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Appeals Court Reverses ITAR Conviction

A federal appeals court June 15 threw out the conviction of a man charged with attempting to export rifle scopes to Indonesia, saying the government had not proven that the scopes were "manufactured to military specifications." While Section 2778(a) of the Arms Export Control Act (AECA) gives the president and State Department authority to place items on the U.S. Munitions List (USML) without judicial review, prosecution for violations of the law cannot rely merely on State's Directorate of Defense Trade Controls' (DDTC) claim that an item meets USML criteria without revealing the basis for that judgment, ruled the Seventh Circuit Court.

> The ruling in *U.S. v. Doli Syarief Pulungan* could upset the basis for many ITAR prosecutions where the government and juries have relied on the testimony of DDTC licensing officers who assert an item is subject to the USML and requires an export license. The three-judge panel reversed Pulungan's 2008 conviction for attempting to export Leupold Mark 4 CQ/T riflescopes to Indonesia through Saudi Arabia without a license from DDTC. He had been sentenced to four years in prison for the crime (see **WTTL**, Aug. 11, 2008, page 4).

"The Directorate's claim of authority to classify any item as a 'defense article,' without revealing the basis of the decision and without allowing any inquiry by the jury, would create serious constitutional problems," wrote Judge Frank Esterbrook. "It would allow the sort of secret law that *Panama Refining Co. v. Ryan*...condemned," he stated. The judge noted that the *Panama* ruling dealt with unpublished rules that were "in the hip pocket of the administrator."

"A regulation is published for all to see," Esterbrook continued. "People can adjust their conduct to avoid liability. A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian regimes," he declared. "Government must operate through public laws and regulations," he added; saying the proof does not need to be made in open court and pointing to a statute that allows such proof to be kept secret.

Ironies in U.S. Complaint against Chinese Export Restrictions

The complaint the U.S. filed June 23 at the World Trade Organization (WTO) against Chinese export taxes and quotas is rife with ironies, including the fact that four of the nine products cited in the U.S. complaint are currently subject, at least in part, to U.S. imposed antidumping

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orders. Another irony is the contention that China is restricting exports to the U.S., despite criticism from many in Congress, labor and U.S. industries about the U.S. trade deficit with China. In addition, the complaint underscores the growing economic codependency between the U.S. and China and the increasing reliance of American companies on imports from China – in this case steel and high-tech companies.

> The U.S. complaint, which was joined by the European Union (EU), contends China is violating its obligations under WTO rules by imposing export restraints that are prohibited under the General Agreement on Tariffs & Trade (GATT). Washington, which has been in talks with Beijing for nearly two years about the issue, rejects Chinese claims that the restraints are permitted under GATT Article 20(g) to protect limited natural resources. U.S. officials say the exemption doesn't apply because China hasn't restrained domestic consumption.

U.S. Trade Representative (USTR) Ron Kirk admitted that the U.S. complaint "does seem a bit counter-intuitive." He drew a distinction between the antidumping cases against Chinese imports and the complaint against Chinese export restrictions. China is "unfairly restricting the flow of raw materials that are critical to the steel, aluminum and other chemical industries that causes two things," he told reporters. "One, it limits our access to supplies that we have to have to make steel. So it increases the cost of our supplies for American manufacturers. It increases the availability of those materials within China and reduces their costs which then can distort the market," he added.

The U.S. complaint cites Chinese restrictions on exports of fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, zinc and coke. There are currently anti-dumping orders and injury determinations on imports from China of magnesium, manganese, silicon metal and foundry coke, which is indirectly related to the furnace coke of concern to U.S. steelmakers, although they fall under the same Harmonized Tariff Schedule number.

GE India Gets Approval for First VEU in India

General Electric India has received approval to be the first designated Validate-End User in India, although the Bureau of Industry and Security (BIS) has not yet published the details on the specific products that can be exported to the firm without a license or which facilities in India are eligible to receive the goods. Commerce Secretary Gary Locke announced the VEU approval at a U.S.-India Business Council meeting June 17. The VEU will cover exports of civilian aircraft technology and explosive detection equipment, he said.

> "This is an important step in enabling a more rapid and efficient flow of sensitive technology between India and the United States," Locke said. "It also is a significant effort to build trust between the United States and India. We're looking forward to reciprocal actions from our partner," he added.

Approval of GE India as a VEU comes at a time when there is still a cloud over BIS' approval of Aviza Technology in China to be a VEU (see **WTTL**, June 8, page 1). Aviza's designation may become more complicated in light of its U.S. parent, Aviza Technology, Inc., filing for Chapter 11 bankruptcy protection on June 11.

Border Measures Included In House Cap-and-Trade Bill

Cap-and-trade legislation (H.R. 2445), which the House passed June 26 by a 219-121 vote, aimed at cutting carbon emissions included a last-minute amendment added by Rep. Sander Levin (D-Mich.) that partially responds to concerns about a unilateral American approach to such curbs but still leaves open the possibility of sanctions on imports from countries that don't curb such emissions. The amendment would make the negotiation of an international agreement on climate change the first goal for the U.S., but if no agreement is reached, it

would allow the president to impose border measures to offset so-called carbon leakage. "We want to see a meaningful international agreement reached that will reduce global carbon emissions and maintain trade neutrality in the process," Levin said in a statement. "If we are unable to do that through an international agreement, this legislation ensures that the United States will avoid carbon leakage in its energy intensive and trade sensitive industries," explained Levin, who chairs the Ways and Means Committee's trade subcommittee.

> During floor debate on the legislation, Ways and Means Ranking Republican Dave Camp (R-Mich.) still faulted the added language as opening the U.S. to retaliation by trading partners. "The border measures, which the Committee on Ways and Means has not reviewed, are an open invitation for our trading partners to retaliate against our goods and against our workers," Camp said. "How does this help our environment? It doesn't," he stated. House Minority Leader John Boehner (R-Ohio) also warned about possible retaliation if the border measures are imposed.

"There are those who claim that these changes make the bill subject to trade challenges. They are wrong," Levin said during floor debate on the bill. "Just today, the World Trade Organization and the United Nations Environment Program issued a report which confirms that 'WTO rules do not trump environmental requirements'," he said.

The Levin amendment says one objective for multilateral environmental negotiations is "an internationally binding agreement in which all major greenhouse gas-emitting countries contribute equitably to the reduction of global greenhouse gas emissions." Only if such talks fail to produce an agreement by 2020 can the president with congressional agreement impose border measures on imports of trade-intensive products from countries that have not agreed to reduce their emissions. Adding negotiations as the preferred path toward reducing carbon emissions meets concerns raised by the Obama administration, but other provisions in the legislation still raise objections from some in industry about making industrial competitiveness rather than the environment a major factor in the imposition of border measures (see **WTTL**, April 20, page 3).

In a letter to House and key committee leaders before the Levin amendment was adopted, two trade groups voiced concerns about linking border measures to the competitiveness of U.S. industries. The bothersome language was in the original bill from the House Energy and Commerce Committee but left in the bill in the Ways and Means amendment.

"This is particularly true with respect to the purpose of the international reserve program (Title IV, Subpart 2, Section 766(a)(2) in the text), which links the program to 'the competitive imbalance in the costs of producing or manufacturing primary products in industrial sectors'," said the joint letter from the National Foreign Trade Council and the U.S. Council for International Business. "The Ways and Means Committee Proposal is even more likely to be challenged by U.S. trading partners at the World Trade Organization, as it strongly suggests that these measures are being taken to improve the competitiveness of U.S. industries rather than to deter carbon leakage," they wrote.

Administration Enters Dispute over China's Green Dam Proposal

USTR Ron Kirk and Commerce Secretary Gary Locke June 24 brought the weight of the Obama administration into the fight U.S. computer makers are facing in China over Chinese demands that computers sold in China include pre-installed filtering software that could restrict Chinese citizens' access to the Internet and the world. The proposed rule (Circular 226), also known as the Green Dam proposal, is ostensibly intended to block pornography, but many see it as a tool to block sensitive political information as well.

Kirk and Locke complained about the proposal in a letter to officials at China's Ministry of Industry and Information Technology (MIIT) and Ministry of Commerce (MOFCOM). They urged the Chinese to revoke the order, which is to take effect on July 1. "China is putting companies in an untenable position by requiring them, with virtually no public notice, to pre-

install software that appears to have broad-based censorship implications and network security issues," Locke said in a statement reporting the sending of the letter. Kirk said the regulation is "an unnecessary and unjustified means to achieve that objective, and poses a serious barrier to trade." According to the Commerce Department, the letter raised questions about regulatory transparency in China and about compliance with WTO rules, such as notification obligations. The department said the letter also cited the concerns of global technology companies, Chinese citizens, and the worldwide media about the stability of the software, the scope and extent of the filtering activities and its security weaknesses.

Trade Groups Object to Limits on Afghan-Pakistan Legislation

Seven trade associations wrote to the Senate Finance Committee June 22 to say they were disappointed with the provisions the Pakistan Enduring Assistance and Cooperation Enhancement Act (H.R. 1886) that the House passed June 11 to create duty-free Reconstruction Opportunity Zones (ROZ) along the Pakistan-Afghanistan border. They urged the committee to amend the House bill before adopting it, using legislation (S.496) introduced by Sen. Maria Cantwell (D-Wash.) as the basis for the amendment. The Cantwell bill also needs modification, especially its disclosure and transshipment provisions, before adoption, they said.

> "Much has changed both politically and economically since the ROZ program was first crafted by the Bush Administration more than two years ago," the letter said. "Yet the pending legislation is essentially unchanged, gerrymandering coverage to match a China quota agreement that no longer exists, and blocking benefits for those products that Pakistan is best positioned to produce," it added.

"Configuring the ROZ program to include [cotton apparel] will give Pakistan a fighting chance in this competitive industry," the letter argued. It also said the labor provisions in the House bill should be modified to match current requirements for goods subject to the Generalized System of Preferences. Signing the letter were the American Apparel & Footwear Association, Fashion Accessories Shippers Association, National Foreign Trade Council, National Retail Federation, Retail Industry Leaders Association, Travel Goods Association, U.S. Association of Importers of Textiles and Apparel and the U.S. Chamber of Commerce.

* * * Briefs * * *

BIS: Commerce Secretary Gary Locke reportedly has narrowed search for new BIS under secretary to one candidate and nomination is expected soon, trade sources report. Candidate is said to be attorney with large Seattle company who has extensive experience in international business but none in export controls.

TRADE PEOPLE: Ex-USTR General Counsel Warren Maruyama has returned to DC law firm of Hogan & Hartson as partner. He was with firm before joining USTR's office in Bush administration.

CENSUS: Omari Wooden has been named ombudsman for foreign trade division. He fills post left vacant by retirement at Jerry Greenwell. Wooden can be reached at 301-763-3829.

ANTIBOYCOTT: Gulf International Bank of New York has reached agreement with BIS to settle charges that it committed 26 violations of antiboycott regulations. Firm agreed to pay $49,850 civil fine. BIS had charged bank with providing business-relationship information related to the boycott of Israel to clients in Syria, failing to report boycott requests it received to BIS and failing to maintain required records.

EXPORT ENFORCEMENT: After making a "partial voluntary disclosure" to BIS, Delphi Corporation of Troy, Mich., agreed to pay $50,000 civil fine to resolve three BIS charges that on three occasions it exported triethanolmine to South Africa and China without approved export licenses.

CHINA: In June 22 Federal Register, Committee for the Implementation of Textile Agreements terminated Electronic Visa Information System (ELVIS) and Quota Reporting Requirements for Textiles from China effective July 1. "This action is consistent with the terms of the bilateral agreement on textiles and apparel between the Governments of the United States of America and the People's Republic of China that was signed on November 8, 2005," notice stated.