

## Justice Refutes Roth's Pulungan Arguments in Appeal

In a reply brief filed Dec. 14 in the Sixth Circuit Court, the Justice Department opposed the appeal of former University of Tennessee Professor J. Reece Roth and his contention that his conviction for violating the Arms Export Control Act (AECA) should be reversed because his case was identical to the *Pulungan* ruling in which the Seventh Circuit threw out an AECA conviction (see **WTTL**, Nov. 2, page 1). "This case, however, is not like *Pulungan* because the government here presented witness testimony detailing the specific nature of the technical data in question to establish that it was, in fact, of the type identified in Category VIII(i) of the Munitions List," Justice argued.

"The government did not simply have a State Department official certify that the information in question was directly related to the design and development of a military aircraft; rather, it presented testimony regarding the issue and left it for the jury to decide," Justice stated. "More specifically, the government introduced evidence regarding (i) the nature of the defense articles alleged to have been exported, and (ii) why those defense articles were, as a matter of fact, of a type listed on the Munitions List. That was not done in *Pulungan*," it added.

"Simply put, the government here did what the *Pulungan* court said the government should have done there," Justice said. It placed the issue before the jury. "It is Defendant who is now asking this Court to hold that the district court should have taken the matter out of the jury's hands," it said. "Finally, it bears mentioning that the logical extension of Defendant's argument is that there could never exist any Category VIII(i) technical data absent the existence of a fully functional military aircraft. That is clearly not what is contemplated by the law because 'technical data' includes information "which is required for the *design, development, production, manufacture . . . testing. . .* of defense articles" (original emphasis), the brief contended.

## Ex-Im Bank Could See Another Record Year of Financing

Export-Import Bank officials say they expect the bank's export financing in fiscal 2010, which started Oct. 1, to meet or exceed the record \$21.02 billion it provided in 2009. The record level of financing will continue because of a number of major-project deals that are still in the pipeline from 2009 and the sharp rebound in exporting that has already been seen in the fourth quarter of this year, including for **Boeing** aircraft sales. Ex-Im help will be needed because "credit remains tight," Ex-Im Senior Vice President John McAdams told the bank's advisory committee Dec. 16. The bank has "seen some signs of improvement" in global credit markets,



but “banks are clearly keeping their hands in their pockets,” he said. Several Ex-Im initiatives to deal with the global credit crisis in the last year have helped bring down financing costs for exporters, McAdams reported. In particular, an Ex-Im “take-out option” has allowed about a half dozen lenders to buy a plan from Ex-Im that would allow them to sell their export loans back to Ex-Im if certain conditions are met. This option has allowed them to eliminate a 1.5% “liquidity premium” they had added to loans during the crisis. The reduction has given U.S. banks a “competitive edge over Europe and Japan,” he told the committee. Even banks that have not taken advantage of this option have also eliminated the premium based on the perception that risks have come down from a year ago, McAdams told WTTL.

Ex-Im Chairman Fred Hochberg told the committee that his goals include speeding up the processing time it takes for the bank to make financing decisions. He also said he wants to focus more attention on helping U.S. exporters expand business in emerging markets, such as Brazil, China, India and Indonesia.

## Talks on Trans-Pacific Trade Pact Face High Hurdles

U.S. Trade Representative (USTR) Ron Kirk’s enthusiasm for negotiating a Trans-Pacific Partnership (TPP) free trade agreement (FTA) may cool once the talks start. While the U.S. has FTAs with four of the seven countries that will participate in the initial talks, Australia, Chile, Peru and Singapore, Kirk will have to deal with the new partners in the talk, Vietnam, which is still a communist, state-controlled economy; Brunei, an oil-rich monarchy, and New Zealand, a major potential competitor for U.S. dairy farmers (see **WTTL**, Nov. 23, page 4). He will also have to avoid hurting other Asian trading partners, such as Cambodia and the Philippines, which could be at a disadvantage, if a TPP pact is reached.

Although fast-track legislation that required the president to notify Congress before starting new trade talks has expired, Kirk still applied it to the TPP, sending a formal notice to Congress Dec. 14 informing lawmakers of the planned talks. He also asked the International Trade Commission (ITC) to conduct a study of the potential economic impact of a deal and published a notice in the Dec. 15 Federal Register inviting public comment on the negotiations.

While Kirk calls the TPP countries the “coalition of the willing,” the current FTA countries may bristle, if Washington tries to modify their existing agreements or negotiate a TPP deal that goes much beyond their current accords. Kirk said one of his goals is to incorporate those existing pacts into a new TPP accord. “It potentially will have the ability to allow us where we have existing free trade agreements to incorporate those into it,” he told the Washington International Trade Association (WITA) Dec. 15.

“We will have to confront big challenges, from rationalizing rules of origin amongst our current FTA partners to addressing agricultural, developmental and labor challenges elsewhere to adding additional countries in ways that ensure that we maintain a comprehensive, high standard agreement,” Kirk told WITA. “But with our initial group of partners, we expect to break new ground, to create a true 21<sup>st</sup> Century trade agreement,” he said. Assistant USTR for South Asia Barbara Weisel began consultations in November with the other TPP countries following President Obama’s announcement that the U.S. would enter talks on a trade pact with them.

## Customs Officials Press for Clearer Rules of Origin

The proliferation of regional trade agreements (RTAs) and free trade agreements (FTA) has accentuated the need to standardize certificates of origin for preferential trading partners, but World Trade Organization (WTO) efforts to establish standards for rules of origin (RoO) have not produced an agreement after 10 years of work, World Customs Organization (WCO) Secretary-General Kunio Mikuriya told WTTL. RTAs drew much discussion at the WTO ministerial conference in Geneva Nov. 30-Dec. 2, but ministers didn’t give a clear signal that they are

ready to start discussing convergence, he said. The need for convergence is growing, especially for RoO consistency, Mikuriya told WTTL. National customs agencies are now more focused on RoO than ever because of the increasing number of pacts signed in the last decade. Customs officials face the burden of managing and implementing RoO at their borders.

Origin certificates are the “key to realizing electronic customs for the future” as part of the automation of the customs process, Mikuriya told a workshop during the ministerial meeting Nov. 30. “Quite often, the origin certificate is the last obstacle” to fully electronic document exchange, he said.

A number of initiatives to standardize the certificates of origin are underway, Mikuriya reported. A 2007 WCO action plan on preferential RoO calls for development of an origin database, a comparative study of dispute settlement, training and seminars, Mikuriya said. A review of the revised Kyoto Convention, under which the WCO operates, will start after the Doha Round talks are concluded. One goal is to prepare for the implementation of any trade facilitation agreement that is included in a final Doha accord, he said.

## Miscellaneous Tariff Bill Could Be Split in Two

The miscellaneous tariff bill (MTB) (H.R. 4380) that Ways and Means trade subcommittee chairman Sandy Levin (D-Mich.) and ranking Republican Kevin Brady (R-Texas) introduced in the House Dec. 17 could be divided into two separate pieces of legislation in January to assure the continuation of tariff suspensions that will expire Dec. 31. Their MTB would temporarily suspend or reduce for three years duties on over 600 products, most of which were the subject of previous duty suspensions that are about to expire.

Lawmakers are considering splitting the bill into two separate measures. The first would include all expiring suspensions in H.R. 4380, plus new tariff suspensions that are in bills introduced in both the House and Senate and already reviewed by the ITC. The ITC has completed its mandatory review of all the bills in H.R. 4380 but is still examining tariff measures that were only introduced in the Senate. The second bill would comprise all new measures that have been introduced only in the House and only in the Senate.

By dividing the MTB, members hope to be able to move quickly on the first legislation and prevent tariffs from being reimposed on those goods covered by past suspensions. Sources say lawmakers don't want to include a retroactivity clause that would reimburse importers for tariffs paid during any lapse in suspensions. Lawmakers had wanted to enact at least a rollover bill for existing tariff suspensions before the measures expired at the end of December, but House and Senate action was stymied by Sen. Debbie Stabenow (D-Mich.), who has become a strong critic of the MTB program. In a op-ed article in the Nov. 18 issue of *The Hill*, a D.C. newspaper, Stabenow said the U.S. should encourage production in the U.S. of products that get tariff benefits rather than cutting tariffs on imports. “Instead of making excuses for why we can't build things in the United States, we should be creating incentives to help domestic manufacturers compete with their foreign counterparts,” Stabenow wrote.

## Chinese Agree to End “Famous Brands” Export Subsidies

China has agreed to resolve a WTO dispute-settlement case with the U.S. before it goes to a panel for adjudication. The USTR's office Dec. 18 said China has agreed to end its program of export subsidies aimed at developing global recognition for so-called “famous brands” and that China has confirmed that the programs have already been eliminated. The program, which involved export subsidies from the central government, provinces and local governments, was aimed at moving Chinese exports “up the value chain,” according to one U.S. official. The Bush administration, along with Mexico and Guatemala, requested consultations with China on the program in December 2008. At issue were 90 individual subsidy programs that fell under

three primary initiatives known as the “Famous Export Brand” initiative, the “China World Top Brand” initiative, and the “China Name Brand Products” initiative. This is the fourth time out of eight complaints the U.S. has made at the WTO against China where Beijing has chosen to settle the dispute before having a formal WTO ruling on its trade practices. “It is significant,” one U.S. official said. “From our perspective, we think it shows that there is a pragmatism about fixing problems when they are identified in certain circumstances,” the official said. “It shows that China understands the utility of the way WTO dispute-settlement is set up.”

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DDTC: Compliance specialists Lisa Studtmann has been named director of Office of Defense Trade Controls Compliance. She fills post vacated when David Trimble moved to GAO in April (see **WTTL**, April 6, page 4). Studtmann joined compliance staff in July 2007 after work in private law practice and in office of CIA’s general counsel.

TRADE PEOPLE: Veteran trade attorney Evan Berlack of Baker Botts retiring Dec. 31. He has co-chaired Practising Law Institute’s annual export controls conference since 1985....Laura Jones, executive director of Unites States Association of Importers of Textiles and Apparel (USA-ITA) for 21 years is stepping down. After her retirement, USA-ITA will move offices from New York to D.C., and vice president Julia Hughes will take her post....Philip M. Heneghan named ITC inspector general. Formerly, he was chief information security officer at USAID and before that was assistant IG at Peace Corp.

BIS: Senate Banking Committee Dec. 17 approved nomination of Eric Hirschhorn to be BIS under secretary. Full Senate action was pending at press time. Also at BIS, Acting Assistant Secretary for Export Enforcement Kevin Delli-Colli is retiring Feb. 1 after 30 years in government service. He will be joining Deloitte Financial Advisory Services in Arlington, Va., as senior manager in its forensic and dispute services group. Separately, omnibus appropriations bill (H.R. 3288) passed by Senate and sent to president Dec. 13 includes \$100,342,000 for BIS for fiscal year 2010, which started Oct. 1. This is steep increase from 2009 budget of about \$83 million.

CUBA: Omnibus appropriations bill (H.R. 3288) that Senate approved Dec. 13 and sent to president includes provisions in Sec. 619 that will ease payment requirements for agriculture sales to Cuba. Section 619 says “the term ‘payment of cash in advance’ shall be interpreted as payment before the transfer of title to, and control of, the exported items to the Cuban purchaser.” Bush administration had required payment before shipping. “This is a small but welcome step in the right direction, and it is great to see that fixing Cuba policy remains on the radar screen for Congress,” said NFTC Vice President Jake Colvin.

IRAN: House by 412-12 vote Dec. 15 approved Iran sanctions bill (H.R. 2194) that would authorize president to impose sanctions on firms aiding Tehran’s import or development of refined petroleum (see **WTTL**, Nov. 2, page 4). Separately, appropriations bill (H.R. 3288) passed by Senate Dec. 13 says Ex-Im Bank can’t “authorize any new guarantee, insurance, or extension of credit for any project controlled by an energy producer or refiner that continues to: (A) provide Iran with significant refined petroleum resources; (B) materially contribute to Iran's capability to import refined petroleum resources; or (C) allow Iran to maintain or expand, in any material respect, its domestic production of refined petroleum resources, including any assistance in refinery construction, modernization, or repair.”

EXPORT ENFORCEMENT: Amir Hossein Ardebili, an Iranian national who pleaded guilty in May to violating AECA and IEEPA, was sentenced in Wilmington, Del., U.S. District Court Dec. 14 to 60 months in jail. He had been arrested in Tbilisi, Georgia, in 2008 as part of ICE undercover operation when he tried to buy parts for F-4 jets for Iran.

BANANAS: EU and Latin American banana exporting countries reached agreement Dec. 15 to end 15-year dispute over EU tariff and quota preferences for banana producers in former colonies of EU members. Separately, the U.S. and EU initialed agreement to end Washington’s complaint against EU banana regime, which U.S. claimed discriminated against U.S. banana distributors in Europe. “In the agreement, the EU undertakes not to reintroduce measures that discriminate among bananas distributors based on the ownership or control of the distributor or the source of the bananas, and to maintain a non-discriminatory, tariff-only regime for the importation of bananas,” USTR statement said. “It has been a long road, and we still have more to travel before we finally and conclusively settle this dispute,” USTR Ron Kirk cautioned.

**EDITOR’S NOTE**: In keeping with our regular schedule of 50 issues a year, there will be no issues of *Washington Tariff & Trade Letter* on Dec. 28, 2009. Our next issue will be Jan. 4, 2010. Until then, we wish all our readers a HAPPY HOLIDAY and a HEALTHY AND PROSPEROUS NEW YEAR.