

Vol. 41, No. 46

November 22, 2021

## CIT Reverses Bifacial Exclusion from Solar Tariffs

In two rulings, the Court of International Trade (CIT) reinstated the exclusion of imported bifacial solar modules from Section 201 safeguard tariffs and reduced the tariff rate from 18% to the original 15%. Solar energy advocacy groups were quick to welcome CIT Judge Gary Katzmann's decisions. After a court ruling and several statements back and forth, the previous White House in October 2020 expanded the scope of the tariffs, revoking the exclusion of bifacial solar panels from the duties (see **WTTL**, Oct. 19, 2020, page 5).

“While Proclamation 10101 complied with the procedural requirements of the safeguard statute, it nevertheless clearly misconstrued the reach of Section 204(b)(1)(B) of the Trade Act, and thus constituted an action outside the President's delegated authority. Neither the statute nor the statutory scheme supports interpreting Section 204(b)(1)(B) to permit increased restrictions on trade,” Katzmann wrote Nov. 16 in *Solar Energy Industry Association [SEIA] v. U.S.* (Slip Op. 21-154).

“In sum, the court concludes that the Second Withdrawal of the exclusion from safeguard duties on imported bifacial solar modules must be vacated for lack of statutory authority and as arbitrary and capricious. The court reiterates that from the start, this case has not been about the choice between one policy and another regarding imports of solar panels. Nor has it been about whether the statutory scheme should be modified,” he wrote the next day in *Invenergy Renewables LLC v. U.S.* (Slip Op. 21-155).

The CIT decision “to strike down an order by President Trump to change the step-down rate for the Section 201 tariffs and reverse the bifacial module exclusion was clearly the right conclusion. Both actions were an unlawful attempt to harshen the Section 201 tariffs,” SEIA President and CEO Abigail Ross Hopper said in a statement.

## WTO Panel Affirms EU Claims in U.S. Olive Dispute

Get out those olive oil recipes. A World Trade Organization (WTO) dispute panel Nov. 19 accepted most of the European Union's (EU) claims that the U.S. investigations leading to

the imposition of countervailing duties (CV) on ripe olives from Spain were inconsistent with WTO rules. The WTO Dispute Settlement Body established the panel in June 2019 after the U.S. blocked the EU's first request a month before (see **WTTL**, July 1, 2019, page 9). Earlier consultations failed to resolve the dispute.

Specifically, the panel found the U.S. determination that the subsidies provided to Spanish raw olive growers under the EU Common Agricultural Policy were *specific* to the growers – and thus liable to CV duties – was inconsistent with various WTO provisions. In addition, the panel found that a U.S. regulation that allowed Commerce to deem the full amount of subsidies received by raw olive growers to have passed through to the downstream processed agricultural product (table olives), subject to limited factual considerations, is inconsistent with commitments.

The panel also found inconsistencies with Commerce's calculation of a final subsidy margin and CV duty rate for one of the investigated ripe olive processors, and the manner in which the department requested information from investigated companies in the investigation. Finally, the panel rejected the EU's claims that the International Trade Commission (ITC) determination that U.S. producers of olives were injured by the dumping of Spanish olives on the U.S. market and the granting of subsidies to Spanish raw olive growers were inconsistent with WTO agreements.

EU officials welcomed the ruling. "These duties severely hit Spanish olive producers, who saw their exports to the U.S. fall dramatically as a result. We now expect the U.S. to take the appropriate steps to implement the WTO ruling, so that exports of ripe olives from Spain to the U.S. can resume under normal conditions," EU Trade Commissioner Valdis Dombrovskis said in a statement.

## **North American Leaders Tackle Thorny EV, Trade Disputes**

When the leaders of the U.S., Canada and Mexico met in Washington Nov. 18, they had some work to do. Labor disputes under the U.S.-Mexico-Canada Agreement (USMCA), softwood lumber, immigration questions, covid recovery and supply chain disruptions figured prominently in the bilateral and trilateral meetings, as well as potential Buy America credits for electric vehicles.

In September, U.S. Trade Representative (USTR) Katherine Tai and Labor Secretary Marty Walsh announced "the successful conclusion of the first course of remediation" under the USMCA Rapid Response Labor Mechanism (RRM) (see **WTTL**, Sept. 27, page 8). "We will continue to collaborate closely with Mexico to strengthen the legitimization vote process and ensure workers in Mexico can access their rights to freedom of association and collective bargaining," Tai said in a statement at the time.

Following their bilateral meeting, Prime Minister Trudeau and President Biden "reaffirmed their shared vision for a sustainable and inclusive economic recovery," according to a Canadian readout of the meeting. "They acknowledged that [USMCA] is

instrumental to achieving this vision, given the agreement's strong labor protections and commitments to ensuring free trade between Canada and the United States," it added. Trudeau "noted that the bilateral trade and investment relationship is essential to both countries' prosperity. He raised Canada's concerns with the United States' proposed electric vehicle [EV] tax credits. The Prime Minister also raised the importance of Line 5 to Canada's energy security and economy. The two leaders further discussed bilateral economic and trade issues, including Buy America provisions, softwood lumber, and potato exports," the readout added.

During remarks before the bilateral meeting, and before the Build Back Better Act passed the House, Biden addressed the EV tax credits that could violate USMCA provisions. "It hasn't even passed yet through the House. We're about to see that move. And we don't know what will happen in the Senate, but there's a lot of complicating factors. We're going to talk at length about it, I'm sure," he said. Whether the U.S. and Canada can find common ground, Biden said, "The answer is: I don't know. And I don't know what we're going to be dealing with, quite frankly, when it comes out of legislation."

A joint statement after the meeting sounded all the right notes. "Our vision is to support sustainable growth and resilient infrastructure, build upon the foundation established by our trade agreement to protect workers' rights, and actively promote gender, racial, ethnic, and social equity to unlock the region's tremendous human capital. As supply chains constrict globally, we seek to deepen our economic ties, support the development of Small and Medium Enterprises (SMEs), and enhance our collective security, while raising labor and environmental standards," the three leaders said.

In a letter to Biden administration officials the day before the meetings, the Information Technology Industry Council (ITI) urged the three leaders to "further integrate the digitalized North American economy." USMCA "includes some of the most forward-thinking and comprehensive digital trade, trade facilitation, and other commitments of any modern trade agreement. It provides a template for both innovation- and worker-friendly policies for facilitating increased economic growth and cooperation, and tackling common concerns," the group added.

## **Trade Officials Begin Building Indo-Pacific Economic Framework**

With one eye on China and another on Republican criticism, the Biden administration in a quick one-two punch, worked with Asia to build resiliency to trade and the supply chain, as well as resolve steel and aluminum dumping issues, all a drag on the U.S. economy. Both USTR Katherine Tai and Commerce Secretary Gina Raimondo made trips to the region the week of Nov. 15.

A week before the trip, more than 14 Republicans wrote Biden haranguing him for not doing enough to get to Asia ahead of China. They may have been spooked by China's application to the Comprehensive and Progressive Agreement for Trans-Pacific

Partnership (CPTPP) (see **WTTL**, Nov. 15, page 3). The previous administration withdrew from the deal, and President Biden has said the U.S. is not in the position to rejoin the agreement.

In meetings with government counterparts from Japan, Singapore, Malaysia, New Zealand and Australia, Raimondo followed up on the creation of a nascent Indo-Pacific economic framework. “We don’t envision this to be a traditional free-trade agreement like CPTPP. This is a new framework for a new economy. So, the topics that we intend for it to cover include supply chain resiliency, including semiconductors, infrastructure, cyber-security, privacy, setting tech standards together,” Raimondo told reporters from Malaysia Nov. 18.

“We’ve proposed a number of areas for the framework: digital economy standards, supply chain resiliency, infrastructure, export controls, clean energy. We absolutely do not envision this to be a traditional trade agreement, absolutely do not envision it to require Congress to be involved. It is not that,” she added. “We are here initiating discussions and in the very earliest stages of having these discussions. So, it is far too premature to suggest precisely which countries, precisely which issues,” Raimondo noted.

In a joint statement Nov. 15, Raimondo and Japanese Trade Minister Hagiuda Koichi went beyond steel and aluminum, announcing plans to work through the U.S.-Japan Commercial and Industrial Partnership (JUCIP). “JUCIP will promote the resiliency of supply chains for semiconductors, 5G and other vital industry segments, strengthen collaboration in the protection of critical technologies and the development of infrastructure, and address market-distorting measures to counter unfair trade practices,” they said.

This was a point reiterated by both Tai and Raimondo as they held discussions with officials in Singapore, Malaysia, New Zealand, Australia and the European Union. In a readout of Raimondo’s meeting Nov. 16 with Singapore Trade Minister Gan Kim Yong, the two partners said they plan “to collaborate further with ...Commerce on shared goals with the United States in areas such as infrastructure, export controls, the digital economy, and supply chain resilience.”

In a joint statement Nov. 17, Tai, Hagiuda and EU Trade Commissioner Valdis Dombrovskis “renewed their Trilateral partnership to address the global challenges posed by non-market policies and practices of third countries.” With New Zealand, the U.S. discussed “opportunities to enhance their collaboration on cross-border data flows such as through the APEC Cross-Border Privacy Rules System,” a readout of Raimondo’s meeting with New Zealand Trade Minister Damien O’Connor said.

In remarks on the U.S.-Korea Free Trade Agreement (KORUS) in Seoul Nov. 19, Tai reiterated stronger Korean-American trade relations with caveats. “While not glamorous, this work of monitoring each other’s policies and resolving our trade irritants remains important. And our stakeholders and our legislatures look closely at KORUS and whether issues are being resolved when deciding whether trade agreements are working for us,” she cautioned.

## Commission Urges Interagency Review of Export Controls

In its annual report, the U.S.-China Economic and Security Review Commission (USCC) made two dozen recommendations to Congress, including two tackling export controls and China head-on. Specifically, the Commission urged Congress to fully implement two pieces of recent legislation, especially provisions directing agencies to identify emerging and foundational technologies.

Testifying at a USCC hearing in September, acting Bureau of Industry and Security (BIS) Under Secretary Jeremy Pelter defended his agency's pursuit of multilateral export controls, but stopped short of giving a specific timeline of when to expect final rules on emerging and foundational technology (see *WTTL*, Sept. 13, page 1).

“Congress [should] ensure the effective implementation of the Export Control Reform Act of 2018 and the Foreign Investment Risk Review Modernization Act of 2018,” the USCC recommended. Specific actions included: create a Technology Transfer Review Group (TTRG); authorize the TTRG to direct BIS to implement export controls; authorize and require the TTRG to oversee multilateral engagement related to export controls, foreign investment screening, and technology transfer regulations; and require that additional resources be provided to improve and expand end-user verification of export controls.

A second recommendation to Congress involves the use of export controls and Chinese nuclear weapons research. “Congress [should] direct the administration to conduct an interagency review of any Chinese universities that maintain research or training arrangements with China's nuclear weapons research institutes, such as the Chinese Academy of Engineering Physics and the Northwest Institute of Nuclear Technology.”

Specific actions included: assess whether current U.S. export controls adequately address risks from the transfer and exchange of information and technologies with applications to nuclear research; identify Chinese universities and research institutes that should be added to the Entity List; and identify Chinese universities and research institutes that merit a presumption of denial for all export licenses involving items covered by the Export Administration Regulations.

## ITA Nominees Commit to Maintaining Open Lines of Communication

At a Senate Finance committee hearing Nov. 16, two nominees for Commerce's International Trade Administration (ITA) covered all the usual bases: supply chain disruptions, suspension agreements, China, environmental standards, non-market economies (NMEs) and self-initiated trade remedy cases.

President Biden nominated Marisa Lago to be Commerce under secretary for international trade. She currently serves as the director of the NYC Department of City Planning and chair of the City Planning Commission. Lisa Wang was nominated to be Commerce assistant secretary for enforcement and compliance. She has been a partner with Picard,



Kentz and Rowe LLP since 2016 and previously served in senior roles at the USTR's office and Commerce. During the hearing, Lago responded to several questions on supply chain disruptions. "ITA has a number of tools in its tool kit that it can deploy to help address this issue," she said. "We know that the supply chain is controlled by the private sector so we need to work with them as they need to cooperate to get us through this," Lago added. "There are players in the world that operate in anti-competitive ways," she said.

On Russia's NME status, Lago said, "NME is an important distinction for purposes of antidumping duties and how they are calculated," she said. "It is a highly fact-specific and technical determination that is based on multiple factors. If confirmed I would look forward to working with Commerce's expert career staff to look at [those] factors."

Lago on environmental standards in trade: "Among China's anti-competitive and trade-distorting practices are the fact that many of its industries operate not in accordance with the environmental standards that our country prides itself on," she said. "In highlighting our carbon advantage, it suggests that there are opportunities for U.S. businesses to take advantage of the technological edge that we have here to create new markets and thus new jobs for Americans," Lago added.

Wang on suspension agreements and congressional engagement: "I certainly understand the importance of your role in oversight of enforcement and compliance matters. If confirmed I would absolutely commit to maintaining open lines of communications with your offices on these matters," she said.

Wang on self-initiated trade remedy cases: "Self-initiation of antidumping and countervailing duty proceedings is an important issue particularly in helping small businesses find effective trade relief and I take that seriously," she said. "Within the office of enforcement and compliance there already is a pre-petitioning unit and a self-initiation unit," Wang noted. "If confirmed I would work with those units to find a way forward in helping these small businesses and American workers," she added.

## **BIS Clarifies Recent Wassenaar Cyber Rule**

In an attempt to soothe industry nerves, BIS Nov. 12 published 29 new Frequently Asked Questions (FAQs) on its recent rule implementing changes to controversial cyber intrusion software controls that Wassenaar Arrangement (WA) members agreed to at its December 2017 plenary. After eight years of industry comments and agency pushback, BIS finally published its interim final rule in October (see **WTTL**, Oct. 25, page 2).

One FAQ answered whether non-published, machine-executable exploits (and other forms of proprietary "intrusion software") are considered "cybersecurity items" for purposes of the Export Administration Regulations (EAR). "No. The [WA] decisions related to 'intrusion software' do not place exploits (sometimes referred to as 'payload') within the control scope of ECCN [Export Control Classification Number] 4D004," the agency noted.

“In real-world situations, ‘payload’ delivered onto a targeted computer or other network-capable device may simultaneously meet the definition of ‘intrusion software’ (classified EAR99) while also having the *command and control* characteristics of ‘software’ classified ECCN 4D004. Such software that both meets the definition of ‘intrusion software’, and is also designed to generate, command and control, or deliver other ‘intrusion software’, is considered ‘intrusion software’ for purposes of the EAR,” BIS wrote.

Another answered whether companies would be required to share their zero-day exploits with the government in order to get an export license. “Exploits that meet the definition of ‘intrusion software’ are not controlled, and information pertaining to the discovery of a vulnerability is also not controlled. Therefore, BIS would not request a company to share the technical details of any exploitable vulnerability, zero-day or otherwise,” the FAQ said.

The agency also addressed penetration testing products and whether all such product would fit the definition of intrusion software. “Some penetration testing products meet the description of systems, equipment or software ‘specially designed’ or modified for the generation, operation or delivery of, or communication with, ‘intrusion software’ set forth in proposed ECCNs 4A005 and 4D004,” BIS wrote.

“However, there are some tools that are used in penetration testing that are not caught by the entries because they do not do the things described in the definition. For example, tools such as port scanners, packet sniffers and protocol analyzers would not be controlled. A penetration testing tool not designed to avoid detection by ‘monitoring tools’ would not be controlled. Also, a vulnerability scanner, which just finds vulnerabilities in a system without actually exploiting them and extracting data, would not be captured by the proposed rule,” it added.

**\* \* \* Briefs \* \* \***

**EXPORT ENFORCEMENT:** Ga. business owner Dali Bagrou was sentenced Nov. 10 in Savannah U.S. District Court to 51 months in prison followed by three years of supervised release for conspiracy to procure Vectra 40G power turbine from U.S. manufacturer and ship Vectra to blocked Russian company that intended to use turbine on Arctic deepwater drilling platform. Bagrou’s U.S.-based company World Mining and Oil Supply (WMO) was sentenced to five years’ probation. Bagrou and WMO pleaded guilty in July. Codefendant Oleg Vladislavovich Nikitin was sentenced in September to 28 months in prison (see **WTTL**, Oct. 4, page 8). Nikitin and his Russian company KS Engineering (KSE) pleaded guilty in March. Co-defendant GVA International Oil and Gas Services (GVA) pleaded guilty in May. KSE and GVA were ordered five years’ probation. Italian national and GVA owner Gabriele Villone was sentenced in June 2020 to 28 months in prison on related charges. Other charged parties were KSE employee Anton Cheremukhin and GVA employee Bruno Caparini.

**MORE EXPORT ENFORCEMENT:** Jury in Jacksonville, Fla., U.S. District Court found active-duty U.S. Navy officer Fan Yang guilty Nov. 12 after eight-day trial of conspiracy to unlawfully smuggle military-style inflatable boats, with Evinrude MFE military outboard motors, to China from September 2018 through October 2019. Sentencing is set for March 16, 2022. Chinese citizen Ge Songtao, chairman of Shanghai Breeze Technology, was sentenced in July to 42 months in prison for related charges (see **WTTL**, July 19, page 7). Yang, Ge, Yang’s wife Yang Yang of Jack-

sonville and Chinese national Zheng Yan were indicted in October 2019. All four were charged with conspiring to submit false export information and to fraudulently attempt to export articles from U.S. Yang Yang and Zheng Yan previously were sentenced to time served.

**RUBBER:** Lion Elastomers filed antidumping duty petition Nov. 15 at ITA and ITC against emulsion styrene-butadiene rubber from Czech Republic, Italy and Russia. Company previous filed antidumping petition against imports from Korea, Mexico and Poland (see **WTTL**, July 25, 2016, page 6).

**WIND TOWERS:** In 5-0 final vote Nov. 16, ITC determined U.S. industry is materially injured by dumped imports of utility scale wind towers from India and Malaysia and subsidized imports from India.

**YARN:** In 5-0 final vote Nov. 16, ITC found U.S. industry is materially injured by dumped imports of polyester textured yarn from Indonesia, Malaysia, Thailand and Vietnam.

**OCTG:** In 5-0 preliminary vote Nov. 19, ITC found U.S. industry may be injured by allegedly dumped imports of oil country tubular goods (OCTG) from Argentina, Mexico, Russia and South Korea and subsidized imports from Russia and South Korea.

**NOMINATIONS:** Senate Finance Committee Nov. 17 voted to advance nominations of Maria Pagan to be deputy USTR in Geneva and Chris Wilson to be USTR chief intellectual property (IP) negotiator. Pagan vote was 27-1 (Lankford said no); Wilson was 24-4 (Burr, Toomey, Scott and Lankford voted no).

**NICARAGUA:** OFAC Nov. 15 designated Public Ministry of Nicaragua as well as nine Nicaraguan government officials, including vice minister of finance, minister of energy and mines, and president of Nicaraguan Institute of Energy, “in response to the sham national elections” held week earlier, agency said. OFAC in June designated four other Nicaraguan government officials, including President Ortega’s daughter, coordinator of Creative Economy Commission; president of Central Bank of Nicaragua; deputy of Nicaraguan National Assembly (NNA); and brigadier general of Nicaraguan Army (see **WTTL**, June 14, page 6).

**FCPA:** Brothers Luis Enrique Martinelli Linares and Ricardo Alberto Martinelli Linares, dual citizens of Panama and Italy, were indicted Nov. 15 in Brooklyn U.S. District Court on charges of conspiracy to commit money laundering for their roles in bribery scheme involving Brazilian construction conglomerate Odebrecht S.A. and high-ranking government official in Panama. Luis Martinelli Linares was extradited from Guatemala same day to face charges. Both were charged in criminal complaint in July 2020 (see **WTTL**, July 13, 2020, page 9). Between August 2009 and January 2014, defendants allegedly “established shell companies in foreign jurisdictions; served as the signatories on certain of the shell company bank accounts; and personally sent and caused to be sent wire transfers through the structure of shell company bank accounts to conceal and spend bribery proceeds,” complaint noted. Odebrecht pleaded guilty in Brooklyn court in December 2016 to conspiracy to violate Foreign Corrupt Practices Act (FCPA) for its involvement in scheme.

**VIETNAM:** Country Nov. 15 revised most-favored nation (MFN) tariff rates for corn, wheat and frozen pork. Decree eliminates MFN tariff on all classes of wheat, lowers duty on corn from 5% to 2%, and lowers duty on frozen pork from 15% to 10%. U.S. exports of corn, wheat and pork to Vietnam were valued at \$228 million in 2020. wheat and corn tariff reductions enter into force Dec. 30, while frozen pork reduction will enter into force July 1, 2022. “With about half of the



wheat we produce available for export each year, we depend on increasing access to markets like Vietnam,” National Association of Wheat Growers (NAWG) President Dave Milligan said in statement.

**BURUNDI:** President Biden Nov. 18 signed Executive Order (EO) terminating sanctions on Burundi that have been in place since 2015. At same time, OFAC removed 19 individuals from its list of Specially Designated Nationals. U.S. “recognizes the positive reforms pursued by President Ndayishimiye, while continuing to press the Government of Burundi to improve the human rights situation in the country and hold accountable those responsible for violations and abuses,” Deputy Treasury Secretary Wally Adeyemo said in statement. In addition, all property and interests in property blocked solely pursuant to Burundi Sanctions Regulations are unblocked; and “OFAC will remove the Burundi Sanctions Regulations from the Code of Federal Regulations at a future date,” agency said. President Obama imposed sanctions on government officials of central African country in November 2015 (see **WTTL**, Nov. 30, 2015, page 11).

**DIGITAL TAXES:** USTR Nov. 18 formally terminated Section 301 actions over digital services taxes (DSTs) adopted by Austria, France, Italy, Spain and United Kingdom based on countries’ commitments “to remove their DSTs pursuant to Pillar 1 and on their political agreement to the transitional approach prior to Pillar 1’s entry into force,” Federal Register notice said. USTR announced plan after 130 members of Organization of Economic Cooperation and Development (OECD) approved agreement in principle on 15% global minimum tax (see **WTTL**, Oct. 25, page 3).

**IRAN:** OFAC Nov. 18 designated six Iranian individuals and one Iranian entity -- cyber company Emennet Pasargad -- for “attempting to influence the 2020 U.S. presidential election.” Designated entities include company manager, two employees and three members of company board. Emennet was designated under its former name, Net Peygard Samavat Company, in February 2019 and “rebranded itself to evade U.S. sanctions and continue its disruptive cyber operations,” OFAC noted (see **WTTL**, Feb. 18, 2019, page 5).

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