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## Judge Delays Sentencing of Professor Roth Again

Knoxville, Tenn., U.S. District Court Judge Thomas Varlan May 13 again delayed the sentencing of former University of Tennessee Professor J. Reece Roth after hearing oral arguments over the appropriate penalty he deserves under the U.S. Sentencing Guidelines. Varlan had been expected to issue his ruling at the hearing, but instead listened to arguments from Roth's attorney and a Justice Department lawyer over the provisions of a Pre-Sentence Investigation Report by a court probationary officer. Varlan's sentencing decision is not expected now until mid-June. The sentencing of Atmospheric Glow Technologies, Inc., for whom Roth was working, is scheduled for Aug. 27.

At the hearing, the government had a U.S. Air Force colonel testify to the national security threat posed by Roth's release of defense technology to a Chinese graduate student who was working with him on a contract. Varlan indicated that he wanted to review the arguments presented at the hearing, many of which were covered previously in court briefs. Justice lawyers contend the proper Sentencing Guideline for Roth's crime should be 78 to 97 months in jail. Roth has asked the court to limit sentencing to probation (see **WTTL**, April 6, page 4).

## Kirk's Visit to WTO Leaves Questions Unanswered

During his first official visit to the World Trade Organization (WTO) and Geneva May 11-13, U.S. Trade Representative (USTR) Ron Kirk urged countries to keep an open mind to changes that "might drive us to a successful conclusion" of the Doha Round. But one proposal that was floated to do that has already drawn negative reactions from other WTO members. Kirk indicate a willingness to shift the basis of the talks from the current focus on "modalities" for cutting tariffs on agriculture and industrial goods to bilateral negotiations based on the old "request-offer" approach to negotiations.

In Geneva, Kirk met with the WTO leadership and representatives from over half of the WTO membership. "Something needs to happen differently to get us to a successful conclusion," Kirk told reporters after those meetings. "If we need to look at a different delivery mechanism, let's be open to do that," he said. The U.S. doesn't want to scrap the progress or change the mandate, Kirk said. "We should all be willing to consider changes to the process that could put the negotiations on a more direct path to success," he stated. The idea of going directly to scheduling and leaving the modalities wasn't received very well, according to trade officials in Geneva. "It's very easy to start a riot with developing countries on that basis, very easy," a



high-ranking diplomat told WTTL. Kirk's statements on the need for advanced developing countries, such as India, Brazil and China, to do more in the talks also got a cool reception. In his meetings in Geneva, Kirk repeatedly said the U.S. needs to see what big "developing countries are going to do," a diplomat from one of those big developing country reported.

"The problem is that the developing countries are never going to accept this idea that the U.S. has done too much and it needs to be compensated for coming to the table," he said. "This is something that will simply not fly," he added. "It looks like more of the same...what they've been saying for a long time," the diplomat added. Kirk says the Obama administration is different from the Bush administration, "but then he comes exactly with the same thing," the official complained.

The diplomatic corps in Geneva appeared to be impressed by Kirk's approach and charm. Kirk said President Obama is serious about listening and getting to a fair result in the Doha Round, said Manuel Teehankee, Philippine ambassador to the WTO. Indications from the U.S. point to a resumption of negotiations in autumn, Teehankee said. U.S. reengagement in the talks is awaiting the results of an Obama administration review of the negotiations and U.S. positions.

"We have for the most part kind of worked through" the overarching review of U.S. trade policy, Kirk told reporters. Doha is slightly different because of "the extraordinary potential" and the complexities, he noted. "That review was bumped up to the level of our National Economic Council. The first stage was our review within the USTR. The next stage has been and will be our continued engagement with our partners here at the WTO, because we understand this is not simply a matter of the United States showing up and saying here's the silver bullet that we've all been searching for," Kirk said.

## WTO Hearing Hits EU Tariffs on Information Technology

The U.S., Japan, Taiwan and almost a dozen other countries ganged up on the European Union (EU) at a May 12-14 WTO dispute-settlement panel hearing on complaints against EU tariffs on products that the complaining countries contend should be duty-free under the Information Technology Agreement (ITA). EU representatives defended the tariffs, claiming that new functions added to the products have fundamentally changed their status for tariff purposes. The hearing, which was open to the public, focused on EU tariffs on set top boxes with a communication function, certain flat-panel displays and multifunction digital machines.

While officials blamed the EU for setting the threshold for assessing the changes too low, the dispute may point to systemic troubles with the ITA and the need for further negotiations to expand its scope. The hearing before a three-judge panel was held in one of the WTO's large conference rooms and broadcast to outsiders.

Third-party countries in the dispute include Brazil, China, Hong Kong, India, South Korea, Philippines, Thailand, Vietnam, Australia, Costa Rica, Singapore and Turkey. Brazil didn't make a statement and Turkey lined up behind the EU. The May 13 session was notable because of the extent that third-party governments were engaged on the details of the case, noted one observer. A number of developed and developing governments expressed serious concern with the systemic implications of the EU's action on the ITA, he said.

The European Community (EC) "has no significant domestic production of any of the products at issue," an EU lawyer told the panel. "This dispute is not about protectionism," he argued. Supporters of the complaint, however, contend the EU has industries that support these products. In addition, Eastern European governments have pressed for higher tariffs on certain high-tech products as a way to attract production, said one lawyer who supports the complaint. An industry executive also pointed out that Poland and the Czech Republic in particular, "have been extremely successful in attracting investment" for production of LCD displays for TV sets. An EU official argued that the recording function in a TV set top box with a communication function and a large hard drive is "far more than a support or ancillary" function. The U.S.,

Japan and Taiwan claim “that 61-inch flat panel monitors” with or without a tuner should be entitled to duty-free treatment as computer monitors, he noted. The real problem is that radical changes in monitor technology make it “extremely difficult to distinguish between computer monitors and video monitors including television sets,” he argued.

European duties based on “arbitrary technical characteristics” are inconsistent with the EC’s WTO tariff schedule and are “a perverse upending” of the agreement, a U.S. official said. “The EC in essence appears to believe that, regardless of the text, if a device comes to perform a function that is also performed by a product for which the EC has not made a concession as a result of the ITA, that device becomes the non-ITA product and falls out of the EC’s duty-free commitments,” the official said in his closing arguments.

“Our position is simple,” the U.S. representative claimed. “What a product does is only relevant to determining whether or not it is covered by a particular concession if the meaning of the text of the concession specifies that a product must do something to qualify or is disqualified if it does something else. One must look at the text. And looking at the text of the concessions at issue, none define the products in the manner suggested by the EC,” he asserted.

## **WTO Ruling on Zeroing May Require \$\$\$ Millions in Refunds**

The U.S. may need to refund millions of dollars in collected antidumping duties and deposits as the result of a May 14 ruling from the WTO Appellate Body which said Washington has failed to implement earlier WTO decisions against the use of “zeroing” in trade cases. In its ruling on 15 original investigations and 16 administrative reviews, the Appellate Body (AB) rejected U.S. arguments that Commerce could continue to use zeroing in administrative reviews for goods imported before the end of the “reasonable period” of time it was given to implement previous rulings against the practice. The AB said Commerce had to stop using zeroing on the original and all following administrative reviews, sunset reviews and new shipper reviews.

In addition to requiring refunds, the AB decision is likely to intensify discussions reportedly already being held in Commerce and at the USTR’s office about the U.S. policy of retrospective applications of dumping duties through the administrative review process. Most WTO members only apply duties prospectively with adjustments made only when parties petition for a revision. While some argue the U.S. system is fairer because it assesses duties on actual trade, it also makes it more complicated and costly for parties in these cases.

“The Appellate Body’s report raises a number of troubling questions and implications, particularly regarding what this means in practice and how these findings translate for purposes of retrospective antidumping systems and prospective systems,” a USTR statement acknowledged. “The WTO agreements expressly provide to Members the right to maintain a retrospective antidumping system. We will need to review the report carefully,” the statement added.

The U.S. said it was disappointed that the AB added additional requirements that were not addressed in the original rulings. These aspects of the report “are not supported by the WTO agreements,” it said. The U.S. said “the WTO has overreached by inventing new obligations to limit the use of antidumping measures, when such obligations were never agreed to by the WTO Members. Today’s report compounds the problems with the earlier rulings.”

The AB said it considers the obligation to cease using zeroing to be, at the latest, the end of the reasonable period of time allowed for compliance. “By contrast, the approach based on the date of entry advocated by the United States would allow a WTO Member operating a retrospective duty assessment system to resort to a methodology for assessing duty liability that has been found WTO-inconsistent beyond the end of the reasonable period of time. Thus, the implementing Member would be able to extend the reasonable period of time and delay compliance depending on when it chooses to undertake final duty assessment,” it declared. The cases

at issue covered imports from a half-dozen EU countries and range from stainless and carbon steel to pasta and resins and ball bearings to steel bars. In addition to the cases in the dispute, the ruling could apply to numerous additional administrative reviews related to these cases. Non-EU countries are now likely to seek similar treatment for their products which have been subject to zeroing, which Commerce is still applying in administrative reviews. Japan has already won a separate ruling on zeroing (see **WTTL**, May 4, page 4).

For many covered products that have not yet been subject to liquidation, Commerce may merely issue new liquidation orders to Customs to collect duties with revised zero-free margins. To the extent the new margins are lower, refunds would be due to importers. Where there has been liquidation and protests have been filed, the government could drop its opposition to the protest. If liquidation has occurred without protest, legislation may be needed to get refunds.

## **Mexican Trucking Proposal at White House, LaHood Says**

A Transportation Department proposal for restarting a pilot project that allowed a limited number of Mexican trucks to operate in the U.S. is pending at the White House, Transportation Secretary Ray LaHood told reporters May 11. He said the proposal was drafted after he talked with 28 senators and House members and tries to address the safety concerns that led Congress to block the program (see **WTTL**, April 6, page 5). "I think when you see the proposal that we put together it addresses safety issues: driver safety, truck safety, how do you measure that, how do you really know that a driver has complied with hours of service," LaHood said.

He acknowledged that the blocked pilot program also addressed these concerns, but "not enough to satisfy the members of Congress." LaHood said he thought his plan would satisfy lawmakers "because we have taken their ideas and put them in our proposal." He also noted that he had met with Teamsters Union President James Hoffa and heard his concerns about low wages paid to Mexican drivers. "We tried to address their issues," he said.

While the Teamsters have been the driving force against allowing Mexican trucks into the U.S., it appears the union doesn't have the backing of other organized labor groups. The AFL-CIO in particular is not taking a stand on the Mexican trucking issue because it sees the dispute as a fight for the Teamsters which is not a member of the AFL-CIO.

### **\* \* \* Briefs \* \* \***

**FCPA:** Denmark's Novo Nordisk A/S May 11 agreed to pay \$9 million penalty in deferred prosecution agreement with Justice which charged it with violating FCPA by paying illegal kickbacks to Iraqi government as part of UN Oil-for-Food program. In separate settlement with SEC, Novo agreed to pay \$3,025,066 in civil penalties and \$6,005,079 in disgorgement of profits, including pre-judgment interest.

**TRADE FIGURES:** March goods exports of \$82.0 billion were down 22% from last March and lowest since February 2006, Commerce reported May 12. Goods imports of \$120.3 billion dropped 31% from year ago and were lowest since April 2004. Services exports in March were \$41.6 billion, down nearly 7% from last March. Services imports declined 7% from year ago to \$31 billion

**ICE:** John Morton sworn in March 15 as assistant secretary of homeland security and head of ICE. He is former assistant U.S. attorney and was special assistant to general counsel in old Immigration and Naturalization Service.

**CJ GUIDELINES:** DDTC May 14 issued revised guidelines for submitting Commodity Jurisdiction (CJ) requests to determine if item is on USML and comes under State jurisdiction or is on CCL and comes under BIS authority. Guideline notes: "Processing times vary depending on the complexity of the case. CJ requests normally take less than 65 business days (95 calendar days) to complete."

**BEEF:** U.S. and EU May 13 signed MOU settling beef-hormone dispute for next four years. Canada is reportedly negotiating its own deal for additional access to EU market (see **WTTL**, May 11, page 2).