

# Washington Tariff & Trade Letter<sup>®</sup>

A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Export Controls and Trade Laws

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301-570-4544 Fax 301-570-4545

Vol. 26, No. 27

July 3, 2006

## NEW TRIAL SCHEDULED ON CHARGES OF NIGHT VISION CAMERA EXPORT

The U.S. Attorney in San Francisco is pressing ahead with plans for a new trial starting Aug. 28 of Philip Cheng after a federal jury in March failed to reach a verdict after his first trial on charges of exporting a night-vision camera to China in violation of the Arms Export Control Act. The hung jury followed a three-week trial that was marked with conflicting testimony by government and defense expert witnesses over whether the Panther I infrared camera is a defense item or a commercial camera that is widely available from noncontrolled sources outside the U.S. (see **WTTL**, July 5, 2004, page 3).

Cheng was indicted on June 2, 2004, along with Martin Shih and Shih's company, Night Vision Technology, Inc. (NVT), of San Jose, Calif., on charges related to the export of the camera to the North China Institute for Electro-Optics. Cheng, who had his own sales company, was also charged with brokering.

After Shih died in late 2005, the government moved for the dismissal of the charges against him and NTV. U.S. District Court Judge Ronald M. Whyte granted the motion on Dec. 19. A source close to the case says the government has continued to pursue the case against Cheng because of the expense and resources that went into the multi-agency investigation of the alleged export and the grand jury indictment.

At the government's request, most of the documents in the case have been placed under seal by Whyte, but the court docket reveals a complex legal fight over the use of wiretap information obtained under a Foreign Intelligence Surveillance Act (FISA) warrant and a jurisdiction determination prepared by State's Directorate of Defense Trade Controls (DDTC). Cheng has argued that the camera isn't controlled. He has claimed most its thermal imaging parts came from France and it was assembled in Taiwan for export to China.

## BIS CHINA PROPOSAL WOULD INCREASE LICENSING REQUIREMENTS

The Bureau of Industry and Security (BIS) is expected to publish its long anticipated proposal for comprehensive changes to its licensing policies for exports to China in the Federal Register the week of July 3, according to agency sources. The proposal, obtained by **WTTL**, includes extensive changes from a draft proposal that had been widely circulated informally in the trade community in April (see **WTTL**, June 12, page 1). Ahead of the proposal's publication, U.S. representatives in China reportedly provided a copy of the document to officials in the Chinese Ministry of Commerce (Mofcom). As anticipated, the proposal, which will have a 120-day comment period, would impose new export licensing requirements on 47 Export Control

Copyright © 2006 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

Published weekly 50 times a year except last week in August and December. Subscription in printed or electronic form is \$597 a year in U.S., Canada & Mexico; \$627 Overseas. Additional copies with full price subscription are \$75 each.  
Circulation Manager: Elayne F. Gilston

Classification Numbers (ECCNs) when an exporter knows the items will be going to a military end-use in China. These items currently don't need licenses for export to China. "Items primarily affected by the revisions discussed in this section are items covered for antiterrorism reasons" under the Export Administration Regulations (EAR), BIS says in the proposal. A key proposed requirement would require exporters to get an end-use certificate from Mofcom for any licensed export with a value that exceeds \$5,000 for any single ECCN entity. Industry sources are concerned this proposal could significantly slowdown export licenses for China because Mofcom doesn't have the staff and resources to provide the end-use certificates on a timely basis for the number of licenses likely to be affected.

The proposal also would establish a mechanism for identifying trusted civilian end-users in China. An earlier version of the proposal called this the "certified end user" program, but BIS has changed its name to the "validated end user" program for Chinese firms that qualify for special licensing treatment.

"The proposed authorization would allow the export, reexport and transfer of eligible items to specified end-users in an eligible destinations, including the PRC," BIS says. "These validated end-users would be those who meet a number of criteria, including a demonstrated record of engaging only in civil end-use activities and not contributing to the proliferation of weapons of mass destruction or otherwise engaged in activity contrary to U.S. national security or foreign policy," the proposal states.

## **MINISTERS' MEETING TO TEST LAMY, FUTURE OF DOHA ROUND**

The meeting of more than 50 World Trade Organization (WTO) trade ministers that started formally June 30 in Geneva will test whether the great expectations about the talents of Director General Pascal Lamy were warranted. It also may be the last chance ministers have to save the Doha Round. Ahead of the formal gathering, the Trade Negotiations Committee (TNC) met on June 27 and bilateral and group meetings also began.

With three more days of TNC, "Green Room" and smaller meetings ahead, prospects for success still seemed dim. The potential remains strong that the talks will collapse or drag on for another three years, like the Uruguay Round. It was difficult to tell whether the increased public posturing and hardening of positions were just a negotiating ploy of members or a sign of real trouble.

Having set expectations low before the Hong Kong Ministerial in December, Lamy told reporters at a June 28 press conference that the coming meetings represented the "moment of truth" in the round. Lamy tried to dampen any expectation that the weekend talks were not the real deadline for decisions and that deals on modalities could still be put off until the end of July. "Later would be in the zone of too late," he declared. Despite this warning, it wasn't clear how forceful Lamy intended to be in the meetings to get ministers to "top up" their offers to reach satisfactory goals on agriculture and non-agriculture market access (NAMA) modalities and formulas (see **WTTL**, June 26, page 1).

Even before the start of formal talks, Lamy ran into trouble with his suggestion that a deal might be built around a "magic 20" which would include accepting the G-20 goal for a 54% cut in farm tariffs, a 20% coefficient for cutting tariffs in NAMA and capping total U.S. domestic support below \$20 billion. The U.S. quickly rejected the idea of a 20% coefficient in NAMA, "We told him in no uncertain terms that is not our goal," one senior U.S. official said. "That doesn't do it for the United States," the official added. Although the U.S. has offered to limit Amber and Blue Box farm subsidies to about \$12.7 billion, other countries are concerned the addition of many de minimis programs for specific crops could add up to more than \$20 billion.

Before leaving for Geneva June 27, U.S. Trade Representative (USTR) Susan Schwab and Agriculture Secretary Mike Johanns held a press conference on Capitol Hill with Senate Agriculture Committee Chairman Saxby Chambliss (R-Ga.), House Agriculture Committee

Chairman Bob Goodlatte (R-Va.), and Sen. Max Baucus (D-Mont.). With the lawmakers standing behind her, Schwab looked like a hostage in one of those hostage videos that come out of Iraq, with insurgents standing behind their victim, although this time without ski masks.

Schwab repeated complaints that the U.S. farm offer last October hasn't been matched by other trading partners. "We made it clear last fall that our proposal was not a take it or leave it offer. However, it was contingent on receiving meaningful offers from our trading partners that match our level of ambition on agricultural market access. We have yet to receive such offers," she said.

Schwab said the press conference was intended to demonstrate that the U.S. is committed to "a comprehensive, ambitious, and meaningful agreement." She said the U.S. message and negotiating posture has been consistent and remains exactly the way they were in the fall. "There have been periodically rumors that somehow we would settle for something less. The message here is we have no intention of settling for something less," Schwab declared.

Goodlatte also delivered a strong warning that Congress would not be willing to give more and receive less in the talks. "As I've conveyed to Ambassador Schwab, this is not an option. There is absolutely no support in the Congress for further concessions on our part including further concessions on market access and domestic supports," Goodlatte stated. "Now it is time for the rest of the world to step up to that challenge. If they will not, then that old but accurate phrase applies -- No deal is better than a bad deal," he said.

At the June 27 TNC meeting, Lamy presented a detailed agenda and sequence of issues that he proposed the ministers address in their meetings. He said his agenda "is purely a question of sequencing, and not a ranking by importance." Lamy's plan calls for agriculture talks to start with market access, including the formula for tariff reductions, the number and treatment of sensitive and special products and the special safeguard mechanism. That would be followed by decisions on domestic support with concentration on the overall reduction of trade distorting support, reduction in AMS, Blue Box and de minimis, disciplines in AMS and Blue Box and cotton. Lamy said initial discussions in NAMA would concentrate on formulas and coefficients, the treatment of unbound tariffs and flexibilities for developing members subject to the formula. Other topics also will be discussed, but may not get resolved until later in July.

### **CIT SUPPORTS CUSTOMS PENALTIES AGAINST CUSTOMS BROKERS**

In a June 28, 2006, ruling (Slip Op. 06-98) which he described as an "issue of first impression," Court of International Trade (CIT) Judge Gregory Carmen refused to limit the number of pre-penalty notices Customs can issue to customs brokers or the total amount of fines the agency can collect from multiple notices. Carmen denied a motion for summary judgment file by UPS Customhouse Brokerage in a suit Customs filed to collect penalties for alleged violations under the broker statute. Because of the importance of the case, the National Customs Brokers & Freight Forwarders Association of America filed an amicus brief.

"Neither the broker penalty statute nor Customs regulations place any temporal restrictions on a penalty issued by Customs, and this court sees no reason to read one into the statute," Carmen wrote in his opinion. "This court also does not read the statute as prescribing a limit on the number of pre-penalty notices Customs may issue," he added.

### **BIS PROPOSES PENALTY GUIDANCE FOR ANTIBOYCOTT VIOLATIONS**

Voluntary self-disclosure of antiboycott violations to the BIS Office Antiboycott Compliance (OAC) would be a mitigating factor of "GREAT WEIGHT," the agency said in a June 30 Federal Register proposal of antiboycott penalty guidance (capital letters in notice). The guidance and proposed changes to the Export Administration Regulations (EAR) are intended to

explain the factors BIS will consider “when deciding whether to pursue administrative charges or settle allegations of such violations” of the antiboycott regulations, BIS said (see **WTTL**, June 19, page 1). The proposed penalty guidance will be inserted into a new Supplement No. 2 to Part 764 of the EAR. The proposed supplement will describe how BIS responds to violations, the types of administrative sanctions that may be imposed for violations, the factors BIS considers in determining what sanctions are appropriate, the factors it considers in determining the appropriate scope of a denial or exclusion order, and the factors it considers when deciding whether to suspend a sanction.

This rule would provide specific criteria for what constitutes a voluntary self-disclosure and how voluntary self-disclosures relate to other sources of information that OAC may have about antiboycott violations. “BIS believes that publishing this information in the EAR will tend to place all potential respondents and their counsel on a more equal footing because procedures for making voluntary disclosures, information about how OAC responds to violations and how OAC makes penalty determinations in the settlement of administrative enforcement cases will all be matters of public record,” the notice says.

\* \* \* BRIEF \* \* \*

POLYESTER: Rare antidumping complaint, only second so far in 2005, was filed at ITA and ITC June 23 by Dak Americas, Nan Ya Plastics Corp. America and Wellman, Inc., against imports of certain polyester staple fiber from China.

OMAN: House Ways and Means Committee by 23-15 vote and Senate Finance Committee on 14-6 vote approved U.S.-Oman FTA implementing legislation June 29, sending it to floors of respective houses for likely vote in July. Sen. Max Baucus (D-Mont.) voted for deal, but only after chastising Bush administration for ignoring committee amendment dealing with imports made by coerced labor. “Mr. Chairman, the way this administration has misused trade promotion authority is outrageous,” Baucus declared. “The administration must understand that its actions on this agreement will have effects far beyond and long after this markup,” he said. Senate passed legislation immediately after Finance action by 60-34 margin.

PERU: Stage set for Congress to act on U.S.-Peru trade promotion agreement after Peru’s legislature approved pact June 27 by 79-14 vote. At Senate Finance Committee hearing June 29 on accord, Chairman Charles Grassley (R-Iowa) said Peru’s action “clearly demonstrated that it’s committed to building its economic relations with our country.”

EXPORT ENFORCEMENT: Tesmec USA, Inc., has agreed to pay \$12,600 civil fine and Tesmec Spa, Italy, \$24,300 fine as part of settlements they reached with BIS to settle charges related to alleged export of trencher classified as EAR99 to Libya through Italy. Charging Letters claim firms tried to evade regulations by changing U.S.-origin markings on equipment.

MORE EXPORT ENFORCEMENT: Arrow Electronics, Inc., of Melville, N.Y., reached settlement with BIS to pay \$20,000 civil fine for five charges related to export of various electronic equipment to Russia without licenses. Firm made voluntary self-disclosure.

EXPORT DENIAL ORDER: BIS imposed export denial order and civil fines in June 29 Federal Register on German national Malte Mangelsen, in his individual capacity, and on his company, BiB Industrie-Handel Dipl. Ing M. Mangelsen Gmbh. They were each fined \$77,000 and denied export licensing privileges for 20 years. Case stemmed from their attempt to acquire and export to Libya spare parts for hydraulic shears. Their co-conspirators, John Clements, Minequip, Jeffrey Woodbridge and Sigma Enterprises were indicted along with Mangelsen and pleaded guilty to violating IEEPA in 2003. They also reached settlements with BIS (see **WTTL**, Nov. 17, 2003, page 4).

ITAR GUILTY PLEA: State Metal Industries, Inc., of Camden, N.J., and its vice president, Michael S. Dorfman, pleaded guilty in Newark, N.J. federal court to exporting parts for Sparrow Missile to China. Firm had acquired parts from Defense under contract to smelt them down to ingots and bars. Instead, it attempted to export them to China. Shipment was blocked when Customs agents opened container at port.

HORMONES: U.S., Canada and EU have agreed to allow open public meeting Sept. 27-28 of WTO dispute-settlement panel hearing with scientific expert witnesses on dispute over EU import restrictions.