

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

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

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## DEFENSE REPORT PROVIDES SUPPORT FOR TIGHTER CONTROLS ON CHINA

The Pentagon's annual report to Congress on China's military power will give the Bureau of Industry and Security (BIS) more ammunition to justify its coming proposal to extend controls on exports to China that involve military end uses, as well as the tightening of deemed export controls (see **WTTL**, May 15, page 4). While repeating many warning issued previously, the 2006 report, released May 23, claims Beijing is shifting more of the defense procurement and research conducted in the past by the People's Liberation Army (PLA) to civilian entities.

"China's logistics reform features the integration of the civil sector with the military procurement system," the report states. "Under this concept, the PLA will acquire common and dual-use items on the market," it adds.

"Increasing numbers of logistics functions will be outsourced, especially when civilian industry can perform similar functions at lower cost. In addition, the PLA is placing greater emphasis on the mobilization of the civilian economy, both in peacetime and in war, to support national defense requirements," the report warns.

The report contends that China is continuing a systematic effort to obtain dual-use technology through trade and commercial transactions and joint ventures, particularly in the area of software and integrated circuits. It also notes the large number of Chinese engineering and technical students and managers who are receiving training in the U.S. There were 38,578 student and exchange visas issued for Chinese nationals in 2004, the report states.

Although the PLA has been divesting its ownership of civilian enterprises, Defense says 8,000-10,000 civilian firms remain under PLA directorship. The same is true in the R&D area. "More than 80 percent of government science and technology appropriations are not associated with overt government-sponsored programs, making it difficult to account for expenditures in military-related activities," it states.

## SCHWAB CONFIRMATION DELAYED BY SEN. SCHUMER'S "HOLD"

Senate confirmation of Susan Schwab to be U.S. Trade Representative (USTR) has been put off until at least the week of June 5 because of a "hold" Sen. Charles Schumer (D-N.Y.) has placed on her nomination because of his dissatisfaction with Schwab's answers on how the U.S. will deal with continuing restrictions China places on foreign financial services. Schumer had raised this issue during Schwab's confirmation hearing and indicated on May 26 that he still wasn't satisfied with the responses she offered in the written answers she provided to the

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committee (see **WTTL**, May 22, page 3). “I want to emphasize that my reluctance to allow your nomination to be approved expeditiously and unanimously, without floor debate or a roll call vote, is not related in any way to your qualifications or experience,” Schumer said in a May 26 letter to Schwab. “I felt that your responses to several of my questions at your nomination hearing, particularly as they related to China and financial services, were unnecessarily evasive and unhelpful,” he wrote. In a separate letter to her co-signed by Sen. Lindsay Graham (R-S.C.), Schumer asked Schwab to provide more details on six additional questions he had on China’s compliance with its obligations to open its financial services sector.

Schwab May 25 overcame a separate hold that Sen. Patrick Leahy (D-Vt.) had placed on her confirmation. Leahy had protested the Bush administration’s opposition to legislation that would amend U.S. patent law to make it easier to export low-cost generic drugs to countries that take advantage of a WTO agreement that gives poor countries the ability to issue compulsory licenses for life-saving drugs. The Vermont senator lifted the hold after USTR Rob Portman sent him a letter saying Leahy’s proposal “merits further careful consideration.”

## **STATE AMENDS ITAR TO CONTROL AIRCRAFT PARTS**

Makers of aircraft parts and components that are common to both the C-130 (models A to H) and the L-100 aircraft have 90 days from May 23 to switch their export licensing procedures to move these items to the jurisdiction of the U.S. Munitions List (USML) from the Commerce Control List (CCL). As it announced in March, the Directorate of Defense Trade Controls (DDTC) May 23 issued a Federal Register notice claiming jurisdiction for these products under USML Category VIII (see **WTTL**, March 6, page 1). “Exporters should note that this notice addresses only airframe parts and components common to the C-130 and L-100 aircraft; the Department of State is not asserting jurisdiction over the L-100 aircraft at this time,” it said.

DDTC said it was taking jurisdiction for these items based on a Commodity Jurisdiction (CJ) ruling it made at the request of a U.S. exporter. “The department determined that the production and application histories of the two aircraft demonstrate a predominantly military commonality,” it stated. DDTC also said no “definitive analysis” had been performed on the jurisdiction of these products before it conducted its CJ.

## **DOHA ROUND DIFFERENCES ARE “NOT UNBRIDGEABLE,” YERXA SAYS**

World Trade Organization (WTO) Deputy Director General Rufus Yerxa came to Washington May 24-25 with two messages for the U.S.: don’t give up on the Doha Round and be prepared to compromise. He also attempted to offset the growing pessimism about prospects for the round, suggesting a deal is closer than many think. “I’m still very optimistic,” Yerxa told the Washington International Trade Association May 25. “It is important from the U.S. perspective to view the round not based on all of what your hopes are but to compare the potential result with the status quo.” he said. “Even the less ambitious proposals on the table apply some fairly significant cuts,” Yerxa said.

Yerxa, acknowledged the cynicism that has developed about the round. “To be realistic, you’ve got to find the right balance between ambition and flexibility,” he said. “We have to realize that liberalization through the WTO system has always been based on the principle of gradualism,” Yerxa said. “You can’t achieve things overnight. You have to take time, and you have to be willing to see some degree of disappointment in not achieving all the objectives that you set out to achieve,” he added.

In agriculture talks, Yerxa cited numbers that show the differences between the various market access proposals to be closer than the debate suggests. “If you look at the U.S. proposal on

market access as the high-end of the spectrum and the EC proposal being at the low end of the spectrum, the range between them is, in my opinion, not an unbridgeable gap," he declared. Yerxa noted that current European Union (EU) farm tariffs average 22-23%. With the U.S. proposal, that average would drop to 8%, while the EU proposal would take the average down to 13%, he pointed out. He admitted that averages can be deceptive since some individual products are high above that level and countries are also seeking exceptions from tariff cutting obligations for some products.

Nonetheless, "somewhere in between those two there is, in our view, a landing zone that should be negotiable." If the G-20 proposal on agriculture tariffs were adopted, the EU would cut its tariffs by 54%, he noted. That would bring the average down to less than 11%. EU officials have rejected the 54% goal so far.

In the non-agriculture market access (NAMA) talks, which Yerxa is overseeing, several assumptions have already been made, he said. There is an assumption that major developed countries will agree to cut industrial tariffs based on a Swiss formula that would cut higher tariffs more than lower tariffs with virtually no exceptions. Major developing countries also will reduce duties according to the Swiss formula with "quite limited" exceptions that would exclude about 5% of their tariff lines or 10% of tariff lines with cuts of at least 50% of any agreed upon reduction formula. Least developed countries would have to do very little but will be expected to increase their tariff binding, Yerxa stated.

When asked if Director General Pascal Lamy might prepare his own draft agreement if negotiators can't reach a deal – similar to a draft Uruguay Round text offered in December 1991 by Arthur Dunkel, who was the director general of the General Agreement on Tariffs & Trade (GATT) – Yerxa said: "Mr. Lamy will do whatever is necessary to get the deal." He explained, however, that the Dunkel draft came only after Uruguay Round talks broke down in December 1990 in Brussels and members asked him to take that step. The Dunkel draft's purpose "was not to create something out of whole cloth," recalled Yerxa, who served then as deputy U.S. trade representative in the administrations of both George H.W. Bush and Bill Clinton. Dunkel "had most of the elements for a comprehensive text already on the table, already negotiated, already produced by many of the negotiating group chairs," he said.

At the end of July, Lamy will have to look at all the elements and see what is on the table, Yerxa suggested. "My best guess right now is that what has to happen in many of these areas is the chairs themselves of the different groups have to produce texts and the members have to come forward," he said. "Ideally what we will have at the end of July are draft schedules in agriculture, draft schedules in NAMA tariff schedules and draft schedules in services," he continued. "Right now, it's not necessary for him to put something forward. It's necessary for each of these groups, particularly agriculture and NAMA, for the negotiating process to enable the chairs to put out new texts," Yerxa asserted.

## **CUSTOMS CAN'T USE TRADE ACT TO OBTAIN DAMAGES FOR TARIFF FRAUD**

The Court of International Trade (CIT) has put in limbo the government's effort to collect damages from importers who have circumvented antidumping orders. In a May 25 ruling (Slip Op. 06-79), CIT Judge Gregory Carmen dismissed for lack of jurisdiction a government suit to obtain damages under the False Claims Act (FCA) from an importer who circumvented an antidumping order on garlic from China.

The government launched and won a suit to collect damages in *U.S. v. Universal Fruit* in 2000 from a U.S. district court, but the Ninth Circuit overturned that decision, ruling jurisdiction was with the CIT. Customs was seeking treble damages under the FCA in addition to circumvented duties and penalties. "Upon a reading of the statute, the relief granted under the FCA is for damages and civil penalties with no reference to duties," Carmen wrote. "This Court's jurisdiction is limited under 28 USC Section 1582(3) to the government's effort to recover only 'customs duties' and does not extend to actions to recover 'civil penalties' or 'damages'," he

ruled. "This court cannot shoehorn customs duties into a statute that unequivocally provides for damages and penalties," Carmen added.

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

BIS: D.C. U.S. District Court Judge John Bates May 25 denied government motion for summary judgment and said he would set trial date on former BIS Operating Committee Chairman Carol Kalinowski's suit against Commerce for sex discrimination and retaliation. He granted government's request to dismiss her claim of constructive discharge (see WTTL, July 19, 2004, page 2).

TAA: CIT's effort to help workers overcome Labor's denials of benefits under Trade Adjustment Assistance (TAA) program was curtailed May 24 by Court of Appeal for the Federal Circuit (CAFC) which said CIT doesn't have jurisdiction to review Labor decisions involving "secondary workers" under Job Training Partnership Act (JTPA). "Nothing under the NAFTA Implementing Act provides secondarily-affected worker benefits under the Trade Act," it decided. NAFTA statute does not "constitute an express statutory waiver of sovereign immunity and grant of jurisdiction to the Court of International Trade," it stated.

EXPORT ENFORCEMENT: Extreme Networks of Santa Clara, Calif., has reached settlement agreement with BIS under which it will pay \$35,000 civil fine to settle six charges related to export of computer network switching equipment without license to entity in China that was on BIS Entity List.

BRATSK ALUMINUM: ITC has asked CAFC to clarify its April 10 ruling in *Bratsk Aluminum*, which requires commission to examine how nonsubject imports might be cause of injury in antidumping and countervailing duty cases (see WTTL, April 17, page 3). Bratsk case "politically could make our lives more complicated," ITC Commissioner Dan Pearson told Washington International Trade Association.

MORE EXPORT ENFORCEMENT: BIS in May 23 Federal Register issued temporary denial order against Data Physics of San Jose, Calif., and Data Physics China and two company executives for alleged exports of items to Chinese academy working on cruise missiles.

ADVISORY OPINIONS: BIS has posted two new advisory opinions on its website to clarify its policies on identification of ultimate consignees on export documents and on licensing of bullet-proof windshields.

CUBA: BIS May 26 amended EAR restrictions on Cuba to increase weight allowance under License Exception BAG to exclude weight of wearing apparel and health and safety items such as wheelchairs.

OFAC: Agency published amendments to several sanctions regulations in May 22 Federal Register to reflect legislation that raised fines under IEPPA to \$50,000 per violation.

ANTIDUMPING: ITA can't wait until next administrative review to correct scope determination after court ruling, three-judge CIT panel said May 18 (Slip Op. 06-75). "Indeed, nothing in the antidumping statute precludes correction of the order in accordance with the holdings of the Federal Circuit issued here," they ruled in fourth decision in *Eurodif v. U.S.*, remanding case on low-enriched uranium back to ITA again.

The Export Practitioner and Washington Tariff & Trade Letter Present:

## HOW TO NAVIGATE THE BIS OPERATING COMMITTEE MAZE

**An Audio-Conference Briefing Featuring: Brian H. Nilsson, Chairman, Bureau of Industry and Security, Operating Committee, and Kathleen C. Little, Partner, Vinson & Elkins**

What happens when your export license sparks disagreements among the U.S. departments and agencies that have responsibility for reviewing and approving your application? This timely audio-conference briefing will give you an in-depth look at how the Bureau of Industry and Security (BIS) Operating Committee handles such disputes, how you can help get your license speedily through this review process, and what other exporters have done to succeed in overcoming opposition to their licenses.

**Tuesday, June 13, 2006, 2:00 to 3:30 P.M. (Eastern),  
For More Information Call: 202-463-1250, Ext. 2**