

# Washington Tariff & Trade Letter®

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. 25, No. 37

September 19, 2005

## ISRAELI DEFENSE FIRM PROMISES NOT TO SELL ARMS TO CHINA

Orbit-Alchut, an Israeli defense manufacturer, has agreed not to sell defense items or services to any country subject to a U.S. arms embargo, including China, for three years as part of a consent agreement its U.S. subsidiary reached with State's Directorate of Defense Trade Controls (DDTC). As part of the deal, DDTC has lifted a debarment order which blocked Orbit-Alchut's subsidiary, Orbit/FT of Horsham, Pa., from conducting defense exports.

State debarred Orbit/FR after it pled guilty in 1999 to two counts of violating the Arms Export Control Act by exporting an aircraft radome measurement system to China without State approval. Orbit/FR paid a \$600,000 fine for those violations. The recision notice was published in the Sept. 7 Federal Register.

Under the new deal, Orbit/FR also agreed to pay a \$100,000 civil penalty over three years and to spend an additional \$200,000 on remedial export compliance measures over three years. Another \$200,000 in civil penalties was suspended on the condition that the company and Orbit-Alchut implement a new export compliance program based on guidance provided in an annex to the settlement. [**Editor's Note:** A copy of the DDTC charging letter, consent agreement and order will be sent to WTTL subscribers on request.]

## LAMY SAYS REBALANCING OF BENEFITS NEEDED FOR DEVELOPING COUNTRIES

At his debut press conference Sept. 14 as WTO director general, Pascal Lamy said the Doha Round must lead to a rebalancing of benefits for developing countries. "Given that the membership of the WTO is two-thirds developing countries, there's no way we can reach a positive result of the round without this being seriously and totally factored in," he said.

"I believe we need a solid Aid for Trade package," Lamy argued. "This is one of the reasons why I will be attending the World Bank and IMF meetings in Washington next week," he said. The proposed aid is intended to help developing countries take advantage of the trade liberalization coming out of the round.

Lamy, the former EU Trade Commissioner, spoke earlier to the WTO Trade Negotiations Committee and mapped out the path he said members need to follow to have a successful ministerial meeting in Hong Kong in December. He told reporters that he had "presented a rapid and focused diagnosis, if not a precise roadmap, of the timing ahead of us in preparation for the Hong Kong conference." He said his basic objective "is to reach by Hong Kong, a result which takes us two-thirds of the way to concluding the round in 2006." A number of

Copyright © 2005 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

focused and specific points need to be addressed urgently, he said. "In agriculture, a date for elimination of export subsidies and treatment of other forms of export support...all elements of the cotton dossier...[on non-agriculture market access] the same sort of focused attention on the formula on unbound tariffs and flexibilities," as well as rules and development, Lamy explained.

"There is no way Hong Kong can result in a sort of lowest common denominator deal," he declared. He conceded that members won't agree on all the numbers for all the formulas for reducing tariffs and subsidies in the various talks.

"Let's focus on a few issues, which sequentially will get this train moving," he said. "Some time by mid-October we will have to make a first evaluation of the progress made from now on so that we better define exactly our ambition in Hong Kong -- the sort of landing zone we are aiming at," he said. The next step must come "by mid November, when the different negotiating groups will have produced specific and substantial results," Lamy added.

Meanwhile, current EU Trade Commissioner Peter Mandelson and EU Agriculture Commissioner Mariann Fischer Boel were in Washington the week of Sept. 12 for talks with USTR Rob Portman, Agriculture Secretary Mike Johanns and members of Congress. After their meeting, Portman said the U.S. and Europe are now talking about the specifics of a deal on agriculture, including the impact an accord would have on specific commodities. EU sources say the talks were important because they show both the U.S. and EU are now focused on the Doha Round.

## **KATRINA PROMPTS REVIEW OF TARIFFS ON STEEL, CEMENT, LUMBER**

Commerce officials have spoken with representatives of the steel, cement and lumber industries to determine if they can meet the expected surge in construction in the Gulf Coast in the aftermath of Hurricane Katrina or whether antidumping and countervailing duty orders might have to be lifted on imports of these products to assure adequate supplies. The department is weighing whether "changed circumstances" reviews are needed to lift or reduce these tariffs.

"Right now we are trying to work this out with the U.S. industries that are the suppliers of these items," said Peter Lichtenbaum, who is serving as acting under secretary of both the Bureau of Industry and Security and the International Trade Administration. "We are trying, in the first instance, to determine what they can do to assure us that there will no be supply shortfall," he said.

Harry Clark, attorney for the Coalition for Fair Lumber Imports, confirmed that the lumber industry is working closely with all levels of the government on the issue. "Fortunately, it appears there is a fully adequate supply of lumber. In our case, it doesn't appear that there will be any issue of having an adequate lumber supply," he said. An Agriculture Department report Sept. 15 said Katrina destroyed or damaged 19 billion board feet of timber.

Separately, USTR Rob Portman traveled to the Gulf Coast Sept. 16 to tour the Port of New Orleans and the Port of Southeast Louisiana (PSL). He told reporters he wanted to assure foreign trading partners that the ports are open and operating. PSL is operating at 85% capacity and New Orleans expects to be at 80% capacity in a couple of months. Foreign buyers should have no concern about getting U.S. grains that are now coming to harvest and usually exported through the two Gulf ports, he said. On the import side, there are still problems moving trucks from the ports because of road damage in the region, but some ships have been diverted to other ports for delivery, Portman reported.

## **FIRST OPEN WTO PANEL HEARING WEIGHS BEEF HORMONE SANCTIONS**

The first publicly open hearing of a World Trade Organization (WTO) dispute-settlement panel drew an audience of nearly 150 people on its first day Sept. 12, but by the fourth day, the crowd had dwindled to just 20. Curiosity apparently gave way to boredom as observers,

including delegates from other WTO members, the press and public, listened to representatives from the European Union (EU), the U.S. and Canada debate whether the U.S. and Canada should be allowed to keep trade retaliation in place against EU goods because they don't believe the EU has come into compliance with an earlier panel ruling which found its ban on imports of hormone-treated beef to violate WTO rules.

The panel hearing was held at the WTO headquarters in Geneva and broadcast via closed circuit to an adjacent conference center where it was displayed on two large screens. Representatives from the three countries were shown seated at parallel tables on one screen. The three panelists hearing the dispute were seen seated on a dais in the hearing room on the other screen.

The U.S., EU and Canada had agreed to allow the hearing to be the first ever opened to the public in the WTO's 10-year history. The opening of panel hearings to the public is one of the goals the U.S. is seeking in the Doha Round negotiations. The WTO secretariate had arranged seating for 400 people, so the actual turnout was much lower than expected. The first day's session was limited to opening statements. The next day, participants questioned each other through the chair, and the panel also asked questions. Each delegation addressed a list of 74 questions from the panel during the last session on Sept. 15.

EU, U.S. and Canadian speakers engaged forcefully in pointed exchanges that nearly became heated at times. The dispute panel's chairman, Cho Tae Yul of Korea, said the proceedings were "much more lively than any other the chair has ever experienced in a panel meeting."

The three-member panel was hearing an EU complaint against the U.S. and Canada over their continuing sanctions. While the EU said its 17 risk assessment studies were enough to bring it into compliance with the previous panel ruling, the U.S. and Canada said the onus of proving the barrier had been removed didn't fall on them. The EU countered by saying the U.S. and Canada simply didn't like the result of the studies so they didn't view them as a valid remedy.

Panel members often asked sharp questions during the three days, with one question cutting to the heart of the American argument. "What provision of the DSU [Dispute Settlement Understanding] is there to prevent the indefinite suspension of concessions?" one panelist asked. The panel also questioned why no party had asked for a review of the EU's actions under Article 21.5 of the DSU, which provides a mechanism for a panel to review the corrective actions of a party that has lost a dispute to determine if it has come into compliance with WTO rules. "There is a problem of protracted suspension of concessions, and I think this is the essence of this case," said Cho. "Sanctions are to be extreme and temporary," said another panelist.

The EU said that if the U.S. and Canada had found its remedy insufficient, they could file an Article 21.5 case, but they haven't. "The U.S. and Canada can't just sit back and wait with their suspension of concessions in effect," an EU lawyer argued. Canada said it was entitled to continue to suspend concessions absent an Article 21.5 panel ruling, which the EU has to request. The EC has the burden of proving its measure is in compliance, the Canadians said.

## **LUMBER INDUSTRY CHALLENGES CONSTITUTIONALITY OF NAFTA PANELS**

No one asked Judge John Roberts during his confirmation hearing whether he considers the dispute-settlement provisions of Chapter 19 of NAFTA to be constitutional, but he may face that question if he is confirmed to be chief justice of the Supreme Court. As expected, the Coalition for Fair Lumber Imports filed suit in the D.C. U.S. Circuit Court challenging NAFTA's dispute-settlement process and the so-called "fallback" provisions of the accord which says the president would implement panel decisions even if the process were declared unconstitutional (see **WTTL**, Aug. 15, page 3).

Whether the Supreme Court ever gets the case is problematic. "If we were presented with the prospect of settling the underlying issue, that is, fully addressing the unfair trade problem, we

would retract all litigation,” said Coalition attorney Harry Clark of Dewey Ballantine. “The Canadians would retract their litigation and we would retract ours,” he added. The Coalition’s suit claims NAFTA’s Chapter 19 is unconstitutional because it denies U.S. parties due process and violates Article III of the Constitution which establishes the U.S. judicial system and the process for the appointment and confirmation of judges.

The USTR’s office said the Bush administration will defend the constitutionality of Chapter 19. “The United States firmly believes that the dispute-settlement procedures in the NAFTA, as it is structured and as it has been applied, complies with the Constitution,” said USTR Spokesperson Neena Moorjani. “We remain strongly committed to the NAFTA, including the dispute-settlement procedure, and the administration will vigorously defend its constitutionality,” she added.

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

**GRAY MARKETS:** In key ruling expanding definition of “material difference,” Court of Appeals for Federal Circuit Sept. 14 in *SKF USA Inc. v. ITC* affirmed ITC Section 337 ruling that SKF wasn’t entitled to trademark protection from imports of its gray market bearings. Noting its previous rulings in *Gamut* and *Nestle*, court said, “We here carry that reasoning further and make explicit what may have only been implicit in *Gamut*. We hence conclude that, consistent with the *Gamut* decision, material differences that preclude infringement by gray goods may be physical or nonphysical,” court declared.

**EXPORT ENFORCEMENT:** *Price Brothers Ltd.* of Weybridge, Surrey, United Kingdom, has agreed to pay \$101,500 civil fine to settle BIS charges that it committed 29 violations of EAR by causing the export and reexport through England of unlicensed machinery parts classified as EAR99 to Libya.

**MORE EXPORT ENFORCEMENT:** Four owner/operators of *Manten Electronics* in Mount Laurel, N.J., pled guilty in Newark, U.S. District Court Sept. 13 to violating EAA and AECA in export of dual-use and defense items to China without approved licenses. They had been indicted in July 2004 (see **WTTL**, July 5, 2004, page 4). Group agreed to forfeit \$391,337 from illegal sales and will be sentenced Feb. 6, 2006.

**SHRIMP:** Shrimp industries in tsunami-struck India and Thailand and in Katrina battered Gulf Coast may be recuperating faster than expected, according to testimony at ITC hearing Sept. 14 on whether “changed circumstances” warrant lifting antidumping orders on frozen shrimp and prawns from India and Thailand. After dipping in first quarter, Indian and Thai exports are ahead of 2004 levels, petitioners argued. Louisiana shrimpers said reports of Katrina’s destruction of U.S. industry are overstated. “Many in the industry were not affected,” one shrimper testified.

**MAGNESIUM:** In split decision, NAFTA binational panel upheld ITA’s new shipper review ruling applying countervailing duty order on *alloy magnesium from Canada* to Canada’s *Magnola Metallurgy, Inc.*

**COMMERCE:** Senate Banking Committee Sept. 15 held confirmation hearing on President Bush’s nominations of David McCormick to be BIS under secretary, Darryl Jackson to be BIS assistant secretary for export enforcement, Franklin Lavin to be under secretary for ITA and Israel Hernandez to be ITA assistant secretary for trade promotion. No exciting issues raised. Senate vote expected by Sept. 23.

**USTR:** President Bush nominated former BIS Deputy Under Secretary Karan Bhatia to be deputy USTR. He is currently assistant secretary for aviation and international affairs at Transportation Department. Separately, USTR Rob Portman named Tim Stratford, who has been general counsel for General Motors’ operations in China since 1998, to be assistant USTR for China. Stratford is fluent in Mandarin and Cantonese. On rumor mill, sources say Susan Schwab, former Commerce Assistant Secretary and ex-trade aide to Sen. John Danforth (R-Mo.), is under consideration for other deputy USTR slot.

**IRAQ:** In Sept. 16 Federal Register, BIS revised EAR rules on in-country transfers of licensed exports to Iraq. Separately, in Sept. 14 Register, OFAC unblocked debt owed to Iraqi government.

**ANTIDUMPING FINE:** Customs Sept.9 fined *Mainland, Inc.*, of Marco Island, Fla., \$1.6 million for failing to pay antidumping duties on imported pencils from China.

**EXPORT ENFORCEMENT TRENDS:** *WTTL* and *The Export Practitioner* will sponsor audio-briefing conference Oct. 19 on latest trends in export enforcement. Featured speakers will be BIS Office of Export Enforcement Director Michael Turner and Mark Menefee, former OEE director who is now with Baker & McKenzie. For details, call Tami Gilston at 202-463-1250, Ext. 2.