

**Seventh Circuit Reads AECA  
Restriction on Judicial Review Narrowly;  
Decision Could Lead to More Specific Identification of  
Which Items Are Subject to the U.S. Munitions List**

**By Eric L. Hirschhorn<sup>1</sup>  
Winston & Strawn LLP**

In 1989, the Arms Export Control Act (“AECA”) was amended to provide that “[t]he designation, in regulations issued under [AECA § 38], of items as defense articles or defense services for purposes of this section shall not be subject to judicial review.”<sup>2</sup> Although this provision likely renders U.S. Munitions List (“USML”) designations “immune from judicial review, at least on a direct challenge,” it has been unclear whether “the court hearing, say, a criminal proceeding charging an AECA violation could examine such a designation.”<sup>3</sup> On June 15, 2009, the U.S. Court of Appeals for the Seventh Circuit provided at least a partial answer.

The USML includes “[r]iflescopes manufactured to military specifications.”<sup>4</sup> Doli Pulungan allegedly attempted to export 100 Leupold Mark 4 CA/T riflescopes (the “Scopes”) to Indonesia.<sup>5</sup> Because he erroneously believed that the arms embargo against Indonesia remained in force, the Scopes were to be transshipped via Saudi Arabia.<sup>6</sup> Pulungan was convicted of violating the AECA on the ground that the Scopes were “manufactured to military specifications.”<sup>7</sup> On appeal, he and the government agreed that because the AECA criminalizes

---

<sup>1</sup> Any opinions expressed herein are solely those of the author and not those of his law firm or any other entity.

<sup>2</sup> Anti-Terrorism and Arms Export Amendments Act of 1989, Public Law No. 101-222, § 6, 103 Stat. 1896 (codified at 22 U.S.C. § 2778(h)).

<sup>3</sup> ERIC L. HIRSCHHORN, THE EXPORT CONTROL AND EMBARGO HANDBOOK, SECOND EDITION 112 (2005).

<sup>4</sup> 22 C.F.R. § 121.1, categ. I(f) (2008).

<sup>5</sup> *United States v. Pulungan*, \_\_\_ F.3d \_\_\_, 2009 U.S. App. LEXIS 12736, \*1 (7<sup>th</sup> Cir. June 15, 2009) (No. 08-3000).

<sup>6</sup> *Id.* at \*1-\*2.

<sup>7</sup> *Id.* at \*2.

only willful violations, the government was required to show that Pulungan had “knowledge that a license is required.”<sup>8</sup>

The government had sought to prove this element of the offense through testimony that the Directorate of Defense Trade Controls (“DTC”) had concluded that the Scopes are “manufactured to military specifications.”<sup>9</sup> The witness did not produce the DTC decision and, according to the court of appeals, “would not say what those specifications are or why the Directorate believes that the Mark 4 CQ/T is ‘manufactured to’ them.”<sup>10</sup> Pulungan apparently asked neither the manufacturer nor DTC whether the Scopes were USML items.<sup>11</sup> Over the defendant’s objection, the trial judge, relying upon § 2778(h), instructed the jury that neither she nor they could question the propriety of the classification.<sup>12</sup>

The court of appeals, speaking through renowned conservative Chief Judge Frank Easterbrook, reversed Pulungan’s conviction. First, said the court, the Scopes have not been placed on the USML by “regulation,” for the relevant USML entry refers only to “[r]iflescopes manufactured to military specifications” and does not expressly name the Scopes:

[W]hile a narrative description may be the most sensible way to proceed, it also limits the effect of § 2778(h). Only material “in regulations” is covered by that statute. The Directorate’s conclusion that the Leupold Mark 4 CQ/T riflescope is “manufactured to military specifications” is not in a regulation and so is unaffected by § 2778(h).

The Directorate’s claim of authority to classify any item as a “defense article,” without revealing the basis of the decision and without allowing any inquiry by the jury, would create serious constitutional problems. It would allow the sort of secret law that *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), condemned. \* \* \* A regulation is published for all to see. People can adjust their conduct to avoid liability. A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use in a

---

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*7-\*9.

<sup>12</sup> *Id.* at \*3.

criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian regimes. Government must operate through public laws and regulations. Thus the United States must prove, and not just assert, that the Leupold Mark 4 CQ/T riflescope is “manufactured to military specifications.”<sup>13</sup>

Moreover, continued Easterbrook, even if the government were to prove the Scope “to be a ‘defense article,’” the defendant “cannot be convicted unless he *knew* that it is one, and that licenses are necessary to export them.”<sup>14</sup> Even though the manufacturer had secured a commodity jurisdiction determination placing the Scopes on the USML, that fact was not known to Pulungan or the general public.<sup>15</sup> Pulungan did know, based upon Internet web page printouts found in his possession, that exports of the Scopes were restricted but the court said that could have been for commercial rather than regulatory reasons.<sup>16</sup>

Also, said Easterbrook, Pulungan’s mistaken belief that arms exports to Indonesia were illegal because of an arms embargo against that country does not translate into knowledge that the Scopes were “manufactured to military specifications.”<sup>17</sup> “[T]he ‘willfulness’ element in a regulatory offense such as § 2778(c) is designed to require knowledge of *this* rule, rather than of some other actual or potential regulation.”<sup>18</sup>

Finally, the court said that even if intent could be transferred in this manner, “§ 2778(c) requires proof of *knowledge* of the law’s coverage, as well as intent to violate the law. Pulungan acted willfully only if he knew that [the Scopes] are ‘manufactured to military specifications.’”<sup>19</sup> The opinion suggests that DTC should list in the regulations “all riflescopes that it has tested and

---

<sup>13</sup> *Id.* at \*5-\*6.

<sup>14</sup> *Id.* at \*8 (emphasis in original).

<sup>15</sup> *Id.* (“Pulungan was not an industry insider, nor were his potential customers”).

<sup>16</sup> *Id.* at \*9-\*11.

<sup>17</sup> *Id.* at \*11-\*13.

<sup>18</sup> *Id.* at \*13 (emphasis in original).

<sup>19</sup> *Id.* at \*13-\*14 (emphasis in original).

found to be covered,” thus taking advantage of § 2778(h)’s bar on judicial review and giving notice to affected persons.<sup>20</sup>

The decision concludes that “the evidence is insufficient to show, beyond a reasonable doubt, that Pulungan knew that these ‘scopes were ‘defense articles’ that required export licenses,” and that accordingly his conviction must be reversed.<sup>21</sup>

As of this writing (June 27, 2009), the government’s time for seeking rehearing or Supreme Court review of the ruling has not yet run.<sup>22</sup> The decision can be criticized for ignoring the fact that Pulungan could have asked the manufacturer or DTC whether the Scopes are USML items. Sometimes that is not determined until a request is made but in this particular instance, DTC already had ruled that the Scopes are USML items.<sup>23</sup> All Pulungan had to do was ask.

If the decision stands, it could complicate significantly the government’s approach to determining and publicizing what items are subject to control. This issue is more acute in the context of the USML, which often relies upon general descriptions like that addressed in this case, than for the Commerce Control List (“CCL”), which typically sets out technical specifications delineating which items fall into which categories.

The general rule long has been that manufacturers are encouraged to self-determine whether their items are on the USML or the CCL, turning to the commodity jurisdiction procedure<sup>24</sup> only when unable to resolve the issue themselves. In such instances, there typically is public knowledge only if the manufacturer publishes that information or otherwise makes it

---

<sup>20</sup> *Id.* at \*14.

<sup>21</sup> *Id.* at \*15.

<sup>22</sup> The decision arguably conflicts with a 1985 decision of the 3<sup>rd</sup> Circuit that a USML entry for “countermeasures and counter-countermeasures” provided adequate notice for criminal liability on the part of an exporter. *See United States v. Zheng*, 768 F.2d 518 (3<sup>rd</sup> Cir. 1985), *rev’g* 590 F. Supp. 274 (D.N.J. 1984). The existence of a conflict between the decisions of different federal courts of appeals often is a basis for the Supreme Court’s decision to hear a case. S. Ct. R. 10(a).

<sup>23</sup> *Pulungan*, at \*8.

<sup>24</sup> *See* 22 C.F.R. § 120.4 (2008).

available. Some manufacturers do this but many do not. Further, the *Pulungan* ruling suggests that a would-be exporter isn't compelled to inquire about the export control status of the goods. Thus the decision may leave the government, in AECA prosecutions, unable to prove that the defendant knew an item was on the USML unless (1) its status is obvious (e.g., a fighter aircraft or a sophisticated weapons system) or (2) a commodity jurisdiction determination has been made *and published* by DTC or the manufacturer.

To make matters even more difficult from the government's standpoint, the decision suggests that anything less than a product by product, model by model listing raises constitutional questions.<sup>25</sup> If that is so, then even a legislative change to the AECA might not obviate the problem.

One possible answer might be for DTC to follow the longtime approach of the CCL—including technical specifications and parameters in USML listings wherever it's practicable to do so. A case where the exporter has ignored such specifics might be viewed by the courts quite differently than one in which the only regulatory guidance is “manufactured to military specifications.”

Where the *Pulungan* decision will lead is not yet clear. What is clear, though, is that it can only complicate the lives of the government's already overburdened export control agencies.

---

<sup>25</sup> See *Pulungan*, at \*5-\*6.