ISSN 0276-8275

WTTLonline.com

A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

Washington Tariff & Trade Letter®

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Vol. 30, No. 20 **May 17, 2010**

Justice Cites New Ruling to Bolster Roth Conviction

Justice Department lawyers have referred a judicial panel in the Sixth Circuit to a new ruling in the 11th Circuit which the government contends supports the conviction of former University of Tennessee Professor J. Reece Roth. The decision in *U.S. v. Piquet* rejected the appeal of Joseph Piquet, who was convicted of violating the Arms Export Control Act (AECA). The jury instructions in the Roth case are "indistinguishable from that in Piquet," wrote Justice lawyers. Piquet, who was the president of AlphaTronx, Inc., was sentenced to 60 months in jail in May 2009 after being convicted on seven counts of conspiracy to export to China military equipment he had bought from Northrop Grumman Corporation (see **WTTL**, May 25, 2009, page 4).

> In his appeal, Piquet challenged government claims that the equipment he planned to export was on the U.S. Munitions List (USML) and subject to the International Traffic in Arms Regulations (ITAR) and that the court had given incorrect instructions to the jury on the meaning of "willfulness" and "knowledge." These are arguments Roth has also made in an effort to overturn his conviction.

The appellate ruling noted that the government had submitted a document signed by Robert Kovac, managing director of State's Directorate of Defense Trade Controls, certifying that the APH-502 is a defense article on the USML. "Piquet's contention that the government failed to present sufficient evidence that APH-502 was a defense article on the USML in 2004 and 2005 is without merit," the court ruled.

The 11th Circuit also upheld the district court judge's instructions to the jury on what the government needed to prove to show that Piquet knew a license was required for the exports and that he acted "voluntarily and purposely with specific intent to do something the law forbids" and not "by mistake, accident or good faith." The judge's instructions "as a whole made clear, however, that the government was required to prove that Piquet was aware of the licensing requirements, from whatever source, even if he had not actually read the statutes and regulations at issue" the appellate court ruled.

Court Invalidates ITA Wage Rule for Non-Market Economies

In a precedent-setting decision, the Court of Appeals for the Federal Circuit (CAFC) May 14 invalidated Commerce antidumping regulations for determining wage rates in non-market economies (NME). The ruling in *Dorbest v. U.S.* , written by Chief Judge Paul Michel, not only applies to the case at the bar, imports of wooden bedroom furniture from China, but to all

Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail $647 a year. Combo subscription of print and e-mail is $747. Additional print copies mailed with full-price subscription are $100 each.

pending antidumping investigations, administrative reviews and court cases involving imports from NMEs, including China and Vietnam. Scores of antidumping case could see their dumping margins revised, probably to a lower rate, because of the decision. Government sources say Commerce is likely to have no option but to start applying the ruling to all pending cases.

> While the CAFC addressed several issues that have ensnared the bedroom furniture case since its initial final order in 2005 and produced three separate remand rulings from the International Trade Administration (ITA), the key portion of the decision struck down rules that ITA has applied since 1996 to determine NME wage rates using regression analysis. The appellate court agreed with Dorbest and other Chinese furniture manufacturers that the antidumping law requires Commerce, when using surrogate countries to determine wage rates in an NME, to use wage rates in comparable countries and comparable industries and not an average that includes more advanced, higher-wage countries.

"Here, the statute requires the use of data from economically comparable countries 'to the extent possible'," Michel wrote, citing 9 U.S.C. Section 1677b(c)(4)(A). "This seems to us to be a clear statement that Congress intended to require use of data from economically comparable countries except in situations where such data were not available or were irretrievably tainted by some statistical flaw. In promulgating its regulation, however, Commerce has decided to use data from many market-economy countries, regardless of their economic comparability to China, without any finding that data from economically comparable countries were unavailable or otherwise unusable," he wrote.

"A similar analysis pertains to Commerce's use of data from countries that are not significant producers of merchandise comparable to the Chinese wooden bedroom furniture at issue here," the judge noted. The chief judge also rejected the argument that Commerce was entitled to deference under the *Chevron* doctrine to its interpretation of the law. "We agree with Dorbest. Where the intent of Congress is clear from the language used in a governing statute, neither the agency interpreting the statute nor this court may interpret the statute in such a way as to deviate from Congress's intent," he declared.

"This means now that every non-market case that is pending before the department is going to require a fresh look by Commerce in terms of what labor rates to apply," Dorbest's attorney, Jeff Grimson of Mowry and Grimson, told WTTL. "Nobody has challenged this regulation before," he noted. "We're in uncharted territory somewhat, but the court was pretty clear in its decision," Grimson said. Joseph Dorn of King & Spalding, which represented the American Furniture Manufacturers Committee for Legal Trade, told WTTL he was not surprised by the ruling because Michel had questioned the Commerce regulation during oral arguments. He conceded the ruling will have broad implications. "It changes the whole game," he said. Dorn also suggested Commerce may still be able to use its regression analysis in some cases, even without the regulation, where it can justify its use based on the particulars in a case, such as when there is a lack of significant production of subject goods in a comparable country.

Customs Chief Grilled at Senate Hearing for Not Filing Reports

Alan Bersin, who needed a recess appointment by President Obama to become commissioner of Customs and Border Protection (CBP), may face trouble getting Senate confirmation for a full term in office because of his failure to file required employment reports on household staff he had hired in recent years (see **WTTL**, April 5, page 1). At a Senate Finance Committee hearing May 13 on Bersin's re-nomination for the post, Chairman Max Baucus (D-Mont.) chastised Bersin for failing to file Department of Homeland Security Employment Verification Form I-9 for people who had worked in his house and not being candid about the status of his employees during Finance staff vetting of his original nomination. Although Bersin attempted to explain his actions at the hearing, Baucus closed the session by saying, "I still have concerns." Bersin told the committee that over the last 20 years, he and his wife have assured the work eligibility of all the individuals they have employed and kept verification records, such as copies of

passports, Social Security cards and drivers licenses. "Over 20 years, no employee ineligible to work in the United States has ever worked in our household. No employee who has worked in our household has not had taxes paid in connection with that employment," he declared. "As I have acknowledged, my wife and I simply did not know, and we were mistaken in not knowing, that the I-9 form was needed to report the information I just alluded to," he added.

> Baucus sounded unsatisfied by Bersin's answers and also annoyed that Obama had made the recess appointment even though the White House knew the committee was holding up Bersin's confirmation because of discrepancies and questions about the I-9 forms. He also was skeptical about Bersin's lack of knowledge about the form, since Bersin had served as a U.S. Attorney during that period. "I find it incredible you didn't know about the I-9 obligation. That doesn't pass the credibility test," Baucus said.

U.S., EU Dance Around Talks to Settle Airbus-Boeing Dispute

Before the U.S. and European Union (EU) can start expected talks on a negotiated settlement to their World Trade Organization (WTO) disputes over subsidies for Boeing and Airbus, they are still having trouble setting the terms for those negotiations. In a meeting with U.S. Trade Representative (USTR) Ron Kirk May 11, EU Trade Commissioner Karel De Gucht insisted the talks begin without pre-conditions. The U.S. wants European countries to stop launch aid for the Airbus 350 before starting talks. "I think there should be negotiations without pre-conditions," De Gucht told reporters after meeting with Kirk. The next day, Kirk told WTTL "We have always been willing to entertain efforts that would give us a negotiated solution. I don't want to say any more about that."

> Pressure for talks intensified after a WTO panel issued a preliminary ruling to parties in March, finding some aid given by EU members to Airbus violated WTO rules (see **WTTL**, March 29, page 2). Now the U.S. and EU are playing a cat-and-mouse game over whether to start talks before a WTO panel issues a separate report on the EU's counter-complaint against U.S. help for Boeing.

"I agree with USTR that we should have negotiations," said De Gucht. "As far as I am concerned, the only reasonable way out is having a negotiated resolution of this dispute," he added. "Negotiations could start immediately," he stated. If the U.S. and EU had to wait for the panel report on Boeing, that "in itself would be a pre-condition," De Gucht argued. But setting a time frame for talks or "putting a hold on eventual aid for the subsidies in whatever form for A350, that would also be a pre-condition," he said.

"It is also obvious that when you have those negotiations, the whole package should be on the table," De Gucht said. "We are of the opinion that this is a battle between the Boeing 787 and the Airbus 350," he continued. "What this is really about is that you would have to strike a balance between Airbus and Boeing because in both cases there is subsidization. And a good question is, Can you really develop a large aircraft without subsidies? I think Airbus can't and Boeing can't," De Gucht said. He said talks should also address how Airbus and Boeing may be able to cooperate in the future in areas such as research. "Is it only dispute settlement or having a strategy for the future? Maybe that is a way out, if we combine both," he said.

India, Brazil Hit EU Detention of Generic Drugs In Transit

India and Brazil took a long-simmering dispute with the EU over the detention of generic drugs to the WTO May 12 with a request for consultations with the EU and the Netherlands about what the two countries claim is the WTO-illegal seizure of the medicines in transit. India and Brazil are protesting EU rules that allow the detention of drug shipments in transit through the EU on the basis that the shipments violate patents held by European drug makers (see **WTTL**, Oct. 5, page 3). They claim these detention violate WTO rules, including the agreement on

Trade-Related Intellectual Property Rights (TRIPS). The shipments were of generic drugs legitimate under WTO rules in the source and destination countries, said Ujal Singh Bhatia, India's ambassador to the WTO. India doesn't agree with the EU distinction that these were detainments of goods in transit, not seizures. "The impact is disruption of legitimate trade and therefore in concrete terms, in substantive terms, we see no distinction" Bhatia said.

> The seizures "seem to emanate from complaints made by patent holders in Europe," he noted. International transit guarantees are being violated by entertaining such claims, he asserted. The EU actions have also raised concerns about enforcement measures under a proposed anti-counterfeiting and piracy agreement.

The seizures are a clear violation of WTO disciplines on the freedom of transit, which is one of the cornerstones of the multilateral trading system, said Brazil's ambassador to the WTO, Roberto Carvalho de Azevedo. "There is no doubt on the lack of patent protection for the goods, either in the exporting country or in the importing country," he said. "These measures, in general, have a highly negative systemic impact on legitimate commerce, on South-South trade," and on national health policies in developing countries, Azevedo asserted.

African Trade Benefits Losing Steam, Industry Complains

At a May 12 reception marking the 10th Anniversary of the Africa Growth and Opportunity Act (AGOA), members of Congress spent 90 minutes congratulating each other for their effort to pass the bill a decade ago, while business representatives warned that the preference program is failing to keep sub-Sahara Africa competitive with Asia. In his comments, USTR Ron Kirk made it clear that, unlike the Clinton administration which forcefully pushed for enactment of AGOA, the Obama administration isn't going to lead efforts to improve the program.

> "There is a robust debate in Washington about whether we extend the timeline for elements of AGOA and whether we extend product coverage," Kirk said. "We at USTR still believe that is a congressional perogative," he said; adding that the administration would work to achieve any benefits that Congress grants.

Industry supporters of AGOA note that the program will expire in 2015 and rules for third-country fabrics will expire in 2012. They say the benefits of the program have been limited because of poor infrastructure in many sub-Sahara countries, wages that are higher than in Asia and lack of incentives for U.S. investment in the region, "Let's face it, in the apparel industry, U.S. retail customers have written off the AGOA countries," Martin Trust, chairman of Samtex (USA) Inc., told the reception. "They've given up....That is a reality and we need to face that reality," he added. "AGOA is running out of gas," said Trust, whose firm operates an apparel factory in Madagascar, an African country not eligible for AGOA because of a military coup in the country. Trust called for new tax incentives for U.S. investment in Africa and creation of enterprise zones to encourage new production there.

* * * Briefs * * *

TRADE FIGURES: U.S. goods exports in March of $102.7 billion were up 24.5% from last March, while services exports of $45.2 billion were 12% ahead of year ago. Goods imports of $155.6 billion were 28% above March 2009 levels, and services imports of $32.7 billion beat last year's figure by 9%.

VEU: BIS in May 10 Federal Register issued notice that it has granted Validated End-User status to plants in China operated by Advanced Micro Devices China, Inc. In May 14 Federal Register, it said it had granted VEU status to three more factories operated by previous VEU grantee Applied Materials (China), Inc. and for additional ECCNs.

OFAC: ABN AMRO Bank N.V., which is now named Royal Bank of Scotland N.V., agreed May 10 to forfeit $500 million in deferred prosecution deal with Justice on charges that it violated IEEPA, Trading with the Enemy Act and Bank Secrecy Act in connection with transfer of payments for customers in embargoed countries from approximately 1995 to December 2005.