

Vol. 32, No. 32

August 6, 2012

## Judge Ignores Justice Recommendation in FCPA Sentencing

A federal judge went against both prosecution and defense recommendations July 31 and sentenced Richard T. Bistrong to 18 months in prison and 36 months' probation for his role in a Foreign Corrupt Practices Act (FCPA) case in which he was a cooperating witness. As part of an undercover sting operation, Bistrong cooperated with Justice in the failed prosecution of 22 gun dealers who were charged with violating the FCPA. D.C. U.S. District Court Judge Richard Leon, who sentenced Bistrong to jail, was also the judge who dismissed the last of the charges against the dealers in February (see **WTTL**, Feb. 27, page 2). When he dismissed those cases, Leon criticized Justice's entire handling of the prosecution.

At Bistrong's sentencing hearing, both prosecutors and Bistrong's lawyers argued for probation. "Given Bistrong's substantial assistance to law enforcement, the government recommends that Bistrong be sentenced within the guideline range to a sentence that includes a combination of probation, home confinement, and/or community service," Justice's sentencing memo noted. In an e-mail to **WTTL** Aug. 2, Bistrong's attorney, Brady Toensing, said, "The DOJ did the right thing. It made a sentencing recommendation based on its assessment of the value of Mr. Bistrong's extraordinary cooperation, regardless of the outcome of any trial."

Sources close to the case say they've never seen a judge not take account of a defendant's role in helping the prosecution. Other recent cases have taken a different view and valued cooperation much higher, they say. In his ruling, Leon emphasized Bistrong's guilty plea in September 2010 to one count of conspiracy to violate the FCPA and falsify the books and records of his employer, Armor Holdings Inc., as well as exporting military products without authorization.

## Negotiators to Seek New Path for Arms Trade Talks

In the end, industry sources say the White House pulled the plug July 27 on United Nations (UN) negotiations on an Arms Trade Treaty (ATT). "It was a political issue," one source said. After 51 senators issued a letter opposing the draft treaty, "the White House decided it was not a great thing to do before the election," the source said. A State Department source, however, denied this. "It's not true. All along the way, we've been hearing from senators and NGOs," the State official said on background. UN members are now scrambling to come up with a plan for restarting talks at a later date. "While the Conference ran out of time to reach consensus on a text, it will report its results and the draft text considered back to the UN General Assembly (UNGA). The United States supports a second round of negotiations, conducted on the basis



of consensus, on the treaty next year; we do not support a vote in the UNGA on the current text,” said a statement by State Department Spokesperson Victoria Nuland. A statement from UN Secretary General Ban Ki-moon said he was disappointed that negotiators couldn’t reach a deal. “However, I am encouraged that this is not the end of the ATT, and that States have agreed to continue pursuing this noble goal. There is already considerable common ground and States can build on the hard work that has been done during these negotiations,” he said.

While the U.S. has publicly supported ATT talks, it also had drawn several “red lines” on provisions it could not accept in a deal. These included any controls on the transfer or export of ammunition, anything that would appear to infringe on U.S. Second Amendment rights, and controls on parts and components.

“This is the last thing the administration would want at this point before the election. It would cost them the White House and maybe the Senate,” one source asserted. Industry sources and U.S. officials are now concerned the General Assembly might adopt the draft treaty despite objections from the U.S., Russia and more than a dozen other countries. The biggest support for the treaty has come from the European Union and the United Kingdom, sources report.

According to UN sources, the mandate for the ATT talks expired July 27 and any future negotiations would require a new resolution by the UN General Assembly. Initially, however, the issue is likely to be presented to the First Committee, a UN committee on international disarmament. The committee, which won’t meet until October, will have to prepare recommendations for the General Assembly on the next steps for any talks or the draft treaty. UN sources say the committee may not recommend another round of formal negotiations similar to those that have just failed, but may suggest other forms of discussion and review aimed at overcoming the disagreements that scuttled the ATT. A new General Assembly vote on future work or the treaty probably would not come before December, a UN source noted.

## **Congress, Administration Impose New Sanctions on Iran**

Both the Obama administration and Congress have moved to impose tougher sanctions on Iran. The House by a 421-6 vote and the Senate by voice vote Aug. 1 passed and sent to the president legislation (H.R. 1905) that will strengthen U.S. sanctions against Iran, including its financial, oil and gas, and shipping sectors. The vote came after the Obama administration imposed new sanctions on banks in Iran and China and authorized new sanctions against entities that facilitate the purchase of oil from Iran (see **WTTL**, May 21, page 3). The legislation attempts to cut off loopholes that have allowed Iran to circumvent previous sanctions.

One provision in the bill would require the president to impose five or more sanctions on persons that transport Iranian crude oil. Another would hit efforts to evade sanctions on Iranian shipping. Some Iranian shippers have avoided sanctions by re-registering their ships under different flags and different names.

The measure would also go after U.S. firms that own a controlling interest in a firm operating in Iran or otherwise subject to sanctions. The president would be required to prohibit an entity owned or controlled by a U.S. person outside the U.S. from engaging in any transaction that would be prohibited if the transaction were engaged in by a U.S. person or in the U.S.

President Obama issued an Executive Order July 30, expanding sanctions against anyone determined to knowingly conduct or facilitate significant transactions with a private or public foreign financial institution or other entity for the purchase or acquisition of Iranian oil. It also would sanction individuals and entities that support the National Iranian Oil Company, Naftiran Intertrade Company, or the Central Bank of Iran, or the purchase or acquisition of U.S. bank notes or precious metals by the Government of Iran. Treasury followed Obama’s order July 31 with new sanctions on China’s Bank of Kunlun and Iraq’s Elaf Islamic Bank for “knowingly facilitating significant transactions or providing significant financial services to Iranian banks designated for their connection to Iran’s support for terrorism or proliferation.”

## Fate of Russia PNTR Put off Until Fall

The list of excuses for why Congress failed to pass legislation granting Russia permanent-normal-trade-relations (PNTR) status before it left for its August vacation Aug. 2 is long. Most of the publicly expressed reasons reflect partisan complaints about the other party's lack of commitment to the legislation. The underlying fear for both parties, however, may have been how a vote for PNTR would be perceived politically if the situation in Syria gets worse before the election and Russia continues to block United Nations intervention.

In the end, the House leadership "was not sure where everybody stood," said Randi Levinas, executive vice president of the U.S.-Russia Business Council. "There were a lot of issues at the end of the session," she added. With Russia's accession to the World Trade Organization (WTO) now set for Aug. 22, "we're setting our sights on September," she told WTTL (see WTTL, July 30, page 2).

In the days before Congress recessed, Republicans said they wanted President Obama to help pass the legislation apparently so Democrats would share any political fallout from the vote. Some Democrats, meanwhile, were content to let the GOP carry the burden of passing the bill, although Democrats on the Ways and Means Committee strongly backed the measure. Democrats also had to deal with labor opposition to PNTR, despite the attachment of the Magnitsky Act and strong monitoring and reporting requirements on Moscow's compliance with its WTO obligations. Democrats, however, dismissed claims that labor was blocking their support for the legislation. Labor's position "was no surprise to anyone following this," one source said.

Ways and Means Trade Subcommittee Chairman Kevin Brady (R-Texas) said two critical things were needed to get PNTR passed. "We need bipartisan support in the House and a clear date set [for a vote] in the Senate by Senate Majority Leader Reid," he told reporters. "We're going to need those two things to move Russia PNTR this week; we're going to need it to move it in September; and we're going to need it to move it in the lame duck," he said.

Democrats claimed the Republicans, with a majority in the House, could have passed the PNTR bill on their own if they had gone through "regular orders," which would require only a majority vote, rather under "suspension" of the rules, which requires a super majority and would have needed Democratic votes. They contend there would have been enough Democratic votes for the measure to make up for any GOP defections. The Democrats also say the Republicans were slow to move the legislation through the Ways and Means Committee and then spent most of the last week in session passing a bill to extend the Bush-era tax cuts. Democrats also claim Republicans demurred on a vote because of presidential candidate Mitt Romney's criticism of Russia. Levinas, however, said she has talked to Romney's people, "and they support this."

## Industry Generally Happy with USML Category X Proposals

Industry seems to be pretty happy with State and Commerce proposals for transferring articles in Category X (protective personnel equipment) of the U.S. Munitions List (USML) to the Commerce Control List (CCL). But in comments on the proposals, companies said they still want to ensure their products are clearly defined and controlled (see WTTL, June 11, page 2).

BAE Systems, Inc., said it is "concerned that the terms 'development' and 'developed under a contract with the U.S. Department of Defense' are not as clearly defined and would introduce some ambiguity into the product classification process." DRS Technologies agreed, referring to entry X.a.8. "The only positive criteria identified for this entry is that the equipment or shelter be developmental and developed under a contract with the Department of Defense," it wrote. "As such, this entry would capture a new shelter developed for us in arctic environments simply because the DoD funded the development," DRS wrote. IPC, a trade group representing printed board makers, reiterated sentiments it expressed in comments on other category proposals. IPC recommends that "DDTC clarify the proper treatment of printed boards, to ensure that the industry understands the U.S. government's position regarding the proper export control

jurisdiction of these important products.” On the positive side, Boeing wrote “We welcome a simplified, narrowly scoped, positive-list Category X.” It said it appreciated the overall clarity of the proposal. “Boeing believes that the proposed rule’s focused controls represent an appropriate balance between national security protection and international business opportunity.”

## Appellate Court Rejects CIT Intrusion in ITA Methodology

The Court of International Trade (CIT) erred in ordering the International Trade Administration to reconsider the production costs a Russian magnesium producer claimed showed that its magnesium was a byproduct of its production methods, the Court of Appeals for the Federal Circuit (CAFC) ruled July 27 in *PSC VSMPO-Avisma Corporation v. U.S.*, reversing and remanding the CIT decision. “In our view, the Trade Court improperly intruded upon Commerce’s power to apply its own procedures for the timely resolution of antidumping reviews,” the CAFC decision stated.

“The role of judicial review is limited to determining whether the record is adequate to support the administrative action. A court cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered,” the opinion added, supporting the position of the U.S. petitioner, US Magnesium, LLC.

“The Trade Court construed the phrase ‘in the ordinary course of business’ as requiring Commerce to include in its constructed value methodology costs involved in Avisma’s entire production process. This was error,” the appellate court said. “The plain language of the statute indicates that the phrase ‘during a period which would ordinarily permit the production of the merchandise in the ordinary course of business’ aims to ensure that constructed value is based on the costs of production incurred when the facility is operating in the usual and ordinary course of business, so as to guard against aberrant costs not typically incurred in the normal course of producing the subject merchandise. The phrase does not dictate that Commerce employ a specific cost accounting methodology that would include Avisma’s entire production process,” it declared.

### \* \* \* Briefs \* \* \*

AGOA ET. AL.: House and Senate passed legislation (H.R. 5986 and S. 3326) by voice votes Aug. 2 renewing AGOA third-country fabric provisions through 2015 and import sanctions on Burma, as well as passing technical fixes to CAFTA-DR. Bill would also make South Sudan exports eligible for preferred treatment. Sen. Coburn amendment on paying for benefits by cutting budget of trade promotion agencies failed by 40-58 vote (see WTTL, July 23, page 1).

BEARINGS: On 5-0 vote July 31 in “sunset” review, ITC determined that ending antidumping duty order on tapered roller bearings from China would likely cause renewed injury to U.S. industry.

ENVIRONMENTAL SERVICES: USTR July 31 asked ITC to investigate trade and market trends in environmental services and renewable energy services under Section 332 of the Tariff Act.

INFORMATION TECHNOLOGY: USTR July 31 requested that ITC investigate trade of information and communications technology (ICT) goods under Section 332 of the Tariff Act.

BACK TO SCHOOL: In vote Aug. 2 in “sunset” review, ITC determined that ending countervailing duty (CVD) order on lined paper school supplies from India and antidumping (AD) orders on imports from China and India would likely cause renewed injury to U.S. industry. For China, vote was 6-0, and for India for both CVD and AD, vote was 3-3. In 5-1 vote, ITC also determined that ending CVD and AD orders on lined paper from Indonesia would not cause renewed injury.

CELL PHONES: In split 2-1 ruling Aug. 1, Court of Appeals for Federal Circuit remanded to ITC decision that Nokia did not infringe on InterDigital Communications’ cell phone technology (case 2010-1093). “Because the Commission erred in construing the claim terms ‘code’ and ‘increased power level’ and in finding, based on those claim constructions, that Nokia’s products do not infringe InterDigital’s patents, we reverse the administrative law judge’s determination of non-infringement and remand for further proceedings,” majority decided.