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Judge Vacates Plea after Sentence in Deal Changed

An Iranian woman has succeeded in getting a plea agreement she entered with the U.S. Attorney in Fort Lauderdale, Fla., on export control violations thrown out because the government changed its calculation of the U.S. Sentencing Guidelines and had her sentenced to 29 months in jail instead of the time she had already served as she expected. Shahrazad Mir Gholikhan will now face trial starting July 28 on a charge of conspiracy to violate the Arms Export Control Act (AECA) for allegedly exporting a night vision goggle to Iran. A July 1 court order suggests that she may be preparing to enter a new plea agreement before the trial starts.

Fort Lauderdale U.S. District Court Judge James Cohn June 26, 2008, accepted Gholikhan's hand-written motion to vacate her sentence because the government had changed its sentencing recommendation after reaching a deal with her for a shorter sentence. On April 25, Gholikhan, an Iranian citizen, agreed to plead guilty to conspiracy to export a sample night vision goggle to Iran in 2002 without a license. In her plea, she admitted that she had served as a translator for one of the two men who actually arranged for the export.

Gholikhan was initially sentenced to time served of about four and a half months, but then the government filed a motion in court for a new sentence based on its discovery that it had made a "clear error" in calculating the aggravating and mitigating factors under the U.S. Sentencing Guidelines. The court accepted the motion and issued the new, longer sentence to Gholikhan.

In his ruling vacating the guilty plea, Judge Cohn said Gholikhan did not have to appeal her case to the appellate court as would normally be the process under the Supreme Court's decision in *Bousley*. "The court reasons that Ms. Gholikhan's case differs in a significant respect from *Bousley*," Cohn stated. "The court also finds that, because of the inaccurate representations made to Ms. Gholikhan by her own counsel, the government and this court as to the applicable Guidelines range, her plea entered on April 25, 2008, was not voluntary," he ruled. [Editor's Note: Copy of Cohn's decision will be sent to subscribers on request.]

Russia's IPR Problems Remain Roadblock to WTO Accession

Troubles still face a U.S. agreement with Moscow on Russia's accession to the World Trade Organization (WTO) because of the continuing failure of Russia to stop violations of intellectual property rights (IPR). The U.S. Trade Representative's (USTR) latest report on Russia's IPR enforcement gave a bland assessment that tried to play down the continuing IPR violations in



Russia. “With respect to a petition from the International Intellectual Property Alliance on Russia’s IPR protection, the Administration continues to monitor closely the Russian government’s progress in meeting the commitments it undertook in the November 2006 Agreement with the United States on IPR and to seek further progress in the context of ongoing WTO accession negotiations, ” said a USTR statement June 30 announcing the results of the 2007 review of products and countries that benefit from the Generalized System of Preferences (GSP).

An earlier State Department report on Russia’s IPR practices was more critical. “In 2007, Russian law enforcement authorities initiated raids on optical disc production facilities and retail sites, and investigations of Internet sites,” said a report from State’s Bureau of International Information Programs. “However, prosecutions and adjudications of IP cases remain sporadic and inadequate; there is also a lack of transparency and a failure by courts to impose deterrent penalties for IPR violators,” it reported.

As a result of the 2007 review of GSP benefits, the Bush Administration determined that 25 products from beneficiary countries with a value of approximately \$1.4 billions in 2007 can compete effectively in the U.S. market without duty-free treatment and will no longer be eligible under the GSP program. This includes 21 products that exceeded the statutory Competitive Need Limit (CNL) and four products that have had waivers to the CNLs for the past five years and are now subject to statutory “super-competitiveness” thresholds. In 2006, Congress amended the GSP statute to add the “super-competitiveness” provision, which requires the president to “revoke any existing CNL waiver that has been in effect for five years or more if a GSP-eligible product from a specific country has an annual trade level in the previous calendar year that exceeds 150 percent of the value-based threshold or 75 percent of all U.S. imports of that product.”

Based on these new rules, waivers were revoked from “\$266 million worth of gold products from India, \$233 million of jewelry from Turkey, \$151 million of ferroniobium from Brazil and \$6.6 million of peanuts from Argentina,” a USTR statement said. Losing GSP status in their first year beyond the threshold are “\$172 million of zinc and \$162 million of ferrochromium from Kazakhstan and \$161 million of insulated ignition wiring and \$154 million of biodiesel from Indonesia,” it reported. With GSP changes made last year on imports from India and Thailand, “Jewelry and brake parts will soon be completely removed from the GSP,” said Dan Anthony, director of research at the Coalition for GSP. Peanuts from Argentina represent 100% of the import market, which is why they are significant even at \$6.6 million, he noted.

Criminal Defense Lawyers Support Review of FCPA Ruling

Because of its ambiguity, the legislative history of the Foreign Corrupt Practices Act (FCPA) should not be used to interpret the statute, the National Association of Criminal Defense Lawyers (NACDL) argued in an amicus, friend of the court, brief filed in the Supreme Court in support a petitioner for a Writ of Certiorari filed by two executives convicted for violating the anti-bribery law (see **WTTL**, May 19, page 2). Instead of the legislative history, courts should apply the rule lenity in interpreting the statute, the group said. “This case affords an excellent vehicle for the Court to resolve the uncertainty in its own decisions and in the lower courts over proper application of the rule of lenity,” the group suggested.

David Kay and Douglas Murphy, two former executives of Rice Corporation of Haiti have asked the High Court to reverse a Fifth Circuit ruling from October 2007, upholding their conviction under the FCPA for bribing Haitian officials to get reductions in the taxes and customs duties the company was paying. They have claimed that the FCPA wasn’t intended to cover all illegal actions by U.S. persons in foreign countries. They also complained that their indictment didn’t clearly state a provision of the law that they had violated.

“NACDL supports the petition here because the majority view in the circuits – that the omission of an element from an indictment may be harmless error – presents a fundamental threat to the

'substantial right to be tried only on charges presented in an indictment returned by a grand jury,' the brief stated, quoting an earlier ruling. "The Fifth Circuit found that the text of the so-called "business nexus" requirement in 15 U.S.C. Section 78dd-1(a)(1) and -2(a)(1) is ambiguous," the amicus brief said. "Resorting to snippets of legislative history, however, including the legislative history of amendments to the FCPA that Congress declined to adopt, the court of appeals refused to apply the rule of lenity," it added.

"Because the relevant statutory text is indisputably ambiguous here, the rule of lenity requires that the business nexus element be interpreted in petitioners' favor unless, as the court of appeals held, resort may first be had to legislative history. Allowing the use of legislative history to resolve textual ambiguity in penal statutes therefore invites result-oriented decisions and a continual expansion of criminal liability," NACDL told the Supreme Court.

EAR Controls on North Korea Stay in Place

Export controls under the Export Administration Regulations (EAR) enforced by the Bureau of Industry and Security (BIS) will not change under President Bush's June 26 orders lifting North Korea's designation as a state supporter of terrorism, BIS has clarified. "The directive issued by President Bush does not affect BIS licensing practices," BIS Senior Advisory Matt Braud told WTTL in an e-mail. "Export control requirements for North Korea remain in place," he said. "Under the Export Administration Regulations (EAR), the U.S. Government will continue to require a license for all items subject to the EAR, except food and medicine classified as EAR 99, that are destined North Korea," Braud stated (see WTTL, June 30, page 1).

"Although the items on the Commerce Control List (CCL) will no longer be controlled for Anti-Terrorism reasons to North Korea, they will continue to require a license pursuant to Section 6 of the Export Administration Act, and in accordance with United Nations Security Council Resolution 1718 (UNSCR 1718)," Braud pointed out. "These sanctions are related to North Korea's detonation of a nuclear device, proliferation activities, and human rights violations," he added.

Boeing Pays \$3 Million ITAR Fine for Exceeding License Values

Even major defense exporters like Boeing have trouble keeping track of all the requirements and conditions in Technical Assistance Agreements (TAAs) and Manufacturing Licensing Agreements (MLAs). For Boeing, the failure to comply with these requirements led to a June 17 Consent Agreement with State's Directorate of Defense Trade Controls (DDTC) under which the airplane manufacturer will pay a \$3 million civil fine to settle 40 charges that it violated the conditions in several of its MLAs by exceeding the value of manufacturing allowed under the MLA and failing to file required reports. The proposed charging letter to Boeing reveals that over the last 30 years, it has received approval for about 170 MLAs and 200 TAAs.

Under the agreement, Boeing will make an initial \$1 million payment toward the fine and pay another \$1 million on the first and second anniversaries of the deal. It also agreed to strengthen its corporate export compliance program, hire an outside consultant to audit the implementation of improvements, and continue to implement a comprehensive automated export compliance system. A copy of the consultant's audit report will be submitted to DDTC.

"The Department considered the Respondent's Voluntary Disclosure and remedial compliance measures as significant mitigating factors when determining the charges to pursue in this matter," DDTC's charging letter said. "While these violations did not include exports to unauthorized parties or countries, Respondent had committed numerous administrative violations in the management of its MLAs and TAAs over the course of many years, particularly under certain heritage McDonnell Douglas Corporation programs and sites," the letter stated.

*** * * Briefs * * ***

BIS: Christopher Wall was sworn in July 2 as BIS assistant secretary for export administration. His Senate confirmation came late in evening of June 27 after WTTL had gone to press (see **WTTL**, June 30, page 4).

CHINA: President Bush June 30 notified Congress that he was waiving temporarily ban on defense sales to China to permit export of certain equipment to support 2008 Summer Olympics. DDTC will be allowed to issue licenses for “firearms and related items for use by U.S. and non-U.S. athletes competing in shooting events, and military gyroscopes that are embedded in mobile high definition television camera systems for use by U.S. filming crews,” he said. “Licensing requirements remain in place for these exports and require review and approval on a case-by-case basis by the United States Government. The equipment will be returned to the United States following the end of the games,” notification stated.

ZIMBABWE: As expected (see **WTTL**, June 23, page 1), President Bush June 28 said U.S. will impose additional sanctions on Zimbabwe in response to rigged re-election of President Robert Mugabe. “Given the Mugabe regime's blatant disregard for the Zimbabwean people's democratic will and human rights, I am instructing the Secretaries of State and Treasury to develop sanctions against this illegitimate Government of Zimbabwe and those who support it,” Bush said in statement. “We will press for strong action by the United Nations, including an arms embargo on Zimbabwe and travel ban on regime officials,” he added.

USTR: USTR Susan Schwab June 30 announced appointment of Colleen Litkenhaus to be assistant USTR (AUSTR) for intergovernmental affairs and public liaison and Michael J. Delaney to be AUSTR for South Asian Affairs. Since May 2006, Litkenhaus has served as deputy assistant secretary in Commerce's U.S. and Foreign Commercial Service and before that was at White House as special assistant to president for management and administration. Delaney, who is currently serving as political advisor to NATO Regional Command in Afghanistan and will join USTR in September, is career foreign service officer who has served in senior posts in Australia, Finland, Portugal, Seoul and Thailand. Former AUSTR for public liaison Tiffany Moore left to join Venable law firm in DC as senior legislative advisor.

EXPORT ENFORCEMENT: OFAC imposed civil fine of \$67,574 on United Radio, Inc., of Florence, Ky., for shipments its Canadian subsidiary, Blue Star Canada (BSC) allegedly shipped to Cuba between 2004 and 2006. “OFAC alleged that BSC shipped electronic products to Cuba,” agency said in announcing penalty. United Radio, which does business as BlueStar, “voluntarily disclosed this matter to OFAC,” agency reported.

EXPORT ENFORCEMENT: Hassan Saied Keshari and Traian Bujduveanu were arrested on June 23 on two-count complaint in Miami U.S. District Court accusing them of exporting parts for F-14 jets to Iran without approved licenses. Keshari operates Kesh Air International in Novator, Calif., and Bujduveanu heads Orion Aviation Co. in Plantation, Fla. Affidavit in case says federal agents reviewed 857 e-mails between Keshari and Bujduveanu discussing purchase and delivery to Iran of commercial and military aviation parts.

SERVICES: Importance of services in Doha Round talks is underscore in June 30 ITC report on recent trends in services industry. Report notes 8% annual growth rate for service exports from 2001 to 2005, reaching \$404.3 billion in 2006, latest year reported. Just as important is presence of subsidiaries of U.S. service firms overseas. “In 2005 (the latest year with available data), sales of services by foreign affiliates increased by 9 percent to \$528.5 billion, approximately twice the average annual growth rate for years 2001-04,” said ITC report (ITC Report No. 332-345).

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