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Appeals Court Rejects “Vagueness” Complaint Against EAR

Just because export regulations are complicated and come from a variety of sources, doesn't mean they are too vague to be enforced, ruled the Ninth Circuit Court in San Francisco March 17, affirming the conviction of Zhi Yong Guo. Guo was convicted Feb. 23, 2009, of knowingly and willfully conspiring to export, and attempting to export, 10 thermal-imaging cameras to China without a license (see **WTTL**, March 2, 2009, page 6). In his appeal, he argued that “the statute is too vague to satisfy the constitutional demands of due process.”

The appellate court admitted the existing export regulations are complicated. “We recognize that putting together the pieces of this regulatory puzzle is not easy,” it stated. “To understand the crime with which Defendant was charged, one must look at four sources and read them together,” it noted.

“But a statute does not fail the vagueness test simply because it involves a complex regulatory scheme, or requires that several sources be read together, and Defendant has not directed us to a single case in which we have held otherwise,” the court declared. “Rather, the test is whether the text of the statute and its implementing regulations, read together, give ordinary citizens fair notice with respect to what the statute and regulations forbid, and whether the statute and regulations read together adequately provide for principled enforcement by making clear what conduct of the defendant violates the statutory scheme,” it continued.

“Although complicated, the Export Administration Regulations describe in detail the technologies subject to export control,” it stated. “Because the regulations apprise those who take the time and effort to consult them as to what may and may not be taken to other countries without a license and do not allow for arbitrary enforcement, the regulations satisfy due process.”

NGOs Ask for UN to Intervene in TPP Talks on Drug Patents

While the Obama administration cites the Trans Pacific Partnership (TPP) as a new kind of trade agreement, a group of nongovernmental organizations (NGOs) and lawyers have asked the Special Rapporteur for the United Nations (UN) to step into the negotiations to help prevent the adoption of rules on drug patents that would limit access to medicines in developing countries. “The United States has already made proposals that would require the parties to the negotiation to adopt levels of patent protection that exceed that which is required by the WTO TRIPS Agreement [trade-related aspects of intellectual property rights], and higher than the standards that developing countries ‘should’ adopt, in order to promote access to medicine for all,” said



the group, led by Knowledge Ecology International (KEI), in a letter to Anand Grover March 22. “The new obligations on intellectual property protection for medical technologies will make it less likely that developing countries will elect to provide legal guarantees of universal access to medical care, including new medicines, or that they can sustain and implement obligations they have already made,” the group argued.

The letter cited UN Commission on Human Rights resolution 2002/31, and asked the Special Rapporteur to make an urgent appeal to the nine countries involved to remove those patent obligations from the text of the agreement. “In particular, no developing country should be obligated to implement intellectual property obligations concerning the duration of patent, the subject matter or standards for granting patents, procedures for addressing challenges to patentability [sic], the linkage of patents to drug registration, or the protection of drug registration data,” the group argued.

Proposal Would End Revocation of Individual AD/CVD Orders

Exporters and producers that are the subject of antidumping (AD) and countervailing duty (CVD) orders would not be able to get individual revocation of those orders unless all exports subject to the orders are also subject to revocation under a change in trade rules that the International Trade Administration (ITA) proposed in the March 21 Federal Register. The proposal would end the current policy that allows respondents to seek revocation of an order when administrative reviews have found that they have not dumped for three consecutive years or benefited from subsidies for five consecutive years.

“Company-specific revocations are not required by the [Trade] Act,” ITA asserted. The agency said the current process requires it to expend additional resources, including additional mandatory verifications, during administrative reviews when it receives a request for company-specific revocations.

In addition, ITA said, “only a small fraction of the reviewed companies are ultimately found to be eligible for a company-specific revocation under the regulations at issue here.” Specific companies that have received a zero margin determination during an administrative review would still get that margin even without revocation of the order, ITA said. The agency also argued that the proposed changes would be fairer for exporters not able to participate in the revocation process. “Companies not selected for review will normally receive an antidumping or countervailing duty rate based upon the average of the rates calculated for the individually reviewed companies,” it explained.

Doha Talks Primed for the Abyss, Observers Fear

Nearly all hope has faded for concluding the Doha Round this year, according to trade lawyers and officials after meetings March 22-23 of a group of 11 key trade partners failed to break the ongoing stalemate in negotiations. Discussion on the round’s future is expected to ramp up following a Trade Negotiations Committee meeting scheduled for March 29.

Negotiators have not made the progress they hoped to achieve by now, Deputy U.S. Trade Representative (USTR) Michael Punke admitted after the latest talks, citing “a significant concern” shared by other countries. His comments also followed recent talks with India and China. “Wide” gaps remain, Punke said.

Senior officials attending the so-called G-11 meeting had been trying to achieve a breakthrough in the talks, one trade official said. Now the goal of having revised draft modality texts in April likely won’t be achieved, he added. Everyone realizes that finishing the round this year is “really, practically unattainable,” said a trade lawyer following the talks. “This was one last effort to see if there was a way that anyone could see of putting together a deal in the short

term,” he said. The presumption now, and for some time, is that the intensive negotiating effort that started in January “really hasn’t produced anything,” he added. Movement “had to happen” in talks outside the negotiating groups, “and it hasn’t happened,” he said, referring to U.S. talks with the Chinese and Indians. The only text showing “any evidence of progress” deals with trade facilitation, he noted. Texts in other areas “will not be the basis for a final flurry of activity ending in July with a general agreement,” he suggested.

Speculation has also faded that World Trade Organization (WTO) Director General Pascal Lamy will come up with a “Dunkel Draft” similar to what Arthur Dunkel, the director general of the General Agreements on Tariffs and Trade, produced to get then-deadlocked Uruguay Round talks moving. A Dunkel-type text is possible but unlikely, sources in Geneva say. Lamy’s drafting of such a text “without talking to the members would probably be suicide,” one official argued.

SITAC Urges Foreign Availability Finding in STA Comments

Citing wide foreign availability of cameras, focal-plane arrays and other optical systems, the Bureau of Industry and Security’s (BIS) Sensors and Instrumentation Technical Advisory Committee (SITAC) submitted comments to BIS urging the agency to grant these items the broadest exceptions under the proposed License Exception Strategic Trade Authorization (STA). In a 300-page filing, which included a copy of BIS’ own report on the foreign availability of these products, SITAC disagreed with the agency’s proposal to exclude many of these products from the new license exception (see **WTTL**, Jan. 31, page 4).

Several of the 29 Export Control Classification Numbers (ECCNs) that BIS said would likely be excluded from STA are in Commerce Control List (CCL) Category 6, which includes many cameras and thermal-imaging products. “SITAC has a concern regarding the STA exception of 6A001, 6A002 and 6A003,” the committee told BIS. “While there are very sensitive portions of 6A001, 6A002 and 6A003, there are other parts of these ECCNs that have significant foreign availability in both regime partner and non-regime partner nations,” it said.

“Commercial Marine Seismic Equipment in 6A001 is available from companies located in Europe and China. Equivalent non-space qualified focal-plane arrays in 6A002a2 and 6A002a3 are available from several European manufacturers. The cameras containing those focal plane arrays, 6A003b, are currently available worldwide from vendors in Europe, the Middle-East, the Pacific, and most notably China,” the comment noted. SITAC also took issue with the STA’s increased documentation requirements, which it said create confusion among exporters and their foreign customers. These requirements “will likely create costly export system change requirements, and create confusion for the overseas customer,” it argued.

Chinese Barriers Block up to \$5.4 Billion in U.S. Farm Goods

American farmers are losing the opportunity to export an additional \$3.9 billion to \$5.4 billion in agriculture products to China because of Chinese trade barriers, the International Trade Commission (ITC) reported March 22 (ITC Report No. 4219). Despite these barriers, China has become the second largest market for U.S. farm exports after Canada, with U.S. agriculture exports to China nearly tripling from 2005 to 2010, when they reached \$17.8 billion, it noted.

U.S. export growth has been driven mainly by sales of soybeans, cotton, processed animal feed and hides and skins. “At the same time, China’s purchases of U.S. animal products, grains, and vegetable oils—sectors where the United States is highly competitive internationally—remained negligible,” the report stated. The ITC identified tariffs, non-tariff measures (NTM) and tariff-rate quotas (TRQ) as the main inhibitors of U.S. farm exports to China. “NTMs impeded between \$2.6 billion and \$3.1 billion in sales of selected U.S. agricultural products in 2009, while China’s tariffs and TRQs inhibited between \$1.3 billion and \$2.1 billion in sales of a

broader range of U.S. agricultural products that year,” the ITC said. “China maintains TRQs for wheat, corn, rice, cotton, sugar, and wool; those for wheat, corn, rice, and sugar are administered largely by state-owned enterprises. Over-quota tariff rates are generally prohibitive and TRQ fill rates are low for grains,” the report found. “Chinese NTMs effectively prohibit imports of U.S. beef, pears, fresh potatoes, pet food, and strawberries, and significantly restrict imports of U.S. apples and pork,” the ITC reported.

Aerospace Sales Aid Chinese Military, Report Claims

U.S., Japanese and European industry sales of aerospace equipment and technology to China and joint ventures with supposedly commercial Chinese aviation firms are helping the development of China’s military capabilities, claims a report the RAND Corporation prepared for the U.S.-China Economic and Security Review Commission and released March 22. “Foreign involvement in China’s civil aerospace sector has unquestionably contributed to its development and thus to the development of China’s military capabilities,” the report asserts.

“A U.S.-only ban would likely slow the development of China’s military aerospace capability by only a small amount while handing business opportunities to European and Asian companies and aggravating relations with Beijing,” the report cautions. U.S. restrictions on satellite sales to China contributed to the indigenous development of Chinese space launch capabilities.

“Thus, whether the United States could significantly improve its security through alterations of its policy toward civil aerospace cooperation with China without having a significant negative effect on its own economic interests is unclear,” it states. The report names numerous foreign firms that do business with Chinese aviation companies and paints a picture of a market that is too big for aerospace companies to abandon. China is expected to buy roughly 4,000 new jetliners over the next 20 years; 1,200 additional civil helicopters by 2018; and, by 2015, between 10,000 and 12,000 general aviation aircraft of various types, the report projects.

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PROTECTIVE GEAR: DDTC in March 23 Federal Register proposed amending ITAR to add exemption for temporary export of chemical agent protective gear under USML Category XIV(f)(4) for exclusive personal use to destinations not subject to restrictions and to Afghanistan and Iraq under specified conditions.

EXPORT ENFORCEMENT: ArvinMeritor of Troy, Mich., will pay \$100,000 to settle 14 alleged EAR violations without admitting or denying charges, BIS said March 22. In 2005 and 2006, ArvinMeritor allegedly shipped vehicle axles and seal assemblies controlled for national security reasons to China and France and allegedly exported controlled technical data to Italy, India, China, Mexico, South Korea and Brazil without licenses, BIS said. “ArvinMeritor voluntarily disclosed the violations and cooperated fully in the investigation,” said Douglas Hassebrock, director of BIS office of export enforcement.

MORE EXPORT ENFORCEMENT: Federal grand jury in Miami indicted four Colombians March 23 on five counts of illegally attempting to export 22 F-5 jet fighter engines to Iran in violation of IEEPA and Iran embargo. Indictment seeks forfeiture of engines by Felipe Echeverry of Bogota; Diego Echeverri of Elmhurst, N.Y.; Amparo Echeverri Valdes of Bogota; and Carlos Alfredo Pantoja-Coral of Bogota.

MORE EXPORT ENFORCEMENT: Lian Yang, of Woodinville, Wash., is expected to plead guilty to conspiracy to violate AECA as part of alleged scheme to obtain 300 radiation-hardened programmable semiconductors for export to China, after a criminal information was filed in Seattle U.S. District Court March 22. Yang was arrested Dec. 6, 2010, in the alleged conspiracy, involving efforts to buy items from three U.S. firms: Xilinx, Inc., Data Device Corporation and Peregrine.

KOREA: Rep. Brad Sherman (D-Calif.) says USTR assurances on treatment of goods from Kaesong Industrial Complex in North Korea under Korea-U.S. FTA aren’t adequate (see WTTL, March 21, page 4). “The language needs to be iron-clad,” he said in statement March 24. USTR had given Sherman’s office document, saying: “No Administration could change how Kaesong products are treated under the KORUS without Congress passing a law to extend any KORUS tariff benefits to products made in Kaesong or any OPZ. The President would need to sign that bill into law.”