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Supreme Court Denies Roth's Petition for Certiorari

After a long legal battle, former University of Tennessee Professor J. Reece Roth could be heading to prison some time in November following the Supreme Court's denial Oct. 3 of his petition for a writ of certiorari to review his 2008 conviction of violating the Arms Export Control Act (see **WTTL**, July 18, page 1). "Following denial of petition for a writ of certiorari by the Supreme Court the next step will be for Professor Roth to begin serving his sentence as designated by the Bureau of Prisons," Assistant U.S. Attorney Will Mackie told **WTTL**. Mackie and his colleagues in the Knoxville U.S. Attorney's office prosecuted the case against Roth.

Roth, 73, is expected to be assigned to a minimum security prison to serve his four-year sentence. His attorneys have asked for his assignment to a facility close to his family in Knoxville. While he could spend all four years in prison, Bureau of Prison policies allow for early release in appropriate cases after 86% of a sentence has been served. The bureau also may allow him to serve the last six months of his sentence in a halfway house.

[Editor's Note: WTTL and *The Export Practitioner* will sponsor an audio-conference briefing Nov. 15 on "The Prosecution of Professor Roth and Its Aftermath." Featured speakers include Mackie, J. Patrick Rowan of McGuire Woods and Jahna Hartwig, principal compliance officer for the Johns Hopkins Applied Research Laboratory. Details will be available shortly.]

Court Upholds ITC on "Domestic Industry" in Section 337 Cases

The Court of Appeals for the Federal Circuit (CAFC) Oct. 4 upheld the International Trade Commission's (ITC) position that paying litigation expenses to defend patents is not sufficient to meet the "domestic industry" definition under Section 337 of the Trade Act. The appellate court agreed with the ITC's decision that John Mezzalingua Associates, Inc. (doing business as PPC, Inc.) did not have standing in its Section 337 complaint against imports of coaxial cable connectors because it had failed to meet the requirement to be a domestic industry.

"The original Act, however, did not describe how a complainant could go about establishing the existence of a domestic industry," noted CAFC's 2-1 split opinion (case 2010-1536). In the 1988 Omnibus Trade Act, Congress "believing the Commission's application of the domestic industry requirement had been too rigid, liberalized the domestic industry requirement by allowing that requirement to be satisfied by proof of non-manufacturing activity, such as licensing and research," the court said. "Nonetheless, it is clear that Congress had no intention of disposing of



the domestic industry requirement altogether; Congress recognized that the Commission is fundamentally a trade forum, not an intellectual property forum, and that only those intellectual property owners who are ‘actively engaged in steps leading to the exploitation of the intellectual property’ should have access to the Commission,” the court ruled.

“The statute does not specify whether litigation expenses incurred in enforcing a patent may later be used as evidence that the required domestic industry requirement exists. In light of the purpose underlying the 1988 amendment to section 337, the Commission reasonably concluded that expenses associated with ordinary patent litigation should not automatically be considered a ‘substantial investment in . . . licensing,’ even if the lawsuit happens to culminate in a license,” it added.

Flowserve and Affiliates Pay \$3 Million Fine to BIS and OFAC

Flowserve Corporation of Irving, Texas, has agreed to pay over \$3 million to settle charges by the Bureau of Industry and Security (BIS) and Treasury’s Office of Foreign Assets Control (OFAC) that it and 10 foreign affiliates made unlicensed exports and reexports of pumps, valves and related components to Iran and Syria and 30 other countries. Flowserve will pay \$2.5 million to BIS to settle 288 charges and \$502,408 to OFAC for alleged violations of the Iranian Transactions Regulations, the Sudanese Sanctions Regulations, and the Cuban Assets Control Regulations from January 2005 through December 2006. Flowserve, which made a voluntary self disclosure, also agreed to conduct an external audit of its export compliance program.

The agencies claimed Flowserve and 10 of its foreign affiliates made unlicensed exports and reexports to a variety of countries, including China, Singapore, Malaysia and Venezuela, of items classified under Export Control Classification Number (ECCN) 2B350 and EAR99 items to Iran and Syria.

“The settlements come as a result of a voluntary systematic process performed by the company to determine its compliance with respect to U.S. export control and economic sanctions laws and regulations, which has been discussed in the company's prior public filings,” Flowserve said in a statement. The company “has worked closely with the authorities to supplement and clarify specific aspects of the disclosures and has taken a number of actions designed to ensure the effectiveness of its global export compliance program,” Flowserve said.

Congress Puts Fast into Fast Track for FTAs

Just two days after President Obama sent Congress the free trade agreements (FTAs) with Colombia, Panama and South Korea for approval, the House Ways and Means Committee reported out the three deals Oct. 5 and sent them to the House for a vote that is expected on Oct. 12. The Senate Finance Committee has scheduled its markup of the measures for Oct. 11, with a Senate vote on Oct. 12 as well. Congressional action sets the stage for approval of the implementing legislation in time for the state visit of Korean President Lee Myung Bak Oct. 13.

While Congress is moving fast to approve the three accords, one senior White House official told WTTL that the deals could have been submitted and approved in August had Republicans been willing to agree on a vote on Trade Adjustment Assistance (TAA). It has now been agreed that the House will vote on TAA, although the exact timing for a vote is still not set. The House Rules Committee issued a rule Oct. 3 for a TAA vote, but without setting a specific time.

The two-hour-plus Ways and Means debate over the Colombia FTA bill (H.R. 3078) showed that President Obama’s effort to make the deal more palatable to Democrats by coming up with a labor action plan failed to convince most of his fellow party members. When the vote was taken on the measure, the committee split mostly along party lines voting 24-12 to report the bill out favorably. Only two Democrats, Reps. Joe Crowley (D-N.Y.) and Ron Kind (D-Wis.), joined

with GOP members in support of the Colombia FTA. Democrats continued to complain about the killing of labor leaders in Colombia, the lack of criminal prosecutions for the killings and the failure to include the action plan as part of the FTA. Although some expected the Democrats to propose an amendment to add the action plan to the deal, no amendment was offered. The majority of House Democrats are expected to vote against the Colombia pact, but Crowley said the measure will get some Democratic backing. "This will be bipartisan when it passes," he told WTTL (see WTTL, Sept. 26, page 1).

The Panama bill (H.R. 3079) drew strong support from Republicans and Democrats and passed by a 32-3 vote, with only three Democrats dissenting. The Korean measure (H.R. 3080) also received general bipartisan support, passing 31-5, with five Democrats objecting. The toughest questioning during markup of the South Korea deal came from Rep. Bill Pascrell Jr. (D-N.J.), who pressed Tim Reif, general counsel in the U.S. Trade Representative's (USTR) office, on the rule of origin in the agreement. Reif found it difficult to refute Pascrell's contention that the rule of origin would permit up to 65% of the content of goods coming in tariff-free from Korea to be from other countries, including China.

Decade after WTO Accession, China Not Meeting Obligations

As the Senate weighs legislation aimed at Chinese currency manipulation, U.S. industry representatives testified Oct. 5 that Beijing still does not comply with commitments it made to join the World Trade Organization (WTO). On the tenth anniversary of China's accession to the WTO, the USTR's interagency Trade Policy Staff Committee (TPSC) heard witnesses complain about a broad range of Chinese trade policies, but disagree over the impact of currency manipulation.

"We urge the Congress to refrain from passing unilateral legislation that would be unlikely to create any incentive for China to move quickly to modify its exchange policies and would likely have the opposite effect and result in retaliation against U.S. exports to China," said Jeremie Waterman, senior director for greater China for the U.S. Chamber of Commerce. On the other side, Barry Solarz, senior vice president for the American Iron and Steel Institute (AISI) argued that "Chinese currency manipulation is hurting U.S. growth, limiting U.S. exports and destroying U.S. jobs." He said AISI supports prompt passage of legislation.

Other witnesses noted China's indigenous innovation, intellectual property and government procurement policies. "This year, we highlight the failure of China's enforcement infrastructure for copyright to meet the standards of the WTO TRIPS Agreement, and note that the market remains largely closed to our creative industries," testified Michael Schlesinger of the International Intellectual Property Alliance. John Nueffer of the Information Technology Industry Council called China's indigenous innovation policies particularly vexing. "This is going to be a long-term problem. While we've seen some amelioration of the problem at the central government level, it's quite significant at the provincial and local level," he said. Nueffer said Beijing is now rolling out a Multi-Level Protection Scheme (MLPS) that will, among several elements, prohibit foreign technologies in certain critical infrastructure products and force disclosure of source code.

Amendment Battle Delays Senate Vote on China Currency Bill

After a week of debate, the Senate postponed until Oct. 11 a final vote on legislation (S. 1619) aimed at China's "misaligned currency." If senators can overcome a fight over unrelated amendments dealing with President Obama's jobs bill, the measure is expected to pass with bipartisan support. Even if passed, the bill is likely to be dead on arrival in the House. House Speaker John Boehner (R-Ohio) declared the bill "dangerous," and House Ways and Means Committee Chairman Dave Camp (R-Mich.) told WTTL that "I have no plans to bring up the Senate bill." The chances for the future of the measure also seemed to dim with President Obama's muted opposition to it during his Oct. 6 press conference. "My main concern, and I've expressed this

to Senator Schumer, is whatever tools we put in place, let's make sure that these are tools that can actually work, that they're consistent with our international treaties and obligations," Obama said. "I don't want a situation where we're just passing laws that are symbolic knowing that they're probably not going to be upheld by the World Trade Organization, for example, and then suddenly U.S. companies are subject to a whole bunch of sanctions," the president added.

Perhaps not by happenstance, the USTR's office announced Oct. 6 that it has submitted to the WTO a list of nearly 200 subsidy programs that China has failed to notify as required under WTO rules. For good measure, it also identified 50 subsidy programs in India not previously notified. The U.S. wants China and India to provide more information on these programs. The USTR said China has submitted only one subsidy notification since joining the WTO in December 2001, and that was five years ago and was noticeably incomplete.

Senate passage of the bill seemed assured following two procedural votes on cloture to move the measure toward debate and a final vote. One cloture motion passed by a 79-19 margin and a second one by 62-38. During the debate on the bill, several senators referred to the measure as a "message" bill, apparently recognizing that its passage was in doubt and even if enacted would have small impact on getting Beijing to change either its currency or trade policies.

U.S., Seven Countries Sign ACTA Anti-Counterfeiting Pact

The U.S. and seven other countries signed the Anti-Counterfeiting Trade Agreement (ACTA) in Tokyo Oct. 1. Representatives of Australia, Canada, Japan, Korea, Morocco, New Zealand, Singapore and U.S. signed the pact. Official of the EU, Mexico, and Switzerland attended the ceremony but need domestic approval before they can sign (see **WTTL**, Nov. 22, 2010, page 4).

ACTA obligates signing countries to step up border protection against both imports and exports of counterfeit and pirated goods, to initiate criminal action against violative goods and to impose criminal remedies against importation or use of labels or packaging for counterfeit goods. "Since ACTA is consistent with United States law and does not require further legislation on our part, we anticipate depositing our instrument of acceptance without delay," Deputy USTR Miriam Sapiro said in a statement at the signing ceremony.

* * * Briefs * * *

BUY AMERICA: U.S. and Canadian business groups have sent letters to congressional leaders urging Congress to drop "Buy America" provisions included in President Obama's jobs bill (H.R. 2911). "As we witnessed with similar provisions in the *American Recovery and Reinvestment Act of 2009*, manufacturers in the United States lost business when Buy American restrictions barring Canadian manufactured goods forced Canadian manufacturers to cancel longstanding contracts with U.S. materials and parts suppliers," said a letter from the Canadian Manufacturers and Exporters and several U.S. trade groups. "At the same time, many U.S. companies were unable to source Canadian parts and component technologies from their Canadian subsidiaries, which in turn increased their costs and made them less competitive in bidding for both privately and publicly funded infrastructure projects," letter added (see **WTTL**, Sept. 19, page 4).

MEXICO TRUCKING: Transportation Department Oct. 3 issued final environmental assessment (FEA) of pilot program to allow Mexican trucks to enter U.S., rejecting complaints against its findings. Federal Motor Carrier Safety Administration (FMCSA) "concludes that the potential environmental impacts from the pilot program are not significant and do not warrant additional environmental analysis in the form of an Environmental Impact Statement. FMCSA issues a Finding of No Significant Impact (FONSI) based on the conclusions in the FEA," it said in Federal Register notice (see **WTTL**, Aug. 22, page 3).

BALL BEARINGS: CIT Judge Timothy Stanceu Oct. 4 remanded to ITA nineteenth administrative reviews of antidumping orders on imports of ball bearings and parts from France, Germany, Italy, Japan and United Kingdom (Slip Op. 11-121). He directed agency to provide explanation for its inconsistent use of zeroing in investigations and administrative reviews as contemplated by the Court of Appeals for Federal Circuit in its March 2011 ruling in *Dongbu* (see **WTTL**, April 4, page 1).