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Eleven Indicted for Exporting Microelectronics to Russia

Bureau of Industry and Security (BIS) officials are touting a multi-agency enforcement effort that resulted in the indictment and arrest Oct. 3 of 11 Russian and U.S. naturalized citizens who are charged with the unlicensed export of microelectronic products to Russian military and intelligence agencies. The case could have ramifications in the congressional effort to grant Russia permanent-normal-trade relations (PNTR) status because one of those indicted, Alexander Fishenko, was also charged with being an unregistered foreign agent of the Russian government, which had bought some $50 million in unlicensed U.S. goods from him since 2002. The case suggests widespread Russian efforts to acquire controlled U.S. goods illegally.

> The 25-count indictment claims the defendants provided U.S. suppliers with false information on the end-users and the end-uses of the items. The indictment was filed in the Brooklyn U.S. District Court but the arrests were made in Houston.

Fishenko, a naturalized U.S.-citizen, is the president and CEO of Arc Electronics, Inc. and a part owner of Apex System, LLC, a procurement firm in Moscow that was also charged. Nine other defendants are Arc or Apex employees and one was employed by Atrilor, Ltd., another Russian firm. One customer allegedly was the Federal Security Service, Russia's domestic intelligence agency. The exported items included analog-to-digital converters, amplifiers, digital signal processors, microcontrollers, static random access memory chips and field programmable gate arrays. "The Russian military is currently undergoing a large-scale modernization campaign, and many of the sophisticated electronics necessary for electronic weapons systems, including those exported by the defendants, cannot be purchased in Russia and often can only be purchased from United States-based companies," one court document noted.

"The investigation that gave rise to the instant charges began in approximately July 2010, and has involved extensive court-authorized electronic surveillance of the defendants' telephone and email communications," the document stated. BIS also said it was adding to its Entity List 165 foreign persons and companies who received, transshipped or otherwise facilitated the export of controlled commodities by the defendants. The entries are listed under 12 destinations and include 119 persons in Russia, including various Apex and Atrilor offices.

Lamy: Value-Added Study Could Change Trade Debate

Research that is trying to separate the value added at each stage of the supply chain from final export figures could change the trade debate, asserts World Trade Organization (WTO) Director

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General Pascal Lamy. The results of the study will show that bilateral trade imbalances, such as the U.S. trade deficit with China, are not the result of trade but of macroeconomic imbalances involving investment, consumption and savings, Lamy told a Brookings Institution program in Washington Oct. 1. The research, launched earlier this year by the WTO and the Organization for Economic Cooperation and Development (OECD), is examining how much of the final value of an export is added in the last country of export and how much is in the components and inputs from other countries (see **WTTL,** March 26, page 4). "WTO economists believe that China's $295 billion trade surplus with the U.S would be reduced by nearly half if two-way trade were measured in value-added terms," Lamy told the Brookings audience.

> Value-added numbers won't change current account balances, but they "will simply give a totally different picture of what this is made of," Lamy argued. "What measuring trade in value added helps doing is realizing that this is not a trade problem," Lamy said. "More importantly, that these trade imbalances cannot be corrected through trade measures," he added. "I think the moment that we start looking at these numbers will change the way we look at it with positive consequences on the trade debate," he said. The way the trade deficit with China is measured today "just hypes this as a formidable issue," he suggested.

In response to a question, Lamy also acknowledged the $520 billion trade surplus run by the countries of Northern Europe, a surplus larger than China's. "It's just a confirmation of what I said, these current account balances have nothing to do with trade policies because by definition EU [European Union] members have the same trade policy," he stated. It is more a matter of competitiveness, he added.

Lamy expressed skepticism about the chances of using Article XV of the General Agreement on Tariffs and Trade (GATT) to combat misaligned currencies, an option many have suggested as a way to challenge China's currency manipulation. Article XV supposedly bars the use of currency manipulation to influence trade or use of trade to influence exchange rates. The provision "was written at a time of fixed exchange rates and has never been tested," Lamy said, noting historians who say the provision was written by John Maynard Keynes himself at the time of the Bretton Woods Agreements and the Havana Conference that created the GATT.

Lamy stressed that agreement between the U.S. and China in multilateral and plurilateral talks is the key to their success, including the Doha Round and negotiations on services and information technology. In the round, "if the U.S. and China will agree on a compromise on industrial tariff reductions, I tell you, the whole picture would change," Lamy asserted. This is also true in plurilateral talks. "The problem being, in today's world of trade, a global plurilateral without both the U.S. and China in the deal is not global; it doesn't make sense," he stated. "So you come back to the same starting point, you need the U.S. and China to agree," Lamy said.

Customs Seizures Are District Court Issue, CIT Rules

Legal challenges of Customs and Border Protection (CBP) seizures of imports, even after detention, must be taken to U.S. district courts and not the Court of International Trade (CIT), ruled CIT Judge Gregory Carman Oct. 2 (slip op. 12-126). In the case, the importer contested CBP's detention and then seizure of aluminum extrusion from Malaysia based on questions about the country of origin of the materials. Although the detention would come under CIT jurisdiction, once the goods were seized the district court was the place to take the case, Carman ruled.

"While this Court has exclusive jurisdiction of any civil action commenced to contest the denial of a protest pursuant to 28 U.S.C. Section 1581(a), this is a court of limited jurisdiction," he wrote. Although the court considered the plaintiff's argument about deemed exclusion, "this is a seizure case at its heart," he declared. "Upon review of the relevant statutes, the Court agrees with Defendant that the fact of seizure trumps the fact of deemed exclusion. Further, the timing of the seizure, before commencement of Plaintiff's action, makes the jurisdictional analysis of *CBB Group* inapposite to this case," Carman ruled. "Because the merchandise was seized, the

Court looks at the jurisdictional statute for seizure found under 28 U.S.C. Section 1356, which provides that '[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title'," he ruled, citing the law.

Petitioners Oppose Proposed Changes to Rules for Trade Cases

The International Trade Administration (ITA), which is often perceived as favoring domestic industry petitioners in antidumping (AD) and countervailing duty (CVD) cases, stirred up strong opposition from attorneys representing import-sensitive industries to its proposed changes to rules and deadlines for submitting factual information in trade remedy cases. Comments from the petitioners' bar overwhelmingly criticized the changes that were proposed in the July 10 Federal Register.

> "The practical effect of the Proposed Regulation will be to unnecessarily deprive the petitioners and other domestic interested parties of the ability to meaningfully participate in proceedings to ensure the calculation of accurate margins by (1) limiting the opportunities for domestic interested parties to provide factual information and relevant argument; and (2) severely restricting the time that petitioners have to analyze record documents, develop and research relevant factual information and argument in response, obtain necessary certifications for that information and timely file it on the record," wrote attorneys with Kelley, Drye & Warren.

Comments also criticized how the proposal would treat the review of surrogate and normal values in investigations. "With respect to allegations relating to market viability and the basis for determining normal value, it is also not clear that the proposed rule would increase the Department's opportunity to consider record evidence," said comments from Hughes Hubbard, questioning proposed deadlines for responding to questionnaire data. "While this could shorten the time period in some cases, it could significantly delay submission in other instances, and overall provides more uncertainty in the timing of such information." its lawyers argued.

Attorneys from King & Spalding noted that "it is prejudicial to provide domestic interested parties with less time to provide rebuttal factual information than the respondents were permitted to file their questionnaire responses. This is particularly so, because respondents are providing their own data to the Department, while domestic interested parties (and their counsel) need time to review, understand, and research the information filed by the respondents."

Few comments came from the attorneys for respondents in trade cases. One comment from Elliott Feldman of Baker Hostetler, who wrote on behalf of Canadian lumber groups, said ITA "through these proposed modifications of the rules, is imposing discipline on parties who may be prone to exploit ambiguities in the regulations as now written to submit factual information when the other side might not have a reasonable opportunity to respond." With the proposed changes, however, the agency "is perpetuating its own lack of discipline, reserving for itself the discretion to place information on the record at any time and to set entirely the timing of comments from the parties," he added.

Dutch Firm Settles Charges of Violating TDO Tied to Kraaipoels

BIS' long-running legal action against Dutch father and son Niels and Robert Kraaipoel continues to catch other firms and individuals in its web. In the latest case, Cargo-Partner Network B.V. (CPN BV), another Netherlands firm, reached a settlement with BIS Sept. 27 to settle charges that it did business with Lavantia Ltd., a company in Cyprus that was covered by the same Temporary Denial Order (TDO) that was issued against the Kraaipoels. It also was charged with exporting controlled items to Iran. In another twist, the former sales manager of

CPN BV was Ulrich Davis, a Dutch citizen who was sentenced in May to six months in prison and a $2,000 fine for conspiring to export goods to Iran and violating the TDO against the Kraaipoels (see **WTTL**, May 21, page 4). In the settlement with BIS, CPN BV agreed to pay a civil penalty of $98,000 to settle one charge of causing, aiding or abetting the unlicensed export of U.S. items to Iran via the Netherlands and two charges of acting contrary to the terms of a TDO. When asked for a comment, a Cargo-Partner spokesperson in Austria told WTTL, "we do not add anything" to the BIS notice.

* * * Briefs * * *

FCPA: Justice FCPA opinion (12-01) Sept. 18 said royal family member doesn't qualify as "foreign official" under antibribery provisions "so long as the Royal Family Member does not directly or indirectly represent that he is acting on behalf of the royal family or in his capacity as a member of the royal family."

SOFTWOOD LUMBER: In response to reports that Canadian government or Nova Scotia plan to assist paper mill in Nova Scotia, USTR Ron Kirk wrote Oct. 4 to Rep. Michael Michaud (D-Maine) to say reports "raise troubling questions." "In that regard, I have directed my staff to confirm whether the information provided in the news reports is correct, on an expedited basis. In concluding this inquiry, I have further directed my staff to request information from the Government of Canada regarding any assistance it or the Government of Nova Scotia have agreed to provide or plan to provide. The United States will also raise the matter at meetings later this month of the Committee on Subsidies of the World Trade Organization," Kirk wrote.

EXPORT ENFORCEMENT: Phibrochem, chemical supplier in Teaneck, N.J., Sept. 28 agreed to pay $31,000 civil penalty to settle BIS charge of acting with knowledge of a violation. In January 2008, Phibrochem exported to Mexico sodium fluoride, classified under ECCN 1C350, controlled for chemical and biological weapons proliferation and valued at approximately $14,000 without license. Its previous license expired in December 2007, three weeks before shipment. Phibrochem neither admitted nor denied charges.

MORE EXPORT ENFORCEMENT: Saeed Talebi, Iranian national, pleaded guilty Sept. 26 in Manhattan U.S. District Court to conspiring to violate International Emergency Economic Powers Act, relevant Executive Orders and Treasury regulations with illegal export of parts and goods designed for use in industrial operations to Iran through Dubai (see **WTTL**, July 23, page 4). Sentencing is set for Dec. 19.

MORE EXPORT ENFORCEMENT: Muscle Gauge Nutrition LLC (MGN), nutritional supplement sales firm in Glen Mills, Pa., agreed to pay $62,500 fine Sept. 27 to settle one BIS charge of evasion. MGN attempted to export whey protein supplements classified as EAR99 without license to Iran through UAE in June 2011. In separate settlement, MGN co-owner and founder Robert Reed of Coatesville, Pa., agreed to pay $37,500 to settle charge of making false statement to BIS. MGN and Reed neither admitted nor denied charges.

ANTIBOYCOTT: W W Grainger, industrial supply company in Lake Forest, Ill., Sept. 25 agreed to pay $12,000 to settle 12 BIS charges of violating antiboycott regulations by failing to report receipt of request to engage in restrictive trade practice or foreign boycott against country friendly to U.S. In 2008 through 2009, Grainger engaged in transactions in Kuwait. It neither admitted nor denied charges.

OLIVE OIL: ITC Oct. 1 launched Section 332 study of global competitiveness of U.S. commercial olive oil industry, focusing on U.S., Spain, Italy and North African producers. Study, requested by House Ways and Means Committee Chairman Dave Camp (R-Mich.), will review production, processing and consumption data; analyze international import and export markets; assess factors affecting U.S. consumption; and compare competitive strengths and weaknesses of major olive production and processing countries.

NUCLEAR EXPORT CONTROLS: U.S. export controls on nuclear products put American companies "at a serious disadvantage next to their competitors in the international export market," claims a Nuclear Energy Institute (NEI) report released Oct. 1. Report, prepared for NEI by Pillsbury Winthrop Shaw Pittman law firm, highlighted "four very different sets of regulations, coupled with a complex interagency review process" administered by Energy, State, Commerce, and Nuclear Regulatory Commission. "Although nuclear export control regimes in all major nuclear supplier nations are consistent with guidelines issued by the NSG [Nuclear Suppliers Group], the U.S. regime contains additional restrictions," it said.

EXPORT-IMPORT BANK: Bank returned $803.7 million in profits to Treasury for fiscal year 2012, which ended Sept. 30, Ex-Im reported Oct. 5.

LAOS: Negotiating partners Sept. 28 agreed to terms of Laos' WTO membership, which now go to General Council for approval. Laos first applied to join WTO in 1997.