

Export Controls and Economic Sanctions

MICHAEL L. BURTON, KARA M. BOMBACH, DAN FISHER-OWENS, STEPHANIE BROWN
CRIPPS, J. DANIEL CHAPMAN, JOHN BOSCARIOL, PAUL M. LALONDE, AND CYNDEE
TODGHAM CHERNIAK*

I. Introduction

2010 witnessed continuing trends in U.S. export control and economic sanctions law and policy as well as steps toward a more consolidated and streamlined regulatory regime. Compliance expectations, the mandated use of outside auditors, penalty levels, and the criminal prosecution of corporations and individuals for alleged violations increased. Iran remained the paramount target of U.S. sanctions efforts, though enforcement of the other sanctions programs proceeded at pace. In hopes of isolating the Ahmadinejad regime and hindering Iran's refined petroleum capacity, Congress enacted legislation penalizing certain non-U.S. investments involving Iran. In parallel, multilateral sanctions targeting Iran's financial system demonstrated the power of collective action. Our trading partners such as Canada and the European Union implemented and enforced their own trade controls in ways that increasingly resemble the U.S. system albeit in less cumbersome fashion.

Attempting to balance U.S. national security and foreign policy objectives against the calls for efficiency and a positive balance of trade, the Obama Administration launched a bold initiative to reform the U.S. export controls and economic sanctions regulatory, licensing, and enforcement bureaucracy by targeting our key risks and protecting our critical assets. Whether this initiative will result in genuine reform remains to be seen.

II. Export Reform Initiative

On August 13, 2009, the White House announced a comprehensive interagency review of U.S. export controls, followed by Presidential Study Directive 8 of December 21, 2009, directing the Administration to recommend reforms to the U.S. export control system.

* Michael L. Burton (Arent Fox LLP) and Kara M. Bombach (Greenberg Traurig LLP) served as the committee editors. Parts II-IV were written by Dan Fisher-Owens, with thanks to his co-authors at Berliner, Corcoran & Rowe LLP: Benjamin Flowe, Jr., John A. Ordway, Wayne H. Rusch, Ray Gold, Michelle Turner, and Jason McClurg. Stephanie Brown Cripps (Freshfields Bruckhaus Deringer US LLP) and J. Daniel Chapman (Parker Drilling Company) authored Part V (Economic Sanctions). John Boscariol (McCarthy Tétrault LLP), Paul M. Lalonde (Heenan Blaikie LLP), and Cyndee Todgham Cherniak (Lang Michener LLP) drafted Part VI (Canadian Developments).

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

20 THE INTERNATIONAL LAWYER

The Administration laid out four major reform initiatives: a single export control list, a single licensing agency, a single enforcement agency, and a single information technology (“IT”) platform. These “Four Singles” were described in an April 20, 2010 speech by Defense Secretary Robert Gates and again by National Security Advisor James Jones on June 30, 2010. President Obama announced progress at the U.S. Department of Commerce Bureau of Industry and Commerce (“BIS”)¹ Update on August 30, 2010 relating to:

1. Interagency agreement on criteria for creating tiered positive lists of U.S. Munitions List (“USML”)² and Commerce Control List (“CCL”)³ items,
2. Agreement on the same set of licensing policies for both State and Commerce controlled items, adding clarity and consistency to current International Traffic in Arms Regulations (“ITAR”)⁴ and Export Administration Regulations (“EAR”)⁵ controls,
3. An Executive Order to create an Export Coordination Enforcement Center, and
4. Continuing to develop a single IT system.

A. THE FOUR SINGLES

1. *Single Control List*

The interagency working group sought to develop independent, objective criteria for evaluating controlled technologies and restructuring the USML and CCL into a single, three-tiered, positive list.

- Tier 1: Strictly controlled “crown jewel” technologies available almost solely in the United States, relate to weapons of mass destruction, or confer a critical military or intelligence advantage.
- Tier 2: Sensitive items available almost solely from members of multilateral export control regimes.
- Tier 3: Broadly available items that confer some military or intelligence advantage, or are otherwise prudent to control, such as for crime control or foreign policy reasons.

No tiering criteria or bright-line test for determining whether an item is on the USML has yet been announced.

To prevent decontrolled items from defaulting to EAR99, the combined list will likely have “holding” Export Commodity Control Numbers (ECCNs) in lower tiers for those items not within existing ECCNs. Unless the delegation of authorities under the Arms Export Control Act can be amended administratively, the single control list might require legislation because the USML is mandated by statute.⁶

1. U.S. DEP’T OF COMMERCE BUREAU OF INDUS. & SEC., <http://www.bis.doc.gov> (last visited Jan. 28, 2010).

2. 22 C.F.R. § 121 (2011).

3. 15 C.F.R. § 774 (2011).

4. 22 C.F.R. §§ 120-30 (2011).

5. 15 C.F.R. §§ 730-74 (2011).

6. Arms Export Control Act, §§ 2751-2799aa-2 (2010).

2. *Single Licensing Agency*

Perhaps most controversial is the creation of a single licensing agency (“SLA”) to process export licenses now administered by the Department of Commerce, Bureau of Industry and Security (“BIS”), the Department of State, Directorate of Defense Trade Controls (“DDTC”), and the Department of the Treasury’s Office of Foreign Assets Control (“OFAC”), with participation by the Department of Defense and other agencies. Nuclear controls administered by the Department of Energy and Nuclear Regulatory Commission are not expected to become part of the SLA.

A SLA would provide a one-stop shop for export licensing and classification issues. Concerns have been raised about locating the SLA in one of the existing export control agencies, or within Homeland Security. The Administration has suggested creating an independent agency led by a board of directors representing the numerous administrative stakeholders. The SLA would report to the President, who would appoint the head of the agency, with advice and consent of the U.S. Senate.

Creation of a SLA would require congressional agreement in an area where Congress is traditionally resistant. Some harmonization of agency licensing practices, however, could be implemented through administrative action.

3. *Single Enforcement Agency (“SEA”)*

Overlapping jurisdiction in export controls enforcement is also perceived as inefficient. Immigration and Customs Enforcement (“ICE”), the Defense Criminal Investigative Service, Naval Criminal Investigative Service, and the FBI have authority to investigate violations of all types of export controls. BIS, DDTC, and OFAC also have jurisdiction to impose administrative (non-criminal) penalties for violations of their own regulations. The single agency reportedly would have authority only over criminal matters (much like the current system), so the goals of this effort need more explanation. Currently, only BIS’s Office of Export Enforcement reviews license applications, so this would be an increased role for enforcement. The SEA will also have a single policy on voluntary disclosures and penalty mitigation.

Full implementation of the SEA could require legislation. The Administration issued an Executive Order on Nov. 9, 2010 establishing an “Export Enforcement Coordination Center” within the Department of Homeland Security, staffed by representatives from the export enforcement agencies and intelligence community.⁷ This order will, essentially, formalize existing coordination practices.

4. *Single IT Platform*

The Administration has proposed a single IT platform to support efficiency and consistency in licensing and enforcement. The single IT platform would allow the various agencies to access and query the system, minimizing inconsistent determinations and enhancing tracking ability. It would also provide a single point of entry for the exporting community. Development of a single IT platform parallels the development of a single export license application.

7. Exec. Order No. 13,558, 75 Fed. Reg. 69,573 (Nov. 9, 2010).

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

22 THE INTERNATIONAL LAWYER

B. PHASED IMPLEMENTATION

The Administration announced a three-phase implementation. Phases I and II are devoted to policy and regulatory changes that can be accomplished through administrative actions. Phase III contemplates legislative changes.

- Phase I: (i) Improve the export controls system and complete work on the earliest two reforms announced in 2009; (ii) rule changes on encryption (EAR) and dual nationals (ITAR); (iii) establish criteria for tiered controls; (iv) streamline and harmonize interagency license processes; (v) create a unified IT platform; and (vi) establish an integrated enforcement center.
- Phase II: (i) Complete two positive, mirrored and tiered CCL and USML lists; (ii) harmonize export agency administrative practices; (iii) adopt common definitions between the ITAR and EAR; (iv) complete IT migration for license review; (v) harmonize enforcement practices and fully implement the Export Enforcement Coordination Center; and (vi) identify items to remove from control lists that require congressional notification and/or proposals to multilateral export regimes.
- Phase III: Implement the “Four Singles.”

C. PARALLEL LEGISLATIVE EFFORTS

Interagency efforts on export reform proceeded in conjunction with separate efforts by the House Foreign Affairs Committee to draft a bill to amend the Export Administration Act,⁸ which lapsed over a decade ago.

III. Dual-Use Export Controls

A. RULE CHANGES

1. Encryption

A June 25, 2010 interim final rule eliminated product-by-product classification requirements for most 5D992 mass market and 5D002 ENC-Unrestricted (“ENC-U”) items, as well as biennial export reporting for most ENC-U products.⁹ The new system institutes a one-time registration requirement for companies producing encryption items, plus an annual report of encryption changes to products during the prior year.

The rule also implements the December 2009 Wassenaar Arrangement agreed-upon Note 4 to CCL Category 5, Part 2, which decontrols items that do not use encryption for the principal purpose of computing, communications, networking, or information security purposes, and where the cryptographic functions are limited to the specific functions of the item. This builds upon the relaxation of prior review requirements on so-called “an-

8. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (Sept. 29, 1979).

9. Encryption Export Controls: Revision of License Exception ENC & Mass Market Eligibility, Submission Procedures, Reporting Requirements, License Application Requirements, and Addition of Note 4 to Category 5, Part 2, 75 Fed. Reg. 36,481 (June 25, 2010) (to be codified at 15 C.F.R. pts. 730, 734, 738, 740, 742, 748, 772, and 774).

cillary” encryption items implemented in 2008.¹⁰ The rule also revised performance parameters for 5D002 ENC-Restricted items and liberalized License Exception ENC eligibility for encryption source code and technology.

2. *Foreign Direct Product Rule*

On July 30, 2010, BIS expanded the scope of the so-called “Direct Product Rule” to encompass reexports to embargoed countries not previously covered.¹¹ Under the Direct Product Rule, certain foreign made items are subject to the EAR and require a license or license exception for export because they are the direct products of national-security controlled U.S.-origin technology or software.¹² The Direct Product Rule previously applied only to foreign made items reexported to Country Group D:1 countries or Cuba. The rule expanded the country scope to cover all of Country Group E:1, adding Iran, Sudan, and Syria and made conforming revisions to License Exception TSR and licensing guidance.

3. *Commerce Control List*

BIS made several rounds of changes to the Commerce Control List (“CCL”), the most important of which are:

a. *Third Phase of Comprehensive CCL Review*

BIS implemented the third and final phase of its comprehensive CCL review, which began in 2007.¹³ Revisions include: (i) clarifications to existing controls; (ii) elimination of redundant or outdated controls; and (iii) establishment of more focused and rationalized controls. This rule affected numerous ECCNs in Categories 3, 4, 7, 8, and 9. Additional changes were made to the *de minimis* rules relating to “hot sections” of jet engines and certain encryption items as well as to License Exception APP for computers in EAR 740.7. The rule also removed Regional Stability (RS2) controls for Austria, Finland, Ireland, Sweden, and Switzerland.

b. *Missile Technology Control Regime*

BIS implemented changes made to the Missile Technology Control Regime (“MTCR”) Annex agreed to at the 2009 Plenary.¹⁴ The rule clarified the meaning of “production facilities” and made changes to ECCNs 1C101, 1C111, 1C117, and 9A101.

10. Encryption Simplification, 73 Fed. Reg. 57,495 (Oct. 3, 2008) (to be codified at 15 C.F.R. pts. 732, 734, 738, 740, 742, 744, 746, 748, 750, 762, 770, 772, and 774).

11. Foreign Direct Products of U.S. Technology, 75 Fed. Reg. 44,887 (July 30, 2010) (to be codified at 15 C.F.R. pts. 732, 736, 740, and 748).

12. 15 C.F.R. § 734.3(a)(4) (2011); 15 C.F.R. § 736.2(b)(3) (2011).

13. Revisions to the Export Administration Regulations Based Upon a Systematic Review of the Commerce Control List: Additional Changes, 75 Fed. Reg. 36,511 (June 28, 2010) (to be codified at 15 C.F.R. pts. 734, 738, 740, 742, 772, and 774).

14. Revisions to the Export Administration Regulations Based on the 2009 Missile Technology Control Regime Plenary Agreements, 75 Fed. Reg. 20,520 (Apr. 20, 2010) (to be codified at 15 C.F.R. pts. 772 and 774).

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

24 THE INTERNATIONAL LAWYER

c. 2008 and 2009 Wassenaar Arrangement Changes

BIS implemented changes made to the Wassenaar Arrangement's List of Dual Use Goods and Technologies at the 2008 Plenary¹⁵ and 2009 Plenary.¹⁶ The rules affected ECCNs in all CCL categories and added unilateral U.S. export controls on some items decontrolled by Wassenaar Arrangement revisions.

d. New and Proposed Controls for Homeland Security Items

BIS implemented the first set of changes identified by an interagency working group reviewing homeland security-related export controls, adding ECCNs to control certain concealed object detection equipment and related software and technology.¹⁷ BIS also proposed new controls on infrasound sensors used to detect earthquakes, volcanic eruptions, rocket launches, and nuclear explosions.¹⁸

e. Clarification of Crime Control License Requirements

BIS updated and clarified controls on certain striking weapons, restraint devices, shotguns, optical sighting devices, electric shock devices, and human execution equipment.¹⁹

4. *Jurisdictional Scope of Commodity Classification Determinations and Advisory Opinions*

By interim final rule, BIS clarified that exporters may not treat BIS-issued commodity classifications or advisory opinions as determinations that an item is "subject to the EAR," and not subject to the jurisdiction of another agency.²⁰ The rule is intended to prevent exporters from circumventing the commodity jurisdiction process by relying on a BIS commodity classification as an implicit ruling that an item is not subject to the ITAR.

5. *Elimination of Hard-Copy Documents and Revisions to Recordkeeping Requirements*

BIS eliminated paper versions of most licenses, notices of denial, return without action notices, classification determinations, License Exception AGR notification results and en-

15. Wassenaar Arrangement 2008 Plenary Agreements Implementation: Categories 1, 2, 3, 4, 5 Parts I and II, 6, 7, 8 & 9 of the Commerce Control List, Definitions, Reports, 74 Fed. Reg. 66,000 (Dec. 11, 2009) (to be codified at 15 C.F.R. pts. 740, 742, 743, 772, and 774).

16. Wassenaar Arrangement 2009 Plenary Agreements Implementation: Categories 1, 2, 3, 4, 5 Part I, 6, 7, and 9 of the Commerce Control List, Definitions, Reports, 75 Fed. Reg. 54,271 (Sept. 7, 2010) (to be codified at 15 C.F.R. pts. 734, 742, 743, 744, 772, and 774).

17. Revisions to the Export Administration Regulations to Enhance U.S. Homeland Security: Addition of Three Export Control Classification Number (ECCNs) and License Review Policy, 75 Fed. Reg. 14,335 (Mar. 25, 2010) (to be codified at 15 C.F.R. pts. 740, 742, 748, and 774).

18. Addition of New Export Control Classification No. 6A981 Passive Infrasound Sensors to the Commerce Control List of the Exp. Admin. Regulations, and Related Amendments, 75 Fed. Reg. 37,742 (June 29, 2010) (to be codified at 15 C.F.R. pts. 742 and 774).

19. Revisions to the Commerce Control List to Update and Clarify Crime Control License Requirements, 75 Fed. Reg. 41,078 (July 15, 2010) (to be codified at 15 C.F.R. pts. 742 and 774).

20. The Jurisdictional Scope of Commodity Classification Determinations and Advisory Opinions Issued by the Bureau of Industry and Security, 75 Fed. Reg. 45,052 (Aug. 8, 2010) (to be codified at 15 C.F.R. pts. 734 and 748).

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

EXPORT CONTROLS 25

ryption review requests, and made related changes to EAR recordkeeping requirements.²¹

B. SIGNIFICANT ENFORCEMENT CASES

Balli Aviation Ltd. On May 11, 2010, Balli Aviation Ltd., a subsidiary of the U.K.-based Balli Group PLC, was sentenced to a \$2 million criminal fine and corporate probation for five years for conspiracy to export three Boeing 747 aircraft to Iran. On February 4, 2010, Balli Group and Balli Aviation entered a civil settlement with BIS and OFAC, which includes a civil penalty of \$15,000,000—the largest civil penalty imposed under the EAR, of which \$2,000,000 is suspended pending no further export control violations. In addition, a five-year suspended denial of export privileges was imposed on both Balli entities. Under the terms of the settlement, Balli Group and Balli Aviation are required to submit to BIS and OFAC the results of independent annual export compliance audits for the next five years.²²

Chitron Electronics, Inc. Chitron and two Chinese nationals (one a U.S. resident), were convicted May 17, 2010 of conspiring to violate U.S. export laws and illegally exporting items from the United States to China, including to military end-users. A Chitron manager was also convicted of making false statements on export control documents. The exported electronic equipment is used in electronic warfare, military radar, fire control, military guidance and control equipment, and satellite communications, including global positioning systems.²³ On July 22, 2010 the manager was sentenced to eleven months imprisonment (time served), three years of supervised release, and a modest fine. The corporation and the other two individuals are to be sentenced in November of 2010.²⁴

Y-Lan Chen. Yi-Lan Chen, a/k/a “Kevin Chen,” a Taiwanese national, was sentenced on August 27, 2010, to forty-two months in prison on charges of conspiring to illegally export dual-use commodities to Iran. Chen’s corporation and co-defendant, Landstar Tech Company Limited, a Taiwan corporation, was sentenced to one year of probation. The conviction relates to an undercover enforcement operation, where Chen attempted to deliver hermetic connectors and glass-to-metal seals to Taiwan for ultimate delivery to Iran.²⁵

21. Issuance of Electronic Documents and Related Recordkeeping Requirements, 75 Fed. Reg. 17,052 (Apr. 5, 2010) (to be codified at 15 C.F.R. pts. 740, 748, 750, and 762).

22. *Don't Let This Happen To You: An Introduction to U.S. Export Control Law*, U.S. BUREAU OF INDUS. & SEC., 10 (2010), http://www.bis.doc.gov/complianceand enforcement/dontlethishappentoyou_2010.pdf.

23. Press Release, U.S. Dep't of Just., Two Chinese Nationals Convicted of Illegally Exporting Electronic Components Used in Military Radar and Electronic Warfare (May 17, 2010), *available at* <http://www.bis.doc.gov/news/2010/doj05172010.htm>.

24. *Don't Let This Happen To You: An Introduction to U.S. Export Control Law*, *supra* note 22, at 16.

25. Press Release, U.S. Dep't of Just., Taiwan Exporter is Sentenced to Three and A Half Years for Conspiring to Export Missile Components from the U.S. to Iran (Aug. 30, 2010), *available at* <http://www.bis.doc.gov/news/2010/doj08302010.htm>.

SPRING 2011

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

26 THE INTERNATIONAL LAWYER

IV. Defense Export Controls

A. RULE CHANGES

Departing from past practice, the State Department solicited formal comments on proposed ITAR changes through *Federal Register* notices instead of issuing final rules without comment.

1. *Proposed Exemption for Foreign Licensee Dual National and Third-Country National Employees*

Attempting to resolve a long-simmering foreign policy irritant with U.S. allies, DDTC published a proposed rule regarding dual-national and third-country national (“DTCN”) employees of foreign recipients of licensed exports.²⁶ Third-country nationals are nationals of countries different from the recipient’s nationality. The exemption attempts to address the collision of DDTC’s requirement that DTCN employees of a foreign recipient be specifically identified and licensed with the human rights and privacy laws of U.S. allies.

The proposed exemption would permit release of defense articles and technical data to DTCNs directly employed by a foreign recipient. Authorization is conditioned on the foreign recipient implementing procedures to prevent unauthorized diversion, such as requiring foreign government security clearance or establishing a screening procedure for employees to determine whether they have “substantive contacts” with restricted or prohibited countries (*e.g.*, China, Sudan, Cuba, etc.), such as travel, contact with agents or nationals of such countries, allegiance to such countries, or acts otherwise indicating a risk of diversion.

2. *Draft Brokering Rule*

On November 25, 2009, DDTC issued a draft proposed rule to amend the ITAR Part 129 brokering regulations.²⁷ The draft expands the definitions of “broker” and “brokering activities,” and removes the precondition of acting “as an agent for others” in return for a “fee, commission, or other consideration.”²⁸ Under the new definition, brokering would include: (1) financing, transporting, or freight forwarding; (2) soliciting, promoting, negotiating, contracting for, or arranging a purchase, sale transfer, loan, or lease; (3) acting as a finder of potential suppliers or purchasers; or (4) taking any other action to assist a transaction involving a defense article or defense service. The proposed rule would expand requirements for prior approval of brokering activities and reporting, and require foreign brokers to register with DDTC and obtain authorization relating to the brokering of reexports of defense articles, even if such reexports were authorized by an existing license.

26. Amendment to the International Traffic in Arms Regulations: Dual National and Third-Country National Employed by End-Users, 75 Fed. Reg. 48,625 (Aug. 11, 2010) (to be codified at 22 C.F.R. pts. 124 and 126).

27. *Amendments to the International Traffic in Arms Regulations: Registration & Licensing of Brokers, Brokering Activities, Related Provisions, and Other Technical Changes*, U.S. DEP’T OF STATE, (Nov. 25, 2009), <http://www.pnddtc.state.gov/DTAG/documents/Part129BrokeringComments.pdf>.

28. *Id.* at 4, 6.

3. *Clarification to Technical Data Exemption*

DDTC amended ITAR 125.4(b)(9) to confirm it applies to technical data “regardless of media or format” and to technical data “taken” out of the United States.²⁹ The rule confirms that the exemption is available for hand-carry exports of ITAR technical data on laptops or portable digital media.

4. *Elimination of Pre-Approval Requirement for Proposals*

DDTC eliminated ITAR 126.8, which required prior approval or notification with respect to certain proposals to foreign persons relating to sales of significant military equipment (“SME”), given the increased efficiency of electronic licensing.³⁰

5. *Proposed Modification to Foreign Military Sales/U.S. Government Program Exemption*

DDTC issued a proposed rule to amend ITAR 126.6, placing more responsibility on the Dept. of Defense (DOD) to monitor use of the Foreign Military Sales (“FMS”) exemption.³¹ The proposed changes would impose additional administrative burdens (primarily on DOD), update eligible modes of transportation, and extend the exemption to cover DOD sales, grants, leases, or loans of defense articles to assist building the capacity of foreign military forces for specified purposes.

B. DDTC POLICIES

In addition to publishing proposed ITAR changes for formal comment, DDTC has increased posting of notices and formal guidance on its website.

1. *Name, Address, or Registration Code Changes*

DDTC began using the General Correspondence (“GC”) process to approve U.S. and foreign entity name, address, and registration code changes for licenses and agreements.³² Changes may be approved for multiple licenses and authorizations, no longer requiring each document to be amended.

29. Amendment to the International Traffic in Arms Regulations: Export Exemption for Technical Data, 75 Fed. Reg. 52,625 (Aug. 27, 2010) (to be codified at 22 C.F.R. pt. 125).

30. Amendment to the International Traffic in Arms Regulations: Removing Requirement for Prior Approval for Certain Proposals to Foreign Persons Relating to Significant Military Equipment, 75 Fed. Reg. 52,622 (Aug. 27, 2010).

31. Amendment to the International Arms Traffic in Arms Regulations: U.S. Government Transfer Programs and Foreign-Owned Military Aircraft and Naval Vessels, 74 Fed. Reg. 61,586 (Nov. 25, 2009) (to be codified at 48 C.F.R. pt. 6).

32. U.S. Dep’t of State Directorate of Defense Trade, *General Correspondence for Amendment of Existing ITAR Authorizations Due to U.S. Entity Name/Address and/or Registration Code Changes*, U.S. DEP’T OF STATE (May 8, 2010), http://www.pmdtce.state.gov/licensing/documents/gl_GCUS.pdf; U.S. Dep’t of State Directorate of Defense Trade, *General Correspondence for Amendment of Existing ITAR Authorizations Due to Foreign Entity Name/Address Change*, U.S. DEP’T OF STATE (May 8, 2010), http://www.pmdtce.state.gov/licensing/documents/gl_GCUSForeign.pdf.

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

28 THE INTERNATIONAL LAWYER

2. *Unauthorized Imports*

On November 25, 2009, DDTC issued a website notice about a U.S. person's obligations when it receives "a defense article for repair or replacement without" prior notice and without an indication that a temporary import license or exemption has been used.³³ The U.S. person is advised to investigate and determine if it has any responsibility for the violation. If not, the U.S. person may apply to return the item in lieu of submitting a voluntary disclosure.

3. *Request for License Proviso Reconsideration/Clarification*

DDTC issued guidance regarding requests for proviso reconsideration or clarification. For DSP licenses, such requests now may be submitted as a (1) "General Correspondence (GC) request," or (2) a "replacement DSP authorization."³⁴

C. ELECTRONIC SUBMISSIONS AND ACCESS TO DDTC

DDTC now requires that all proposed agreements and Commodity Jurisdiction ("CJ") requests be submitted to DDTC electronically.³⁵ The MARY Status Retrieval System became available online as of March 8, 2010.³⁶

The D-Trade 2 System uses a DSP-5 license application form as the "vehicle" for submitting agreements and amendments.³⁷ All post-approval documents must be uploaded to D-Trade 2. An applicant may no longer amend previously approved hard-copy agreements, but must first submit electronically a "re-baselined" agreement.³⁸ DDTC guidelines have been modified accordingly.³⁹

Use of electronic Form DS-4076 is now mandatory for commodity jurisdiction ("CJ") requests and USML category determinations. DDTC prefers that the manufacturer file such requests, and other parties must submit a letter of authorization from the manufacturer.⁴⁰

33. U.S. Dep't of State Directorate of Defense Trade, *Temporary Import Violations*, U.S. DEP'T OF STATE, http://www.pmdtc.state.gov/licensing/documents/WebNotice_TemporaryImportViolations.pdf (last visited Jan. 29, 2010).

34. U.S. Dep't of State Directorate of Defense Trade, *Requests for Proviso Reconsideration and/or Clarification*, U.S. DEP'T OF STATE, (July 19, 2010), http://www.pmdtc.state.gov/licensing/documents/gl_proviso.pdf.

35. Amendment to the International Traffic in Arms Regulations: Commodity Jurisdiction, 75 Fed. Reg. 46,843 (Aug. 4, 2010) (to be codified at 22 C.F.R. pt. 120).

36. MARY [Status Retrieval System] provides Industry Users a quick and convenient way to access their DTrade 2 export license statuses. See U.S. Dep't of State Directorate of Defense Trade, *Industry Notice 03/04/2010: Full Version of Mary Status Retrieval System Going Live*, U.S. DEP'T OF STATE (Mar. 4, 2010), http://www.pmdtc.state.gov/documents/Industry%20Notice_20100305.pdf.

37. U.S. Dep't of State Directorate of Defense Trade, *Guidelines for Preparing Electronic Agreements*, U.S. DEP'T OF STATE, (Apr. 1, 2010), <http://www.pmdtc.state.gov/licensing/documents/agreement-ElectronicGuidelines.pdf>.

38. *Id.*

39. U.S. Dep't of State Directorate of Defense Trade, *Guidelines for Preparing Electronic Agreements (Revision 2.0)* (Apr. 1, 2010), U.S. DEP'T OF STATE, <http://www.pmdtc.state.gov/licensing/documents/agreement-ElectronicGuidelines.pdf>.

40. U.S. Dep't of State Directorate of Defense Trade, *CJ Frequently Asked Questions*, U.S. DEP'T OF STATE, (Sept. 2009), http://www.pmdtc.state.gov/faqs/documents/FAQ_CJ.pdf (FAQ No. 4).

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

EXPORT CONTROLS 29

Although electronic submission is a positive step, the DS-4076 form has limitations. Key fields are character-limited, and an applicant usually will need to attach supporting documents, such as more detailed CJ analysis. Additionally, the form requests information about previous exports. DDTC indicates in the instructions that a disclosure of unlicensed exports on Form DS-4076 does not qualify as a “voluntary disclosure” in accordance with ITAR § 127.12. Thus, exporters seeking CJ determinations for previously exported items may need to file initial voluntary disclosures, contemporaneous with the CJ request or contingent on the outcome of CJ review.

D. ENFORCEMENT

Xe Services LLC (formerly known as Blackwater Worldwide) “entered into a consent agreement to settle 288 violations of the AECA and ITAR in connection with the unauthorized export of defense articles” (including technical data), provision of defense services (military training to foreign forces), violating license provisos, “sales activity involving a proscribed country,” failure to maintain required records, as well as false statements and omissions.⁴¹ Some \$42 million in civil penalties were imposed, following 31 disclosures to DDTC—16 directed disclosures and 15 voluntary disclosures.⁴²

AAR International, Inc. “entered into a consent agreement to settle [thirteen] violations of the AECA and ITAR in connection with the unauthorized export of defense articles by Presidential Airways, Inc. and its affiliates Aviation Worldwide Services, LLC; Air Quest, Inc.; STI Aviation, Inc.; and EP Aviation, LLC.”⁴³ These former Blackwater-affiliated companies were purchased by AAR International, Inc.⁴⁴ No civil penalties were levied, but significant changes to compliance systems for AAR International and its affiliates were exacted by DDTC, including enhancing written compliance procedures, conducting internal audits, engaging outside auditors, and submitting the results to DDTC.

Interturbine Aviation Logistics GmbH “entered into a consent agreement to settle [seven] violations of the AECA and ITAR in connection with unauthorized exports of defense articles.”⁴⁵ In a complex settlement, a total of \$1,000,000 million in penalties was imposed, although \$900,000 of the penalty was suspended.⁴⁶ Engaging an outside auditor

41. U.S. Dep’t of State Directorate of Defense Trade, *Consent Agreements, 2010: Xe Services LLC*, U.S. DEP’T OF STATE, (Aug. 23, 2010), http://www.pmdtc.state.gov/compliance/consent_agreements/XeServicesLLC.html.

42. U.S. Dep’t of State Directorate of Defense Trade, *Xe Services LLC Consent Agreement*, U.S. DEP’T OF STATE, 15, 21-22 (Aug. 16, 2010), http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/Xe_ConsentAgreement.pdf.

43. U.S. Dep’t of State Directorate of Defense Trade, *Consent Agreements, 2010: AAR International, Inc.*, U.S. DEP’T OF STATE, (July 26, 2010), http://www.pmdtc.state.gov/compliance/consent_agreements/AARInternational.html.

44. Andrew J. Shapiro, *Lifting of Policy of Denial Regarding Activities of Presidential Airways, Inc. and Its Subsidiaries/Affiliates Regulated Under the International Traffic in Arms Regulations (ITAR)*, FED. REG., July 23, 2010, <http://www.federalregister.gov/articles/2010/07/23/2010-18109/bureau-of-political-military-affairs-lifting-of-policy-of-denial-regarding-activities-of>.

45. U.S. Dep’t of State Directorate of Defense Trade, *Consent Agreements, 2010: Interturbine Aviation Logistics GmbH*, U.S. DEP’T OF STATE, (Feb. 3, 2010), http://www.pmdtc.state.gov/compliance/consent_agreements/InterturbineAviation.html.

46. U.S. Dep’t of State Directorate of Defense Trade, *Interturbine Aviation Logistics GmbH Consent Agreement*, U.S. DEP’T OF STATE, 3-4 (Jan. 4, 2010), http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/IAL_ConsentAgreement.pdf.

SPRING 2011

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

30 THE INTERNATIONAL LAWYER

to prepare an audit report for submission to DDTC was one of the conditions of the suspension. \$400,000 of the suspended penalty must be applied to compliance program enhancements in the event that Interturbine seeks to restore its DDTC registration.⁴⁷

V. Economic Sanctions

During 2010, the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury focused its efforts on strengthening and streamlining a number of its existing programs, while continuing to expand the reach of its more targeted programs against specific individuals, activities, and companies.

A. BELARUS, IRAQ, LEBANON, NORTH KOREA, AND SOMALIA

In 2010, OFAC issued several new, but separate, sets of sanctions regulations⁴⁸ to synthesize the existing combination of executive orders, licenses, and other documentation that previously comprised much of its sanctions programs regarding Belarus, Iraq, Lebanon, North Korea, and Somalia. These new regulations did not significantly change the overall structure or effect of these sanctions regimes.

Nevertheless, these new regulations adopt certain attributes found only in OFAC's more recent asset freezing and blocking regimes.⁴⁹ Under these newer programs, OFAC generally blocks property and interests in property of a person, and identifies the person as a Specially Designated National during the pendency of an investigation. Avoiding some of the ambiguity of earlier asset freezing and blocking programs, these newer sanctions expressly state that, if a blocked party holds, "directly or indirectly, a 50 percent or greater interest" in another entity, then all property or any interests in property held by that entity are blocked (regardless of whether that entity has been specifically identified by OFAC for blocking purposes). Further, some recent sanctions regulations do not provide exemptions previously common to many sanctions regulations for personal communications, informational materials, and travel.⁵⁰

B. CUBA

On March 9, 2010, OFAC announced that it would amend the Cuban Assets Control Regulations to clarify that, in connection with licensed sales of agricultural items during 2010, "the term 'payment of cash in advance' shall mean payment *before* the transfer of

47. *Id.* at 6.

48. See Belarus Sanctions Regulations, 75 Fed. Reg. 5,502 (Feb. 3, 2010) (to be codified at 31 C.F.R. pt. 548); see also Iraq Stabilization and Insurgency Sanctions Regulations, 75 Fed. Reg. 55,463 (Sept. 13, 2010) (to be codified at 31 C.F.R. pt. 576); Lebanon Sanctions Regulations, 75 Fed. Reg. 44,907 (July 30, 2010) (to be codified at 31 C.F.R. pt. 549); North Korea Sanctions Regulations, 75 Fed. Reg. 67,912 (Nov. 4, 2010) (to be codified at 31 C.F.R. pt. 510).

49. See, e.g., Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 C.F.R. pt. 544 (2011).

50. The new North Korea Sanctions Regulations and the Somalia Sanctions Regulations do not exempt specific types of informational transactions. These sanctions are not entirely predicated upon the International Emergency Economic Powers Act (IEEPA), which requires exemptions for certain informational materials. See North Korea Sanctions Regulations, 75 Fed. Reg. at 67,912.

title to, and control of, the exported items to the Cuban purchaser.”⁵¹ In addition, OFAC updated its list of authorized providers of air, travel, and remittance forwarding services for Cuba eight times during 2010.⁵²

C. IRAN

The Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (“CISADA”) was signed into law on July 1, 2010.⁵³ CISADA expanded the Iran Sanctions Act of 1996 (the “ISA”), which gives the President the authority to penalize companies involved in Iran’s energy sector or in certain other activities disfavored under the ISA.⁵⁴ CISADA also provided for the imposition of certification requirements for federal contractors, authorized U.S. state and local governments to divest their assets from entities that invest in Iran’s energy sector, and required new banking regulations.

Under the amended ISA, penalties are available for any person that the President determines has: (i) invested \$20 million or more in any 12-month period knowing it would directly and significantly contribute to the development of Iranian petroleum resources; (ii) exported goods, services or technology to Iran knowing that they would materially contribute to Iran’s ability to acquire or develop chemical, nuclear, or biological weapons or advanced conventional weapons; (iii) sold, leased, or otherwise provided to Iran goods, services, technology, information, or support with a value of \$1 million, or \$5 million over a 12-month period, that could directly or significantly facilitate the maintenance or expansion of Iran’s domestic production of refined petroleum products; (iv) exported or provided to Iran refined petroleum products or goods, services, information, technology, or support with a value of \$1 million, or \$5 million over a 12-month period, that could directly and significantly contribute to Iran’s ability to import refined petroleum products.⁵⁵

The penalties that may be assessed against any person determined to have engaged in any of the disfavored activities include: (i) a prohibition of transactions in foreign exchange; (ii) a prohibition of transfers of credit or payments by, through or to any U.S. financial institution that “involve any interest of the sanctioned person;” (iii) a prohibition on the acquisition, transfer, import, export, or other use of any U.S. property “with respect to which the sanctioned person has any interest;” (iv) denial of assistance from the U.S. Export-Import Bank; (v) denial of licenses to export from the United States; (vi) denial of loans or credits from any U.S. financial institution exceeding \$10 million in one year; (vii) denial of Federal Reserve primary dealer status or denial of U.S. government funds repository status for financial institutions; (viii) denial of participation in federal

51. Cuban Assets Control Regulations, 75 Fed. Reg. 10,996 (Mar. 10, 2010) (to be codified at 31 C.F.R. pt. 515) (emphasis added) (issued pursuant to pursuant to § 619 of the Omnibus Appropriations Act, 2010).

52. Office of Foreign Assets Control, *2010 OFAC Recent Actions*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/ofac-actions-2010.aspx> (last visited Feb. 4, 2011).

53. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195 (2010) (to be codified at 50 U.S.C. § 1701).

54. Pub. L. 104-172 (1996) (as amended, codified at 50 U.S.C. § 1701).

55. *See* Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195 (2010) (to be codified at 50 U.S.C. § 1701).

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

32 THE INTERNATIONAL LAWYER

contracting; and (ix) denial of the ability to import goods and services into the United States.⁵⁶

On October 1, 2010, the U.S. State Department imposed penalties under the ISA, for the first time in the history of the statute, against Naftiran Intertrade Company (“NICO”), a Swiss subsidiary of the National Iranian Oil Company (“NIOC”).⁵⁷ Later in October, under a “special rule” in the ISA, the President declined to penalize Total, ENI, Royal Dutch Shell, and Statoil because they pledged to end their business in Iran.⁵⁸

In addition, OFAC issued guidance on August 12, 2010,⁵⁹ then amended the Iranian Transactions Regulations on September 28, 2010,⁶⁰ to implement import and export prohibitions of section 103 of CISADA and terminate two general licenses that previously had authorized imports into the United States of, and dealings and services related to, certain foodstuffs and carpets of Iranian origin. Furthermore, the Iranian Transactions Regulations were amended on June 18, 2010, to permit OFAC to expand the list of entities deemed to be “the Government of Iran” to include non-financial entities owned or controlled by Iran.⁶¹

In August 2010, OFAC issued a new set of regulations, the Iranian Financial Sanctions Regulations,⁶² as required under CISADA. The regulations impose restrictions on U.S. “financial institutions”⁶³ that provide correspondent banking services to any non-U.S. financial institutions that may be designated for engaging in certain activities disfavored under the ISA. Financial institutions may be designated for knowingly engaging in: (i) facilitating the Iranian government’s efforts to “acquire or develop weapons of mass destruction” or support terrorism; (ii) facilitating “the activities of a person subject to financial sanctions” under any Iran sanctions resolution of the UN Security Council; (iii) engaging in money laundering or facilitating transactions by Iranian financial institutions related to (i) or (ii); or (iv) providing significant financial services to the Iranian Islamic Revolutionary Guard Corps or its agents or affiliates, or certain blocked Iranian financial institutions.⁶⁴

CISADA also requires the Treasury Department to issue regulations (without specifying a deadline) that may impose certain additional Iran sanctions-related compliance obligations on financial institutions that provide correspondent banking services from the United States for non-U.S. financial institutions.⁶⁵

56. *See id.*

57. *See* 75 Fed. Reg. 62,916 (Oct. 13, 2010).

58. *See* James B. Steinberg, *Briefing on Iran Sanctions Act Implementation*, U.S. DEP’T OF STATE, Sept. 30, 2010, <http://www.state.gov/s/d/2010/148479.htm>.

59. Office of Foreign Assets Control, *Guidance Regarding Import Prohibitions Imposed by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010*, U.S. DEP’T OF THE TREASURY, (Aug. 12, 2010).

60. Iranian Transactions Regulations, 75 Fed. Reg. 59,611 (Sept. 28, 2010) (to be codified by revoking 31 C.F.R. §§ 560.534-35).

61. Iranian Transactions Regulations, 75 Fed. Reg. 34,630 (June 18, 2010) (to be codified at 31 C.F.R. pt. 560).

62. 75 Fed. Reg. 49,836 (Aug. 16, 2010) (codified in scattered sections of 31 C.F.R. pt. 561).

63. 31 C.F.R. § 561.309 (2011) (defining U.S. financial institutions).

64. 31 C.F.R. § 561.201(a) (2011).

65. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 104(e) (2010).

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

EXPORT CONTROLS 33

D. PERSONAL COMMUNICATIONS—CUBA, IRAN, AND SUDAN

On March 8, 2010, OFAC issued general licenses authorizing the export to Cuba,⁶⁶ Iran, and Sudan of certain free, publicly available software for personal communication over the Internet (such as instant messaging, email, and social networking), as well as services incidental to the export.⁶⁷

E. SPECIALLY DESIGNATED NATIONALS

OFAC frequently updated the Specially Designated National List under a variety of programs in 2010. Most designations in 2010 were directed toward Global Narcotics Traffickers.

F. SUDAN

On October 20, 2010, OFAC published a Statement of Licensing Policy establishing a favorable licensing regime for the commercial exportation or reexportation of U.S.-origin agricultural equipment and services to all areas of Sudan (in addition to those areas previously exempted as “Specified Areas”). The Statement of Licensing Policy indicated that OFAC generally would apply the same criteria it uses for agricultural licensing under the Trade Sanctions Reform and Export Enhancement Act of 2000.⁶⁸

G. TERRORISM

On November 23, 2009, OFAC amended the Global Terrorism Sanctions Regulations, imposing blocking requirements against persons who provide certain financial, material, or technological support for terrorist activities.⁶⁹ Together with a list of examples, these amendments clarified that the provision of financial, material or technological support of terrorism can include the provision of any tangible or intangible property used for that purpose. Also, OFAC released its annual report in March 2010 on the effectiveness of its asset blocking programs in combating international terrorism.⁷⁰

66. The export or reexport to Cuba of items “subject to the EAR” also must be authorized by the U.S. Department of Commerce. Cuban Assets Control Regulations; Sudanese Sanctions Regulations.

67. Cuban Assets Control Regulations; Sudanese Sanctions Regulations; Iranian Transactions Regulations, 75 Fed. Reg. 10,997 (Mar. 10, 2010) (to be codified at 31 C.F.R. pt. 515, 538, and 560), available at http://www.treasury.gov/resource-center/Documents/soc_net.pdf.

68. Office of Foreign Assets Control, *Statement of Licensing Policy Regarding Agricultural Exports to Sudan*, U.S. DEP’T OF THE TREASURY, (Oct. 20, 2010), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/sudan_license_ag.pdf.

69. Global Terrorism Sanctions Regulations, 74 Fed. Reg. 61,036, (Nov. 23, 2009) (to be codified at 31 C.F.R. pt. 594), available at http://www.treasury.gov/resource-center/sanctions/Documents/ft74_61036.pdf.

70. See Office of Foreign Assets Control, *Terrorist assets Report: Eighteenth Annual Report to Congress on Assets in the U.S. of Terrorist Countries and International Terrorism Program Designees*, U.S. DEP’T OF THE TREASURY, (2009), <http://www.treasury.gov/resource-center/sanctions/Documents/tar2009.pdf>.

SPRING 2011

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

34 THE INTERNATIONAL LAWYER

H. OTHER ENFORCEMENT ACTIONS

1. *Aviation Services International, B.V.*

Aviation Services International, B.V., also known as Delta Logistics, B.V. (collectively, "ASI") settled administrative charges filed by OFAC and BIS arising from ASI's alleged unlicensed export of aircraft parts and other goods to Iran during 2005-2007.⁷¹ ASI agreed to a \$100,000 criminal penalty, and accepted a BIS Export Denial Order prohibiting it from exporting any goods from the United States for seven years.⁷²

2. *Innospec, Inc.*

Innospec agreed to pay \$2.2 million to settle allegations of violations of the Cuban Assets Control Regulations.⁷³ OFAC's settlement is part of a \$40.2 million comprehensive criminal and civil settlement between Innospec and OFAC, the DOJ, the SEC, and the United Kingdom's Serious Fraud Office. OFAC alleged that Innospec maintained a sales office in Cuba and conducted business in Cuba, with Cuban power companies, and with financial institutions located in Cuba. Innospec voluntarily disclosed the matter to OFAC.

3. *Hilton International Co.*

Hilton remitted \$735,407 to settle alleged violations of the Sudanese Sanctions Regulations.⁷⁴ Hilton voluntarily disclosed to OFAC the alleged violations, relating to the unauthorized operation of two Hilton-brand hotels in Sudan.

4. *Royal Bank of Scotland N.V. / ABN AMRO Bank N.V.*

In May 2010, the Royal Bank of Scotland N.V. (the renamed ABN AMRO Bank N.V.) agreed to forfeit \$500 million and to enter into a deferred prosecution agreement with the DOJ to settle criminal economic sanctions and anti-money laundering charges related to the alleged "stripping" of the details of Iranian and other targeted parties in processing international U.S. dollar funds transfers.⁷⁵

71. Office of Foreign Assets Control, *Enforcement Information for March 9, 2010*, U.S. DEP'T OF THE TREASURY, (Mar. 9, 2010), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/03092010.pdf>.

72. A \$750,000 OFAC civil penalty was deemed satisfied by ASI's agreement to pay the criminal fine and acceptance of the BIS penalties. *Id.*

73. Office of Foreign Assets Control, *Enforcement Information for March 19, 2010*, U.S. DEP'T OF THE TREASURY, (Mar. 19, 2010), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/03192010.pdf>.

74. Office of Foreign Assets Control, *Enforcement Information for April 23, 2010*, U.S. DEP'T OF THE TREASURY, (Apr. 23, 2010), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/04232010.pdf>.

75. Press Release, Office of Public Affairs, U.S. Dep't of Just., Former ABN Amro Bank N.V. Agrees to Forfeit \$500 Million in Connection with Conspiracy to Defraud the United States and with Violation of the Bank Secrecy Act (May 10, 2010), *available at* <http://www.justice.gov/opa/pr/2010/May/10-crm-548.html>.

5. *Agar Corporation*

In June 2010, Agar Corporation Inc. pled guilty to criminal charges and entered into a settlement with OFAC of civil charges related to indirect exports of goods and services and facilitation of exports to Sudan.⁷⁶ Agar agreed to pay a criminal fine of \$760,000, the forfeiture of \$380,000, and a civil penalty of \$860,000, for a total of \$2 million in penalties. Agar also agreed to implement an expanded sanctions compliance program and to appoint an independent export control auditor.

6. *Maersk Line, Limited*

Maersk Line, Limited, and its subsidiaries Farrell Lines Incorporated and E-Ships, Inc. (collectively, "MLL") remitted \$3,088,400 to settle alleged violations of the Sudanese Sanctions Regulations and the Iranian Transactions Regulations.⁷⁷ OFAC alleged that MLL provided unlicensed shipping services for 4,714 shipments of cargo originating in or bound for Sudan and Iran.

7. *Barclays Bank PLC*

In August 2010, Barclays Bank PLC settled criminal and civil charges related to the transfer of Iranian funds through the U.S. financial system, which it had voluntarily disclosed.⁷⁸ Barclays agreed to forfeit \$298 million as part of deferred prosecution agreements reached with the DOJ and the New York County District Attorney's Office.⁷⁹ Barclays entered into a settlement of civil charges brought by OFAC as well mandating an expanded OFAC compliance program but paid no additional penalties. Barclays allegedly caused its New York branch and other U.S. financial institutions to process transactions for entities targeted by sanctions. According to these documents, they removed or falsified references to these entities in U.S. dollar payment messages to U.S. correspondent banks.

I. SIGNIFICANT COURT CASES INVOLVING OFAC PROGRAMS

The Ninth Circuit held that the government need not prove that a person charged with violating the Iranian Transactions Regulations was aware of a specific licensing requirement but only that the defendants knew their actions violated the U.S. embargo.⁸⁰

76. Office of Foreign Assets Control, *Enforcement Information for July 15, 2010*, U.S. DEP'T OF THE TREASURY, (July 15, 2010), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/07152010.pdf>.

77. Office of Foreign Assets Control, *Enforcement Information for July 28, 2010*, U.S. DEP'T OF THE TREASURY, (July 28, 2010), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/07292010.pdf>.

78. *Barclays Bank PLC Settles Allegations of Violations of Multiple Sanctions Programs*, U.S. DEP'T OF THE TREASURY, Aug. 18, 2010, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/barclays08182010.pdf>.

79. *Id.*

80. *United States v. Mousavi*, 604 F.3d 1084, 1093 (9th Cir. 2010).

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

36 THE INTERNATIONAL LAWYER

In *The New York Times Company v. U.S. Dep't of the Treasury*, the Southern District of New York granted the Times' motion for summary judgment pursuant to the Freedom of Information Act to seek the identities of individuals granted an OFAC license.⁸¹

VI. Canadian Developments

A. STATUTORY AMENDMENTS

On July 13, 2010, North Korea joined Myanmar and Belarus on Canada's Area Control List,⁸² which requires an export permit under the *Export and Import Permits Act* for any exports of goods or technology.

There were several key developments regarding Canadian sanctions against Iran this year. On June 18, 2010, amendments to the *Iran Sanctions Regulations* came into force implementing U.N. Security Council Resolution 1929 into Canadian law.⁸³ These included measures in the uranium-mining sector, additions to the list of designated persons, and export bans on certain goods and technology.

On July 22, 2010 following similar actions taken by the United States and the European Union, Canada implemented its own sanctions against Iran, adding to the compliance burden of Canadian companies doing business internationally, particularly in the financial services and oil and gas sectors. The new measures, implemented under Canada's *Special Economic Measures Act* (SEMA), include prohibitions against new investment in the Iranian oil and gas sector, providing items used in refining oil and gas to Iran, establishing correspondent banking relationships with Iranian financial institutions, and providing or acquiring financial services to allow an Iranian financial institution to be established in Canada or vice-versa.⁸⁴ Canada also promulgated a relief provision in the *Special Economic Measures (Iran) Permit Authorization Order*,⁸⁵ which permits the Canadian Government to grant special permission to export to Iran notwithstanding a prohibition under the SEMA.

The following General Export Permits and Regulations are under review: General Export Permit No. 1—Export of Goods for Special and Personal Use Permit; General Export Permit No. 27—Nuclear-Related Dual Use Goods; General Export Permit No. 29—Eligible Industrial Goods; General Export Permit No. 30—Certain Industrial Goods to Eligible Countries and Territories; and Transshipment Regulations.⁸⁶

81. *New York Times Co. v. U.S. Dep't of the Treasury*, No. 09 Civ. 10437 (S.D.N.Y. Oct. 13, 2010).

82. Order Amending the Area Control List, SOR/2010-162 (Can.).

83. Regulations Amending the Regulations Implementing the United Nations Resolutions on Iran, SOR/2010-154 (Can.).

84. Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.).

85. Special Economic Measures (Iran) Permit Authorization Order, SOR/2010-166 (Can.).

86. See *Legislation*, DEP'T OF FOREIGN AFF. AND INT'L TRADE (Can.), <http://www.international.gc.ca/controls-controles/report-rapports/legislation-reglements.aspx> (last visited Jan. 23, 2010).

B. CASES/CBSA ENFORCEMENT ACTIONS

1. *R. v. Yadegari*

On July 6, 2010, Mahmoud Yadegari was found guilty on nine of ten charges in relation to the attempted export of pressure transducers to Iran.⁸⁷ The charges were laid under the Customs Act,⁸⁸ the United Nations Act,⁸⁹ the Export and Import Permits Act (“EIPA”),⁹⁰ the Nuclear Safety and Control Act (“NSCA”)⁹¹ and the Criminal Code.⁹²

The pressure transducers (“manometers”) convert pressure measurements into an electrical signal that can be recorded or displayed. The devices have several benign industrial applications but can also be used in uranium enrichment and are controlled under the EIPA and the NSCA. Mr. Yadegari purchased ten transducers from Alpha Controls and Instruments and then tried to export some of them via courier to Iran through Dubai.

On July 29, 2010, the Court sentenced Mr. Yadegari to 51 months imprisonment.⁹³ The prosecution was seeking 6.5 years. The case sets an important precedent both in terms of the substantive elements of the charges and the factors considered in sentencing for export-related offenses.

2. *Steven and Perinne de Jaray*

On April 29, 2010, Canada Border Services Agency (CBSA) charged Steven and Perienne de Jaray with exporting 5,100 controlled electronic chips to Hong Kong without a permit and failing to report the export.

3. *Kenn Borek Air*

On November 10, 2010 in the first case of its kind involving Myanmar, the CBSA charged Kenn Borek Air and its former general manager for exporting a de Havilland DHC-6 Twin Otter airplane and 149 aircraft parts without valid export permits.⁹⁴

C. ADMINISTRATIVE STEPS TOWARDS LIBERALIZING ENCRYPTION CONTROLS

After launching consultations in response to business concerns about the competitive impact of its encryption controls, the Export Controls Division of Foreign Affairs and International Trade Canada took some tentative steps towards establishing greater transparency and flexibility in its implementation of these rules. These included publishing

87. See *Yadegari Guilty*, PUBLIC PROSECUTION SERV. OF CAN., July 6, 2010, http://www.ppsc-sppc.gc.ca/eng/nws-nvs/comm/2010/06_07_10.html.

88. Customs Act, R.S.C. 1985, c. 1 (2nd Supp.) (Can.).

89. United Nations Act, R.S.C. 1985, c. U-2 (Can.).

90. Export and Import Permits Act, R.S.C. 1985, c. E-19 (Can.).

91. Nuclear Safe and Control Act, S.C. 1997, c. 9 (Can.).

92. Criminal Code, R.S.C. 1985, c. C-46 (Can.).

93. Given certain reductions, the overall sentence is 35.5 months. The prosecution had sought 6.5 years. *Sentence in R. v. Yadegari*, PUBLIC PROSECUTION SERV. OF CAN., July 6, 2010, http://www.ppsc-sppc.gc.ca/eng/nws-nvs/comm/2010/29_07_10.html.

94. *Charges Laid for Unlawful Export of Goods to Myanmar*, CAN. BORDER SERVS. AGENCY, Nov. 10, 2010, <http://www.cbsa-asfc.gc.ca/media/prosecutions-poursuites/pr/2010-11-10-eng.html>.

THE INTERNATIONAL LAWYER
A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

38 THE INTERNATIONAL LAWYER

guidelines on obtaining multi-destination permits or cryptographic goods, software, and technology.⁹⁵ These permits enable exporters to ship or transfer items to consignees in multiple countries under relatively flexible terms and conditions.

⁹⁵ *Permits for Cryptographic Items*, FOREIGN AFF. & INT'L TRADE CAN., Oct. 9, 2010, <http://www.international.gc.ca/controls-controles/export-exportation/crypto/Broadbased-Elargie.aspx?lang=eng>.

VOL. 45, NO. 1

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW