

Vol. 34, No. 38

September 29, 2014

## Judge Rejects Justice Argument on “Willfulness” in Export Case

In a ruling on the meaning of “willfulness” in the prosecution of violations of the Arms Export Control Act, a federal judge has said the government must prove a defendant knew an item met the requirements of the U.S. Munitions List (USML) and is entitled to a hearing to disprove government claims that a violation occurred even without that knowledge. The Sept. 8 decision of Madison, Wis., U.S. District Court Judge Barbara Crabb in the long-running legal battle of Doli Syarief Pulungan rejected government claims that an exporter’s mere knowledge of a legal obligation to obtain an export license is sufficient to be guilty of violating the law.

Crabb’s order came in response to motions seeking clarification on the definition of “willfulness,” the key to Pulungan’s claim of innocence. “The government will be held to the standard of willfulness the court of appeals found it had conceded to at trial and on appeal. The government cannot rely on its assertion that even if the riflescopes in question were not classified as ‘defense articles’ in 2007, they would have been classified as ‘dual-use articles’ at that time, in which case they could not have been exported without a license,” she wrote.

“If anything is clear at this stage of the litigation, it is that no lay person can determine from reviewing the munitions list what specific products would be designated as ‘defense articles.’ However, Pulungan’s furtive activities in pursuit of riflescopes would be relevant evidence on the question of his knowledge,” Crabb wrote.

The case has faced a series of delays and motions (see **WTTL**, Aug. 18, page 5). A Sept. 22 status call proved no different. On that call, Pulungan’s lawyers told Crabb that his visa has been denied, preventing him from appearing in person at an evidentiary hearing previously scheduled for Oct. 2. In response, she agreed that “the only viable option would be for counsel to travel to Indonesia to take plaintiff’s video deposition for use at a hearing at a later date.” She set another hearing for Dec. 10.

## Slim Chance for Fask-Track Bill During Lame-Duck Session

With Congress recessed for eight weeks for the fall elections, prospects remain slim that lawmakers will enact a fast-track Trade Promotion Authority (TPA) bill when they return

for a lame-duck session in November. While Republican members claim they will be ready to act on legislation whenever it comes up, there has not yet been a sign that Senate Majority Leader Harry Reid (D-Nev.) would bring a bill to the floor before the end of the year, some sources say.

The idea that a TPA bill might be enacted during the lame-duck session has been premised on the notion that it would be easier to vote for the legislation after the elections. Speculation that Republicans will gain control of the Senate has also fueled suggestions that Democrats would want to act on the legislation while they still have the power of the majority.

While some sources don't expect those scenarios to emerge, they do predict enactment early in 2015. The key to the legislation moving they say is progress in negotiations on a Trans-Pacific Partnership (TPP). If a TPP deal looks within reach, members of both parties will want to have congressional trade policies and consultation procedures spelled out before the agreement is concluded.

This sets up a delicate timing issue for the Obama administration. Republicans in both the House and Senate have warned the administration not to reach a TPP accord – not even initial one – before action is taken on TPA. U.S. trade officials, however, are pushing to make major progress toward a deal by the end of this year and perhaps by the time of the Asia-Pacific Economic Cooperation Forum (APEC) leaders conference in Beijing in November. Some sources suggest support for TPA in Congress will strengthen once lawmakers see more details on the final agreement and what the pact will produce.

Regardless of the timing of a TPA vote, there is broad agreement in the business community and in Congress that passage will require President Obama to make a strong public commitment to the legislation and to bring along more Democratic lawmakers.

The basis for TPA legislation is likely to be the bills (H.R. 3830/S. 1900) that House Ways and Means Committee Chairman Dave Camp (R-Mich.), then-Senate Finance Committee Chairman Max Baucus (D-Mont.) and Finance Ranking Member Orrin Hatch (R-Utah) introduced in January. Current Finance Chairman Ron Wyden (D-Ore.) has said he wants to introduce his own “smart-track” trade bill but so far has not made the details of that legislation public. With many other legislative issues on the likely agenda for a lame-duck session, there might not be enough time to work out a compromise bill.

## **Biden, Abe Try to Save Failed U.S.-Japan TPP Talks**

After U.S. Trade Representative (USTR) Michael Froman and Japanese Economic Minister Akira Amari failed to make progress Sept. 23-24 toward opening Japan's agriculture and auto sectors, Vice President Biden made another pitch to get the negotiations moving in a meeting Sept. 26 with Japanese Prime Minister Shinzo Abe. Biden and Abe met in New York on the sidelines of the United Nations General Assembly meeting.

“The Vice President and the Prime Minister agreed on the strategic and economic importance of the Trans-Pacific Partnership and the need to resolve outstanding bilateral issues in Trans-Pacific Partnership negotiations, including on agriculture and automobiles, as soon as possible,” a White House statement reported. No further details were released. The Froman-Amari meeting followed months of unsuccessful bilateral talks led by Acting

Deputy USTR Wendy Cutler (see **WTTL**, Aug. 11, page 1). Froman has recently stepped up pressure on Tokyo to reach a deal that could open the way to announced significant progress toward a TPP agreement by the end of the year.

In a blunt statement after Froman and Amari met, the USTR's office didn't try to sugarcoat the results of their meeting. "While there were constructive working level discussions over the weekend, we were unable to make further progress on the key outstanding issues. The United States continues to demonstrate a commitment to the level of ambition that all TPP countries agreed to attain when they entered negotiations. Both sides will consider next steps following consultations in both capitals," the statement said.

Some industry sectors praised the session's failure, saying the results show Froman is taking a tough stand against Japan, particularly on farm issues. Froman was sharply criticized earlier in the year, particularly by Republicans in Congress, when statements from his office suggested the U.S. might be willing to accept "meaningful" access to the Japanese agriculture market rather than insisting on the full elimination of tariffs.

A statement from the National Pork Producers Council (NPPC) thanked U.S. trade officials "for diligently working to achieve an outcome in the Trans-Pacific Partnership (TPP) negotiations that would benefit all sectors of our nation's economy, including agriculture." The group criticized Tokyo's continued demand to exempt an unprecedented number of agricultural products from tariff elimination, including so-call "sacred" products such as pork, dairy, beef, wheat, barley, sugar and rice.

Japan "must be willing to phase out its tariffs over a reasonable transition period and abolish its trade-distorting Gate Price system," the NPPC said. "The difference between Japan's offer as reported in the Japanese press and the elimination of the Gate Price and tariffs on pork is eye popping," it said.

"There is a long history of fraud and criminal activity related to the Gate Price – with some Japanese importers inflating invoices to prices above the Gate Price to minimize import duties – which has been well documented in the Japanese press," the NPPC charged. "We find it odd (to say the least) that anyone in the Japanese government would defend a system that generates fraud and criminal behavior," the group opined.

## **Korea Not in Rush to Join TPP**

Korea is carefully watching progress in TPP negotiations but is in no rush to join the pact now, according to Korean officials. Although Korea's participation in the accord makes economic sense, Seoul is focused for now on bilateral free trade agreement (FTA) negotiations with China, which has become its largest trading partner.

The case for Korea's participation is made in a new policy brief released Sept. 22 by the Peterson Institute for International Economics. "Sooner or later Korea will have to join," said Peterson senior fellow Jeffrey Schott, who co-authored the brief with institute analyst Cathleen Cimino. The brief urges Korea to join the talks immediately before a deal is reached. Korean officials have already held discussions with the USTR's office about Seoul's possible participation in TPP talks. But the U.S. has not encouraged Korea to join the negotiations now because of concerns that its participation would

further slow down already difficult discussions. The additional delays in TPP talks would come not only from Korea having to get up to speed on the new issues being raised in the TPP but also because Seoul would have to enter into contentious bilateral market access talks with other TPP countries and particularly Japan. The Peterson paper, however, argues delay would also make Korea's accession to TPP difficult because it might become tied up with other countries that will want to join later, such the Philippines, Thailand, Indonesia, and possibly China.

Earlier this year, Korean and Chinese leaders had set a goal of completing a bilateral China-Korea FTA by the end of the year. The 13th round of those negotiations were held in Beijing the week of Sept. 22.

The two sides reportedly still need to complete their offers and requests, so the end of year deadline might be missed. Since 2000, China's share of Korea's imports and exports has jumped to 21% in 2013 from 9%, while the U.S. share has fallen to 10% in 2013 from 20%, according to the Peterson brief. Japan's share has also fallen to 9% from 16%. In 2013, Korea exported \$145.9 billion to China and imported \$83.1 billion, more than twice the level of U.S. trade that year. Korea's direct investment in China surged to \$50.6 billion in 2012, the brief reported.

In addition to the emphasis on China, Korea has its own concerns about the direction of TPP talks and how such a deal might compare to the U.S.-Korea Free Trade Agreement (KORUS). It reportedly sees some of the addition of new issues in TPP, such as provisions on state-owned enterprises, pharmaceutical patents and transborder data flows as "KORUS-plus." But it is concerned that a TPP that would give countries, such as Vietnam and Japan, longer phase-out periods for tariffs, especially for farm goods, than it negotiated as "KORUS-minus."

Another concern for Korea is Japan's participation in TPP. The two countries have very sensitive political and historical differences that have damaged relations in the last couple of years. Market access to the Japanese market is also a major issue for Seoul, which has complained about limited access for its agriculture products, non-tariff barriers to Korean electronic products and continued barriers to auto sales. Korean automakers reportedly sell fewer than 500 cars in Japan annually.

Meanwhile, Korea's entry into TPP talks could raise complaints in Congress, where many members – both Democrats and Republicans – are dissatisfied with the implementation of KORUS. Lawmakers are concerned about Seoul's allegedly poor implementation of KORUS provisions on autos, intellectual property rights, medical device reimbursement and import certifications. Members would likely insist on more progress in these and other KORUS areas before supporting Korea in TPP, sources report.

Separately, Korean President Park Geun-hye and Canadian Prime Minister Stephen Harper witnessed the signing of the Korean-Canada FTA Sept. 22 in Ottawa. "For Canada, next steps include the introduction and passage of implementing legislation, followed by regulatory updates. For Korea, next steps include review and approval by the Korean National Assembly of a ratification bill. Once these provisions are complete, Canada and Korea will exchange diplomatic notes, required for entry into force, to notify each other of the completion of their domestic procedures," a Canadian fact sheet explained. "Once the CKFTA is fully implemented, Korea will remove duties covering 100 per cent of non-agricultural exports and 97 per cent of current agricultural exports while Canada

will eliminate duties on approximately 99.9 per cent of Korea's exports to Canada," it added. The pact also covers intellectual property, telecommunications services, electronic commerce, environment and labor protections, non-tariff measures, investor protections, services, investment, and government procurement. Canada-Korea trade is fairly small compared to the U.S., China, Japan, Australia and some other TPP countries, reaching only \$9.9 billion in two-way trade in 2013, the Peterson brief reported.

## Trade Growth Estimates Cut by More Than Third

A host of global economic, health and geopolitical troubles are combining to slow down the pace of export and import volume growth around the world and led to a reduction in WTO forecasts for trade expansion in 2014 and 2015. WTO economists slashed more than a third off projected growth in the volume of world trade for 2014 in a report released Sept. 23, reducing the expected increase to 3.1% from the 4.7% rate they suggested in April. They cut their estimates for 2015 to 4.0% from 5.3%. In dollar terms, foreign figures might be hurt also by a strengthening dollar.

The forecasts for North America see trade increasing 3.7% this year and 3.9% in 2015. For Europe, the projections are 2.3% and 3.5%, respectively; Asia, 5.0% and 4.8%; and for developing nations, 4.0% and 4.5%.

Among the factors weighing on trade were the slowdown of the U.S. and German economies in the first half of this year, Europe's continuing slow recovery and China's slower growth. Lower farm and commodity prices also are a drag, especially in Central and South America, the WTO said. "Tensions between the European Union and the United States on the one hand and the Russian Federation on the other over Ukraine have already resulted in trade sanctions on certain agricultural commodities, and the number of products affected could widen if the crisis persists," the WTO reported.

"Conflict in the Middle East is also stoking uncertainty, and could lead to a spike in oil prices if the security of oil supplies is threatened. Finally, an outbreak of Ebola hemorrhagic fever in West Africa has proven difficult to contain, and any spread of the disease could trigger a broader panic with major economic implications for West Africa, and perhaps even beyond the region. The presence of several such low probability/high cost risk factors has made the trade forecast particularly difficult to gauge this year," it added.

## Bali Restart Stalls Quickly at WTO

World Trade Organization (WTO) diplomats are back to work in Geneva and stuck where they were two years ago. The hopes of Director-General (DG) Roberto Azevedo to get the agreements reached at the Bali ministerial back on track were shot down quickly at informal meetings of Doha Round negotiating groups on non-agriculture market access (NAMA) Sept. 22 and agriculture Sept. 23. Members at the two meetings could not agree on a path forward to get the Bali deals implemented, with many renewing their criticism of India for causing the deadlock (see **WTTL**, Sept. 22, page 2).

Azevedo had asked negotiating committee chairmen to consult with their members to come up with ideas for moving talks forward for an Oct. 6 meeting of the Trade Negotiations Committee (TNC). Aside from common complaints about India, no consensus

emerged at the agriculture and NAMA meetings on moving the Bali agenda forward or renewing work on the Doha Development Agenda (DDA). At the NAMA session, its chairman, Ambassador Remigi Winzap of Switzerland, reportedly said he will tell the TNC that there is no consensus for continuing work on the negotiations or establishing a work program for a Post-Bali agenda. "I don't have a clear view on what you want," Winzap said at one point. "I don't see how I can advance work in NAMA under the circumstances; and if there is no NAMA there is no agriculture and no DDA," he said, according to one source. He also said that he could not agree with a member that told him that in his report to the TNC he did not need to be pessimistic.

Agriculture group chairman John Adank, New Zealand's WTO ambassador, reached a similar conclusion after his meeting. "Taking all of these views into account my general conclusion as of now, is that in the absence of a solution to the current impasse, there is no consensus on how work can be taken forward in this Committee," he told members.

Speakers at both meetings focused on India's blockage of an agreement to implement the Bali deal on trade facilitation until there is agreement of food security and public stockholding of food commodities. There also was no agreement, however, on going ahead with other agreements reached at Bali or for resuming Doha talks.

At the NAMA meeting, the U.S., Japan, the European Union (EU), Australia, New Zealand, Norway, Canada and Switzerland strongly held the view that work cannot continue because trust has been broken due to the WTO's failure to adopt the trade facilitation agreement by the July 31 deadline set in Bali, according to one source. Other countries, however, especially China, Egypt, South Africa and India, argued that Doha talks should continue because trade facilitation isn't the only important issue.

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

EXPORT ENFORCEMENT: Alper Calik, former owner of two N.J. defense contracting businesses, was arrested Sept. 13 and charged in Trenton, N.J., U.S. District Court with mail fraud and violating Arms Export Control Act (AECA) in connection with download of 100,000 military technical drawings of submarine parts without prior State approval. Calik allegedly falsely claimed to Defense that companies were U.S.-based manufacturers of spare parts, when items were manufactured in Turkey.

MORE EXPORT ENFORCEMENT: Hannah Robert, owner of N.J.-based One Source USA LLC, was charged Sept. 11 in superseding indictment in Trenton, N.J., U.S. District Court, with violating Arms Export Control Act, conspiracy to violate AECA, four counts of wire fraud and conspiracy to commit wire fraud. From June 2010 to December 2012, Robert allegedly conspired to export defense blueprints of torpedo parts for nuclear submarines, military attack helicopters, and F-15 fighter aircraft to India without State licenses. She is currently under home detention pending trial, scheduled for Nov. 12. She originally was indicted in October 2013 in Trenton court on charges of conspiring to violate and violating AECA and subsequently pleaded not guilty (see **WTTL**, Oct. 28, 2013, page 7).

EVEN MORE EXPORT ENFORCEMENT: Hui Sheng Shen, aka "Charlie," and Huan Ling Chang, aka, "Alice," both Taiwanese nationals, pleaded guilty Sept. 22 in Newark U.S. District Court to charges of conspiracy to violate Arms Export Control Act (AECA) for attempting to export military technology to China. Two were charged in April 2012 following their arrest in

February in New York on drug importation charges. Drug charges and export control charges appear to be based on same FBI sting operation. Sentencing is scheduled for Jan. 5, 2015.

INDIA: Senate Finance Committee and House Ways and Means Committee leaders asked ITC Sept. 25 to update investigation into “India’s unfair trade practices that discriminate against U.S. exports and investment.” Report based on previous request from August 2013 is due to Congress by Dec. 15, 2014 (see **WTTL**, Aug. 5, 2013, page 8). “The investigation should also include any new relevant trade and investment policies and practices, focusing on the period from mid-2014,” leaders wrote. Lawmakers’ request came in advance of meeting between Indian Prime Minister Modi and President Obama in Washington Sept. 29-30 and amid calls from U.S. business for India to open its markets.

STEEL ROD: In Sept. 22 ruling labeled “nonprecedential,” Court of Appeals for Federal Circuit (CAFC) reversed CIT decision that supported Commerce scope determination in antidumping case against threaded wire rod from China. Department incorrectly included steel coil rod under case, wrote CAFC Judge Sharon Prost for three-judge panel in *A.L. Patterson, Inc. v. U.S.* “There is no evidence that the threaded rod that was the focus of the petition was interchangeable with coil rod in its use as a concrete accessory or that the threaded rod and coil rod markets overlapped,” she wrote. “Second, there is no evidence to rebut Patterson’s evidence that domestic producers of coil rod were entirely excluded from the Commission’s investigation and that no evidence of sales of coil rod were included by any respondents,” Prost added.

WAVEBOARDS: Hey, dude, waveboards aren’t wheeled toys that are duty free; they’re sports equipment as Customs correctly classified them, with duty of 4%, CIT Senior Judge Richard Eaton ruled Sept. 22 (slip op. 14-110). He rejected arguments of Streetsurfing LLC that two-wheeled waveboards are like four-wheeled skateboards.

DIAMOND SAWBLADES: In separate rulings Sept. 23, CIT Senior Judge Richard Eaton granted motion of Diamond Sawblades Manufacturers’ Coalition and ordered Commerce to redo its sunset review of antidumping order on blades from China (slip op. 14-111), while CIT Senior Judge R. Kenton Musgrave ordered remand to department of second administrative review of order (slip. op. 14-112). “As the Department points out, it is unlikely that the facts present here will be repeated. If true, then no practice or precedent will be established by this case. Therefore, the time for correcting this one-time mistake has come. For the foregoing reasons, the Department’s motion to dismiss is denied, plaintiff’s motion is granted,” Eaton wrote.

KAZAKHSTAN: WTO accession negotiations are “moving in the right direction” and chances for Kazakhstan to join WTO by end of year “remain high”, WTO meeting was told Sept. 25. Over summer and in September, progress was made in talk on goods and services schedules. Work still lags on sanitary and phyto-sanitary issues, they were told.

SOMALIA: Troubled East African nation told WTO officials Sept. 10 that it is planning to submit formal request shortly to explore accession to WTO.

DC-DC CONTROLLERS: CAFC reversed in part ITC ruling that Taiwan-based uPI Semiconductor Corporation had not violated consent order barring import of uPI controllers used to convert direct current from one voltage to another in semiconductors. Appellate court agreed Sept. 25 with ITC finding that uPI’s post-order imports had violated patent provision of order but disagreed with commission ruling that UPI had not violated trade secret provisions. “Richtek appears correct in its citations showing identity of the Richtek and uPI schematics, as well as reproduction of purported design errors. The reproduction of design errors, notations and extraneous markings is not consistent with independent development,” wrote Appellate Judge Pauline Newman for three-judge panel in *uPI Semiconductor Corporation v. ITC* and cross-suit, *Richtek Technology Corp. v. ITC*.