

# U.S. v. ITT Corporation: Choose Your Own Lessons

June 27, 2007

**Mark D. Menefee**

Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a “partner” means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an “office” means an office of any such law firm.

# Lesson #1: Two Criminal Violations

- ITT pleaded guilty on March 28, 2007 to Counts One & Two of a three count Information filed in the Western District of Virginia and was sentenced that day.
- Count One: Knowing and willful export of technical data without prior authorization, to Singapore, the PRC, and the U.K. 18 USC 2; 22 USC Sections 2778(b)(2) & 2778(c); ITAR Sections 127.1(a) & 127.3.
- Count Two: Knowing and willful omission of material facts from required reports. ITT failed to tell Department of State that ITT was aware it was violating temporary export licenses before ITT made a voluntary disclosure to the DOS about the violations. 18 USC 2; 22 USC Section 2778(c).

# Lesson #2: What About Count Three?

- ITT did not plead guilty to Count Three.
- Count Three: Knowing and willful export of technical data to the PRC, Singapore and China without prior authorization. 18 USC 2; 22 USC Sections 2778(b)(2) & 2778(c); ITAR Sections 127.1(a) & 127.3.
- Plea Agreement: In exchange for ITT's pleas of guilty to Counts One & Two, the U.S. moved to defer prosecution of Count Three pursuant to a Deferred Prosecution Agreement. If ITT meets the terms and conditions of the DPA, the U.S. will move to dismiss Count Three.

# Lesson #3: Criminal Penalty

- Count One: \$ 1 million (maximum under AECA)
- Count Two: \$ 1 million
- Forfeiture of Proceeds From Crimes: \$ 28 million

# Lesson #4: Civil Penalty

- Department of Justice announced that ITT has agreed to settle administrative charges by DOS (as of June 24, settlement not concluded).
- Civil penalty: \$ 20 million
- Directed remediation likely.

# Lesson #5: Debarment

- DOS debarred ITT from future munitions licensing but suspended most of the debarment.
- ITT negotiating with DOD regarding possible procurement debarment.
- No export denial imposed by Department of Commerce (as of June 24, 2007). DOC denial unlikely.

# Lesson #6: Arithmetic

- Total Fines and Penalties:

\$ 1 million criminal fine

\$ 1 million criminal fine

\$ 28 million criminal forfeiture of proceeds

+ \$ 20 million civil fine

= \$ 50 million

# Lesson #7: PR v. Math

- Press Release by U.S. Attorney John Brownlee, March 27, 2007:
- “Today, we announce that ITT Corporation, the 12<sup>th</sup> largest supplier of sophisticated defense systems to the United States military, will plead guilty to two felony charges, pay **\$100 million** in penalties and forfeitures, subject itself to independent monitoring and an extensive remedial action program, and acknowledge that it illegally transferred classified and/or sensitive night vision technology to foreign countries – including the People’s republic of China – in order to reduce its costs and enhance its financial bottom line.” (emphasis added)

# Lesson #8: The Missing \$ 50 million

- Deferred Prosecution Agreement, paragraph 22.d
- ITT agreed to a “deferred prosecution monetary penalty” of \$ 50 million.
- U.S. agreed to suspend payment of that penalty for 60 months.
- During that period, ITT may reduce the suspended penalty, on a dollar-for-dollar basis, “for monies spent to accelerate and further the development and fielding of the most advanced night vision technology so that the members of the United States Armed Forces can maintain their battlefield advantage of having the most capable night vision equipment in the world.”

# Lesson #9: PR v. The Judgment

- Brownlee's Press Release states his rationale: "ITT will pay \$ 50 million in restitution to the victims of their crimes – the American soldier."
- District Courts use a form "Judgment in a Criminal Case" which contains the following box:
  - "Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_"
- In the ITT case, this box is not checked and no amount is written in the blank.
- Therefore, no restitution was ordered by the District Court in this case.

# Lesson #10: IP Rights Secured

- \$ 50 million Deferred Prosecution Monetary Penalty
  - ITT must transfer “Government Purpose Rights” (DFARS sections 252.227-7013) to DOD’s Night Vision Electronic Sensor Directorate regarding any software or technical data ITT develops pursuant to the Deferred Prosecution Agreement.
  - NVESD has the right to transfer this software or technical data to another agency or contractor for development of products for the U.S. Government.
  - ITT must obtain prior agreement from NVESD in order to receive credit against the \$ 50 million for R&D monies spent .
  - ITT must report regularly to an Army official designated by NVESD.

# Lesson #11: Appropriations Law

- Fundamental rule of appropriations law: An agency is prohibited from enhancing its budget by using funds that are not appropriated by the Congress.
  - U.S. Constitution, Article I, Section 9
  - 31 USC Section 1301(a) – (the “Purpose Statute”)
  - 31 USC Section 3302(b) (the “Miscellaneous Receipts Statute”)
  - U.S. Army JAG Manual, Chap 2

# Lesson #12: Unlawful Penalty

If the \$ 50 million Deferred Prosecution Monetary Penalty is unlawful, what will happen?

- DOJ and ITT could go back to the District Court and request permission to revise the Deferred Prosecution Agreement (drop Count Three, suspend the \$ 50 million entirely, or make it a true restitution), or
- NVESD, DOJ, and ITT could reach an agreement on how ITT and NVESD will cooperate on night vision R&D for the next 60 months, or
- DOJ and ITT could litigate the matter later.

# Lesson #13: Beware of a DPA

- Deferred Prosecution Agreements are currently fashionable with DOJ and regulatory agencies
  - Flexibility
  - Remedial Actions
  - Government Oversight
- DPAs can be bad for the recipient
  - Government has tremendous leverage over defendant
  - No cap on cost of remedial actions
  - Little or no judicial oversight
  - No accountability by the designated Compliance Official
  - No confidential information left in the company
  - Difficult to allocate resources to meet emerging compliance problems

Thank you!

Mark D. Menefee  
Of Counsel  
Baker & McKenzie LLP  
815 Connecticut Avenue, N.W.  
Washington, D.C. 20006-4078  
Tel: +1 202 835 4254  
Mobile: +1 202 375 3051  
Fax: +1 202 452 7074  
[mark.d.menefee@bakernet.com](mailto:mark.d.menefee@bakernet.com)