Court Case Reveals Insights into the Commodity Jurisdiction Procedure

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Introduction

Export Control Reform and its focus on positive control criteria is here. The government believes that a positive control list will make jurisdiction assessments more certain and require less use of the commodity jurisdiction (CJ) procedure. However, what happens if an item is the subject of a CJ case and the government makes a determination that is inconsistent with the control criteria? This is not a theoretical question. A recent lawsuit and its underlying criminal prosecution involved this issue.

In 2007, Mr. Doli Pulungan was convicted of willfully violating the Arms Export Control Act (AECA) by attempting to export without a license Mark 4 CQ/T riflescopes to Indonesia. A 2003 CJ by the Department of State determined that this specific riflescope was a defense article under Category I(f) of the U.S. Munitions List (USML). The U.S. Court of Appeals for the Seventh Circuit in 2009 overturned this conviction on the grounds that Mr. Pulungan did not have the necessary criminal intent. The Seventh Circuit also heavily criticized the CJ procedure as the type of device common to totalitarian regimes.

After Mr. Pulungan's acquittal, he brought suit in the federal courts seeking a certificate of innocence and restitution from the government for his time served in federal prison. One of the key issues in these cases was whether the 2003 CJ determination was incorrect. That question was never answered, as the lawsuit was ultimately dismissed due to Mr. Pulungan's failure to prosecute. Yet, the case is important as it provides insight into the workings of the CJ process.

This article discusses these interesting discoveries.

The CJ Case and its Appeal

In 2002, the manufacturer submitted a CJ request to the Department of State for its Mark 4 CQ/T riflescope. The Department of State determined in 2003 that the riflescope was a defense article under Category I(f) of the USML. This entry controls riflescopes manufactured to military specifications. The Department of State did not explain why or how the riflescope was manufactured to military specifications. The manufacturer appealed the CJ determination in 2009 and the Department of State determined on appeal in 2013 that the riflescope was not a defense article.

The government's position for the differing determinations from 2003 and 2013 is based primarily on updated sales data; however, sales data is immaterial to addressing the factual question of whether any riflescope is manufactured to military specifications. Whether a riflescope is manufactured to military specifications is a characteristic of the riflescope that is not undone by arbitrary sales data. In this case, whether a riflescope is sold 100% to a military or civilian entity does not change this characteristic. Moreover, the International Traffic in Arms Regulations (ITAR) itself states that the intended use of an article for civilian or military purposes is not relevant for determining jurisdiction.

Given that the technical specifications of the riflescope are the same today as they were in the 2002 CJ submission, then we have a situation where there are the *same* material facts and the *same* regulation, and yet we have two *different* outcomes. The government asserts that the differing result is because "the [riflescope] no longer met the qualifications for a defense article on the USML." Yet, the qualifications within Category I(f) and the technical specifications of the riflescope were unchanged. In explaining the differing CJ determinations, the government relied on ITAR § 120.3.

The Use of ITAR § 120.3

The government used ITAR § 120.3 to analyze whether the riflescope is controlled as a defense article. Unfortunately, since it was amended in 1993, this section has been widely misunderstood and its application in this case is inappropriate because riflescopes "manufactured to military specifications" were already included on the USML. The purpose of ITAR § 120.3 is to provide industry with general notice

as to how items are *added* to the USML. For the *current* listing of what constitutes a defense article, the criteria is available in the form of the USML as published. The definition of a defense article in ITAR § 120.6 makes this clear:

> "[D]efense article means any item or technical data designated in § 121.1 of this subchapter. The policy described in § 120.3 is applicable to designations of *additional* items." (Emphasis added)

The AECA only covers items listed on the USML as defense articles and defense services. An item determined for reasons under ITAR § 120.3 is not on the USML until there is an appropriate entry for it. To the extent that items are added to the USML because there is not an entry already on the list for such items, then the USML must actually be amended to do so. Anticipating such a scenario, the regulations provide a temporary holding place in Category XXI.

The regulation that states this requirement was still within ITAR § 120.3:

> "Any item covered by the U.S. Munitions List must be within the categories of the U.S. Munitions List. The scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778)."

By classifying the riflescope as fitting within Category I(f) it must *actually* meet the stated control criteria: that it is a riflescope manufactured to military specifications. This criteria poses two fact based questions: (1) is it a riflescope and (2) is it manufactured to military specifications. Again, the government cannot use the criteria within ITAR § 120.3 in the alternative, especially for an entry that has positive control parameters as in the case of Category I(f).

It's also not only Category I(f) that excludes riflescopes not manufactured to military specifications. The note for Category I specifically states: "This category does not include riflescopes and sighting devices that are not manufactured to military specifications." Thus, controlling this riflescope as a defense article required an amendment to the USML consistent with ITAR § 120.3.

Here, the government failed to provide any explanation on how the riflescope was manufactured to military specifications. In fact, the government agreed that the riflescope was not manufactured to military specifications when it responded to the CJ appeal. It is evident that the government's determination was not appropriately focused on the applicable USML control criteria but instead over immaterial sales data.

The Use of AECA § 38(f)

There is one additional issue. Section 38(f) of the AECA requires congressional notification for the removal of any item from the U.S. Munitions List. As the government's position is that the initial CJ determination from 2003 is correct, how did the Department of State re-designate the same riflescope from the USML without congressional notification?

Specifically, Section 38(f) provides that:

> **The President may not remove any item from the Munitions List until 30 days after the date on which the President has provided notice of the proposed removal to the Committee on International Relations of the House of Representatives and to the Committee on Foreign Relations of the Senate** in accordance with the procedures applicable to reprogramming notifications under section 2394–1 (a) of this title. Such notice shall describe the nature of any controls to be imposed on that item under any other provision of law. (Emphasis added)

The ITAR within § 120.4(a) also notes this requirement: "[The CJ procedure] may also be used for consideration of a re-designation of an article or service currently covered by the U.S. Munitions List. **The Department must provide notice to Congress at least 30 days before any item is removed from the U.S. Munitions List**." (Emphasis added)

For non-observers of the congressional notification process, it involves the identification of specific articles within an entry as well as the removal of entire entries - or classes of items - from the USML. Removals have included specific articles such as chemical toilets used on military aircraft. If a non-lethal article such as a toilet requires congressional notification, then a riflescope would as well.

In removing this riflescope from the U.S. Munitions List, did the State Department comply with this Congressional requirement? It is, after all, a condition precedent under the AECA and ITAR to removing a defense article. This author cannot find anything in the public record to indicate that the required congressional notification was provided to Congress.

If there is no congressional notification, then this riflescope is still on the USML. Interestingly, since the government admits the riflescope is not manufactured to military specifications, then it was not ever designated on the USML. However, the government maintains that the 2003 CJ determination was correct. Logically, the government's position does not make sense.

Conclusion

This case raises three primary concerns. The first concern is over what criteria the government applies in CJ cases. To the public, the criteria is on the USML. However, it is apparent that government uses alternative criteria that could create any basis to control a particular article, even if it doesn't square with the USML entry. Recent federal court cases don't seem supportive of the government's approach and focus instead on the specific criteria on the USML.

The second concern is over what happens if the regulators make a mistake that results in a determination contrary to the law. As the Pulungan case shows, the manufacturer was harmed by having its product incorrectly controlled on the USML. Additionally, exporters are harmed because of the incorrect civil and criminal liability associated with the item due to the prior incorrect CJ determination.

The third concern is over procedure. Why did it take the government so long to respond to what should have been a simple CJ case? It took over 400 days to respond to the initial CJ submission. It also took over 1,400 days (4 years) to respond to the appeal. It should not have taken government experts a total of 1,800 days over a total period of ten plus years to figure out whether the riflescope is manufactured to military specifications. Also, why did the Department of State not follow the law by providing a congressional notification to remove an item from the USML?

Ultimately, the changes to the USML under Export Control Reform to fact-based positive control criteria will weaken the government's position that CJ determinations are not subject to judicial review. This is a position that has already been substantially weakened by recent criminal and civil court cases. While the law in this area is evolving, it seems increasingly likely that a court would allow judicial review of a government determination that is inconsistent with the factual evidence and the USML criteria.

This topic also demonstrates the importance of understanding the consequences of using the CJ process, and the importance of how to frame facts and law effectively in CJ requests to greatly increase the chance of achieving favorable outcomes from the start.

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