

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. 28, No. 13

March 31, 2008

Judge Sentences Chi Mak to 24-plus Years in Prison

Chi Mak, 67, who was convicted of violating U.S. export controls for attempting to send controlled technology to China, could spend most of the rest of his life in prison. Santa Ana, Calif., U.S. District Court Judge Cormac J. Carney threw the book at Mak at sentencing on March 24, sending him to jail for 24 years and five months and also imposing a \$50,000 fine. Mak's new lawyer from the district's public defender's office, immediately filed an appeal March 27 to the Ninth Circuit Court to have his conviction overturned. "We will never know the full extent of the damage that Mr. Mak has done to our national security," Carney said in a Statement of Reasons for the sentence. "A high-end...sentence will provide a strong deterrent to the PRC not to send its agents here to steal American military secrets," he said.

In pre-sentencing briefs, the government had sought an even tougher sentence of over 30 years, claiming a four-level enhancement of the sentence was warranted. The probation office had recommended a sentence of 19 years and seven months plus the \$50,000 fine. It left open the question of whether Mak deserved a two-level upward adjustment of the sentence (see **WTTL**, Feb. 14, page 1).

The government said the two-level adjustment was warranted. "The defendant perjured himself at trial, and attempted to obstruct justice during his post-arrest interview. He deserves the adjustment," it declared. "Defendant deserves an additional two-level upward adjustment under U.S.S.G. Section 5K2.0(a)(1), (2), and (3) to reflect defendant's unusually long history of spying for the People's Republic of China (PRC), the volume of the material he sent the PRC, and the damage to national security that he caused," it argued. "Adding four levels to the total offense level calculated by Probation, defendant's offense level is 40, with a sentencing range of 292-365 months. A sentence of 365 months should be imposed," it argued.

Assistant Attorney General Kenneth Wainstein, who is about to move to the White House to be a presidential assistant, said the "24-year sentence is a fitting punishment for an American citizen who was convicted of working clandestinely on behalf of China in an effort to steal critical information about the U.S. Navy's current and future warship technologies."

Ruling Clarifies Section 337 "Safe Harbor" for Drug Imports

Certain patent-infringing biotechnology products that can be imported for research under a "safe harbor" provision in U.S. patent law can still be subject to challenge under Section 337 of the Tariff Act of 1930 if they are being imported for commercial research in preparation for marketing in the U.S., the Court of Appeals for the Federal Circuit (CAFC) ruled March 19 in a

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Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail is \$647 a year. Combo subscription of print and e-mail is \$747. Additional print copies mailed with full-price subscription are \$100 each. Circulation Manager: Elayne F. Gilston

split opinion (case 2007-1014). In *Amgen v. ITC*, the court partially upheld the International Trade Commission's (ITC) decision that the "safe harbor" protected manufacturer Hoffmann-LaRoche from Amgen, Inc.'s 337 infringement charge, because "the safe harbor provided by "271(e)(1) applies in proceedings under the Tariff Act relating to process patents as well as product patents, for imported product that is used for exempt purposes."

The CAFC, however, reversed the ITC's ruling that it didn't have jurisdiction to investigate and resolve the infringement charges because the product, recombinant human erythropoietin (EPO), had not been sold in the United States and was not the subject of an existing contract for sale. The ITC ruled that sale of the product as well as importation is required for Section 337 jurisdiction to apply.

"The Commission appears to have assumed that all otherwise infringing activities are exempt if conducted during the period before regulatory approval is granted," two of the three-judge CAFC panel stated. "That assumption is incorrect," it said, citing its earlier ruling in *Merck*. "The studies at issue in *Merck* were presented as scientific studies, and it is apparent that commercial and marketing studies are more clearly subject to separate evaluation for application of the exemption," the ruling continued.

"To the extent that the Commission held all importation and all uses exempt while FDA approval was pending, the safe harbor statute does not so provide," they concluded. Some Roche studies were done after it had filed a Biological License Application with FDA. "The factual questions of the purposes of the post-BLA and other challenged activities were improperly summarily decided adversely to Amgen. On remand the Commission shall consider the exempt status of each study for which question has reasonably been raised," they ordered.

Circuit Judge Richard Linn agreed with most of the court's ruling but dissented on the question of the safe harbor for process patents. "While I agree that it would make sense for section 337 to apply that way, the problem remains that if that is what Congress intended, it is not what Congress unambiguously said," he wrote in his dissent.

President's Export Council Weighs into Immigration Debate

At its coming April 8 meeting, the President's Export Council (PEC) is expected to approve a letter to President Bush urging him to support policies that would make it easier for foreign nationals with degrees in science, technology, engineering and mathematics (STEM) to get work visas in the U.S. A draft of the letter says foreign nationals who earn graduate-level degrees from U.S. universities "should be eligible immediately upon graduation for green card (permanent residency) and should be exempt from the numerical limit on green cards issued."

The letter also called for an increase in H1-B and EB employment-based visas. These visas "should be significantly increased (by as much as three times the current level) to meet market demands," it states. "Accompanying family members of professionals should be exempt from the existing quota. Unused quota in any given fiscal year should be carried over to the next fiscal year," it adds.

Defense Warned Before about Lax Export Controls

The embarrassing discovery that the Defense Department mistakenly exported missile nose cones to Taiwan instead of battery packs should have come as no surprise to department officials. The Pentagon's Office of Inspector General has issued several critical reports over the last four years, most recently in October, complaining about the failure of Defense branches to comply with either the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR) (see **WTTL**, Oct. 29, page 1). Defense officials on March 25 revealed that the department had just discovered that four non-nuclear nose cone assemblies

and their associated electrical components for a ballistic missile where mistakenly shipped to Taiwan in the fall of 2006. These items were originally shipped in March 2005 from F.E. Warren Air Force Base in Wyoming to the Defense Logistics Agency warehouse at Hill Air Force Base in Utah. Defense has launched an investigation into the incident.

In addition to potential violations of U.S. export control regulations, the erroneous exports may have violated U.S. obligations under the multilateral Missile Technology Control Regime (MTCR). “That's under analysis now,” Principal Deputy Under Secretary of Defense Ryan Henry told a press briefing. “The Missile Technology Control Regime is self-enforcing,” he noted.

“We are looking at the different items of that. If there was a violation, we are coming forth with it as soon as we became aware of it,” Henry said. “We have corrected the situation. And if there was something that was amiss, it clearly was not intentional,” he added.

Doha Talks Focus on Compensation for Sensitive Products

Meetings at the World Trade Organization (WTO) March 31 and April 1 could determine whether negotiators can achieve a breakthrough in at least one element of the Doha Round agriculture negotiations – the treatment of sensitive products that rich developed countries will be able to protect from full market opening. The talks are expected to focus on what level of specificity must be used to identify a sensitive product and what the corresponding level of compensation will be to exporting countries in the form of expanded tariff-rate quotas (TRQs).

One of the roadblocks in the talks, the submission of domestic consumption data for possible sensitive products, appears to have been overcome. Switzerland, Japan and Norway reportedly have provided their consumption data. “The body language seems to indicate they’re making good progress” on the consumption data, New Zealand Ambassador Crawford Falconer, chairman of the agriculture negotiating group, told WTTL (see **WTTL**, March 24, page 2).

The key question now is whether countries can reach an agreement on how to deal with domestic consumption. If they’re close, Falconer may be able to insert new language on sensitive products into a revised agriculture text. Falconer said movement on this issue is likely to unblock some of the other remaining issues in talks, particularly on market access.

Unresolved is whether sensitive products will be identified at the narrow eight-digit level of the Harmonized Tariff Schedule (HS-8) or at broader six-digit (HS-6) or four-digit (HS-4) levels and whether compensation will be at the same levels. Publicly available data for domestic consumption is only available at the HS-4 or HS-6 level, so a methodology needs to be found to determine consumption at the HS-8 level. The exercise can be tricky, but not impossible, one source said. Some countries designating sensitive products at the HS-8 level say compensation should also be made at that level. The Cairns Group of 25 agriculture exporting countries want compensation at the broader sector level, not at the product specific level.

As the talks have narrowed, maneuvering among WTO members has intensified. “The EU absolutely wants a deal by any means,” one source said. The EU is trying to compromise as much as it can, but it knows a country like Switzerland is holding more defensive ground, the source explained. Brazil, which as a competitive exporter would benefit from any expansion of TRQs, is trying to be very constructive in compromise, he added. Large farm exporters Australia and New Zealand are taking a harder stance, but Argentina “is just not very constructive,” he said.

Australians Will Get Easier Access than U.S. Firms under Treaty

Australian defense manufacturers will have easier access to the U.S. market than American defense exporters will have to Australian customers under the provisions of the implementing

arrangement the U.S. and Australia reached March 14 to apply the U.S.-Australia Defense Treaty. The agreement appears to give Australian defense exporters almost blanket approval to export to the U.S. under the terms of the treaty, which is still pending Senate approval, while U.S. exports will be allowed to go only to an approved list of entities in Australia. Access to U.S. articles and technology for Australian nationals also will be subject to strict conditions.

“The Government of Australia will allow Australian Defence Articles to be exported from the Australian Community to the United States Community without requiring the relevant member of the Australian Community to seek individual export licences for each export,” the arrangement states without defining United States Community. “To this end, the Government of Australia will issue blanket authorizations to members of the Australian Community,” it adds.

U.S. exports without licenses will be allowed only to specifically designated members of the Australian Community, which includes the Australian government and an approved list of entities that must go through review and approval by both the Australian Department of Defense (ADOD) and the U.S. Department of State. Approval of Australian entities will be based on an assessment of “(a) That the entity or facility must be on the Government of Australia’s list of approved facilities for handling of classified information and material; (b) Foreign ownership, control or influence; (c) Previous convictions or current indictment for violations of United States or Australian export control laws or regulations; (d) The United States export licensing history of the entity or facility; and (e) National security risks, including interactions with countries identified or proscribed by Australian or United States laws or regulations” (see **WTTL**, Oct. 1, 2007, page 4).

Access to U.S. defense articles for persons in Australia will require that they be: “(a) Cleared to at least the level of a Government of Australia RESTRICTED security clearance, which includes indicators such as identity, nationality, and police record; and (b) Undergo an additional check for indicators of significant ties,” the arrangement states. “Where this additional check gives rise to concerns of there being significant ties to a country proscribed under section 126.1 of the International Traffic in Arms Regulations of the United States, then the Government of Australia will conduct a dedicated assessment for significant ties at the same standard for that of a Government of Australia SECRET security clearance,” it continues.

* * * Briefs * * *

CHINA: Possibility of legislation to attack China’s manipulation of its currency and other unfair trade practices has become more uncertain. Rather than saying unequivocally that they will pass such legislation, Democrats on House Ways and Means Committee in a March 26 letter to President Bush merely threatened to pass a China bill if administration fails to act. Letter urged president to deal with currency problem though IMF, WTO, collectively with other countries and to designate China a currency manipulator. “If the administration is unable or unwilling to do so, Congress will take action, if necessary, to ensure the integrity of the international economic system and to guard against international economic instability,” Democrats warned.

USTR: President Bush March 26 said he intends to nominate long-time agriculture official Ellen Terpstra to be chief USTR agricultural negotiator. Terpstra, who was at USTR early in her career, currently serves as USDA deputy under secretary of farm and foreign agricultural services. In private sector, she was president of USA Rice Federation. Separately, USTR Susan Schwab promoted Stan McCoy to assistant USTR for intellectual property and innovation and Andy Olson to assistant USTR for legislative affairs.

NEDP: Compass Chemical International LLC March 19 petitioned ITA and ITC for antidumping ruling against 1-Hydroxyethylidene-1, 1-diphosphonic acid from China and India.

VALVES: Parker-Hannifin Corporation March 19 filed antidumping petitions at ITC and ITA against imports of frontseating service valves from China.

TRADE PEOPLE: Veteran trade attorney Donald A. Weadon Jr of Weadon & Associates, died on Easter Sunday March 23. Memorial service will be held April 5 at 11:00 AM at St. John's Episcopal Church Georgetown Parish. Widely respected in trade community for his expertise and experience in export control law and regulation, Weadon, who was 63, was also great friend and mentor to many, including this editor, and our companion publication, *The Export Practitioner*, to which he was a frequent contributor.