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Appellate Court Upholds Professor Roth's Conviction

Former University of Tennessee Professor J. Reece Roth may be headed to jail after a Jan. 5 Sixth Circuit Court of Appeals ruling upholding his 2008 conviction for releasing controlled defense technical data to a Chinese student. His incarceration could be delayed if he seeks an *en banc* review of the decision by the full appellate court or files an appeal to the Supreme Court. "We naturally are disappointed with the court's decision and we are considering our options," one of Roth's attorneys, James Thomas, of Neal & Harwell in Nashville, told WTTL.

> The circuit court's ruling could restrict future use of the "fundamental research" exception under U.S. export controls and also puts an increased expectation of knowledge of U.S. export controls on university researchers. Roth's case has been closely followed by the academic community, which has seen it as a warning to university researchers to adhere closely to export controls.

"What's most significant is that this is the first of its kind case dealing with the export of technical data in an academic setting," one U.S. official told WTTL. He said the ruling is the first time the Sixth Circuit has ruled on the issue of knowledge or *scienter* in the application of the Arms Export Control Act and brings the circuit into alignment with rulings from other circuits.

Roth, 72, had been sentenced to 48 months in jail following his conviction. While he had not raised the "fundamental research" defense in his appeal, the appellate ruling suggests that any expectation of future defense use of a research project might void that exclusion from controls. "The federal regulations extend export controls to all stages of defense projects that are covered by the Act, not just the final stage when military devices are directly involved," wrote Judge Boyce F. Martin Jr. "The regulations have been written to cover a broad range of articles at all stages of research and development in projects covered by the Act," he added. The decision also implies that educated researchers should be expected to have a better understanding of what is illegal under U.S. export controls than the average person on the street. "Exporting defense articles can only be achieved by educated parties with atypical access to proprietary military weapons, systems and data," the opinion declared.

New Trade Cases Hit Record Low in 2010

The number of new trade cases initiated in 2010 – antidumping and countervailing duty (CVD) – hit an historic low, but members of the trade bar say there "is nowhere to go but up" in 2011 and beyond. Six new cases were launched in 2010 against three products from China: drill

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pipe, extrusion aluminum and multilayered wood flooring. Trade lawyers cite several factors for the decline in complaints, with the recession and the 26% decline in imports of manufactured goods in 2009 mentioned as the leading factors. Most cases in 2010 would have included 2009 in the period of investigation, making it hard to show that rising imports were a cause of injury to domestic industries. That picture is changing with imports up about 25% in 2010.

> Companies that are suffering from import competition also may have been less able to afford the $1-2 million it costs to pursue a trade petition. Those firms "don't have a million dollars in spare change to pay lawyers," one attorney said. Given the uncertainty of winning a case or getting a sufficient dumping and CVD margin, the investment "doesn't meet the cost-benefit analysis" of corporate accountants, another attorney told WTTL. Even when cases are successful, legal fees can also rise with almost expected challenges to the Court of International Trade and, in some cases, to the World Trade Organization (WTO).

Also cited as a reason for the decline in new cases, which has been a trend for several years, is the increasing globalization of U.S. companies. The change in global supply chain patterns means more American firms manufacture in multiple countries around the world and import finished products or components from those foreign plants. "They don't want to bring cases against their own products from overseas," one source stated. This shift also explains why unions, especially the trade-active United Steelworkers, are more often than before in either initiating or supporting new cases such as the Section 421 case against Chinese tires. In addition, existing orders are already in place against many products of most interest to import-sensitive industries and from most traditional exporting countries, trade bar members note.

That is why trade lawyers say they expect new cases primarily to target China, which has supplanted many of those old suppliers, particularly in steel production, and whose exports are not yet covered by orders. "There is virtually no chance Commerce won't find dumping" against Chinese imports, one trade lawyer opined. There will also be an incentive to bring cases against China before December 2016, when provisions allowing the U.S. to treat China as a nonmarket economy (NME) under Beijing's WTO accession agreement will expire.

Another motivation for filing cases in the next year or so is the current makeup of the International Trade Commission (ITC). The terms of two current Republican members, Chairman Deanna Okun and Commissioner Charlotte Lane, have already expired, and they can remain in office until replacements are confirmed by the Senate. So far, however, the White House apparently has made no move to find replacements for them. Due to the tradition of seeking ITC nominees alternately from the Democratic and GOP leaders of the Senate Finance Committee and the House Ways and Means Committee, the Obama administration may be reluctant to name any Republican ITC candidates who could be less friendly to domestic petitioners than Lane particularly.

LaHood Releases Plan to End Trucking Dispute with Mexico

After almost a year of saying a plan to resolve the cross-border trucking dispute with Mexico was "pending," Transportation Secretary Ray LaHood finally shared the proposal with Congress and the Mexican government Jan. 6. The Transportation Department described the plan as "an initial concept document for a long haul cross-border Mexican trucking program that prioritizes safety, while satisfying the United States' international obligations." The proposed pilot program won't bring the U.S. into compliance with its NAFTA obligation to open the border fully to Mexican trucks, but could get Congress to lift its two-year-old ban on funding a previous pilot project. It also aims to get Mexico to end its retaliation against some $2.3 billion of U.S. goods, which has drawn increasing complaints from targeted U.S. exporters.

Opposition to allowing Mexican trucks into the U.S. has been spearheaded by the Teamsters Union and its allies in Congress. The union is "deeply disappointed by this proposal," said Teamster General President Jim Hoffa in a statement. "We continue to have serious

reservations about DOT's ability to guarantee the safety of Mexican trucks. Mexican trucks simply don't meet the same standards as U.S. trucks – they don't even have to have anti-lock brakes," he said (see **WTTL**, May 18, 2009, page 4).

> In the concept document, LaHood outlines a plan for pre-operation vetting of drivers and carriers, operational monitoring and progress follow-up, and transparency requirements, including periodic reports to Congress and a public website. The new program also will be limited to make sure all parties are satisfied.

"Subject to negotiation with Mexico, the number of carrier and truck participants in first phase of the program will be managed to ensure adequate oversight," the document said. "The Obama Administration will continue to work with Congress and other stakeholders to put safety first," a Transportation release said. "A formal proposal, which the public will have the opportunity to comment on, is expected to be announced in the coming months," it promised.

Industry groups, especially those hit by the retaliatory duties, applauded the concept document. "Mexico is our largest volume export market and the retaliation Mexico has put in place on pork has hurt U.S. pork producers," said National Pork Producers Council President Sam Carney in a statement. "We applaud any effort by the U.S. Administration that will lead to progress in resolving this issue. Every month that the trucking issue goes unresolved, we continue to lose market share in Mexico - one of our most important export markets," he said.

Daley Will Help Obama Sell Free Trade Pacts

The appointment of William Daley to be President Obama's chief of staff brings to the White House someone who has experience selling free trade agreements to reluctant Democratic members of Congress. Before he named Daley to be Commerce Secretary, President Clinton had hired him in 1993 to coordinate efforts to get the North American Free Trade Agreement (NAFTA) approved. In the end, when the House passed NAFTA by an unexpectedly wide margin of 234 to 200 on Nov. 17, 1993, 102 Democrats voted for the pact.

> Daley, who is leaving a job as a vice chairman of JP Morgan Chase, has remained an astute observer of the trade scene even outside of government. In an exclusive interview with WTTL in September, he said congressional approval of new trade deals would require a presidential commitment. "If the president doesn't truly believe it and fight for it and run the risk of losing, it will never pass," he told WTTL (see **WTTL**, Sept. 27, page 1). He said Obama has "put the marker down" on the Korean FTA and the administration will come out strong for it this spring.

Daley's appointment is also likely to mean that trade policy will continue to be driven by the White House just as it was under his predecessor Rahm Emanuel and presidential political advisor David Axelrod. But rather than steering Obama away from trade as Emanuel and Axelrod did, Daley is expected to push for approval of deals with Panama and Colombia and completion of the Doha Round and Trans-Pacific Partnership. Former U.S. Trade Representative Susan Schwab might also have some influence on Daley's views. Daley and Schwab have served together on the Boeing board of directors.

Wolf Says Foreign Availability Won't Determine Control Tier

During his latest weekly call-in show Jan. 5, Bureau of Industry and Security (BIS) Assistant Secretary for Export Administration Kevin Wolf said foreign availability would be one factor used to determine an items level of control under the agency's proposed three-tier approach to the Commerce Control List (CCL), but it won't be the only factor. "To be clear, availability will not be the determining factor in any particular decision," he said. Rather, "it will be factored in as part of the government's ultimate decision about how to tier items," Wolf stated. He specifically mentioned 29 Export Control Classification Numbers (ECCNs) that were cited

in the Dec. 9 proposal to create a License Exception Strategic Trade Authorization (STA) as needing "extra special review" and possibly being excluded from STA eligibility. "In particular, information about the availability or not of the items that are described in those 29 ECCNs would be of use to the U.S. government," Wolf said (see **WTTL**, Dec. 13, page 1).

> One of the questions submitted by e-mail asked whether it is correct to assume that if an item doesn't meet any of the three tiers of controls in the proposed modification of the CCL that it won't continue to be controlled. "Theoretically, the answer is no," Wolf answered.

"If something is widely available on an apples-to-apples basis in a lot of countries worldwide, and it doesn't provide the U.S. with significant military or intelligence advantage, then it wouldn't be controlled," he added. "The only caveat to this, again, to the extent not otherwise inconsistent with existing statutory obligations or multilateral obligations, that's a standing rule in this entire effort. We're not trying to undo or unwind existing multilateral obligations or statutory obligations," Wolf noted.

Wolf also answered a question regarding industry comments on breaking out ECCNs into sub-ECCNs. "If there's some technical or other objective criteria by which that subparagraph could be further broken out so that part of it would be tier 1, and then another part would be tier 2 and another technical criteria would be tier 3, we're seeking your guidance and recommendations and commentary on exactly that point," he said. "That's actually one of the core purposes of the request," he added.

* * * Briefs * * *

MASS-MARKET ENCRYPTION: BIS in Jan. 7 Federal Register issued final order amending EAR to remove controls on "publicly available" mass-market encryption object code software with symmetric key length greater than 64 bits, and "publicly available" encryption object code classified under ECCN 5D002 on CCLwhen corresponding source code meets criteria of License Exception TSU. "This change is being made pursuant to a determination by BIS that, because there are no regulatory restrictions on making such software 'publicly available,' and because, once it is 'publicly available,' by definition it is available for download by any end user without restriction, removing it from the jurisdiction of the EAR will have no effect on export control policy," notice explained.

FOREIGN TRADE ZONES: In first major effort to amend FTZ rules since 1991, Commerce in Dec. 30 Federal Register published proposed amendments that would, in part, eliminate distinction between "manufacturing" or "processing" in zones and simplify FTZ program through application of unified concept of "production" and provide single set of procedures pertaining to that type of activity. Proposal comes as new opposition to FTZs has surfaced among some domestic industries and unions (see **WTTL**, April 12, page 1). "All changes to rules pertaining to production activity have been carefully balanced, including through adoption of certain additional constraints and safeguards such as enhanced authority to conduct reviews and restrict activity that is determined not to be in the public interest," FTZ Board said in notice.

EXPORT ENFORCEMENT: Wells Fargo Bank, N.A. has paid $67,500 to settle allegations that it violated Iranian Transactions Regulations (ITR) between March 2005 and July 2006, OFAC revealed Dec. 21. Agency alleged that Wells Fargo exported financial services to Iran by performing financial services totaling almost $56,000 in the U.S. on behalf of account holder who was located in Iran. Although Wells Fargo did not voluntarily disclose matter to OFAC, agency reduced fine from base penalty of $90,000.

FCPA: In agreements with SEC and Justice Dec. 27, Alcatel-Lucent, S.A. settled charges that it bribed foreign government officials to win business in Latin America and Asia. Alcatel agreed to pay more than $45 million to settle SEC complaint and $92 million in deferred prosecution agreement with Justice. Three Alcatel subsidiaries -- Alcatel-Lucent France S.A., formerly known as Alcatel CIT S.A.; Alcatel-Lucent Trade International A.G., formerly known as Alcatel Standard A.G.; and Alcatel Centroamerica S.A., formerly known as Alcatel de Costa Rica S.A. -- also pled guilty to FCPA violations. Along with fines, Alcatel-Lucent must retain independent compliance monitor for three-year period to oversee its implementation and maintenance of enhanced FCPA compliance program and to submit yearly reports to Justice.

IVORY COAST: U.S. stepped into international effort to get Ivory Coast President Laurent Gbagbo to accept election results and give up office to opponent who is widely recognized as having won recent vote. Treasury added Gbagbo to SDN list Jan. 6 along with his wife and three of his top aides.