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State Debars Spanish Citizen for Night-Vision Reexports

For the second time in six months, State's Directorate of Defense Trade Controls (DDTC) used an administrative law judge (ALJ) to weigh its charges before issuing a three-year administrative debarment June 5 to Spanish citizen Carlos Dominguez, Elint, S.A., Spain Night Vision, S.A., SNV, S.A., and successor companies. Dominguez and his companies were charged with 366 violations of Arms Export Control Act (AECA), involving the reexport and retransfer of night-vision devices without State authorization.

> "This debarment is the result of the Department's first institution of an administrative proceeding against foreign persons by referral of a charging letter before an Administrative Law Judge," DDTC said. The devices re-exported were defense articles covered under Category XII(c) and technical data covered under Category XII(f) of U.S. Munitions List. From 2005 through 2012, Dominguez had entered into contracts with companies such as ITT Industries, N-Vision Optics, Nivisys and Star Night USA, DDTC noted.

The Feb. 14 charging letter to Dominguez outlined a long history of "multiple unfavorable Blue Lanterns and evidence of falsified export control documents," culminating in application of a policy of denial in September 2009. "Upon notification of ineligibility to engage in defense trade by the Department, Dominguez and Elint changed or established new business names, and engaged third-party purchasers, in order to conceal their activities and evade detection. Further reexports and retransfers of previously exported defense articles continued under these new business names," a State spokesperson said.

DDTC issued administrative debarment Nov. 25 to LeAnne Lesmeister, a former senior export compliance officer at Honeywell International, Inc. (see **WTTL**, Dec. 2, page 1). Lesmeister's debarment was State's "first institution of an administrative proceeding by referral of a charging letter before an Administrative Law Judge," the department noted.

Definition of "Environmental Goods" Could Stymie Talks

Proposed World Trade Organization (WTO) talks on a deal to liberalize trade in environmental goods could be as long and contentious as current negotiations on services and information technology, a hearing held by the U.S. Trade Representative's (USTR) office

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June 5 suggested. Even before negotiations have begun, a major hurdle could be the definition of what is an environmental good or service and what should be covered by any eventual agreement. Witnesses at the hearing urged U.S. negotiators to seek as broad a definition as possible and include as many countries in the deal as possible. They said the list of goods should be larger than the 54 items identified by the Asia-Pacific Economic Cooperation Forum (APEC), which initiated the call for the negotiations.

> APEC's proposal led to statement by 14 countries, including the U.S., in January to launch the WTO talks. USTR Michael Froman sent Congress 90-days advance notice of the talks March 21 (see **WTTL**, March 24, page 10).

The testimony gave USTR negotiators material to reflect on, including "how we classify what are environmental goods; what constitutes an environmental good; and what is appropriate for this negotiation," Douglas Bell, chair of the USTR's trade policy staff committee, said at the end of the hearing. He said the hearing also identified the roll of standards for environmental products and the potential benefits for consumers. "How this would stimulate greater use of environmental goods was very interesting," he added.

Jennifer Prescott, the assistant USTR for environment and natural resources, conceded the talks "will be challenging." She said these will be unique negotiations and a unique opportunity to increase trade in these goods and bring down the cost of environmental protection. "We know there will be lots of different products out there that could help achieve those goals," she said. After the hearing, Prescott told reporters that the goal of negotiations "is to build on the APEC list. So that's the starting point."

A potential problem could arise in the talks if industries try to expand the definition of environmental goods too broadly to circumvent the deadlock in Doha Round negotiations on non-agriculture market access (NAMA) for industrial products. In addition, lack of participation in the talks by such large markets as Brazil, India and Indonesia could raise concerns about "free riders" and prevent the deal from covering the 90% of the world market that traditionally has been seen as the "critical mass" that would allow the agreement to apply on a most-favored-nation (MFN) basis to all WTO members.

At the hearing, a witness for the Fluid Sealing Association called for the deal to cover seals and gaskets that prevent the escape of toxins and pollutants. The Bicycle Products Suppliers Coalition urged coverage of bike and bike parts. The National Electrical Manufacturers Association proposed expansion of the list to include high energy efficient lighting, motors and energy controls. The founder of MegaWatt Storage Farms, Edward Cazalet, said the agreement should include grid storage batteries.

Meanwhile, the European Commission June 5 launched its own public consultations on European Union goals for the environmental negotiations. "Among other things, the Commission would like to hear what types of products European stakeholders think should be considered as 'environmental goods' under the potential agreement," the commission notice said. It also asked for comments on environmental services.

Self-Disclosure Leads to $21 Million Fine for Sanctions Violations

In a global settlement following a voluntary self-disclosure, Dutch aerospace services provider Fokker Services B.V. (FSBV) agreed to pay $21 million to settle more than 1,100 charges of illegal exporting and re-exporting of aircraft parts, technology and

services to Iran, Burma and Sudan from 2005 through 2010, violating U.S. sanctions. The settlement includes a $10.5 million civil fine paid to the Bureau of Industry and Security (BIS) to resolve allegations by Treasury's Office of Foreign Assets Control (OFAC) and an 18-month deferred prosecution agreement (DPA) entered into with Justice, under which the company is forfeiting an additional $10.5 million. OFAC said the company's potential civil liability would have been $51 million if mitigating factors were not taken into account.

> From 2005 to 2010, FSBV "knowingly initiating, either directly or indirectly, 1,153 shipments of aircraft spare, repaired, or exchanged parts, or a combination thereof, which had a U.S. nexus to FSBV customers who FSBV knew were located in U.S.-sanctioned countries," said the information filed in D.C. U.S. District Court as part of the DPA. The agreement with BIS also settles 253 separate violations of the Export Administration Regulations (EAR). The charges include 99 violations of the temporary denial order against Iran Air.

Although the company is based in the Netherlands, court documents said the shipments had a U.S. nexus because: "(1) FSBV sent shipments to U.S. repair shops for repair knowing that the shipments consisted of parts and technology derived from aircraft controlled by FSBV customers located in U.S.-sanctioned countries; or (2) the shipments contained U.S.-origin parts or technology that were subject to export license requirements under U.S. law at the time of shipment."

Fokker Services for years "treated U.S. export laws as inconveniences to be 'worked around' through deceit and trickery," said U.S. Attorney Ronald Machen in a statement. Some examples of the work-arounds included its deliberate withholding of aircraft tail numbers, providing false tail numbers to U.S. and U.K. companies, and stating that the parts were to be used as "stock" parts, the information noted.

In addition, FSBV employees "constructed and constantly updated a chart that tracked which U.S. companies were more vigilant about export controls (the chart was called 'the black list') and directed FSBV business to those U.S. companies which were not vigilant about export compliance," it said. The list was not revealed in the information.

Fokker Services "identified these historical transactions and disclosed them to the U.S. authorities in 2010. The company immediately took appropriate remedial action and cooperated fully with the investigations of the U.S. authorities," the company said in a statement. "A comprehensive set of remedial actions were undertaken, including a disciplinary review of the involved employees. Since 2010 FS has ceased all business with sanctioned countries and has implemented a new compliance program that has proven to be effective over the recent years," the company added.

CAFC Splits over Calculation of "All Others" Rate in CVD Cases

If three judges of the Court of Appeals for the Federal Circuit (CAFC) cannot agree on whether a provision of the countervailing duty (CVD) law is ambiguous or not, that might suggest that the language is ambiguous. Nonetheless, in a June 3 ruling, two judges agreed the law is not ambiguous, while one dissented and said it is. As a result, the court vacated and remanded to the Court of International Trade (CIT) a CIT decision

that forced Commerce to recalculate the "all other" rate in a CVD investigation of aluminum extrusions from China. In *Maclean-Fogg Company v. U.S.*, CAFC Judges Pauline Newman and Raymond Clevenger III agreed the statute is not ambiguous and CIT Chief Judge Donald Pogue erred in twice remanding the case back to Commerce for a different CVD rate that included data from voluntary respondents. Judge Jimmie Reyna dissented, saying the law is ambiguous but Commerce must use voluntary respondent data.

> At issue was Commerce's decision, citing the general rule in Section 1671 of the Trade Act, to exclude the results of the investigation of the voluntary respondents from the calculation of the all-others rate and to use data from mandatory respondents that had not cooperated and received an adverse-facts-available (AFA) rate. As a result, the department imposed a duty rate of 374.15%. After further rounds of litigation and remands at the CIT, Commerce arrived at a "reasonable method" for establishing the all-others rate, settling on a AFA-based rate of 137.65%. Importers who appealed Pogue's ruling wanted an even lower rate.

"By setting forth exclusions, Congress must be understood to intend that the rates of all individually investigated respondents be relied upon unless the rates fall within one of the exclusions," Clevenger noted; concluding that "that ambiguity cannot be found in the specific method for calculating the all-others rate" simply because the statute requires the all-other rate has to include mandatory respondents.

"We thus conclude that the Court of International Trade erred in holding that the statute is ambiguous on the question of whether the countervailing duty rates (other than zero or de minimis) of voluntary respondents must be included in the general rule for calculation of the all-others rate. Because the statute is clear that such voluntary respondent rates must be included in the general all-others rate calculation, Commerce's regulatory interpretation to the exact contrary is invalid," he wrote.

In his dissent, Reyna said he disagreed with the majority that the requirement to calculate an "individual" rate for voluntary respondents implies that voluntary respondents are "individually investigated" within the meaning of Section 1671d. "Because I find the statute ambiguous and Commerce's interpretation reasonable, I would affirm the Court of International Trade's decision affirming a final all-others countervailing duty rate of 137.65% in this investigation," he wrote.

"Section 1671d is ambiguous with respect to the precise question at issue: whether Commerce is required to include voluntary respondent rates when calculating the all-others rate under the general rule," Reyna asserted. "I agree with Commerce that excluding voluntary respondent rates from the all-others rate calculation serves the purpose of preventing distortion or manipulation of data," he added. "I would hold that Commerce's regulation excluding voluntary respondent rates from the calculation of the all-others rate is reasonable and entitled to *Chevron* deference," he concluded.

India Needs to Change Defense Offset Rules, Senator Says

The election of Narendra Modi to be India's new prime minister gives both the U.S. and India an opportunity to improve relations that have deteriorated over the last six years, Sen. Mark Warner (D-Va.), chairman of the Senate India Caucus, said June 3. One of

the steps India needs to take is to revise its defense procurement offset rules, which require foreign defense suppliers to procure 30% of the value of their contracts in India. The 30% requirement is hard to meet because of the limited amount of defense production in India, Warner noted. Instead of requiring the offset to be met just by defense parts and services, India should create a two-tier system that would allow foreign suppliers to meet that goal by spending in non-defense areas such as transportation and telecommunica-tions, he suggested.

> The Virginia Democrat also urged New Delhi to lift the limits on foreign direct investment, continue work with U.S. community colleges to develop its own community college system and move toward adopting a debit card system to allow direct payments to farmers to prevent corruption. If Modi want to show that India is open for business, he should adopt at the national level the same policies he implemented while he was head of the Indian state of Gujarat, Warner said.

For its part, the U.S. needs to fill the empty ambassador post to India, restart defense trade technology cooperation and review its visa policy, he suggested. Both countries should renew meetings of the U.S.-India Strategic Dialogue and work on joint energy policies, he told the program sponsored by the Weekly Standard and the National Association of Manufacturers (NAM).

A panel of speakers said they don't expect much change in India's stand at the WTO (see **WTTL**, June 2, page 2). India looks at trade as a foreign policy issue and "they will look at this issue through the foreign policy lens," said Richard Rossow, senior fellow at the Center for Strategic and International Studies. NAM Vice President Linda Dempsey noted India's absence from WTO talks on services and information technology. India has to get involved in these talks "if it wants to regain its leadership in the developing world," she said. Sadanand Dhume, resident fellow at the American Enterprise Institute, said no one expects "a dramatically different position in the WTO." India, however, is concerned about being locked out of a Trans-Pacific Partnership deal, he noted.

Court Upholds Commerce Selection of Data in NME Case

The difficulty in using surrogate-country data to devise antidumping rates in cases involving non-market economies (NME) was underscored again in a Court of Appeals for the Federal Circuit (CAFC) ruling June 2 upholding how Commerce selected data in an administrative review of imports of wooden bedroom furniture from China. In a ruling on cross appeals by Chinese exporters and the American Furniture Manufacturers Committee for Legal Trade (AFMC), the court affirmed in part, reversed in part and remanded to the CIT the trade court's multi-remand judgment on the data Commerce used in setting the rate.

In its preliminary results, Commerce determined the value for wood inputs into the furniture, including lumber, by using data from the Philippines National Statistics Office (NSO), which listed imports of wood into the Philippines by volume. Based on filings by one Chinese respondent, Guangdong Yihua Timber Industry Co., Ltd. (Yihua), that claimed that data contained anomalies, the department switched positions and used data from the World Trade Atlas (WTA), which gave weight-based (per-kilogram) figures. When that decision was appealed to the CIT, the trade court remanded the case to

Commerce to use the NSO data in the record or to expand the record. After defending the use of WTA data in its first remand redertermination, Commerce, under protest in the second redetermination, used the NSO's volume-based data, rather than reopen the record. "When all the available information is flawed in some way, Commerce must make a judgment call as to what constitutes the 'best' information," the CAFC noted in an opinion written by Judge Richard Taranto.

> Commerce claimed the NSO data was not fully accurate. "AFMC has not presented to this court, and the Trade Court did not set out, an adequate basis for rejecting Commerce's reasoning," he noted in *Lifestyle Enterprise, Inc. v. U.S.*

"In its First Redetermination results, Commerce thus reasonably chose between two flawed data sets. Because it was only under protest that Commerce later revalued the lumber inputs using the NSO's volume-based data, deference to Commerce's reasonable fact finding requires that we reverse the Trade Court's judgment about the wood input valuation and remand for reinstatement of Commerce's First Redetermination on that matter," Taranto wrote. "We do not reach Yihua's alternative argument about which volume-based data should be used if weight-based data could not be used," he added.

* * * Briefs * * *

EXPORT ENFORCEMENT: In indictment unsealed May 28 in D.C. U.S. District Court, Chinese company Shandong Sheenrun Electronics Co. Ltd., its overseas sales director Changxi Shi and its sales representative Shuguo Xiao were charged with conspiracy to export U.S.-origin infrared cameras to Iran without OFAC licenses. Indictment originally filed April 11. Shi and Xiao were arrested in Washington April 29 and are in custody.

COMMODITY JURISDICTION: For second time, DDTC has alerted exporters about delays in its handling of Commodity Jurisdiction (CJ) requests. It posted industry notice on website June 3, saying: "The Commodity Jurisdiction process is being impacted due to ongoing information technology assessments. Currently, CJs are being accepted for processing; however, companies submitting CJ requests should expect delays and plan accordingly. DDTC will advise once the assessments are completed" (see **WTTL**, April 21, page 6).

TRADE FIGURES: U.S. merchandise exports in April went up 2.9% from year ago to $135.1 billion, Commerce reported June 4. Services exports increased 3.2% to $58.2 billion from same month in 2013. Goods imports leapt up 5.7% from April 2013 to $200.9 billion, as services imports gained 4.2% to $39.7 billion.

STEEL RAIL TIE WIRE: ITC made final determination on 6-0 vote June 3 that U.S. industry is being injured by dumped prestressed concrete steel rail tie wire from China and Mexico.

TIRES: United Steelworkers Union (USW) filed antidumping and countervailing duty petitions June 3 with ITA and ITC against imports of certain passenger vehicle and light truck tires from China. "Domestic shipments have been undercut by skyrocketing import growth from China, and while our economy recovers, domestic producers and their workers have not adequately shared in the benefits," said statement from USW President Leo Gerard.

LIQUEFIED NATURAL GAS: Environmental groups applauded Department of Energy proposal in June 4 Federal Register to approve applications to export liquefied natural gas (LNG) "only after the review required by the National Environmental Policy Act (NEPA) has been completed, suspending its practice of issuing conditional decisions prior to final authorization

decisions." Proposal would not affect validity of orders DOE already issued. "For those applications, DOE will proceed as explained in the conditional orders: when the NEPA review process for those projects is complete, DOE will reconsider the conditional authorization in light of the information gathered in the environmental review and take appropriate final action," DOE said. "It's never made sense to evaluate LNG exports without knowing the impact they would have on the environment and on our climate, so this announcement is a step in the right direction," Sierra Club attorney Nathan Matthews said in statement.

TRADE PEOPLE: Senate June 4 confirmed by voice vote Stefan Selig to be under secretary of Commerce for international trade (see **WTTL,** May 26, page 10).

EAR: In Federal Register June 5 BIS issued "corrections and clarifications" to EAR for six final rules published in 2013 and 2014, including transfer of items from USML Categories VII and IX to CCL, rule on Unverified List and transition rule. These changes include "correcting typographical errors and inserting omitted quotation marks and other text for consistency," BIS noted. BIS said it "is correcting all six rules in this single final rule to minimize the number of correction rules for the public to review and because they are similar types of corrections and clarifications."

ENTITY LIST: In Federal Register June 5 BIS added 26 persons under 31 entries in China, Hong Kong, Lebanon and UAE to Entity List. Two Hong Kong entries -- Sinovac Technology Limited and Bing Lu -- "have been involved in the reexport of sensitive U.S.-origin items to unauthorized end-users and have prevented the accomplishment of an end-use check by or on behalf of BIS," notice said. BIS said Lebanon-based entities "have been involved in supplying U.S.-origin items to persons designated by the Secretary of State as Foreign Terrorist Organizations without the required authorizations."

SHIPPING CONTAINERS: ITC in 4-2 preliminary vote June 6 found U.S. industry may be injured by dumped and subsidized imports of 53-foot domestic dry containers from China.

WTO: Yemen will become 160th WTO member June 26. It deposited its "Instrument of Acceptance" May 27. Trade ministers approved its accession at Bali Ministerial in December 2013 after members of WTO Working Party agreed to terms of its membership in September (see **WTTL**, Dec. 9, 2013, page 6). Country applied for WTO membership in April 2000.