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Court Says "Attempting to Cause" Export Doesn't Violate Law

In a ruling that could upset federal prosecutions under the Arms Export Control Act (AECA), the Ninth Circuit Court of Appeals reversed the conviction of Chi Tong Kuok for "attempting to cause" the unlicensed export of a controlled encryption device. Kuok had been caught in a sting operation trying to buy the device from an undercover Immigration and Customs Enforcement (ICE) agent. The Jan. 17 ruling remanded to the district court his conviction on charges of conspiracy and smuggling. "We hold that attempting to cause an export of defense articles without a license is not a violation of U.S. law, and vacate Kuok's conviction," the court ruled.

> Citing earlier decisions, the court said there is "no general federal 'attempt' statute." A defendant can only be found guilty of an attempt to commit a federal offense if the law expressly proscribes an attempt. Neither the general criminal law nor the AECA contain such a provision, the appellate court found.

"For the government's theory to be viable, therefore, either 18 U.S.C. Section 2(b) would have to contain an attempt provision, or 22 C.F.R. Section 127.1 would have to contain an attempted causation provision. Since neither statute does so, Kuok cannot be convicted on this count based on the government's evidence at trial," the court ruled. The ruling appears to rest on narrow reading of the AECA. The court noted that the AECA makes it unlawful "to export or attempt to export" from the U.S. any defense article without a license.

"The government's case at trial did not establish that Kuok *caused* an *attempt* to export: it established that he *attempted* to *cause* an export," the court ruled (its emphasis). "That is, Kuok attempted to cause the undercover ICE agent to export the encryptor without a license," it noted. "Neither an export nor an attempted export occurred: the ICE agent did not form the *mens rea* sufficient for an illegal export or an attempt, because he was an undercover agent working for the government the whole time," the court ruled.

WTO Talks Look for GATS-Plus Services Plurilateral

Talks that began in Geneva during the week of Jan. 16 and continued during a trade ministers' meeting in Davos, Switzerland Jan. 28 are aiming to determine whether there is interest in a plurilateral agreement on services that goes beyond current obligations under the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS). An initial group of 16 countries, which were part of a "friends of services" coalition that pushed for a services deal in the Doha Round negotiations, has agreed to start the process toward a plurilateral agreement by

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convening a working group in Geneva the week of Feb. 13 to collect information on what countries are already doing in services on a unilateral basis or commitments they have made in bilateral free trade agreements that go beyond the GATS obligations.

> In the meeting in Davos, "there was an awful lot of sense that the best way to be productive is to not over-engineer what happens now, but rather to allow people to begin discussions in smaller groups and expand them as they are able to gain traction," one senior U.S. official told WTTL. "One thing we are looking at doing initially is having a clearer understanding of what each country is doing in terms of GATS-plus concessions," he said.

The talks on services are a follow-up to the WTO ministerial conference in December where ministers agreed to explore alternatives to the stalled Doha Round through plurilaterals among like-minded countries (see **WTTL**, Dec, 19, page 1). "In many cases, the services obligations of our bilateral agreements go beyond what we are obliged to do in GATS obligations," the senior U.S. official told WTTL. "One of the challenges is clearly that services is complex. All of us are trying to figure out the best way to conceptualize the discussions," he said.

The services discussions don't include any of the BRICS countries, Brazil, Russia, India, China and South Africa. Nonetheless, the U.S. official said he hoped other countries might join later and a plurilateral agreement "would be a stepping stone toward a broader agreement." Even without the BRICS involved, "we may very well discover when we engage in this scoping exercise that there is a lot of interesting liberalization that can be done even among countries already perceived as being fairly open," the official said. Among participants in these early talks are the European Union, Japan, Canada, Mexico, Australia, New Zealand, Switzerland, Norway, Chile, Colombia, Pakistan and Singapore.

Trade Lawyers Are Special, Court Agrees

International trade lawyers who handle antidumping and countervailing duty cases participate in a "specialized practice" that warrants higher fees when courts grant relief under the Equal Access to Justice Act (EAJA), Court of International Trade Senior Judge R. Kenton Musgrave ruled Jan. 26 (slip op. 12-12). Musgrave's decision granted a request by the Diamond Sawblades Manufacturers Coalition (DSMC) to have the government pay the bills from its law firm, Wiley, Rein & Fielding, for its successful legal battle to force the International Trade Administration to enforce antidumping orders on diamond sawblades from South Korea and China.

> "This court likewise considers international trade practice a 'specialized practice' area requiring interdisciplinary knowledge and skill beyond the 'extraordinary level of the general lawyerly knowledge and ability useful in all litigation'," Musgrave ruled quoting the Supreme Court. "The practice regularly calls upon skills acquired from such diverse fields as economics, accounting, business operations, finance, customs, taxation, technical standards, foreign laws, regulations and administrative practices, linguistics and foreign languages, 'political astuteness'," he added.

Congress Moves Toward New Round of Iran Sanctions

Less than a month after enactment of the National Defense Authorization Act (NDAA) imposed tough new sanctions on Iran, the Senate Banking Committee approved Feb. 2 a new measure that would place additional sanctions on Tehran, banks that do business with Iran and foreign firms involved in supporting its oil and gas sector. The committee approved a "manager's amendment" sponsored by Chairman Tim Johnson (D-S.D.) and Ranking Member Richard Shelby (R-Ala.), combining several amendments offered by committee members (see **WTTL**, Dec. 5, page 1). The bill would provide additional sanctions the president could use against Iran and those who do business with Tehran under the Iran Sanctions Act (ISA). Among those

new powers would be authority for the president to sanction firms participating in joint ventures in Iran's energy section. Other provisions would allow sanctions of senior corporate officers and shareholders of firms that have been targeted. It would make U.S. parents liable for the activities of their foreign subsidiaries which, if undertaken in the U.S. or by a U.S. person, would violate U.S. sanctions. In addition, the bill would require firms whose stock is traded on a U.S. stock exchange to disclose Iran-related activities in Securities and Exchange Commission filings. The president would be required to investigate firms that make such disclosures to determine whether their actions are sanctionable.

Justice's FCPA SHOT Show Prosecution Falling Apart

Justice's prosecution of Foreign Corrupt Practices Act (FCPA) cases keeps hitting setbacks, with the most recent being a federal jury's not guilty verdict in the trial of two gun dealers who have been charged with violating the law and the declaration of a mistrial in the prosecution of three other dealers. The five defendants were among 22 dealers caught in a government sting operation allegedly attempting to pay bribes to an African government official to obtain arms contracts (see **WTTL**, Jan. 23, page 1).

> The jury Jan. 30 found R. Patrick Caldwell and Greg Godsey not guilty of violating the FCPA. The next day on Jan. 31, D.C. U.S. District Court Judge Richard Leon declared a mistrial in the case of three other defendants, John M. Mushriqui, Jeana Mushriqui and Marc Frederick Morales.

The verdicts on Caldwell and Godsey appear to have been based on Caldwell's argument that he suffers from severe hearing loss and didn't hear the bribery deal that was being proposed. Godsey's lawyers noted that his voice was not any of the tape recordings the government had made of the bribery scheme. In December, Leon dropped the FCPA conspiracy charge against these five defendants and dismissed all charges against Stephen Gerard Giordanella. Justice's prosecution of the SHOT Show defendants hit another bump in July 2011 when the separate trial of four other defendants ended in a hung jury. Justice has relaunched its prosecution of those defendants, and their new trial has been scheduled to start May 29, but sources say the trial may be put off while a trial of a third group of SHOT Show defendants gets underway.

Reports Warn of China's Subsidies for Its Auto Industry

Three reports released Jan. 31 provide details on how China is subsidizing its auto and auto parts industries and the threat that aid poses for U.S. manufacturers. Two reports from the Economic Policy Institute (EPI) and one from the law firm of Stewart & Stewart found that China's auto-parts exports increased more than 900% from 2000 to 2010, as China provided $27.5 billion in subsidies to the sector. During the same period, the U.S. trade deficit in auto parts increased from $9.5 billion to $31.2 billion, 28% of which was with China.

> "Over the next decade, China's central government has committed to disburse an additional $10.9 billion in subsidies for industrial restructuring (mainly outbound mergers and acquisitions) and technological development of the auto-parts industry," one EPI report notes. Stewart & Stewart cites China's latest five-year plan, which picks "new-energy" automobiles and their components as one of seven 'strategic and emerging industries' in which to become a world leader by 2030.

Specific parts targeted in the plan include batteries, electric motors, electronic control systems, and fuel cells, it says. The other EPI report notes that while 1.6 million jobs are directly or indirectly supported by auto-parts and tire manufacturing, the U.S. lost more than 400,000 direct jobs in auto parts from November 2000 to November 2011. "Although U.S. automakers have enjoyed a strong turnaround since the government helped restructure General Motors and Chrysler in 2009…that has not translated into a turnaround for the U.S. auto-parts industry, as indicated by the best-available measure of concern to American workers: jobs," it argues.

WTO Appellate Body Rules Against Chinese Export Restrictions

In a ruling Jan. 30 that may set the stage for a U.S. complaint against China's restrictions on exports of rare earth materials, the World Trade Organization's (WTO) Appellate Body upheld most of the findings of a dispute-settlement panel that found Beijing's export restraints on nine raw materials to violate its accession obligations (see **WTTL**, July 11, page 2). The Appellate Body upheld the panel's recommendation that China bring its export duty and export quota measures on certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, and zinc into conformity with its WTO obligations.

> The Appellate Body also agreed with the panel that China could not use the exemptions in its WTO accession protocol to breach its obligations to eliminate export duties. It also backed the panel's finding that China had not demonstrated that its export quota on refractory-grade bauxite was "temporarily applied" to either prevent or relieve a "critical shortage". The Appellate Body said the term "critical shortages" refers to those deficiencies in quantity that are crucial and of decisive importance or that reach a vitally important or decisive stage.

Comments Focus on Details of Proposed USML-CCL Changes

Although the exporting community enthusiastically praises administration plans for moving thousands of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL), companies have specific concerns about the impact the switches will have on their own products, according to industry comments on several of the proposed changes. In some instances, firms identified the unintended consequences of the proposals. In others, they complain the moves from the USML to the CCL could mean more regulation, not less.

> Industry expressed its concerns about these issues and others in comments to the Directorate of Defense Trade Controls (DDTC) and Bureau of Industry and Security (BIS) on proposed changes to USML categories VIII (Aircraft), VII (Military Vehicles) and XIX (Gas Turbine Engines) and new Export Control Classification Numbers (ECCNs) into which many of the products from these categories would be moved.

Exporters also are concerned about the differences between the International Traffic in Arms and the Export Administration Regulations. The lack of parallel rules, such as those dealing with exemptions and exceptions, could mean defense items that are moved to the CCL will face new licensing requirements they didn't have when they were on the USML (**Editor's Note:** A complete review of comments on these proposals will appear in the February 2012 issue of our sister publication, ***The Export Practitioner.*** For free copy call 202-463-1250, ext. 193).

* * * Briefs * * *

GEORGIA: During Oval Office meeting with Georgia's President Saakashvili, President Obama said U.S. and Georgia have agreed to "high-level dialogue between our two countries about how we can continue to strengthen trade relations between our two countries, including the possibility of a free trade agreement."

TRADE PEOPLE: International trade group at Troutman Sanders has moved en banc to Washington office of Atlanta's Morris, Manning & Martin. Making move are partners Donald B. Cameron Jr., Julie C. Mendoza, R. Will Planert and Brady Mills, associate Mary Hodgins, and trade analyst Paul J. McGarr. They can be reached at 202-216-4811.

CHINA CURRENCY: Ways and Means Chairman Dave Camp (R-Mich.) and Senate Finance Committee Chairman Max Baucus (D-Mont.) wrote Jan. 31 to Treasury Secretary Geithner and USTR Kirk, urging U.S. to raise undervaluation of Chinese currency at March symposium of WTO Working Group on Trade, Debt, and Finance. Two lawmakers noted WTO staff's literature survey on impact on trade of exchange rate policies. Survey and symposium "should form the basis for further discussion by the WTO of existing WTO/GATT rules and how those rules could be used to address distortive currency practices," they wrote.