Washington Tariff & Trade Letter®

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

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Vol. 25,No. 42 October 24, 2005

EX-NAVY OFFICER PLEADS GUILTY TO ARMS EXPORT VIOLATION

A retired Navy commander pled guilty Oct. 18 in the San Diego U.S. District Court to three charges of violating U.S. arms export controls in a scheme allegedly organized by Arif Ali Durrani, a Pakistani citizen, to export parts for General Electric jet engines to Malaysia, the United Arab Emirates and Belgium without State approval (see **WTTL**, June 27, page 2). According to the government, the ex-officer, George Charles Budenz II of Escondido, Calif., admitted that he served as Durrani's agent in the U.S. and helped him obtain and export parts for the F-5 fighter jet, the T-38 military trainer jet and the Chinook helicopter.

> Budenz said he met Durrani in 1999. "Budenz agreed to serve as Durrani's agent here, helping him locate, purchase and ship aircraft parts," said a release by the Bureau of Immigration and Customs Enforcement (ICE).

Durrani was convicted in 1986 of exporting guidance systems for the Hawk missile to Iran. He left prison in 1992 and the government began deportation action against him in 1995. He moved to Mexico voluntarily in 1998, ICE noted. When Mexico deported him in June, Durrani was arrested when the plane he was taking from Mexico City to Pakistan stopped in Los Angeles. A third participant in the alleged scheme, Richard Tobey of Temecula, Calif., pled guilty in August to a charge of conspiracy to violated the Arms Export Control Act.

JUSTICE SAYS KNOWLEDGE OF EAR NOT NEEDED FOR CRIMINAL PROSECUTION

Corporations and individual company executives don't need to know the specific requirements of the Export Administration Regulations (EAR) to be held criminally liable for violation of U.S. export controls, the Justice Department contends. In bringing criminal prosecutions against companies and individuals, the department's policy follows a 1998 Supreme Court ruling, *Bryan v. U.S.*, which said that knowing conduct was unlawful is sufficient to sustain a charge, says Steven Pelak, deputy chief of the transnational and major crimes section in the office of the U.S. Attorney for the District of Colombia.

In Bryan, the court was asked to decide if the government needed only to prove that the defendant knew that his conduct was unlawful or whether it also was required to prove he knew the federal licensing requirements for selling firearms. "It is Department of Justice policy and the instructions that we submit that we only have to show the first; that the defendant knew that his conduct was unlawful, not that he knew a specific licensing requirement or a specific law," Pelak told the American Conference Institute Oct. 17. Pelak said the issue of willfulness is important to trade lawyers because when the government charges a violation of U.S. export

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

controls "nearly all negotiations of any substance between defense counsel, company and a prosecutor or investigator center on this topic." The question that arises is whether the corporate official being charged had sufficient criminal intent or willfulness in violating the law.

> It is Department of Justice policy "that Bryan is the law," Pelak declared. "If there is an AUSA [assistant U.S. attorney] out there presenting the position that there is some type of strict liability or some lower standard than Bryan, that is contrary to DoJ policy," he declared.

Pelak's office has issued a memo to other U.S. attorneys on Justice's policy on the meaning of "willfully" and advice on the jury instructions AUSAs should seek in criminal prosecutions for export control violations. Based on Bryan, the memo recommends that jury instructions state: "A person acts willfully if he acts intentionally and purposely and with the intent to do something that the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids." **[Editor's Note**: A copy of the Justice memo on willfully will be sent to WTTL subscribers on request.]

SENATORS PRESS LAVIN TO MAINTAIN CVDs ON CANADIAN LUMBER

International Trade Under Secretary-designate Franklin Lavin assured the Senate Finance Committee that he would do everything possible to keep countervailing duties (CVD) on softwood lumber from Canada despite a NAFTA panel ruling which could force the International Trade Administration (ITA) to find a *de minimis* rate for the imports (see **WTTL**, Oct. 10, page 4). "I am optimistic that there are some mechanisms that we can use"to maintain the duties, Lavin told the committee during his Oct. 18 confirmation hearing. He said ITA staff have told him "there are indeed mechanisms we can use. This doesn't necessarily end the dispute."

> Lavin also told the committee that the U.S. will use the $4-5 billion in collected dumping and CVD duties as leverage to get Canada back to the negotiating table for talks on a settlement to the bilateral dispute. "We have to view those as tools to try to get a settlement," he said. Lavin also noted that President Bush had a telephone conversation with Canadian Prime Minister Martin Oct. 14 during which he urged Canada to resume talks on a negotiated settlement.

Following Lavin's hearing, 21 senators wrote to Commerce Secretary Carlos Gutierrez about the panel's order on redoing the CVD rate, saying the department "must ensure that it calculates the duties in a way that sufficiently offsets pervasive Canadian subsidies."

OFAC ENFORCEMENT POLICY WILL SHIFT TO "RISK-BASED ANALYSIS"

Treasury's Office of Foreign Assets Control (OFAC) will signal a new approach to enforcement of its regulations in compliance guidelines it plans to publish shortly for banks. The change will adopt a "risk-based analysis" policy that will give more credit to firms that have compliance programs in place and take appropriate steps to assure compliance and less emphasis on strict liability, according to Dennis Wood, OFAC assistant director for outreach.

While the coming guidelines will be directed initially at banks, OFAC will adopt the same approach in the future to other financial institutions, insurance firms and ultimately to importers and exporters, Wood told the American Conference Institute in Washington Oct. 17. OFAC Director Robert Werner wants OFAC to give firms more credit for the good things they do, Wood explained. "We're going to factor in the good and the bad of what you do," Wood said. "Although OFAC has a strict liability program, based on our statutes, that strict liability gets meshed with all of the good things that you are trying to do," he added "So OFAC is no longer going to treat individual violations as bean counting and go after individual violations unless they are egregious." Werner wants to give more credit for voluntary self-disclosures and

"feels very strongly that has to be a mitigating factor way up on the front end and not down below," Wood said. "We will consider your history with OFAC, we'll consider your programs," he told the conference. "The bottom line is remediation."

As part of this new approach, OFAC has already changed the way it issues its monthly notice of compliance settlements. Rather than merely listing the name of the company fined, the reason for its fine and the amount, new OFAC reports include more details explaining the alleged violations. For example, OFAC announced that Archer Daniels Midland, the food manufacturing firm, agreed to pay a $13,750 civil fine for exports that a Canadian subsidiary, Finora Canada, Ltd., made to Cuba. In another announced settlement, Imbsen & Associates of Sacramento, Calif., paid a $2,400 fine and agreed to enhance its OFAC compliance program to settle charges that it sold software to Al Nibras for Science and Technology in Tripoli, Libya.

BUSH ADMINISTRATION OPPOSES CHANGES IN EXON-FLORIO LAW

Senior officials from six Cabinet departments sat shoulder to shoulder at the witness table of an Oct. 20 Senate Banking Committee hearing to deliver the same, unified message: the Bush administration opposes legislation to change the Exon-Florio Amendment and its procedures for reviewing foreign acquisitions of U.S. companies, but it is willing to take administrative steps to improve the operations of the Committee on Foreign Investment in the U.S. (CFIUS), the body which conducts the reviews, and to provide more information to Congress on the reviews.

> Questioned by Sen. Chuck Hagel (R-Iowa), all the officials agreed there has never been a case where a foreign investment approved by CFIUS later harmed national security or where Treasury overruled the objections of another department. A Government Accountability Office (GAO) report called for giving CFIUS broader powers to review foreign investments (see **WTTL**, Oct. 10, page 1). The lockstep testimony of the six officials seemed aimed at dismissing suggestions that the Bush administration is divided on Exon-Florio and the CFIUS process.

The officials, including those from Justice and Homeland Security, said their concerns were usually addressed through agreements that acquiring companies have reached with the government to eliminate potential problems. In some cases, this meant divestiture of divisions involved in defense or national security activities, agreements to give federal law enforcement agencies access to telecommunications systems for wiretaps or establishment of physical measures to prevent foreign employees from having access to critical technologies and products.

Deputy Secretary of the Treasury Robert Kimmitt said the GAO reported helped focus attention on the CFIUS process. In response to the report, the government will take three initial steps. One would be to have higher political-level involvement in the CFIUS process. Kimmitt said he would chair CFIUS meetings at the deputy secretary level. He also said CFIUS would look for ways to extend review times. A third step would be enhance CFIUS transparency by providing more information to Congress while continuing to protect proprietary information.

U.S., G-20 GANG UP ON EU IN DOHA AGRICULTURE TALKS

Shades of Brussels 1990 and Geneva 1993 during the Uruguay Round, the European Union (EU) is again resisting international pressure to go further in its offer to open its market to agriculture imports and to cut domestic subsidies. During the Oct. 19-20 meeting of the World Trade Organization's (WTO) General Council, the U.S. was joined by members of the G-20, Australia, Canada and other countries in criticizing the EU's offer and warning that the WTO ministerial meeting in December and the whole Doha Round negotiations could be at risk if Europe doesn't improve its offer (see **WTTL**,Oct. 17, page 2). As in the Uruguay Round, the EU is unlikely to make its final concessions until the morning hours after the midnight deadline for the conclusion of the Hong Kong meeting. Although EU Trade Commissioner Peter Mandelson has called for a temporary shift of attention to other Doha Round issues, it isn't clear yet what the EU

will demand in return for further movement on agriculture. At a minimum, it is likely to want more sensitive products excluded from tariff cuts and protection for geographical indications.

> Following the talks in Geneva, U.S.Trade Represenative (USTR) Rob Portman and Agriculture Secretary Mike Johanns raised the rhetorical heat on the EU. Johanns told reporters the EU proposal "isn't being taken seriously" by other WTO members. He said the "situation today is grave." Portman echoed those views, saying the talks are "very close to the drop dead date."

Portman said the offers from the G-20, which represents advanced developing countries, and the G-10, made up of rich countries with protected farm sectors, are better than EU's. Mandelson gave back a little of his own rhetoric. "The European Union will take no lectures from anyone on the needs of developing countries or the development goal of the Doha Round," he declared.

But Mandelson is operating on a short leash. Although the EU Foreign Ministers Council rejected a French effort to pull back the EU offer Oct. 18, Paris still opposes the EU position and threatens to block a deal in Hong Kong. The EU stand remains driven by its Common Agriculture Policy (CAP), which has undergone hard fought reforms in recent years but still provides extensive subsidies to EU farmers. In a statement to the EU Council, Mandelson assured the ministers that "it is absolutely and unequivocally not the intention of the Commission to use the DDA [Doha Development Agenda] to precipitate a new phase of CAP reform."

ANDEAN FTA COULD FACE CONGRESSIONAL OPPOSITION

Demands by Andean countries for "asymmetry" in a free trade agreement (FTA) with the U.S. could make the deal a hard sell in Congress, if it gets completed in the coming months. Trade officials from the U.S., Colombia, Ecuador and Peru are pushing to finish negotiations on the pact by Thanksgiving and get it to their respective legislatures in the spring of 2006. But talks in Washington the week of Oct. 17 showed "some very tough issues" remain, especially on agriculture, according to Ecuador Trade Minister Jorge Illingworth.

> Illingworth said the Andean countries want "asymmetrical treatment" on agriculture, giving them a long transition period to open their markets to U.S. products and excluding rice from the accord. He said the U.S. and Ecuador are divided over the treatment of tuna, which is now excluded from the benefits of the Andean Trade Preferences Act. Ecuador wants the rule of origin for tuna to be defined by where the fish is processed. Washington wants the origin to be determined by the flag of the boats catching the fish.

* * * BRIEFS * * *

ANTIBOYCOTT: Alcoa Europe SA of Lausanne, Switzerland will pay $6,000 civil fine to settle BIS charges that it failed to report six requests for boycott information from customers in Dubai.

EXPORT ENFORCEMENT: In another case of successor liability, freight forwarder Exel North American Logistics of Irving, Texas, has reached settlement with BIS to pay $8,000 fine for causing one export of medical defibrillator to Iran through South Africa by MSAS Global Logistics, which it acquired in 2001.

USTR: New appoints include naming of James Mendenhall to be general counsel; Matt Niemeyer to be counselor; and Justin McCarthy to be assistant USTR for intergovernmental affairs and public liaison.

DRAMS: USTR's office Oct. 14 asked ITC to provide advice on steps it could take to bring its injury determination on DRAMS from Korea into compliance with WTO ruling (see **WTTL**, July 4, page 4)

OMAN: President Bush Oct. 17 notified Congress of his intent to sign Oman FTA (see **WTTL**, Oct. 10, p.2).

NAFTA: Report from Institute for International Economics Oct. 18 debunks most complaints about deal's impact on U.S. economy and jobs, but calls for renegotiation of accord to establish common external tariff, deepen energy integration, shift dispute settlement to WTO and standardize visa requirements.