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## Wolf: “Specially Designed” Definition Will Preserve “Lachman”

The new definition of “specially designed” that export control officials are drafting will preserve the First Circuit Court’s broad interpretation of the term in its landmark *Lachman* ruling in 2004. “We’re not trying to undo Lachman. We’re not trying to undo that case,” Bureau of Industry and Security (BIS) Assistant Secretary for Export Administration Kevin Wolf told the agency’s Regulations and Procedures Technical Advisory Committee. “We want to do something that is not inconsistent with the conclusion of the court of appeals in that case,” he said.

In its controversial ruling in *U.S. v. Lachman*, the appellate court confirmed the conviction of Walter Lachman, Maurice Subilia Jr. and Fiber Materials Inc. on charges that they exported without a license a control panel that was “specially designed” for use with a hot isotopic press that is subject to controls. “A device is ‘specially designed’ for use with an embargoed commodity, if it is intentionally created for use, and in fact capable of being used, with the embargoed commodity,” the court ruled (see **WTTL**, Nov. 1, 2004, page 2).

Wolf said finding a common definition for both the U.S. Munitions List (USML) and Commerce Control List (CCL) has been complicated and difficult because of all the different purposes the definition will have to satisfy. One of the factors driving the process has been Justice Department pressure to come up with a definition that can be used in court in criminal prosecutions of export control violations. The new definition “has to be objective in the sense that it doesn’t require an examination of the intent of the particular company or individual,” Wolf explained. “By being objective, it has to be a series – to the extent humanly possible – of yes-no questions to be asked and answered fairly easily, not only for the exporter but also the licensing officer, the prosecutor and the juries to the extent it gets that far,” he told RAPTAC June 22.

## Lamy’s Plans for Early Doha Deal for LDCs Draw Resistance

Pressure to plot a course for concluding the Doha Round emerged June 22 following disharmony over a proposal to deliver early benefits for least developed countries (LDCs) and help the World Trade Organization (WTO) save face in the still-deadlocked trade talks. At a meeting of the Trade Negotiations Committee (TNC), WTO Director General Pascal Lamy urged members to focus on a narrow “LDC-Plus” package that could be ready for approval at the WTO Ministerial Conference in December. The U.S. and European Union (EU) are openly opposing the idea and are offering proposals to expand the package. Lamy told the TNC he has received “strong and positive” reaction to his proposal from trade ministers of developed and



developing countries at a meeting in Jakarta. His proposal would provide duty-free/quota-free market access for LDCs in developed countries, measures to help African cotton-producing countries and a waiver from obligations in the services sector for LDCs.

“In looking forward to a possible package for December, it is essential that all major players make a major contribution,” Deputy U.S. Trade Representative (USTR) Michael Punke said in his prepared remarks to the TNC. “We continue to be concerned that some are quite willing to support a package that asks little or nothing of them, but are quick to find difficulties with any result that would require them to contribute,” Punke said. Meanwhile, USTR Ron Kirk asked the International Trade Commission June 17 to conduct a study and offer advice on the probable economic effect of providing duty-free/quota-free market access treatment to imports from LDC nations.

“I think it would be fair to describe the attitude of the delegations with whom I have consulted as constructive, but cautious,” Lamy said. “Approached in isolation, each of the issues I have mentioned has its own problems, but there is also a sense that when linkages are taken into account — and there are linkages being drawn by some members in these issues — perhaps there is some room for maneuver,” he told the TNC. A lawyer close to the talks told WTTL that “there doesn’t seem to be any appetite for some sort of a high wire act in December leading to a possible disaster.” Delegations want to know as soon as possible — perhaps by the end of July — what the package will be, he said.

## **U.S., India to Step Up Talks on Bilateral Investment Treaty**

The U.S. and India are preparing to resume stalled talks on a bilateral investment treaty, Indian Minister of Commerce and Industry Anand Sharma told the U.S.-India Business Council in Washington June 23. He said he and USTR Ron Kirk had agreed to “fast-track the technical negotiations to put in a place” a BIT. Meera Shankar, India’s ambassador to the U.S., told WTTL that it’s taking longer than it should have to sort out the details for BIT talks. According to a USTR press statement on the talks between Kirk and Sharma June 22, Kirk “reiterated the interest of the United States in restarting technical-level discussions between the two countries at the earliest opportunity to advance those negotiations.”

Compared to past meetings between U.S. and Indian trade officials where the Doha Round was usually a top agenda item, the WTO talks seemed to get little attention during Sharma’s latest visit. Sharma did not mention Doha in his speech to the Council. Afterward, when asked specifically about the round, he told WTTL that he and Kirk regularly get together to talk about Doha.

## **U.S. Wants to Bring BIC into OECD Export Credit Arrangement**

With Brazil, India and China (BIC) now providing more medium and long-term export financing than the seven largest industrialized nations (G-7), the U.S. will try to bring those countries into the Organization for Economic Cooperation and Development (OECD) or at least into the OECD export credit arrangement, said Export-Import Bank Chairman Fred Hochberg (see **WTTL**, May 23, page 1). “What we’re trying to do is bring them into the OECD,” he said June 22. Even if they don’t join the OECD, the U.S. wants to “find ways to incorporate them into OECD or some international framework so we can competitively do business and allow companies to compete and not have the heavy hand of governments putting their finger on the scale,” he told a program sponsored by the Information Technology and Innovation Foundation (ITIF).

Hochberg spoke just as the House Financial Services Committee was reporting out a bill (H.R. 2074) to renew Ex-Im’s charter until 2015. Before passing the measure by voice vote, the panel adopted an amendment that Rep. Gary Miller (R-Calif.) offered to require Ex-Im to post a notice on its website providing details about any financing that exceeds \$75 million 25 days

before the bank board meets to consider the deal. The amendment would also require the appointment of a textile industry representative to the Ex-Im Advisory Committee and require the bank to institute programs specially aimed at helping textile exports.

Gary Hufbauer, of the Petersen Institute for International Economics, said he would go beyond Hochberg's solution to the BIC problem. "Playing polite and nice with China is not going to do the trick," he told the ITIF program. "I think the United States should be out there encouraging other OECD countries that are members of the arrangement to match Chinese exports unless China affirmatively discloses" its export financing terms, he said. "We have to get the UK, Japan, France, etc., in on the party and have a very strong policy," Hufbauer argued.

China's export financing threat was also highlighted by Stephen Ezell, a researcher with the ITIF. "One critical point to make about China's strategy behind using export financing is that it is especially and specifically targeted at key U.S. companies and markets," he said. He quoted a report of China's Export-Import Bank, which said its lending was aimed at taking away market share from Caterpillar and supporting China's aviation industry.

## Former PPG Sales Manager Settles EAR Violations

In an example of how BIS is targeting individuals and not just companies in enforcement cases, the agency reached a settlement agreement June 20 with a sales manager of PPG Industries, which entered its own settlement with BIS in December (see **WTTL**, Jan. 3, page 4). Curtis Hickcox of Watertown, Conn., who worked at PPG's Keeler & Long, settled charges of conspiracy and causing, aiding or abetting a violation of the Export Administration Regulations (EAR). BIS imposed a \$500,000 civil fine on Hickcox but agreed to suspend most of the penalty for two years and then waive it, if Hickcox commits no further violations during that time.

In addition to the civil fine, Hickcox must complete an export compliance training program within six months and is under a 15-year denial of export privileges. He will pay \$15,000 of the fine in installments over the next two years. In reaching the settlement, Hickcox neither admitted or denied the allegations.

The charges against Hickcox involved the export of epoxy paint thinner classified as EAR99 and valued at almost \$25,000 to a facility of the Pakistan Atomic Energy Commission through a Chinese subsidiary. Hickcox "took actions designed to make the transaction appear to be a domestic sale in the United States between PPG and Innovative Decoration International Inc. (IDI), a PPG distributor with offices in both the United States and China, when in fact the items were to fulfill a contractual obligation between Huaxing and a PPG subsidiary, PPG Paints Trading (Shanghai) Co. Ltd," BIS charged. When asked whether Hickcox still works at PPG, a company spokesperson, K.C. McCrory, sent an e-mail to **WTTL**, saying, "PPG has chosen not to disclose specific information about the names, status or number of employees involved in this matter."

## Obama Could Be Embarrassed If Congress Rejects Russia PNTR

Unless the White House steps up its effort to educate members of Congress about the need for granting Russia permanent-normal-trade-relations (PNTR) status, President Obama could be embarrassed by congressional rejection of legislation to lift restrictions imposed on Russia by the Jackson-Vanik Amendment, former Rep. Don Bonker (D-Wash.) warned June 22. Bonker said he based his warning on his experience in Congress when lawmakers rejected the first attempt to graduate Romania from Jackson-Vanik (see **WTTL**, May 2, page 3). Congressional sources also complain that until recently the administration was not trying sufficiently to explain to members of Congress the importance of PNTR, if Russia joins the WTO. They say lawmakers have numerous concerns about Moscow, including its enforcement of intellectual property rights (IPR), the adherence to the rule of law, human rights and protection of foreign

investment, and its activities in Iran. The administration also faces the challenge of getting Congress to approve PNTR before the WTO working party negotiating Russia's accession completes its talks and has an accession agreement to present. "We are making very clear with our consultations with the Congress that the best-case scenario is that the vote to terminate the application of the amendment would happen before the conclusion of the working party," Chris Wilson, assistant USTR for WTO and multilateral affairs, told the Washington International Trade Association June 22. The working party is expected to complete its efforts in time to have Russia's accession approved at the WTO Ministerial meeting in early December. That schedule would place the timing of a congressional vote sometime in the fall.

Although Russia has been involved in WTO accession talks for 17 years, progress came to a halt two years ago when Russian Premier Putin said Russia wanted to enter the trade body as part of a customs union with Belarus and Kazakhstan. Although Moscow later backed off that idea, the working party needed to restart its work almost from scratch in 2010 because Russia began revising its trade rules to conform them to the customs union's. Some changes are still being made.

The U.S. still has outstanding concerns that have not yet been resolved, Wilson noted. Among these are Russia's IPR enforcement, sanitary and phytosanitary (SPS) measures, trade-related investment rules in the auto sector, tariff-rate quotas for beef and poultry and import rules on embedded encryption products, including getting Russia to accept the Wassenaar Arrangement's definition of mass-market. Russia also must overcome Georgia's opposition to its WTO entry. Swiss diplomats are trying to mediate an agreement between the two embattled neighbors.

## U.S. Imposes Sanctions on Iran Air, Other Iranian Entities

Treasury imposed new sanctions on Iranian entities June 23, targeting Tidewater Middle East Company, an operator of Iranian ports owned by the Islamic Revolutionary Guard Corps (IRGC), Iran Air, which was designated for providing material support and services to the IRGC, Iran's Ministry of Defense and Armed Forces Logistics, plus Behnam Shahriyari, an Iranian official, and his company, Behnam Shahriyari Trading Company.

Iran Air, which operates only inside Iran, still owns U.S.-built planes purchased during the reign of Shah of Iran. U.S. export control policies have allowed licensing of parts and components for those aircraft under "safety-of-flight" rules, but no civil aviation exports have gone to Iran in the last three years. According to Census data, there were \$23,000 in such exports in 2007, \$15,000 in 2006, \$550,000 in 2005 and \$52,000 in 2004.

House Foreign Affairs Committee Chairman Ileana Ros-Lehtinen (R-Fla.) and Rep. Brad Sherman (D-Calif.) had urged the administration to stop the export of all civil aviation parts to Iran before the sanctions were imposed. "Given Treasury's decision today, there should no longer be any debate within the U.S. government – the repair of these planes should not be licensed," Sherman said in a statement. "Our message should be that these unsafe planes should remain grounded until Tehran grounds its illicit nuclear weapons program," he added.

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

HIGH PERFORMANCE COMPUTERS: BIS in June 24 Federal Register implemented changes agreed to at December 2009 Wassenaar Arrangement plenary, raising the Adjusted Peak Performance (APP) for digital computers in ECCN 4A003. Rule increases APP level from 0.75 WT to 1.5 WT. Also, rule moves Albania and Croatia from Computer Tier 3 to Computer Tier 1, which includes NATO allies.

EU: Homeland Security Secretary Janet Napolitano signed joint statement on supply-chain security with EU June 23. Statement calls for implementing mutual recognition of trade partnership programs, such as AEO and C-TPAT, and bilateral cooperation and coordination of customs security procedures, seeking mutually recognized controls in aviation and maritime security, and improving and sharing risk/threat information.