIGHT LOOMS OVER HOUSE LEADERSHIP ON EXPORT CONTROLS

With the Democrats having won control of the House Nov. 7, a new battle may arise over who will chair the House International Relations Committee (HIRC), the key committee with jurisdiction over the Export Administration Act (EAA) and dual-use export controls. Rep. Tom Lantos (D-Calif.) has been the panel's ranking Democrat for several years and normally would be in line for the post, but sources say Rep. Howard Berman (D-Calif.) may challenge him for the job. The chairmanship will be decided by the Democratic Caucus in January. Berman is seen as more popular among his fellow Democrats, but the outcome of this fight may depend on which of the two men will get the backing of incoming House Speaker Nancy Pelosi (D-Calif.).

Berman, who has long experience dealing with export control legislation, is seen as a moderate on export controls and would certainly be more acceptable to the exporting community. Lantos is considered a hard liner who has been the chief sponsor or supporter of numerous bills imposing new unilateral trade sanctions, including measures aimed at Iran, Syria and Sudan.

A more certain change will see Rep. Ike Skelton (D-Mo.) taking the chairmanship of the House Armed Services Committee from Rep. Duncan Hunter (R-Calif.). Although Skelton has been a strong advocate for tough export controls, he is not expected to use the annual National Defense Authorization Act (NDAA), as Hunter has, to propose new restrictions on trade with China or on countries that trade with China. In the Senate, Sen. Christopher Dodd (D-Conn.) is slated to take over the Banking Committee from Sen. Richard Shelby (R-Ala.). Dodd is also seen as more moderate on export controls as well as a supporter of the Export-Import Bank.

Despite the change in party control of Congress, observers say they don't expect a significant change in attitude toward export controls or any chance for legislation to renew the EAA. Export controls has not been a partisan issue, and the balance of views between hard liners and moderates hasn't changed, they say.

## DEMOCRATS MAY GIVE BUSH FAST-TRACK BILL HE WON'T LIKE

The Democratic takeover of the House and Senate in January, following the results of the Nov. 7 elections, means there is nil chance that Congress will renew or extend President Bush's fast-track trade negotiating authority in its current form before it expires next July 1, unless U.S. trade negotiators can hand lawmakers a Doha Round agreement before then that meets almost all U.S. objectives. Almost no one expects that to happen, although there is likely to be a rush to finish bilateral trade deals, including ones with Korea and Malaysia, in time to get fast-track

Copyright © 2006 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 printed or electronic form is \$597 a year in U.S., Canada & Mexico; \$627 Overseas. Additional copies with full price subscription are \$75 each.  
Circulation Manager: Elayne F. Gilston

treatment. But an internal fight among Democrats is possible between those strongly opposed to any trade deals and those who support trade but want agreements to include stronger rules on international labor standards and environmental protection. Thus, any fast-track bill coming out of Congress probably will have provisions that Republicans rejected when President Clinton sought negotiating powers for five years. President Bush may be forced to accept these provisions or veto the bill and see his trade agenda put on the shelf for the next two years.

To avoid such a dilemma, one former congressional staffer pointed back to the 1988 Omnibus Trade Act, which saw a Republican president, Ronald Reagan, work out a major compromise trade bill with a Democratically controlled House and Senate. U.S. Trade Representative (USTR) Susan Schwab would be well prepared for such a scenario, since she participated in that effort as an aide to then-Sen. John Danforth (R-Mo.) and wrote a book about it, Trade Offs, which is one of the most comprehensive examinations of the politics of trade legislation ever written. Another former staffer, however, questioned whether there would be enough in such a bill to attract Democratic votes.

The list of potential ingredients of a new trade act would be much smaller than the 1988 act. It could include new fast-track authority, which the White House calls Trade Promotion Authority (TPA), a new or extended Farm Bill, several bilateral free trade agreements, permanent-normal-trade-relations status for Russia, reform of the Committee on Foreign Investments in the U.S. (CFIUS), various tax law changes, some legislation aimed at Chinese trade practices, expansion of Trade Adjustment Assistance (TAA), and whatever trade issues that aren't resolved during the coming lame-duck session of Congress, as well as bills not yet imagined.

The incoming chairman of the House Ways and Means Committee, Rep. Charlie Rangel (D-N.Y.), has said he will seek a bipartisan approach to legislation in the committee, and the new chairman of the Senate Finance Committee, Sen. Max Baucus (D-Mont.), has shown that attitude in the past. The make up of the new Ways and Means Committee, however, may be a key question. Between the retirement of Chairman Bill Thomas (R-Calif.), the decision of two members, Reps. Jim Nussle (R-Iowa) and Bob Beauprez (R-Colo.) to leave to run unsuccessfully for governorships, and the reelection defeats of five other GOPers, there will be eight fewer Republicans on the panel and probably eight more Democrats.

## ITC WEIGHS SUPREME COURT APPEAL OF BRATSK RULING

The International Trade Commission (ITC) is in discussions with the U.S. Solicitor General about a possible appeal to the Supreme Court of the Court of Appeals for the Federal Circuit's (CAFC) divided April 10, 2006, ruling in *Bratsk Aluminum*. The discussion follows the CAFC's denial of an ITC request to clarify the *Bratsk* ruling, as well as its *Caribbean Ipsat* decision, which imposed new requirements on the ITC in antidumping and countervailing duty cases dealing with commodities to explain why non-subject imports couldn't replace subject goods and be a cause of injury to a domestic industry (see **WTTL**, May 8, page 3).

*Bratsk* bothers ITC members because it is seen as adding new criteria that need to be examined in trade cases and because the Commission isn't able to collect information on trade in non-subject imports from parties outside an investigation. The difficulty of applying the *Bratsk* ruling in trade cases received its first and fullest discussion in the ITC's report on its Sept. 6 split final injury determinations on imports of lined paper school supplies from China, India and Indonesia.

In *Lined Paper*, three commissioners, Chairman Daniel Pearson, Jennifer Hillman and Deanna Okun, found only threat of injury from dumped imports from China and no injury from imports from India and Indonesia. They wrote a separate dissenting opinion on the determination. "As a threshold matter, it is not immediately clear to us how the Commission should interpret the *Bratsk* opinion in terms of its effect on our analysis of causation in Title VII investigations," they wrote. "At a minimum, we can discern at least two possible interpretations which differ

substantially: (1) that Bratsk mandates application of an additional test apparently not contemplated by the statute (the so-called ‘replacement/benefit test’), and (2) that *Bratsk* is a further development of the causation approach prescribed in *Gerald Metals*,” the three explained. If the first interpretation is correct, they said it represents an “extra-statutory causation test” and they “respectfully disagree with the court that such a causation analysis is legally required.” If the CAFC meant the second interpretation, then they said they concur with the ruling.

## ONTARIO SPLITS WITH OTTAWA IN NAFTA CONSTITUTIONAL CASE

The province of Ontario Nov. 7 broke with the government of Canada and entered a brief in the D.C., U.S. Court of Appeals supporting the continuation of a law suit challenging the constitutionality of the binational dispute settlement mechanism of NAFTA Chapter 19. The U.S. and Canada are seeking to have the case dismissed for mootness based on the bilateral Softwood Lumber Agreement (SLA) that went into force Oct. 12 (see **WTTL**, Nov. 6, page 3).

Under the revised SLA, Ottawa and Washington dropped preconditions which would have required all court cases over softwood lumber to be terminated. The Coalition for Fair Trade in Lumber, which filed the constitutional challenge under the provisions of the NAFTA implementing law, has refused to drop the case. Some Canadian lumber groups have filed briefs favoring the continuation of the case in order to resolve the constitutionality issue once and for all.

The appellate court issued an order Oct. 26 asking parties to comment on four specific questions, including whether the SLA requires the case to be dismissed and whether the SLA makes the case moot. Another question asks whether the case should be continued under the legal doctrine that the softwood lumber disputes are an exception to mootness because they are “capable of repetition, yet evading review.”

In a Nov. 6 brief, the U.S. cited earlier court rulings which argued that this exception-to-mootness doctrine only applies when the challenged action is of a “duration too short to be fully litigated prior to cessation or expiration.” The brief said NAFTA has no expiration date, the case has already lasted a year, and any future constitutional challenge could be resolved in that amount of time. “Accordingly, regardless of whether petitioner’s constitutional objections are capable of repetition, they certainly do not evade review,” the U.S. said. It also said the “voluntary cessation” doctrine doesn’t apply in this case. “In this case, there has been no voluntary cessation – indeed no cessation at all – of the challenged activity,” it added.

## TALKS IN GENEVA SEEK TO REVIVE DOHA ROUND

With U.S. elections over, “quiet diplomacy” has picked up in Geneva with meetings the week of Nov. 6 aimed at laying the groundwork for restarting Doha Round negotiations and producing something to justify the extension of President Bush’s fast-track negotiating authority. Officials of a new group of WTO countries that is being called the non-G-6 met discreetly Nov. 4-6 in Vevey, Switzerland, to brainstorm on the reasons why the Doha negotiations are blocked.

Separately, New Zealand’s ambassador to the WTO, Crawford Falconer, who chairs the Doha agriculture committee, held an informal meeting Nov. 10 in the hope that members would start to share information on the progress that “quiet diplomacy” has made since the trade talks were suspended in July. WTO Director General Pascal Lamy was also expected to hold a “Green Room” meeting with some WTO members the afternoon of Nov. 10

While those talks were getting underway, U.S. Trade Representative (USTR) Susan Schwab published an op-ed piece in the Wall Street Journal Nov. 9, trying to dampen expectations that the U.S. would make a significant new offer on cutting agriculture subsidies (see **WTTL**, Oct. 30, page 1). “For several months there has been speculation that the results of the U.S. election

could alter prospects for the Doha Round of multilateral trade negotiations -- either by enabling the United States to somehow unilaterally improve its offer or, in the case of a Democratic victory, by restricting the Bush administration's flexibility," Schwab wrote.

"Neither scenario made sense then, and now that the ballots have been cast the U.S. is as determined as ever to move forward," she added. Schwab repeated the call for other countries to make better offers in market access in agriculture and industrial goods and rejected the idea of accepting a deal based on concessions already offered. "Scooping up what is on the table right now and calling it a day will not work," she declared.

Non-G-6 members at the Vevey meeting included capital officials from Canada, New Zealand and Norway, as well as Geneva-based diplomats from Chile, Indonesia and Kenya, plus the chairmen of Doha committees on agriculture and non-agricultural market access (NAMA). Another meeting is planned for December. According to sources in Geneva, the next meeting will consider drafting a "reference paper" on possible solutions to break the deadlock over the treatment of Special and Sensitive Products (SP), which would be mostly excluded from market opening requirements for farm goods, and the Special Safeguard Mechanism (SSM).

At Vevey, the non-G-6 discussed "the U.S. so-called black box of sensitive products, SP and SSM, the flexibilities to market access, and the blue box and green," one source reported. Speculation is that the non-G-6 is trying to reduce demands for SP and SSM from both developed and developing countries and to arrive at some sort of compromise approaches or solutions, the source noted. "They're cooking up something," he said. "It's supposed to be cooked quietly," the official added. "They haven't been saying anything. They've been very tight-lipped. They're only disclosing process issues, not substance," he explained.

\* \* \* BRIEFS \* \* \*

EXPORT ENFORCMENT: Philip Cheng, former employee of Night Vision Technology, entered plea agreement Oct. 31 with San Jose U.S. Attorney to plead guilty to one count of indictment charging him with violating export controls in case involving export of infrared camera and technology to China, according to court report. Sentencing is scheduled for Feb. 5, 2007 (see **WTTL**, July 3, page 1).

DEEMED EXPORTS: Not mentioned in news reports of nomination of Robert Gates to replace Secretary of Defense Donald Rumsfeld is his current position as co-chairman of BIS Deemed Export Advisory Committee (DEAC) (see **WTTL**, Oct. 16, page 1). Gates will go from being advisor on deemed exports' policy to being one of decision makers. Although Gates is expected to win easy confirmation, questions might arise about his alleged role in Iran-Contra affair during his time in Reagan White House and at CIA.

RUSSIA: U.S. and Russia Nov. 10 said they have deal on Moscow's accession to WTO. "Minister Gref and I hope to sign the agreement in Hanoi on the margins of the APEC meeting," said USTR Susan Schwab. Despite upbeat comments from some industry groups, administration may face fight getting PNTR for Russia, given its clamp down on press and human rights and opposition to U.S. foreign policy goals.

VIETNAM: WTO General Counsel Nov. 7 approved Vietnam to become 150<sup>th</sup> WTO member. Hanoi still has to ratify accession agreement. It will become WTO member 30 days after it notifies WTO that it has taken that step. House has scheduled vote on granting Vietnam PNTR for Nov. 13, but bill includes provisions that would allow U.S. to impose quotas on Vietnamese textiles and apparel. President Bush Nov. 8 issued order waiving nonapplication rules for Vietnam because of its state trading enterprises.

ANTIBOYCOTT: BIS has reached settlement agreement with Standard Charter Bank of New York, which will pay \$6,000 civil fine to settle three charges of violating antiboycott regulations. Bank self disclosed alleged violations and neither admitted nor denied charges.

TRADE FIGURES: Falling dollar has helped U.S. exports in September of manufactured goods to surge 20% from last September to \$88.6 billion. Services exports rose 6.5% to \$34.5 billion. Goods imports were up 9.7% from year ago to \$158.7 billion, as services imports increased 8% to \$28.7 billion.

INDONESIA: USTR Nov. 6 announced results of out-of-cycle review of Indonesia's IPR practices, lowering it from Special 301 priority watch list to watch list because of its progress on enforcement.