AMERICAN SHIPPING COMPANY

AMERICAN SHIPPING COMPANY

Supply Chain Gazette

content by INTERNATIONAL TRADE TODAY

November 2022

Trade Court Says CBP Cannot Seize or Exclude Drug Paraphernalia Made Legal at State Level

The U.S. cannot seize or forfeit imports that are federally deemed "drug paraphernalia" but whose delivery, possession and manufacture were made legal at the state level, the Court of International Trade ruled Sept. 21. Judge Gary Katzmann found Washington state's move to make the marijuana-related drug paraphernalia legal allows interested parties to import the paraphernalia under the federal exemption laid out in the Controlled Substances Act.

"The Court's decision today is a huge win for the cannabis industry," Richard O'Neill, counsel for plaintiff Eteros Technologies USA, told *Trade Law Daily*. "It affirms what Neville Peterson has long advised its clients—i.e., that imports of marijuana-related paraphernalia in Washington State, and many other states, are 'authorized' by state law and are therefore exempted from the import prohibitions attaching to all other forms of drug paraphernalia."

In April, importer Eteros Technologies USA entered motor frame assemblies—used to make marijuana harvesting units and deemed "drug paraphernalia"—through the Port of Blaine, Washington. CBP excluded the goods from entry, as drug paraphernalia under the CSA. Eteros contested the exclusion, telling the trade court the goods should be permitted to be imported under 21 U.S.C. Section 863(f)(1).

The exemption says CSA Section 863, which prohibits the sale, distribution or import of drug paraphernalia, doesn't apply to "any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items." Katzmann looked to the conditions that trigger the exemption's applicability. The judge ruled that the authorization by one relevant legislative body at the local, state or federal level was sufficient to permit a party to engage in one of the activities barred by Section 863.

The next key question for the court to consider concerned how to construe the word "authorized." Katzmann held that the "interplay between the Federal and Washington State systems on marijuana-related drug paraphernalia necessitates construing the term 'authorized' ... as a matter of first impression." The judge said Washington state authorized Eteros to import the drug paraphernalia.

Katzmann, though, said the statute's ordinary meaning doesn't conclusively rule in favor of one party. The government argued per the statute's plain terms, the combination of the words person and authorized "explicitly requires a person to [be] specifically ... authorized to engage in the conduct at issue." Eteros, however, said the state plainly authorized the importer to enter the paraphernalia by repealing its past prohibitions on marijuana-related goods, "and that the court cannot accept the Government's person-specific construction without adding words to the statute."

The court, looking to the dictionary definitions of the words "authorize" and "any," said it can find support for both interpretations. The exemption can be found to refer to a class of people as put forth by Eteros or a single person authorized by a license or some similar mechanism, as put forth by the government. Having hit a dead end via the plain meaning of the statute, Katzmann turned to the "relevant case law." Eteros cited the 2018 Supreme Court case *Murphy v. NCAA*.

In this case, the U.S. Supreme Court considered whether a New Jersey law making sports betting legal violated the federal Professional and Amateur Sports Protection Act (PASPA), which made it illegal for states to authorize sports betting. The Supreme Court held that when a state repeals a law that prohibited something—in this case the state law banning sports gambling—the state authorizes the previously-banned activity. In the *Murphy* context, the New Jersey law thus authorized sports betting, putting it in violation of PASPA. The Supreme Court then ruled in favor of New Jersey, finding that PAPSA's prohibition against state authorization of sports betting violates the anticommandeering doctrine of the Constitution's 10th Amendment.

While the case does not explicitly direct lower courts to use this definition of "authorize" when looking at statutes other than PASPA, Katzmann said it has "good reasons for doing so here." The Supreme Court's reasoning can be adopted because the *Murphy* court did not construe the term to rest specifically in PASPA and that definition is relevant to the CSA, the judge said.

Katzmann applied the Murphy ruling—"namely, that the repeal of a state law banning an activity gives those now free to conduct the activity in question the 'right or authority' to so act"—finding that Eteros is "authorized" as laid out in the CSA federal exemption. In permitting the delivery, possession and/or manufacture of marijuana-related drug paraphernalia, the Washington state legislature said it was illegal to deliver, possess or manufacture drug paraphernalia for "other than marijuana." In doing so, it made it legal to possess marijuana-related drug paraphernalia, making CBP's exclusion of such goods illegal, the court ruled.

"As a result of this decision, each State's cannabis legalization scheme will need to be evaluated against the federal authorization exemption which CBP has refused to apply in any circumstance," O'Neill said.

The judge wrapped up his opinion by finding that its holding is in line with the statute's purpose. The plain text of the exemption "suggests Congress contemplated non-uniform application of subsection 863(a)'s prohibitions on selling, transporting, and importing/exporting drug paraphernalia," the opinion said. "This is so because Congress used a disjunctive 'or' to make local, state, and federal 'authoriz[ation]' each individually sufficient" to make all the restrictions inapplicable.

"In sum, upon consideration of the ordinary meaning of the statutory terms, relevant case law, and Congress's purpose, the court determines that Eteros is 'authorized' under 21 U.S.C. § 863(f)(1) such that § 863(a)(3)'s federal prohibition on importing drug paraphernalia does not apply to Eteros' Subject Merchandise at the Port of Blaine, Washington," the opinion said. "The court reiterates that it is not within its province to weigh policy arguments regarding the merits of legislation or to entertain invitations to rewrite legislation; its charge is to interpret and apply the statute as enacted by Congress. Insofar as the Government seeks a different statute, that argument can be addressed."

(*Eteros Technologies USA v. U.S.*, Slip Op. 22-111, CIT #21-00287, dated 09/21/22, Judge Gary Katzmann. Attorneys: Richard O'Neill of Neville Peterson for plaintiff Eteros; Guy Eddon for defendant U.S. government) — ***Jacob Kopnick***

CBP Official Says Agency Has Released UFLPA Targeted Shipments Based on 'Applicability'

CBP has released shipments targeted under the Uyghur Forced Labor Prevention Act based on "applicability," where the importer successfully proves the goods aren't subject to the UFLPA because they aren't connected to the Xinjiang region of China, a CBP official said. However, the agency has yet to see an attempt to prove goods subject to UFLPA aren't made with forced labor, the official said.

Speaking Oct. 25 with business groups in Asia, the official said CBP has not received an "admissibility package" that seeks to overcome UFLPA's rebuttable presumption and prove "by clear and convincing evidence" that no forced labor was involved in the production process. On the other hand, CBP has seen applicability packages, where the importer "successfully demonstrated to us that UFLPA doesn't apply, and then the merchandise goes on its way assuming it's in compliance" with other U.S. laws, the official said.

Overall, in fiscal year 2022, CBP, which requested anonymity for the officials per agency policy, targeted 3,600 entries valued at about $816 million based on the suspicion they were made with forced labor, the agency official said. Some 1,600 of those entries, worth about $486 million, were targeted under the UFLPA, the official said. Another CBP official said in late September that the agency had yet to release a shipment "detained" under UFLPA since the law took effect in June (see ITT 10/03/2022).

CBP's forced labor efforts seem to be having concrete effects on supply chains. "This year, we have engaged with a record number of foreign entities that are remediating forced labor conditions in their production, and we believe that this will absolutely improve working and living conditions for thousands of workers worldwide," the CBP official said. The official cited remediation efforts by Malaysian glove manufacturer Top Glove that resulted in CBP's modification of a forced labor finding (see ITT 09/10/2021), as well as CBP's more recent modifica-

tion of a withhold release order issued on an Indian apparel manufacturer (see ITT 09/08/2022), as two examples of the agency's success.

CBP's goal in the next fiscal year "is not to seize our way out of the problem as goods arrive at the borders but really to push our enforcement efforts working with our interagency colleagues, our inter-department colleagues, [civil society organizations], [nongovernmental organizations] and all good businesses who are really trying to get this right and eliminate forced labor from their supply chains, really working collectively," the official said.

One major risk factor companies can be looking for is production in countries where migrant labor is prevalent, said another CBP official who also spoke at the event. That can often involve third parties involved in recruitment, who may extract fees and put workers in debt bondage, the official said.

Companies may also have trouble demonstrating a lack of forced labor in countries where third-party audits can't be independently conducted, including China, the first CBP official said. The lack of a supply chain audit report could make demonstrating admissibility difficult, the official said. China, for example, has an anti-sanctions law that makes it "very difficult to obtain cooperation and documentation from suppliers in China," and was the impetus behind the rebuttable presumption in UFLPA, the official said. And local laws in many "Southeast Asian countries make third party auditing very challenging," the official said. — ***Brian Feito***

CBP Looks Set for Indefinite Delay, TSN Discussions on New Chinese Postal Code Data Element

CBP officials raised the prospect of an indefinite delay to their plans to add a new data element for the Chinese postal code to cargo release filings, after customs brokers and software developers raised concerns about the new requirement during a regular bi-weekly call to discuss ACE on Oct. 27.

A CBP official on the call said the agency will change its ACE development schedule so that the recently delayed deployment date for the Uyghur Forced Labor Prevention Act "region alert" will be "TBD," rather than the current Dec. 15. That date itself had been delayed from "November" the day before the ACE call (see ITT 10/26/2022).

The official said CBP will use the delay to set up a working group through the Trade Support Network to talk through issues related to the deployment, which will add a new required data element for postal code for any entries with a country of origin of China or a manufacturer ID in China. Validations would be set up to warn the entry filer if the postal code is in Xinjiang, or if it's not a valid Chinese postal code.

CBP officials clarified earlier in the call that the postal code will be required in two contexts: on the cargo release, as well as whenever a manufacturer ID is created or updated. One CBP official said the postal code would not be required for existing manufacturer IDs.

However, software developers on the call pointed out that existing MIDs are often used in the background by filing software to retrieve data for the name and address fields on the cargo release transmission, which is where the Chinese postal code will also go. No postal code would be retrieved from those MIDs, which for brokers can number in the thousands, and there currently exists no way for brokers to update their own MIDs, even if it were feasible.

A CBP official said the agency would not be updating existing MIDs on their end to include the postal code. "The burden that you're putting on the trade without supplying resources to validate … postal code is substantial," replied a software developer on the call.

Another issue identified by a broker on the call is that the MID on an entry can also be the shipper for cargo that goes through a third country. The broker asked whether the new requirement for Chinese postal code means filers will be obligated to report a Chinese MID for goods with a Chinese origin, or if instead filers can continue to use the third-country MID for the actual shipper. CBP officials on the call had no ready answer.

A CBP official on the call said the TSN working group would consult with other trade participants in addition to software developers. More information about the change, including a detailed information sheet on the requirements, will be out by Nov. 3, another agency official said. — ***Brian Feito***

Clock Stopping Events Will Not Be Part of Detention or Demurrage Invoices

The Federal Maritime Commission released a notice of proposed rulemaking further refining prohibited practices for demurrage and detention, which is required under the Ocean Shipping Reform Act (OSRA).

The Commission is proposing to:

- Clarify which parties may be billed for demurrage or detention (only those they have a contractual relationship with)
- Adopt the list of information on demurrage or detention invoices that was mandated in OSRA
- Add more information past what was codified in law
- Require that common carriers and marine terminal operators issue invoices within 30 days after the charges stop accruing, and allow 30 days to dispute the charges "with clear information about how charges should be disputed."

This rulemaking, announced Oct. 7, follows an advance notice of proposed rulemaking from February (see ITT 02/07/2022 and ITT 03/25/2022). At that time, the FMC thought about requiring those billing for demurrage and detention to identify "clock-stopping" events—in other words, conditions where per-day billing should not apply because there was no way to drop off or pick up because there were no available containers or appointments or there were restrictions on the chassis the port would accept. Ultimately, it decided not to, listening to carriers and ports, who said it would be nearly impossible to know all that.

"Instead of requiring billing parties to identify specific 'clock-stopping' events on demurrage and detention invoices, the proposed rule would require the billing party to identify the specific dates on which they charged demurrage or detention. The proposed rule permits billing parties to take into account any intervening events that affected the charges, if known, and enables billed parties to confirm or dispute the validity of charges on specific dates," the notice says.

Detention and demurrage notices will not be sent to customs brokers and motor carriers if this is the version of the rule that becomes final. Motor carriers also will not have to follow these rules if they bill a vessel-operating common carrier.

"The Commission views the practice of sending an invoice to multiple parties involved in the shipping transaction rather than sending an invoice for demurrage or detention charges to only the person that has contracted with the billing party for the carriage or storage of goods as untenable," the notice said.

The rule will apply to non-vessel operating common carriers, even though NVOCCs argued they should not be in the scope of the regulation. "There is a greater need for transparency when the NVOCCs mark up demurrage or detention charges assessed by [vessel-operating common carriers] or [marine terminal operators] or when NVOCCs charge demurrage or detention based on their own tariff rules or negotiated agreements," FMC wrote.

FMC is still undecided as to whether consignees on the bill of lading can be sent demurrage or detention invoices, and asked for comments on that issue. Comments can be submitted for 60 days after the notice is published in the *Federal Register* at regulations.gov, docket number FMC-2022-0066.

The previous round of notice and comment drew more than 80 comments.

The items required on the invoice under OSRA are:

- date that the container was made available
- port of discharge
- container number
- for exported shipments, earliest return date
- allowed free time
- start date and end date of the free time
- applicable detention or demurrage rule underpinning the daily rate
- applicable rate
- total amount due
- email, telephone number for questions or requests for mitigation of fees
- statements that the charges are consistent with FMC rules and that the common carrier's performance "did

not cause or contribute to the underlying invoiced charges."

FMC proposes that the bill of lading number and the basis for why the billing party was invoiced also be on the invoice, and notes that ports of discharge do not apply to export shipments. — ***Mara Lee***

USTR Will Solicit Comments on Effectiveness of Section 301 Tariffs, Better Alternatives

The Office of the U.S. Trade Representative is soliciting comments on how effective Section 301 tariffs on Chinese imports have been in convincing China to change its policies "related to technology transfer, intellectual property, and innovation"—something USTR Katherine Tai has acknowledged the U.S. is not able to do.

It also wants to know if they are effective in "counteracting China's acts, policies, and practices related to technology transfer, intellectual property, and innovation," which is what she says their real purpose is. The office is asking for suggestions of other actions—or ways to modify the tariffs—"that would be more effective in obtaining the elimination of or in counteracting China's" policies in these areas.

USTR is also asking for comments on how the tariffs have affected U.S. consumers and the U.S. economy.

The comment portal at comments.USTR.gov will open Nov. 15, and will close Jan. 17, 2023.

National Security Adviser Jake Sullivan, in a call with reporters Oct. 12, said the administration will be evaluating how to continue the Section 301 actions on Chinese imports "through the particular prism of, you know, what ultimately is going to strengthen the hand of the U.S. industrial innovation base and our workforce here in the United States."

He said USTR is looking at each product's tariff, what the impact of that additional tariff has been "and then looking at ways that the U.S. can more effectively approach our trade policy with China to ensure that we are achieving the strategic priorities the President has laid out, which is the strongest possible American industrial and innovation base and a level playing field for American workers.

"So, that's the process that was launched a few weeks ago. It will continue over the coming months, and it will produce outcomes and recommendations to the President about a way forward." — ***Mara Lee***

Panelists Say Section 301 Tariffs Unlikely to Change Much; GSP, MTB Could Renew This Year

Although President Joe Biden criticized the Trump administration tariffs on Chinese imports during his campaign, and although his treasury secretary repeatedly said they contribute to inflation and some of them are harmful, trade lobbyists for UPS and the U.S. Chamber of Commerce said the tariffs are largely here to stay.

Catherine Mellor, vice president of international trade at UPS, said during an Oct. 19 webinar that manufacturing unions have come to see the Chinese tariffs as protecting their workers' jobs. "That has created a complication of rolling them back," she said.

Mellor noted that UPS is the largest employer of Teamsters, and that its drivers are paid handsomely. "These are not the jobs they're talking about when they're talking about worker-centric trade," she said. "They're talking about manufacturing jobs."

Isabelle Icso, director of international policy at the Chamber of Commerce, agreed. "Politically, it's important to Biden that he not look weak on China. Any lifting or modifications on tariffs will have to be done in an artful … way." She predicted that after the review is done, the administration could raise tariffs past 25% on some products that are seen as strategic, and lower some on others, but whatever changes are possible would be "quite surgical."

She said the Chamber will continue to push for tariff relief, whether through an exclusion process or this kind of policy, or both.

She said Democrats are split on whether an exclusion process is necessary or whether all the tariffs should stay, and the Republicans also have a hawkish wing and a more-sympathetic-to-importers wing.

She said she'll be waiting to see if a change in control in the House of Representatives changes the political dynamic.

The moderator asked Isco about Sen. Rob Portman's comments that he's interested in a lame duck trade "grand bargain" (see ITT 10/18/2022), and she said she thought it was quite possible that an end-of-the-year bill could reauthorize the Generalized System of Preferences benefits program and the Miscellaneous Tariff Bill.

"I think the chances [that] other items get tacked on is less likely," she said, because of some of the demands on the table and the thorny politics around them. She said she thinks it's more likely GSP and MTB will be renewed "early next year."

"We at the Chamber have been pushing hard for GSP and MTB reauthorization as soon as possible," she added.

The panelists, who were speaking at a webinar hosted by Women in International Trade's New England Chapter, also talked about the Indo-Pacific Economic Framework, which is not expected to lower tariffs, but could improve trade facilitation.

Icso said the Chamber's leadership believes the U.S. rejoining the Trans-Pacific Partnership would be best, "but we obviously recognize the sort of political realities about this." The Chamber is eager to see the digital trade pillar in the IPEF come to fruition, as well as trade facilitation, energy, technology and government procurement planks. "Re-engaging in the region is so important no matter what shape it takes," she said.

U.S. Trade Representative Katherine Tai has argued that IPEF is about market access, even though it is not designed to lower tariffs, because of its emphasis on good regulatory practices. Many of the barriers U.S. agricultural exports face are around biotechnology approvals or what U.S. producers see as overly strict sanitary and phytosanitary rules.

"I think pressure is really building in Washington to get more offensive, and really open more markets for U.S. goods," Isco said, and politicians will want to see if Tai is right, and that IPEF's changes to SPS rules result in higher levels of ag exports to participating countries.

But Icso said it's possible the administration will re-animate paused trade talks for traditional trade agreements. "I think a House flip could certainly increase this pressure," she said. "I'd expect to see more engagement with the U.K., Kenya, and even Taiwan."

In response to a question from *International Trade Today*, Icso said the Chamber hasn't gotten a lot of details about the progress in the first year of talks between the EU and the USTR to find agreement on trade in steel that preferences steel made with less carbon intensity and protects their domestic steel makers from uneconomic overcapacity.

"We're certainly interested in seeing how this agreement takes shape," Icso said. But she said when she looked at the readouts about the most recent meeting between the EU's top trade negotiator and Tai, she sensed a difference of opinion about how far along the two sides are.

She said the EU described the idea as "still very much a work in progress," and the USTR statement said the two sides agreed to pick up the pace of negotiations. In a press conference before their meeting, both said they are conscious of the self-imposed deadline of one year from now (see ITT 10/13/2022). — ***Mara Lee***

FDA Food Facility Registrations Due by Dec. 31, Agency Says

FDA recently sent out a reminder that the food facility registration period began Oct. 1, and new registrations and registration renewals are due by Dec. 31. "The FDA will consider the registration of a food facility to be expired if a facility's registration is not renewed" by Dec. 31, the agency said. "There is no fee associated with registration or renewal. Owners, operators, or agents in charge of food facilities must submit their renewal information electronically through their FDA Industry Systems account, unless they have received a waiver that allows for paper submission."

FDA Issues Small-Business Guide for Food Testing Program

FDA issued a small-entity compliance guide Oct. 19 to help small businesses comply with its final rule on laboratory accreditation for analyses of foods (LAAF). The guide includes information for labs that want to be accredited under the scheme, as well as for importers that must use accredited labs to demonstrate admissibility of foods with an iden-

tified food safety issue and removal from import alerts, and also to satisfy other product-specific testing requirements.

FDA has said it will pursue a "stepwise" approach to implementation of the LAAF program. Once the agency has recognized a sufficient number of accreditation bodies, it will announce that laboratories may apply to be accredited under the program. Once enough laboratories have been accredited, FDA will publish a *Federal Register* notice giving importers (i.e., owners and consignees) six months' notice that they will be required to use a LAAF-accredited laboratory for food testing.

FDA Guidance Details Examples of Foreign Inspection Refusals That Lead to Inadmissibility

FDA issued a guidance document Oct. 20 on the types of actions the agency will consider refusal of inspection by foreign food facilities and governments for the purposes of refusing food imports from those facilities. Under federal food safety laws, food from foreign facilities must be refused admission to the U.S. if the facility does not cooperate with FDA inspectors.

The guidance document details examples of when FDA may refuse admission to articles from a facility where the foreign facility or government did not allow FDA to schedule an inspection, or when the foreign facility or government did not allow FDA to conduct an unfettered inspection.

For example, FDA will consider a lack of response within 24 hours to an FDA inspection scheduling request to be a refusal of an inspection, with the 24 hours running from proof of delivery. FDAl also wil consider it a refusal of inspection if a facility agrees to an inspection start date then requests a later date without giving a reasonable explanation.

Examples of a facility not allowing FDA to inspect a facility include a refusal to permit entry into an establishment (including by not answering phone calls when an inspector arrives), closing a facility on the day of inspection and sending staff home on the day of inspection. Other examples include closing off a part of the facility, limiting the inspection to an unreasonably short period of time or causing unreasonable delays or refusing to allow collection of evidence or access to records.

The guidance also details examples of ways government can refuse inspection for inadmissibility purposes. That can happen in many of the ways facilities can be deemed to refuse an inspection, as well as by not permitting FDA inspectors to enter the country, directing the inspectors to leave the country or not allowing inspectors to inspect a particular type of facility.

FDA said that inspectors will inform facilities refusing inspection of the consequences of continuing refusal before the agency considers the refusal final and lists the facility on import alert 99-32.

INTERNATIONAL TRADE TODAY
The source for trade compliance news

(ISSN 1932-6289)
PUBLISHED BY WARREN COMMUNICATIONS NEWS, INC.

Warren Communications News, Inc. is publisher of International Trade Today, Export Compliance Daily, Trade Law Daily, Communications Daily, Communications Litigation Today, Consumer Electronics Daily and other specialized publications.

EDITORIAL & BUSINESS HEADQUARTERS
2115 Ward Court, N.W., Washington, DC 20037

Albert Warren
Editor & Publisher 1961–2006

Paul Warren ..... Chairman and Publisher
Daniel Warren ..... President and Editor
Timothy Warren ..... Executive Managing Editor
Brian Feito ..... Managing Editor
Mara Lee ..... Associate Editor
Ian Cohen ..... Associate Editor
Jacob Kopnick ..... Associate Editor
Ben Perkins ..... Assistant Editor

Sales

William R. Benton ..... Sales Director
Bruce Ryan ..... Account Manager
Jim Sharp ..... Account Manager
Matt Long ..... Account Manager
Matt Peterson ..... Account Manager
Walt Sierer ..... Account Manager

Send news materials to ittnews@warren-news.com
Phone: 202-872-9200 Fax: 202-318-8984
https://internationaltradetoday.com
Email: info@warren-news.com