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Judge Drops FCPA Charges Against Ex-ABB Manager

The Justice Department has been handed another in a series of setbacks in its prosecution of Foreign Corrupt Practices Act (FCPA) cases. On the fourth day of a jury trial in Houston U.S. District Court Jan. 17, a federal judge acquitted John Joseph O'Shea, the former general manager of ABB NM in Sugar Land, Texas, a business unit of Switzerland's ABB Inc., of substantive charges of violating the FCPA. The ruling underscores why the government may prefer reaching deferred prosecution agreements with companies in FCPA cases and extract multimillion dollar penalties without having to risk the uncertainties of court decisions.

O'Shea was indicted in November 2009 on 18 counts, including conspiracy to bribe officials of Mexico's state-run utility company to secure contracts for his company. Six of those charges are still pending.

In December 2011, amidst accusations of prosecutor misconduct and false testimony, a Los Angeles District Court judge overturned the convictions of Lindsey Manufacturing and two of its former executives in a related bribery case involving the Mexican electric utility officials. The O'Shea and Lindsey decisions come as Justice is facing troubles in its prosecution of 22 arms dealers caught in a sting operation allegedly attempting to bribe an African official to win weapons contracts with his government.

Last July, the trial of four of the so-called "Shot Show" defendants ended in a hung jury. A retrial of those defendants, Pankesh Patel, John Benson Wier III, Andrew Bigelow and Lee Allen Tolleson, is scheduled to start May 29, 2012. In December, D.C. U.S. District Court Judge Richard Leon dropped the conspiracy charges against five other defendants and threw out all charges against one (see **WTTL**, Jan. 16, page 4). The trial of a third group of Shot Show defendants is scheduled for Feb. 21. Three defendants have pleaded guilty separately.

FTZ Petitions Pit Export-Oriented v. Import-Sensitive Firms

Petitions to Commerce for approval to create two Foreign Trade Zone (FTZ) subzones has sparked a fight between the last U.S. producer of silicon metal and three companies that claim the subzones will help achieve the Obama administration's goal of doubling U.S. exports, especially for environmental products. Commerce's Foreign Trade Zone Board has scheduled a hearing for Jan. 25 to hear Global Metallurgical Inc.'s opposition to the establishment of subzones in Midland, Mich., (FTZ 140) and Clarksville, Tenn., (FTZ 78) for Dow Corning Corp., Hemlock Semiconductor Corp. (HSC) and Hemlock Semiconductors LLC (HSL). Dow



owns 63.25% of HSC, Shin-Estu, 24.5% and Mitsubishi Materials, 12.5%. In its request for a subzone for FTZ 140, the city of Flint, Mich., said the subzone, which would be located in Hemlock, Mich., would allow for an increase in the production of polysilicon, which is made from salines and silicon metal, and used in the manufacture of solar cells. It said HSC is the largest U.S. producer of polysilicon and exports 75% of its production.

“Given the desire of the U.S. government to encourage its infant solar manufacturing industry to become a leading global producer and exporter of solar cells and modules instead of a net importer, a critical component of that growth will be ensuring that major U.S. polysilicon producers can cost effectively supply the industry from a U.S. base.” the request states.

To speed up their applications, Dow, HSC and HSL have agreed to a restriction that would prohibit the import into the subzones of silicon metal from Russia and China that is the subject of antidumping and countervailing duty orders. “Dow Corning and Hemlock Semiconductor Corporation acknowledge and accept that a grant of manufacturing authority for the Hemlock Semiconductor Corporation polysilicon operations will prohibit the admission of foreign status silicon metal subject to an AD or CVD order at this time,” the application states.

This concession didn’t satisfy Global. “The application qualifies this statement by making it clear that Dow Corning only accepts the restriction ‘at this time’,” Global’s lawyers at DLA Piper say in their request for a hearing on the application. “Therefore, these applications, on their face, are intended to move Dow Corning closer to achieving its ultimate objective of obtaining authority to consume silicon metal subject to AD/CVD orders without paying AD/CVD duties,” they write. They also note that with the proposed subzones, 68% of silicon metal consumption would take place in FTZ subzones. “In these circumstances, facilitating import sourcing of such a large percentage of total U.S. consumption would have serious adverse consequences for the U.S. silicon metal industry,” they contend.

Marubeni Pays \$54.6 Million to Settle FCPA Charges

With Marubeni Corporation’s payment of \$54.6 million in criminal fines, bribes to Nigerian government officials to garner contracts to build liquefied natural gas (LNG) facilities on Bonny Island, Nigeria, have now led to \$1.7 billion in total penalties and forfeiture orders for the five companies involved. The Japanese trading company agreed to pay the penalty as part of a deferred prosecution agreement (DPA) with Justice to resolve charges relating to its participation in a decade-long scheme to obtain engineering, procurement and construction (EPC) contracts on Bonny Island. Justice filed the DPA and a two-count criminal information against Marubeni in Houston U.S. District Court Jan. 17, charging it with one count of conspiracy and one count of aiding and abetting violations of the FCPA.

According to court documents, Marubeni was hired as an agent by the TSKJ joint venture to help TSKJ obtain and retain EPC contracts for the project. TSKJ comprised Technip S.A., Snamprogetti Netherlands B.V., Kellogg Brown & Root Inc. (KBR) and JGC Corporation. JGC paid a \$218.8 million criminal fine to settle related charges in April 2011 (see **WTTL**, April 11, 2011, page 4). KBR, Technip and Snamprogetti had previously reached settlements with Justice and the Securities and Exchange Commission and paid fines for their role in the scheme.

Under the DPA, Justice agreed to defer prosecution of Marubeni for two years on the condition that the Tokyo-based firm retain a corporate compliance consultant to review the design and implementation of its compliance program, enhance its compliance program to ensure that it satisfies certain standards and cooperate with the department in ongoing investigations. If Marubeni abides by the terms, Justice will dismiss the criminal information after two years. In a statement on its website, Marubeni said, “Between 1995 and 2004, TSKJ was awarded contracts by Nigeria LNG Limited. Marubeni executed Service Agreements with TSKJ regarding the Project... and assisted TSKJ in obtaining the contracts.”

Wagons Circle Around USTR to Keep It out of Reorganization

While President Obama's proposals for reorganizing the government, and especially trade agencies, face stiff political headwinds, the business community has rallied around the U.S. Trade Representative's (USTR) office and objected to its inclusion in any consolidated trade department (see **WTTL**, Jan. 16, page 2). Industry is also concerned that merging the Export-Import Bank into such a department would reduce the bank's effectiveness. The business community's views on keeping the USTR independent match statements from members of the Senate Finance Committee and House Ways and Means Committee.

Industry trade groups say they support the president's ability to reorganize government, but just not the USTR's office. "Reorganization holds real potential to strengthen accountability, improve government efficiency and produce significant budget savings," said John Engler, president of the Business Roundtable.

The Emergency Committee for American Trade (ECAT) said it had "strong doubts" about melding six agencies, including the USTR's office, into one department. "The amalgamation of USTR and other key U.S. government entities may severely damage the ability and functioning of USTR and other entities as they seek to improve the competitiveness of U.S. companies and their workers in the international economy," said ECAT President Calman Cohen.

The National Foreign Trade Council (NFTC) echoed that view. "Congress has historically been reluctant to combine USTR with other functions, preferring to have our chief trade negotiator concentrate on negotiating rather than be burdened with broader programmatic responsibilities," said NFTC President Bill Reinsch. "Considering this and given the current political climate in Washington, we do not anticipate that Congress, especially the Members of the House, will approve the President's request for broad reorganization authority," he added.

"We are concerned that folding USTR into a massive Department of Commerce or Industry structure would significantly weaken the coordination role played by USTR on trade interests across sectors, and the work on agricultural trade opportunities and barriers would be diminished," said the American Soybean Association. "We therefore support continuing the current structure and functions of the Office of the U.S Trade Representative," it said.

John Hardy Jr., president of the Coalition for Employment through Exports, which represents firms that deal with Ex-Im, questioned inclusion of the bank in a new department. "CEE believes any efforts beyond co-locating these agencies will most likely result in reduced responsiveness to the needs of U.S. exporters – both small- and medium-sized businesses and large worldwide American companies," said Hardy. "In our experience, we have found that smaller, more nimble agencies are better able to respond to the needs of American business – a reality that this proposal seems to ignore," he said in a statement. "Additionally, in this proposal the President emphasized the need to provide further support for small businesses. The best method for achieving this goal is to push for a quick reauthorization of Ex-Im Bank," he stated.

Russia's WTO Deal Addresses Concerns, WTO Official Says

In negotiating Russia's accession agreement to join the World Trade Organization (WTO), members attempted to anticipate and address all the major objections to Russia's membership, including concerns about the experience with China, according to Chiedu Osakwe, director of the WTO accession division. As Congress prepares for the debate over waiving the Jackson-Vanik Amendment and granting Russia permanent-normal-trade relations (PNTR) status, Osakwe told the Washington International Trade Association (WITA) Jan. 19 that of the 1,431 paragraphs in the accession protocol, 163 are "legally binding and legally enforceable."

As the most comprehensive accession agreement ever negotiated, "this is tight; it is nailed to the mast," Osakwe said. In comparison to the 200 pages in China's accession protocol, the Russian agreement runs 600 pages, he noted. WTO members accepted Russia's accession

agreement at their ministerial conference in December (see **WTTL**, Dec. 19, page 3). Osakwe, who shepherded the last few years of the accession talks, provided a detailed explanation of the provisions in the protocol, particularly the rights that foreign persons will have to challenge Moscow's trade practices in civil courts and administrative procedures. He noted that treaty obligations such as the WTO accession protocol become part of Russian law.

Separate from its commitment to join the Information Technology Agreement (ITA), Moscow has agreed to cut its average tariff on information goods from 5.4% to zero upon accession, he noted. It has also committed to meeting WTO rules on trade-related investment (TRIMS) and trade-related intellectual property rights (TRIPS), eliminating all WTO-inconsistent laws by July 2018. It will cap trade-distorting farm subsidies at \$4.4 billion by 2018 and open most services sectors, allowing 100% foreign ownership in key areas over the next few years.

An important factor in Russia's accession is how it will set the standard for accession of other former Soviet republics that are seeking WTO accession and a plan that Russian Prime Minister Putin announced in October calling for creation of a Eurasian Union comprising many former USSR republics, Osakwe stressed. In November, Russia, Belarus and Kazakhstan, which are already in a customs union, issued a declaration on Eurasian Integration and created a super-national Eurasian Economic Commission Jan. 1. "In that document, they committed themselves to the principles and disciplines of the [WTO] organization," he noted. In addition to Belarus and Kazakhstan, former republics Azerbaijan, Tajikistan and Uzbekistan are also in the process of seeking WTO membership.

* * * Briefs * * *

EX-IM BANK: Mario Francisco Mimbella of Miami, owner of Mario's Air Inc., was sentenced Jan. 18 to six months in prison for defrauding Ex-Im of \$496,869, relating to purchase of garbage trucks by Peruvian borrower. He was sentenced in D.C. U.S. District Court to additional 36 months of supervised release and ordered to pay \$496,869 in restitution and \$759,547.49 in forfeiture. Mimbella pleaded guilty on July 12, 2011, to one count of making false statement in connection with scheme to defraud Ex-Im Bank.

ANTIBOYCOTT: Parfums de Coeur in Darien, Conn., Jan. 12 reached agreement with BIS to pay \$27,000 to settle nine charges of violating antiboycott regulations by furnishing information about business relationships with boycotted countries or blacklisted persons and failing to report receipt of request to engage in restrictive trade practice or foreign boycott. From August 2005 through September 2006, Parfums engaged in transactions from U.S. to UAE. Parfums neither admitted nor denied charges.

CLOVES: U.S. filed appeal Jan. 5 with WTO Appellate Body to overturn dispute-settlement panel ruling against U.S. restrictions on imports of clove cigarettes (see **WTTL**, Sept. 12, page 3).

TUNA: USTR Jan. 20 appealed WTO dispute-settlement panel report challenging U.S. dolphin-safe labeling measures. Panel issued mixed report Sept. 15, concluding that Mexican tuna products are not afforded less favorable treatment than tuna products of U.S. under label law, but finding U.S. measures to be more trade restrictive than necessary to achieve objectives (see **WTTL**, Sept. 26, page 4).

IMPORT ENFORCEMENT: Three Philippine nationals were indicted in L.A. U.S. District Court Jan. 12 on charges of violating Arms Export Control Act. Sergio Santiago de Leon Syjuco, aka "Yogi,"; Cesar Paolo Inciong Ubaldo, aka "Arvi,"; and Arjyl Revereza were arrested Jan. 6 on criminal complaint that claimed they imported defense articles into U.S. without licenses, including 12 fully automatic Bushmaster M-4 .223 caliber rifles, .50 caliber sniper rifle, M14 7.62mm assault rifle, single-shot grenade launcher, rocket propelled grenade (RPG-7) launcher, mortar launcher, AK-47 rifle and ballistic vests.

ITC: Former ITC Chief Administrative Law Judge Paul J. Luckern has died, ITC announced Jan. 19. "We consider it an honor and privilege to have worked with Judge Luckern, who was one of the nation's pre-eminent intellectual property jurists and the USITC's longest-serving Administrative Law Judge. He presided over more than 150 section 337 investigations during the 27 years he worked here," ITC statement said. Luckern retired in August 2011 (see **WTTL**, Aug. 8, 2011, page 4).

FURFURYL ALCOHOL: ITC made unanimous 6-0 "sunset" determination that lifting antidumping order on furfuryl alcohol from China would likely lead to renewed injury to U.S. industry.