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Chi Mak Loses Appeal of AECA Conviction

Chi Mak, who became the government's "poster child" for Chinese military espionage, has lost an appeal of his 2007 conviction of violating the Arms Export Control Act (AECA) by attempting to export defense technology to China. The Ninth Circuit Court June 21 rejected his claim that the AECA violated his constitutional rights. In March 2008, Mak was sentenced to 24 years and five months in jail and fined $50,000 (see **WTTL**, March 31, 2008, page 1).

> Mak was a senior engineer with Power Paragon, Inc., a subsidiary of L-3 Communications, when he was arrested and charged with working off a "tasking list" from the People's Liberation Army and attempting to export naval warship data to China. He was convicted after a 25-day trial.

The circuit court rejected Mak's appeal. It affirmed the district court decision "because: (1) the AECA and its implementing regulations do not violate Mak's First Amendment rights since the AECA is substantially related to the protection of an important governmental interest; (2) the court's instructions to the jury concerning technical data did not violate Mak's Due Process rights because they expressly required the Government to prove that the documents at issue are not in the public domain; (3) the court's instructions to the jury on willfulness did not violate Mak's Sixth Amendment rights because they did not prevent the jury from fully deliberating as to whether Mak acted willfully, as required by the AECA; and (4) the documents at issue were covered by the United States Munitions List (USML) at the time Mak attempted to export them and, therefore, his conviction does not violate the Ex Post Facto Clause."

Opening of Arms Treaty Talks Preview Difficulties Ahead

Opening statements during the first five days of talks on a United Nations Arms Trade Treaty (ATT) in New York July 2-6 provide a hint of the disagreements that could block the conclusion of a deal by the scheduled end of negotiations July 27 (see **WTTL**, April 23, page 2). While most speeches voiced strong support for reaching an agreement, they also raised questions about the scope of a treaty, the products to be covered and transparency in arms sales.

A key issue appears to be any potential requirement to regulate domestic arms sales, an option that has brought objections from the National Rifle Association and members of Congress. "We believe that the issue of transparent reporting requires careful consideration. Transparency should not be misused to encroach upon the legal activities of states relating to the conventional arms trade," said a statement by Amir Sagie, deputy director of arm control for

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Israel, which is one of the major arms exporters in the world. "Small arms, light weapons, man-portable air defense systems, explosives and land mines should be included within the scope of the ATT, along with the seven categories of the UN Register for Conventional Arms," said Ambassador Ertugrul Apakan, Turkey's representative to the arms talks. "Their ammunition and components, as well as technology designed for their manufacture should also be added therein," he added. The U.S. opposes including ammunition in the treaty.

> Controversy also surrounds a potential requirement for domestic regulations. "A first requirement, therefore, should be that States have appropriate systems of national laws, regulations and administrative procedures to exercise effective control over armaments and the export, import and transfer of conventional arms," said Antonio Guerreiro, Brazil's representative. A Nicaraguan official said: "These national controls systems should include effective control of civilian arms possession and licenses, and authorizations for their export, import and transfer."

Then There Was One — Ecuador Is Last Andean Pact Beneficiary

The trade preference program for countries under the Andean Trade Preferences Act (ATPA) continues to shrink, and benefits for the last remaining country, Ecuador, remain in doubt. The U.S. Trade Representative's (USTR) office in its sixth report on the operation of the program, released June 30, left Ecuador's status untouched, despite complaints from Chevron, the major oil producer, and business trade groups. The report shows how the number of ATPA eligible countries has declined as Peru and Colombia shifted to the duty-free benefits of their free trade agreements with the U.S. and President Obama dropped Bolivia from the program in 2009.

> Ecuador's future benefits could depend on how its trade dispute with Chevron is resolved. Chevron has urged the USTR's office to revoke Ecuador's eligibility under ATPA because of its failure to abide by an arbitration decision under the U.S.-Ecuador Bilateral Investment Treaty and Chevron's claim that the country doesn't provide effective means for resolving commercial disputes. Meanwhile, Quito keeps pressing suits in U.S. courts to collect an $8 billion penalty imposed by an Ecuadoran court on Chevron for environmental damage allegedly caused by Texaco before Chevron acquired it.

MTB Comments Reflect Division in U.S. Industry

Comments posted on the House Ways and Means Committee website June 29 reveal conflicts between U.S. manufacturers who rely on foreign inputs and those that use U.S.-origin raw materials. The committee posted nearly 1,100 public comments on 1,250 Miscellaneous Tariff Bills (MTB), the majority of which would extend the suspension of duties on various products. The Senate Finance Committee June 29 also posted 200 public comments received in response to its 793 MTB bills (see **WTTL**, May 28, page 4).

> The bills cover a wide range of products, from hydrogenated polymers of norbornene derivatives to plastic nightlights; from monocarboxylic fatty acids derived from palm oil to single-serve coffee makers, electric skillets, battery-operated jar openers and ice cream makers. "The majority of the suspended duties affect material inputs which are intra-company transfers from globally connected supply chains," the American Chemistry Council wrote.

The most comments were aimed at bills on acrylic staple fibers and filament tow. The American Manufacturing Trade Action Coalition noted the lack of domestic acrylic production. "For the U.S. textile industry, the MTB is vital to reduce costs on inputs like certain acrylic and rayon products that are no longer made in the United States for environmental reasons," it said. Kaltex, a Mexican manufacturer, said it opposed more than 30 MTB bills on acrylic fiber, which currently comes from NAFTA partners. The bills "would give a 'free ride' of unilateral

duty-free treatment to Chinese, Japanese and European fiber manufacturers," it wrote. While the textile industry, in many cases, no longer finds domestic inputs, other industries still do, other comments said. "It appears that the intent of these bills is to allow Chinese manufacturers to compete more effectively against US manufacturers, possibly under the assumption that there is a shortage of reusable bags made in the US. There is no shortage of US manufactured reusable polyethylene bags," noted Roplast, a California maker of reusable bags.

EU Parliament's Rejection Leaves ACTA's Future in Doubt

The controversy that has surrounded negotiation of the Anti-Counterfeiting Trade Agreement (ACTA) at every stage came to a head July 4 with the European Parliament's 478 to 39 vote to reject the accord. After the vote, European Union (EU) Trade Commissioner Karel De Gucht said the EU is waiting for advice from the European Court of Justice, which was asked in May to determine whether the pact harms the fundamental rights of EU citizens, including free speech, which was a concern raised by members of parliament. In April, David Martin, who was responsible for steering ACTA through parliament, had recommended rejection of the pact.

> According to a parliament report, Martin had noted public concerns about the agreement's criminalization of certain activities, the definition of "commercial scale," the role of internet service providers and possible interruptions in the supply of generic medicines. "The intended benefits of this international agreement are far outweighed by the potential threats to civil liberties. Given the vagueness of certain aspects of the text and the uncertainty over its interpretation, the European Parliament cannot guarantee adequate protection for citizens' rights in the future under ACTA," he said (see **WTTL**, Oct. 17, page 1).

Services Talks Move to Next Phase of Defining Agreement

A group of 18 World Trade Organization (WTO) members, including the U.S., announced July 5 the next phase in discussions toward a plurilateral agreement on services. "Any such agreement should: Be comprehensive in scope, including substantial sectoral coverage with no a priori exclusion of any sector or mode of supply; Through negotiation, include market access commitments that correspond as closely as possible to actual practice and provide opportunities for improved market access; and Contain new and enhanced rules developed through negotiations," the group's statement declared.

> "We plan to move our exploratory discussions to a new phase aimed at clearly defining the contours of an ambitious agreement on trade in services to allow us to undertake any necessary consultations or procedures prior to any negotiations," the group said in a statement (see **WTTL**, July 2, page 2). "Such an agreement would aim to capture a substantial part of the liberalization achieved in other negotiations on trade in services. The outcomes of the agreement could then be brought into the multilateral system," the group said.

U.S. Files Complaint Against Chinese Duties on U.S. Autos

In asking China for WTO consultations on its antidumping (AD) and countervailing duties (CVD) on U.S. autos, the USTR's office sidestepped the question of whether Washington's bailout of General Motors and Chrysler constituted a subsidy that was countervailable under WTO rules. Instead, the July 5 request focused on many of the same systemic problems that the U.S. successfully challenged in its complaint against Chinese restrictions on imports of American grain-oriented flat-rolled electrical steel (see **WTTL**, June 15, page 1). "In our complaint, we have chosen not to challenge the subsidy rates as found by China," a senior USTR official said. "Whenever you bring a piece of litigation, you select points that you think

are the most important to bring. In this case, we have highlighted the systemic problems that affected the three cases that we have brought against China for AD and CVD where, without a basis, they are bringing actions that harm our exports from places like Michigan and Ohio," he added. The U.S. complaint filed at the WTO accuses the Chinese of numerous violations of WTO rules, including the failure to provide sufficient evidence in the application to justify the initiation of a CVD investigation, to adequately disclose the calculations and data used to establish the AD rates and to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material and the reasons for the acceptance or rejection of relevant arguments or claims.

> The U.S. is also challenging China's injury determination in the case, which avoids having to defend itself against any aid given to the U.S. carmakers. "If we are successful as we were in our first case, it will call into question the validity of the entire proceedings by China, which would entail all the elements of the proceedings, including the findings," the USTR official explained.

COOL Will Require Fixing, According to WTO Ruling

U.S. country-of-origin labeling (COOL) requirements still need fixing to come into compliance with two June 29 decisions from the World Trade Organization (WTO) Appellate Body, which reviewed a dispute-settlement panel's November 2011 finding that the rules are inconsistent with the WTO Technical Barriers to Trade (TBT) agreement (see **WTTL**, April 2, page 3). In separate but nearly identical rulings on appeals filed by the U.S., Canada and Mexico, the Appellate Body upheld the panel's determination that the COOL rule "treats imported livestock differently than domestic livestock" and modifies "the conditions of competition in the U.S. market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock."

> The Appellate Body reversed the panel's opinion that the COOL rule is more trade-restrictive than necessary and does not fulfil the identified objective. But the reversal was based on the Appellate Body's finding that "in the light of the lack of sufficient undisputed facts on the Panel record or factual findings by the Panel, the Appellate Body is unable to complete the legal analysis under Article 2.2 of the TBT Agreement and properly assess whether the COOL measure is more trade restrictive than necessary to fulfil its legitimate objective."

* * * Briefs * * *

AUSTRALIA GROUP: In Federal Register July 2 BIS implemented agreements reached at June 2011 Australia Group (AG) plenary meeting.

YEMEN: State updated ITAR in Federal Register July 3 to reflect new policy toward Yemen. "Licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Yemen will be reviewed, and may be issued, on a case-by-case basis," notice said.

GSP: Based on results of 2011 annual review, President Obama announced July 2 addition of seven cotton fiber products to list of goods eligible for duty-free treatment when imported from least developed countries. USTR also accepted petitions to review worker rights violations in Fiji and Iraq and lack of IPR protection in Indonesia and Ukraine. It closed without action review of worker rights in Sri Lanka.

WTO: Members agreed July 6 on new procedures to ease accession of least developed countries (LDCs). Under new benchmarks, LDCs will bind farm tariffs at average rate of 50% and bind 95% of industrial goods tariffs at average rate of 35%, with flexibility to retain 5% unbound, though the specific lines would need to be negotiated. "The decision provides that acceding LDCs shall not be required to undertake commitments in services sectors and sub-sectors beyond those that have been committed by existing WTO LDC Members," WTO said. "Nor shall they be required to undertake commitments in sectors and sub-sectors that do not correspond to their individual development, financial and trade needs," it added. Of 48 UN-designated LDCs, 32 are already WTO members. Ten others are in process of acceding: Afghanistan, Bhutan, Comoros, Equatorial Guinea, Ethiopia, Lao PDR, Liberia, Sao Tome & Principe, Sudan and Yemen.