

Vol. 33, No. 13

April 1, 2013

## Court Vacates Export Conviction for Post Hoc Classification

While rejecting claims that the Arms Export Control Act (AECA) is unconstitutionally vague, the First Circuit Court has vacated part of the conviction of two individuals based on State's "after-the-fact" classification of their exports as being subject to the U.S. Munitions List (USML). The three-judge panel, which included retired Supreme Court Justice David Souter, upheld the convictions of Zhen Zhou Wu, aka Alex Wu, and Yu-feng Wei, aka Annie Wei, owners of Chitron Electronics, on 15 counts, but vacated their conviction on two counts of violating the AECA (see **WTTL**, May 24, 2010, page 4).

"We reject the constitutional vagueness argument, but we agree that the jury instructions were flawed and so vacate the convictions on the Munitions List counts," wrote Chief Judge Sandra Lynch for the court. "Wu and Wei are not just ordinary people sending gifts to friends living overseas," she wrote, noting that they ran a multimillion-dollar business. "It is not too much to ask these businessmen and businesswomen to comply with export control regulations, even if the meaning of those regulations might not be immediately obvious to someone lacking the same sophistication," she declared.

Lynch agreed, however, that the jury should have been allowed to weigh State's classification of their exports as being on the USML. "As of June 2006, the time of the exports in question, no official determination had been made as to the presence of the phase shifters on the Munitions List. Indeed, at the time there was disagreement even within the government as to the proper categorization of the phase shifters," she noted.

Lynch said the court did not have to address the question of whether a commodity jurisdiction (CJ) determination is a regulation that is not reviewable by the court. "Even if Section 2778(h) does bar jury review of CJ determinations and/or certifications, there would be serious constitutional problems if we read that provision to render Directorate [State] determinations issued after exports have already occurred as being retroactively dispositive as to the coverage of the Munitions List," she wrote.

## Failed Arms Trade Treaty Headed to UN General Assembly

The U.S. and other supporters of a United Nations (UN) Arms Trade Treaty (ATT) want the accord taken directly to the UN General Assembly (UNGA) for adoption after

agreement on a final text was blocked late March 28 by Iran, Syria and North Korea. Most of the countries participating in the talks appeared ready to accept a final draft treaty prepared by the president of the meeting, Australia's ambassador to the talks, Peter Woolcott, March 27 (see **WTTL**, March 25, page 3). The U.S. was one of 90 countries that backed a resolution sponsored by Kenya asking UN Secretary General Ban Ki-moon to bring the treaty to the UNGA for adoption. Sources expect Ban to present the resolution on April 1 but no date is set for when a vote might be taken.

While Iran, Syria and North Korea blocked consensus on a treaty, other countries, particularly several Arab nations and Russia, said they still see flaws in the pact, but not enough to block its adoption. They are expected to vote against it in the UNGA, where a majority vote will be sufficient to approve it, and not sign or ratify the final agreement.

"Over two weeks of hard negotiations we reached a text that was meaningful, that was implementable, a text that did not touch in any way upon the constitutional rights of American citizens, a text that the United States could support," Thomas Countryman, assistant secretary of State for international security and nonproliferation, told reporters after the meeting. When the ATT goes to the UNGA, "the United States will vote in favor. We think an overwhelming majority of states will vote in favor," he said.

Countryman noted U.S. support for adopting the deal by consensus. "We wanted consensus; we didn't get it today," he said. Countryman said the deal will help U.S. industry. "This treaty will bring much of the rest of the world not up to the American standards but much closer to the American standards. And in that sense, I believe it levels the playing field and gives American manufacturers a better competitive position in the world," he argued.

The U.S. decision to take the treaty to the UNGA, however, drew a protest from the National Shooting Sports Foundation (NSSF), which represents commercial arms companies and has opposed the ATT. "We are very concerned by the fact that the administration no longer supports consensus in the General Assembly," Lawrence Keane, NSSF's senior vice president and general counsel, told **WTTL**. "To cave on consensus is a bad precedent for future treaties," he said; noting that State has supported the need for consensus on the ATT throughout the negotiations. The treaty will have "negative effects on the commerce of our members," Keane stated.

"The U.S. secured everything it was looking for," Daryl Kimball, executive director of the Arms Control Association, told **WTTL**. His group, along with several other non-government organizations, has been a supporter of a strong arms treaty. He also said members of Congress have opposed the ATT because "most Senators have not read the treaty or conducted legal analysis of the treaty."

The level of congressional objection to an ATT was seen March 22 as the Senate voted on nonbinding amendments to the nonbinding Democrat budget bill. By voice vote it approved an amendment sponsored by Senate Judiciary Committee Chairman Pat Leahy (D-Vt.), making it clear that nothing in the treaty can trump the Constitution. "So all my amendment does is make clear that the United States should not agree to any arms trade treaty that would violate our second amendment rights," Leahy said on the Senate floor. While falling short of the 60 votes needed for passage, a second amendment by Sen. James Inhofe (R-Okla.) would have barred the U.S. from signing any ATT. It got a

53-46 vote. The amendment would “uphold the second amendment rights, that is one thing. And secondly, prevent the United States from entering into the United Nations arms trade treaties,” Inhofe said.

Woolcott’s final draft clarified several sections of earlier drafts and added language to make it clear the treaty recognizes that “ownership” of certain conventional arms can be “permitted and protected by law.” The new draft also gives separate, clear rules for the control of ammunition and munitions, a major concern for the U.S. “Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1), and shall apply the provisions of the Article,” the draft states. Separate provisions are added also for parts and components.

## **Customs Bill Includes Trade Enforcement Provisions**

New legislation (S. 662) to reauthorize Customs and Border Protection (CBP) includes language to strengthen enforcement of antidumping (AD) and countervailing duty (CVD) orders and better enforce intellectual property rights (IPR) at the border. Cosponsored by Senate Finance Committee Chairman Max Baucus (D-Mont.) and Ranking Member Orrin Hatch (R-Utah) March 22, the Trade Facilitation and Trade Enforcement Reauthorization Act of 2013 is similar to previous measures introduced in the last Congress to reauthorize CBP and update its organization and functions. The trade enforcement provisions match those in the so-called ENFORCE Act that was sponsored by Sen. Ron Wyden (D-Ore.) and passed by Finance in July 2012 (see **WTTL**, July 23, page 1).

The measure would create a Commercial Targeting Division (CTD) in CBP’s Office of Trade with the job of targeting imports that may violate customs and trade laws, especially those related to: (1) intellectual property rights; (2) health and safety; (3) agriculture; (4) textiles and apparel; (5) general revenue; and (6) antidumping and countervailing duties.

The CTD would be authorized to issue Trade Alerts to port directors when there is suspicion that incoming cargo might violate these rules and to instruct the ports to conduct additional inspections, physical examinations or merchandise testing. A port director would have discretion not to conduct these examinations, if the director determines they are not justified for security reasons. Another provision would repeal previous legislation that prohibited the use of advance shipment information for commercial enforcement purposes. While the information could be used, it could not lead to additional penalties for the filer. The bill also allow CBP to share information with IPR rights holders to determine whether a suspect good entering the U.S. violates a copyright or trademark, except when sharing this information would compromise an ongoing law enforcement investigation or national security.

## **BIS Initiates First Holding ECCN for Emerging Technology**

For the first time, the Bureau of Industry and Security (BIS) has placed controls on an emerging technology under the new 0Y521 “holding” Export Control Classification Number (ECCN) it created in April 2012 (see **WTTL**, April 16, 2012, page 1). In the interim final rule published in the Federal Register March 28, the agency imposed controls on

biosensor systems, “software” and “technology” which will now be classified under ECCNs 0A521, 0D521 and 0E521, respectively, on the Commerce Control List (CCL). BIS established the ECCN 0Y521 series to identify items that warrant control but are not yet identified in an existing ECCN. Agency officials said the new ECCN also is intended to solve a dilemma raised during commodity jurisdiction (CJ) determinations by BIS and State’s Directorate of Defense Trade Controls (DDTC) when they don’t want to place an item on the U.S. Munitions List (USML), but there is no ECCN for it.

“Immediate imposition of a license requirement is necessary to effect the national security and foreign policy goals of this rule,” the BIS notice said. The new rules “will allow BIS to prevent exports of these items to users and for uses that pose a national security threat to the United States or its allies,” it added. The rule points out that the new controls differ from those for items under USML Category XIV, which covers equipment for the detection, identification, warning or monitoring of biological agents.

“ECCN 0A521 covers biosensor systems and dedicated detecting components capable of detecting certain aerosolized bioagents and having the following characteristics: capable of showing results in three minutes or less; containing an integrated bioaerosol collector and identifier; containing antibodies to the bioagents listed in the entry; and utilizing bioluminescence as a process,” BIS noted. The entry also includes a Related Controls paragraph that differentiates ECCNs 1A004.c detection systems and 2B351 toxic gas monitoring systems and their dedicated detecting components controls on the CCL from 0A521 biosensor systems. In addition, ECCN 0D521 would cover “software” for the function of biosensor systems controlled by ECCN 0A521, while 0E521 would cover “technology” for the “development” or “production” of those systems.

## **WTO Candidate Groser Argues for Bigger Doha Deal, Not Smaller**

The explosion of regional and bilateral trade agreements around the world makes it important for the World Trade Organization (WTO) to reach a bigger, grander Doha Round deal rather than the smaller, carved-out plurilateral accords, argues New Zealand Trade Minister Tim Groser. Groser, who is considered one of the leading candidates among the nine entries to be the next WTO Director-General, spoke to the U.S. Chamber of Commerce in Washington March 25 (see **WTTL**, Feb. 4, page 2).

“At the outermost limits of optimism about what Bali [the next ministerial in December 2013] might or might not deliver, there is still a mountain to climb and we will never climb that mountain by slicing and dicing the existing Single Undertaking into tiny packets to be digested every two years at Ministerial meetings. It would take us decades. Do the math,” he said.

“If we are going to have a bigger deal, a more interesting deal, a more relevant deal, it will have to be put together discreetly with a lot of reflection and taking full account of the existing mandate,” Groser stated. “To do that, it will be vital that the new director general has the confidence of all the members – not just this ‘group’ or that ‘group’ of countries,” he added. Groser rejected the idea that Doha failed because of the downturn in the economy. “It is blindingly obvious that there is no ‘turning away’ from trade and investment integration taking place because of tough economic times. Not at all, there is

an explosion of interest in such agreements. So whatever lies behind the problem in Geneva, it is not ‘tough times’,” he said.

## Industry Still Confused about Jurisdiction on Nuclear Products

Based on comments posted March 27, companies still have questions about how any double jurisdiction would be handled for nuclear product exports and which products are covered under the proposed rule (see **WTTL**, Feb. 4, page 3). In its effort to remove duplicate jurisdiction, BIS and DDTTC have proposed removing most nuclear products controlled by the Department of Energy (DoE) from USML Category XVI and moving other items to the CCL.

L-3 Communications Corporation in Arlington, Va. wondered whether the heading “Modeling or simulation tools” covers “only numerical tools (as we have been informed by DoE) or also cover physical items, in particular EMP or radiation-producing simulators.” The company recommended “that the wording in the proposed rule be modified to clarify exactly what simulation tools are transitioning to DoE control.” It also noted that DoE did not post a companion proposed rule and wondered “what will be the mechanism for applying to DoE for authorization to export equipment, technical data, or services transitioning from Category XVI?”

Sandia Corporation, a wholly owned subsidiary of Lockheed Martin, also was curious about joint jurisdiction of modeling or simulation tools remaining on the USML. “The U.S. Department of Energy also controls these items under the Atomic Energy Act. These items are specifically referenced in the U.S. Department of Energy, National Nuclear Security Administration, Tier Guidance for Export/Import Control,” the company noted. “Sandia proposes the addition of a note indicating that Category XVI(b) does not apply to items under the export control of the U.S. Department of Energy pursuant to the Atomic Energy Act of 1954, as amended,” it added.

Sydor Optics in Rochester N.Y. wondered if disposable debris shields for super lasers that are used in nuclear weapon research, would be covered under the USML as they had been. “These super lasers are involved with atomic weapons research so the super laser could be looked at as a modeling or simulation tool. The disposable debris shield is an accessory of the super laser, under the proposed amendment as written it is not clear if accessories of a modeling or simulation tool would still be on the USML or CCL.”

## WTO Food Security Talks to Move Forward

WTO negotiations on a food security proposal from a group of least developed countries known as the G-33 will move forward despite opposition from the U.S. and several developed countries. At the end of an informal meeting of the Doha Round negotiating committee on agriculture March 27, committee chairman John Adank, New Zealand’s WTO ambassador, said enough technical progress has been made to allow ambassador-level officials to start substantive discussions of a plan that would allow poor countries to pay subsidies to farmers and to buy food stocks to assure food security. The U.S. has objected strongly to the proposal (see **WTTL**, March 11, page 7). Adank said there was a “free and frank exchange of views” at the meeting. The session followed a series of

nine technical discussions in February and March during which critics of the plan were asked questions about it and proponents provided answers. The G-33 want to loosen restrictions on so-called “Amber Box” limits for farm support to allow them to subsidize farmers to encourage food production and to stockpile food. Because of current high farm prices, they contend, the current limits restrict that support. Opponents said they are concerned that current WTO disciplines on farm subsidies would be weakened and there would be no limits on how much aid was given.

**\* \* \* Briefs \* \* \***

STATE: After many rumors predicting his retirement, Robert Kovac, managing director of State’s Directorate of Defense Trade Controls (DDTC), formally retired at end of March. During his term, Kovac drew broad praise from exporting community for speeding up defense export licensing system and making agency more transparent and open.

STEEL: Thomas Steel Strip Corporation of Warren, Ohio, March 27 petitioned ITC and ITA to investigate alleged dumping of imports of diffusion-annealed, nickel-plated steel flat-rolled products from Japan.

EXPORT ENFORCEMENT: Qualitech Enviro-Instrument Company in Fairfax, Va. and its president Xiaoming (Sam) Wang agreed March 22 to pay \$35,000 to settle BIS charge of exporting two Wavetek 650 Precision 2MHz Variable Phase Synthesizers to China without license. Fine will be suspended for five years and then waived, provided neither Wang nor Qualitech committed any further violations. Wang and Qualitech neither admit nor deny charges.

MORE EXPORT ENFORCEMENT: Sixing Liu, aka, Steve Liu, Chinese citizen and ex-employee of L-3 Communications, space and navigation division, was sentenced March 25 in Newark U.S. District Court to 70 months in prison for exporting sensitive U.S. military technology to China, stealing trade secrets and lying to federal agents. Liu was convicted in September 2012 for stealing files from L-3 Communications and taking them to China to present at universities and conferences (see WTTL, Oct. 1, 2012, page 4). Files detailed performance and design of guidance systems for missiles, rockets, target locators and unmanned aerial vehicles.

U.S.-EU TALKS: USTR asked ITC March 26 to conduct Section 131 investigation in advance of U.S.-EU Transatlantic Trade and Investment Partnership talks to determine economic effects for U.S. farmers and economy as whole from eliminating U.S. tariffs on EU farm products.

CHINA: Ways and Means Committee Ranking Member Sander Levin (D-Mich.) and trade subcommittee Ranking Member Charles Rangel (D-N.Y.) wrote March 28 to Acting USTR Demetrios Marantis asking USTR to consider designating China Priority Foreign Country during next Special 301 review of IPR violations because of its cyber theft of trade secrets from U.S. companies. Letter cites report linking cyber theft of trade secrets to Chinese government.

SENATE: Banking Committee Chairman Tim Johnson (D-S.D.) announced March 26 that he will not seek reelection in 2014. Committee, which has jurisdiction over Export Administration Act, didn’t put trade reform on its agenda for next two years (see WTTL, Feb. 18, page 7).

TRADE PEOPLE: Nathaniel Edmonds, assistant chief of Justice FCPA unit, has become partner at Paul Hastings in Washington law firm’s global compliance and disputes practice.

ENTITY LIST: In Federal Register March 28 BIS added 18 persons under 19 entries to its Entity List: two in China, one in Germany, four in Hong Kong, one in Ukraine and 11 entities in UAE. BIS also removed one entity -- Atlas Electronic Systems -- in Montreal, Canada, “as a result of the person's successful request for removal,” notice said.