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Justice Opposes Roth's Appeal to Supreme Court

There is no disagreement among U.S. circuit courts over the meaning of "willfully" in the prosecution of export control violations, the U.S. government argues in a brief filed July 11 at the Supreme Court, opposing ex-University of Tennessee Professor J. Reece Roth's request for review of this conviction of violating the Arms Export Control Act (AECA) (see **WTTL**, April 18, page 1). Roth's petition for a writ of certiorari seeks Supreme Court review of his case, claiming disagreement over the meaning of "willfully" justifies reversing his conviction.

> "None of the cases petitioner identifies presents a direct conflict with the court of appeals' decision or any of the cases that have squarely addressed petitioner's contention that a conviction under section 2778 requires the jury to find that a defendant knew his conduct violated specific prohibitions contained in the munitions list," argues the U.S. Solicitor General. "This court's intervention is not necessary to resolve a conflict in the courts of appeals," it states.

"In fact, courts have consistently held that the word 'willfully' in the Arms Export Control Act merely requires that the defendant was aware that he was violating a legal duty not to export certain items without a license, not that he had knowledge of the specific features of the regulatory regime implementing the act," the brief adds. The brief also argues that a 1998 Supreme Court ruling in *Bryan v. U.S.* has long settled the meaning of "willfully" under laws similar to the AECA. It also distinguishes Roth's case from the Seventh Circuit ruling in *U.S. v. Pulungan*. In contrast to Pulungan, Roth "was repeatedly warned that Phase II project material was subject to the export-control laws, and he does not contend that he was unaware of the Arms Export Control Act or its license requirements," the brief contends.

Defense Reviewers Complete Draft Revisions of USML

Pentagon licensing officers and military branches have completed converting all U.S. Munitions List (USML) categories, except one, into positive, three-tier lists and sent the draft changes out for interagency review. "We have been able, as of last week, to provide draft copies of every single category except one, Category III ammunitions, which is still in finalization," Michael Laychak, licensing director in the Defense Technology Security Administration (DTSA), reported July 13. The drafts will now undergo interagency review with the goal of issuing separate Federal Register notices formally proposing each set of changes starting in October or November, Laychak said. Some 150 Pentagon employees have worked on drafting the changes to the USML, he said. "I must say this is going to be more work for all organizations

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involved," he added. Categories that are one or two pages on the USML have been lengthened, with Category XIII now 25 pages; Category XI 45 pages; and Category XV 15 pages, he said.

No Message from BAE Settlement, Says DDTC's Aguirre

State's settlement with BAE Systems plc (BAES) in May should not be looked at as a precedent on how the Directorate of Defense Trade Controls (DDTC) interprets brokering rules for foreign distributors and subsidiaries, according to Lisa Aguirre, director of DDTC's compliance office (see **WTTL**, May 23, page 1). "This particular settlement does not give as easy a read or as much of a lesson as others in the past," she told the American Conference Institute's annual forum on the International Traffic in Arms Regulations (ITAR) July 13.

> Industry export compliance managers have questioned whether the charges against BAES for the allegedly failure of its affiliates in Europe to register as brokers and to obtain approval for brokering the sales of aircraft containing U.S. parts set a new DDTC policy on foreign brokering activities. "I agree when you read it you are not quite sure, if you don't know the underlying facts," Aguirre said. "I can understand why there is some confusion," she added. "If we could articulate more of the facts, which was not possible, you would understand more of why it was a violation," she said.

"The problem with trying to take a message from [the settlement] is that all of the facts could not be articulated," Aguirre said. DDTC's proposed charging letter "was a reasonable approximation of some of the violations," she noted. "We didn't have all the facts for some of them. This was a settlement. It says they neither confirmed nor denied the allegations," she stated. "As far as a take-away, I'd be careful, because it is not articulated," she cautioned.

FCPA Mistrial Could Bode Poorly for Justice Sting Case

In what could be a blow to Justice prosecutions based on sting operations, the trial of four arms dealers caught in a 2010 sting ended in a mistrial July 7, after a jury couldn't reach a verdict on charges they violated the Foreign Corrupt Practices Act (FCPA). When the jury's deadlock was announced, Justice attorney Joey Lipton told the court the government intends to retry the case against Pankesh Patel, John Benson Wier III, Andrew Bigelow and Lee Allen Tolleson. The four were among 22 arms dealers caught in a widely publicized Justice prosecution that accused the men of conspiring to violate the FCPA through the bribery of a person they believed to be a defense official for an African country, but who was actually an FBI agent.

> "Sting cases can bring out skepticism of juries, especially when the underlying criminal conduct is subtle," Patrick Rowan, a partner at the law firm of McGuire Woods and a former assistant attorney general for national security, told WTTL. Three other defendants, Daniel Alvirez, Jonathan Spiller and Haim Geri, who previously pleaded guilty in the case, "might be regretting their decision," Rowan said (see **WTTL**, April 18, page 4).

On the other hand, the remaining 15 defendants "have to be happy about this hung jury" and the prospects for their own trials, he noted. Attorneys for all the defendants and Justice will meet July 26 to figure out the next steps in the case. A second group of defendants was scheduled to go to trial in September, but the retrial of the hung-jury four might intervene.

Meanwhile, in a related story, Armor Holdings of Jacksonville, Fla., settled FCPA charges July 13 with SEC and Justice, for participating in a bribery scheme from 2001 through 2006 to obtain contracts to supply body armor for use in United Nations peacekeeping missions, paying over $15 million in fines and signing a nonprosecution agreement (NPA). The SEC charged Armor Holdings, which makes military and law enforcement equipment, with failing to properly account for more than $4 million in commissions. Spiller and Richard Bistrong reportedly are

former Armor Holdings employees. According to court records, Bistrong cooperated with the government in setting up the sting that caught the 22 arms dealers. Armor Holdings agreed to pay $5,690,744 in disgorgement, prejudgment interest, and civil penalties to resolve the SEC charges. Under its NPA with Justice, it will pay a $10,290,000 fine. After the alleged violations occurred, Armor Holdings was acquired on July 31, 2007, by BAE Systems, Inc., a U.S. subsidiary of Britain's BAE Systems plc, which paid a $400 million criminal fine in 2010 after pleading guilty to lying to the Pentagon regarding the bribery of officials in Saudi Arabia.

BIS Proposes Creating Commerce Munitions List

In its long-awaited plan for moving products from the U.S. Munitions List (USML) to its Commerce Control List (CCL) published in the Federal Register July 15, the Bureau of Industry and Security (BIS) tried to assure Congress that transferred products would still face tight export controls. Along with a restrictive *de minimis* rule for those transferred products, BIS also proposed limiting the use of license exceptions for them, making them subject to the China Rule and constraining their export for military end-uses (see **WTTL**, June 13, page 1). The proposal also includes a promised new definition for "specially designed" (see story below).

> "The State Department will reference this proposed rule, and any applicable follow-on proposed amendments to particular CCL categories, when it submits its 38(f) [of Arms Export Control Act] notices to Congress prior to publishing the final rules that would amend the corresponding USML category or groups of subcategories," BIS says.

The proposal would establish a new "holding" Export Control Classification Number (ECCN), called the "600 series," into which transferred USML items will be placed temporarily. "This proposal would effectively create a 'Commerce Munitions List,' comprising distinct ECCNs, that allows for identification, classification, and control of items transferred from the USML that, based on their technical or other characteristics, are not classified under an existing ECCN that is subject to controls for any reason other than Anti-Terrorism (AT) reasons," BIS advises. The proposal also would move current CCL items under ECCNs xx018 to the 600 series.

Products moved into this new holding ECCN would be subject to a stricter *de minimis* rule than other products on the CCL, but less restrictive than the "see-through" rule for USML items. U.S.-origin "600 series" items would be excluded from the 25% *de minimis* rule and subject to a 10% rule, BIS said. Another technical change would be establishment of ECCN 0Y521 for items that warrant control but are not controlled yet -- e.g., as with an emerging technology -- similar to USML Category XXI (Miscellaneous Articles). In addition, the rule proposes the transfer of "an initial tranche of items" from USML Category VII (Tanks and Military Vehicles) to the CCL as a pilot for the future transfer of other items.

Specially Designed Means "Peculiarly Responsible," BIS Proposes

As part of the BIS proposal for shifting USML items to the CCL published in the July 15 Federal Register, the agency is offering a new definition of "specially designed" that includes multiple elements aimed at covering numerous situations where the term may apply, including under multilateral regime controls and on the USML. "A core element of the positive USML review exercise is to avoid using design-intent based control parameters for generic items," BIS states (see **WTTL**, June 27, page 1). BIS says a basket category of "specially designed" articles is still necessary for national security reasons and because it is not practical to list all parts and components that need control individually.

The proposal also includes a note saying the definition "does not extend control to items simply because they could in theory be used with the listed item on the USML or CCL." In addition, "This definition of 'specially designed' is not applicable to the phrase 'specifically designed' in use throughout the U.S. Munitions List or to 'especially designed or prepared for' in use

throughout the Nuclear Regulatory Commission regulations," it adds. The proposed definition of "specially designed" would be:

> "(a) A 'specially designed' item, other than a 'part' or 'component,' is an item that is enumerated on the CCL and, as a result of 'development,' has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions of the referenced item identified in the CCL.
> "(b) A 'specially designed' "part' or 'component' is a 'part' or 'component' of an item 'enumerated' in a category of the CCL.
> "(c) For the purposes of this definition, an item is not considered 'specially designed' if it is separately 'enumerated' in an USML subcategory or an ECCN that does not have 'specially designed' as a control criterion."

The definition goes on to explain that items not separately 'enumerated' are also not considered "specially designed" in any category of the CCL if they meet one of several criteria, including parts used in civil items, such screws and bolts, or they are specifically excluded from control on the USML or the CCL. In addition, parts and components of end items in "serial production" and not "enumerated" on the USML or CCL are excluded.

* * * Briefs * * *

TRADE FIGURES: U.S. goods exports in May rose 17.9% from year ago to $125 billion, as imports increased 18% to $190 billion. Services exports increased 9.5% to $49.7 billion, while services imports inched up 5.4% to $35 billion, Commerce reported July 11.

POWER TRANSFORMERS: ABB Inc. of Cary, N.C., Delta Star Inc. of Lynchburg, Va., and Pennsylvania Transformer Technologies Inc. of Canonsburg, Pa., filed antidumping petitions July 14 with ITC and ITA against imports of large power transformers with a power rating of 60 MVA or more from Korea.

ZEROING**:** WTO dispute-settlement panel report July 11 ruled U.S. use of "zeroing" in administrative review of antidumping order on shrimp from Vietnam was inconsistent with trade rules.

EXPORT ENFORCEMENT: Xun Wang, former managing director of PPG Paints Trading (Shanghai) Co., Ltd., wholly-owned Chinese subsidiary of U.S.-based PPG Industries, Inc., was indicted July 7 in D.C. U.S. District Court on charge of conspiring to violate IEEPA and EAR (see **WTTL**, June 27, page 3).

MORE EXPORT ENFORCEMENT: Boniface Ibe of Mitchellville, Md., was sentenced July 11 in Greenbelt, Md., U.S. District Court, to five months in prison followed by 10 months of supervised release for exporting arms and controlled goods to Nigeria without license and delivering firearm to common carrier without written notice. Ibe pleaded guilty March 10.

SECTION 302: USTR in July 15 Federal Register rejected petition seeking compensation under CAFTA-DR for expropriations in Dominican Republic during Trujillo regime of 1950s. USTR said it "is not in a position to investigate events that occurred five decades ago." In separate notice same day, USTR denied petition claiming Israel misappropriated business confidential information during negotiation of U.S.-Israel FTA in 1984. "The petition is addressed to an alleged act by the Government of Israel that occurred over 27 years ago" and doesn't allege any current practices that are unjustifiable or unreasonable.

EX-IM BANK: Jose Quijano of Aventura, Fla., was sentenced in absentia in Miami U.S. District Court July 11 to 46 months in prison for his role in scheme to defraud Ex-Im Bank of nearly $1 million. Quijano pleaded guilty on Feb. 9 to criminal information that charged him with conspiracy to commit wire fraud, but he fled from pre-trial release on June 7 and is currently fugitive.

FCPA: Cinergy Telecommunications Inc., its president and director, plus president of Florida-based Telecom Consulting Services Corp. and two former Haitian government officials were charged July 13 in Miami U.S. District Court in superseding indictment for alleged FCPA violations, wire fraud and money laundering. Indictment alleges Cinergy and its related company, Uniplex Telecommunications Inc., paid more than $1.4 million to shell companies to bribe officials of Telecommunications D'Haiti (Haiti Teleco).

SOUTH SUDAN: BIS in Federal Register July 13 officially placed newly formed country of South Sudan in Country Group B on Commerce Country Chart, making it eligible for certain export and reexport license exceptions. Controls that continue to apply to Sudan under EAR will not apply to Republic of South Sudan, BIS said. OFAC previously issued guidance on South Sudan (see **WTTL**, April 18, page 4).