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Proposals Would Move Commercial Satellites from USML to CCL

After a 14-year detour into munitions controls, commercial satellites will return to export control on the Commerce Control List (CCL) under parallel proposals the Bureau of Industry and Security (BIS) and State's Directorate of Defense Trade Controls (DDTC) published in the Federal Register May 24. The proposals would transfer commercial spacecraft and related items now on U.S. Munitions List (USML) Category XV to new "500 series" Export Control Classification Numbers (ECCN) on the CCL. DDTC also proposes a new definition for "defense services," and the BIS proposal would set a new threshold for "radiation hardened" semiconductors (see related story, page 5).

> Because transferred satellites aren't considered military items, they won't be placed under the new "600 series" on the CCL. Instead they will come under new ECCNs 9A515, 9B515, 9D515 and 9E515, which also will cover existing CCL controls on spacecraft.

"The proposals are a move in the right direction, but no one should kid themselves that they solve the problem," one industry representative told WTTL. The continuing embargo on exports of commercial satellite components to China will still exclude U.S. parts makers from one of the largest and fastest-growing markets in the world and will continue to benefit European competitors, he noted.

To avoid imposing controls on microelectronics that are becoming inadvertently radiation hardened because of advances in technology and not necessarily for space use, BIS proposes a new control threshold under ECCN 9A515.d for microelectronic circuits, previously controlled on the USML. The new ECCN will cover items "rated, certified, or otherwise specified or described as meeting or exceeding all the following characteristics" including total dose, dose rate upset threshold, neutron dose and uncorrected single event upset sensitivity (see **WTTL**, April 29, page 10). Industry sources expect further changes to be made in the final rule.

Appellate Court Upholds Original Injury Ruling on Ball Bearings

The Court of Appeals for the Federal Circuit (CAFC) has struck a blow to end remand mania over imports of ball bearings. In *NSK v. ITC*, the appellate court agreed with the

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International Trade Commission's (ITC) original injury determination in the "sunset" review of ball bearings from France, Germany, Italy, Japan, and the United Kingdom (UK) and said the Court of International Trade (CIT) "erred in repeatedly remanding the case" back to the ITC. In all, the CIT reviewed six attempts by the ITC to meet the trade court's remand instructions. The CAFC sided with the ITC and Timken Company that the commission's first sunset ruling was the correct one.

> Based on the CIT's remand instructions, ITC said it reached a conclusion under protest that there would be renewed injury to U.S. industry if the antidumping orders on imports from France, Germany and Italy were revoked but that there would be no injury from terminating the orders on imports from Japan and the UK. The CAFC's May 16 ruling vacated the CIT ruling by CIT Judge Judith Barzilay and reinstated the ITC's second affirmative remand determination for all the imports.

"Having reviewed the entire body of record evidence, we conclude that substantial evidence supports the Commission's determination that U.K. imports likely would have a discernible adverse impact on the domestic ball bearing industry if the antidumping order were removed," Appellate Judge Kathleen O'Malley wrote for the three-judge panel. "Consequently, we reverse the Court of International Trade's order affirming the Commission's decision under protest not to cumulate U.K. imports with those of the other subject countries and order the court to reinstate the Commission's decision in its *Second Remand Determination* to cumulate imports from the U.K. with those from the other subject countries," she stated.

The CAFC ruling (1) reversed the CIT in *NSK V* and *VI,* which affirmed negative rulings on orders for the UK and Japan; (2) vacated the CIT decision in *NSK IV*; (3) instructed the CIT to vacate the ITC's negative injury determinations in the Third and Fourth Remand Determinations; and (4) ordered the CIT to reinstate the ITC's affirmative material injury determination reached in the Second Remand Determination.

Congress, OFAC Take Action to Tighten Iran Sanctions

Legislation that would compel countries that are still purchasing crude oil from Iran to reduce their purchases by 1 million barrels a day within a year moved one step closer to passage May 22, when the House Foreign Affairs Committee unanimously passed the Nuclear Iran Prevention Act (H.R. 850). The measure would significantly expand existing economic sanctions against Iran, as well as penalties for U.S. and foreign persons and banks that do business with Iran.

> The bill would stiffen penalties for human rights abusers in Iran; penalize foreign persons who engage in significant commercial trade with Iran; expand the Iranian economic sectors effectively blacklisted; and limit Iran's access to overseas foreign currency reserves. It was introduced in February by Committee Chairman Ed Royce (R-Calif.) and Ranking Member Eliot Engel (D-N.Y.) (see **WTTL**, March 4, page 8). The committee approved a Royce substitute measure and several other amendments by voice votes.

The legislation would broaden penalties under the International Emergency Economic Powers Act to apply to "a person that violates, attempts to violate, conspires to violate,

or causes a violation of this Act or any amendment made by this Act or regulations prescribed under this Act to the same extent that such penalties apply to a person that commits an unlawful act" under the statute.

> Separately on May 22, the Senate voted 99 to 0 to approve a non-binding resolution "strongly supporting the full implementation of United States and international sanctions on Iran and urging the President to continue to strengthen enforcement of sanctions legislation." S. Res. 65 was sponsored by Sens. Lindsey Graham (R-S.C.) and Robert Menendez (D-N.J.).

That same day, Treasury's Office of Foreign Assets Control (OFAC) added 20 individuals and companies to its list of specially designated nationals, including Seifollah Jashnsaz, who is chairman of Naftiran Intertrade Company (NICO) and director of Hong Kong Intertrade Company and Petro Suisse Intertrade Company SA. In addition to Jashnsaz, OFAC's designated five other individuals "holding other leadership positions in Iran's energy sector who have been involved in Iranian attempts to evade international sanctions."

Those named are: Ahmad Ghalebani, managing director of National Iranian Oil Company (NIOC) and a director of both Petro Suisse and Hong Kong Intertrade; Farzad Bazargan, managing director of Hong Kong Intertrade; Hashem Pouransari, an NICO official and managing director of Asia Energy General Trading LLC; and Mahmoud Nikousokhan, NIOC finance director and a director of Petro Suisse. Treasury identified NIOC and NICO in 2008, which are centrally involved in Iranian oil sales, as entities owned or controlled by the government of Iran.

CAFC Rejects Simple Averaging to Set Dumping Margin

Commerce can't just average the dumping margins of two mandatory respondents in an antidumping investigation to determine the rate for imports by separate-rate parties, the Court of Appeals for the Federal Circuit (CAFC) ruled May 20. In *Yangzhou Bestpak Gifts & Crafts Co. v. U.S.*, the court vacated an opinion by Court of International Trade (CIT) Judge Judith Barzilay, who upheld Commerce's margin decision in a case involving narrow woven ribbons with woven selvedge from China. The appellate court remanded the case to the CIT to remand to Commerce to revise its determination.

> To determine a dumping margin for Yangzhou, which was seeking a separate rate, Commerce had averaged the rates of the two mandatory respondents. One mandatory respondent had a *de minimis* rate and the second had an adverse face available (AFA) rate of 247.65% because it had refused to cooperate in the investigation. Commerce took the average of zero and 247.65% and set Yangzhou's rate 123.83%. The CIT said that decision was not unreasonable.

"Although Commerce may be permitted to use a simple average methodology to calculate the separate rate, the circumstances of this case renders a simple average of a *de minimis* and AFA Chinawide rate unreasonable as applied. Similarly, a review of the administrative record reveals a lack of substantial evidence showing that such a determination reflects economic reality," CAFC Chief Judge Randall Rader wrote for the three-judge panel. "Assigning a non-mandatory, separate rate respondent a margin equal to over 120% of the only fully investigated respondent with no other information is unjustifiably high and may amount to being punitive, which is not permitted by the

statute," he stated. "Even with determinations of an AFA-rate, Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin. Likewise, rate determinations for nonmandatory, cooperating separate rate respondents must also bear some relationship to their actual dumping margins," he ruled. Separately, he said Barzilay had not abused her discretion in finding that Bestpak failed to exhaust its administration remedies with respect to evidence in the case.

Industry Backs Customs Reauthorization Legislation

The trade community's frustration dealing with Customs and Border Protection (CBP) was just under the surface of a May 22 Senate Finance Committee hearing that heard industry witnesses express support for legislation (S. 662) to reauthorize and reform Customs. The measure, introduced by Finance Chairman Max Baucus (D-Mont.) and Ranking Member Orrin Hatch (R-Utah), would attempt to rebalance CBP's mission – as well as Immigration and Customs Enforcement's (ICE) – so more attention is given to its trade mandate along with its national security role (see **WTTL**, April 1, page 3).

> Since legislation was passed in 2002 to create the two agencies and the Department of Homeland Security, "CBP and ICE's trade missions have been put on the back burner as they have pursued their new security and law enforcement missions," Baucus said in his opening statement. Sen. Ron Wyden (D-Ore.) said he has been trying to get Customs to pay more attention to trade, "but that hasn't worked." After the hearing, Baucus told reporters the committee has no plans yet to hear from administration witnesses or to schedule a markup of the bill. He said it might be possible to act on the bill before the Senate's August recess.

Clark Silcox, general counsel for the National Electrical Manufacturers Association, praised a provision in the bill that would give CBP clear authority to share information on suspected counterfeit imports with patent and copyright holders. He criticized a Customs directive that cites the Trade Secrets Act as requiring the agency to obliterate the name and identifying information about an import before releasing a sample to the trademark holder. He said Customs still refuses to share this information despite provisions in the 2012 National Defense Authorization Act that authorized its release.

"The markings themselves are in no way secret or confidential," he argued, noting that they are seen on store shelves and by buyers. If the imports were legitimate the information would be released to the rights-holder and would not violate the Trade Secrets Act, he said. "If the goods were counterfeit, however, any such codes included in the goods would be indecipherable by the trademark owner; they will not reveal any information regarding the identity of the manufacturer, exporter or importer, but simply would reveal the fact that the goods are not genuine," he told the committee.

David Cooper, global customs compliance manager for Procter & Gamble, said his firm supports the bill and specifically Section 201, which would require CBP to consult with industry to ensure that the Customs-Trade Partnership Against Terrorism (C-TPAT) has measurable benefits. "Having met or exceeded the security requirements for this program, we anticipate receiving in a measurable way the benefits highlighted by CBP for C-TPAT companies – lower inspection rates, expedited processing at ports of entry, expedited treatment when containers are selected for scanning or inspection and others,"

he testified. "To date, we have not seen these benefits apply in a measurable way to our entries," Cooper stated. Mary Ann Comstock, a customs manager with UPS, said the Customs Operations Advisory Committee (COAC) has recommended that the U.S. shift to a prospective system for setting antidumping duties instead of the current retrospective system, which can take up to three and a half years to determine an import's final duty. Because the current system takes so long, it is "an incentive to evade" the duties, she testified. If the law were changed, "you'd have a lot of happy honey producers," said Sen. John Thune (R-S.D.).

U.S., Burma Agree on Trade and Investment Talks

The political opening of Burma and the relaxation of U.S. trade sanctions continued May 21 with the signing of a bilateral Trade and Investment Framework Agreement (TIFA). The signing of the accord by Acting U.S. Trade Representative (USTR) Demetrios Marantis and Burma's Deputy Commerce Minister Dr. Pwint San of Myanmar creates "a platform for ongoing dialogue and cooperation on trade and investment issues between the two governments," noted a statement from the USTR's office.

> "As part of this dialogue, the two sides will work together to identify initiatives that support the ongoing reform program and promote inclusive development that benefits the people of Burma, including the poorest segments of its population," the statement noted. Marantis had visited Burma in April, meeting with senior officials there and highlighting the potential for a TIFA (see **WTTL**, April 29, page 11).

Later that day, President Obama met with Burmese President Thein Sein in the first visit to the U.S. by a leader of that country in 50 years. After the meeting May 21, Obama said that policy changes and opening within that country "has also allowed the United States and other countries and international institutions to participate in engagement with the Myanmar government about how we can be helpful in spurring economic development that is broad-based and that produces concrete results for the people of Myanmar. And that includes the prospect of increasing trade and investment in Myanmar, which can produce jobs and higher standards of living."

On the contentious issue of labor rights, the TIFA "recognizes the importance of respecting, promoting, and realizing in each Party's laws and practices the fundamental labor rights as enumerated by the International Labor Organization (ILO) and of effectively enforcing their respective laws and regulations on worker rights," USTR noted. Under the TIFA, the U.S. will seek to work with the government in Burma to "achieve further improvements in the protection of worker rights," it added. Since the easing of sanctions in 2012, bilateral trade has increased but still remains small. Through the first three months of 2013, bilateral trade was uneven, with $89 million in U.S. exports to Burma but only $1 million in U.S. imports from Burma.

State Reproposes Definition of "Defense Services"

In response to numerous public comments complaining about a proposal it issued in April 2011 to revise the definition of "defense services" in the International Traffic in Arms Regulations (ITAR), DDTC came back with a new proposed definition as part of

its proposed changes to Category XV controls on commercial satellites (see related story, page 1). "Rather than proceed to a final rule on the definition, the Department is republishing the definition as a proposed rule, incorporating certain changes stemming from the public comment review, but also including in the definition the provision of certain assistance with regard to spacecraft," DDTC said.

> The "defense service" definition would be revised in part to "specifically include the furnishing of assistance for certain spacecraft related activities," DDTC said. Specific to satellites, the proposed definition now covers the furnishing of assistance (including training) in the "integration of a satellite or spacecraft to a launch vehicle, including both planning and onsite support," and "in the launch failure analysis of a satellite, spacecraft, or launch vehicle," the DDTC noted.

Among the many areas that drew objections was the original proposal's treatment of services involving "public domain information." Comments recommended revisions to ITAR Section 120.9(a)(4) to clarify that an aggregation of public domain data and clarification that the aggregation of public domain data cannot be considered a defense service or render the data "other than public domain."

"The Department confirms that a defense service involves technical data and therefore the use of publicly available information would not constitute a defense service according to the new ITAR Sec. 120.9(b)(2). The Department notes, however, that it is seldom the case that a party can aggregate public domain data for purposes of application to a defense article without using proprietary information or creating a data set that itself is not in the public domain," DDTC responded.

DDTC, however, rejected comments calling for replacing the phrase "other than public domain" in Section 120.9(a)(1) with "using technical data." Industry had complained the former phrase would extend the definition to include services State did not intend to capture, including assistance provided using proprietary data not controlled by the ITAR. "The Department did not accept this comment because it intends to control as a defense service certain services that use other than technical data. An example would be the services covered under ITAR Sec. 120.9(a)(3)," DDTC said.

The proposal's new definition of defense services in ITAR Section 120.9 would cover such activities as furnishing of assistance, including training, using other than public domain information to a foreign person whether in the U.S. or abroad, in the design, development, engineering, manufacture, production, assembly, testing, intermediate- or depot- level maintenance modification, demilitarization, destruction, or processing of defense articles; plus furnishing assistance to a foreign person for the integration of any USML item or item "subject to the EAR into an end item (see Sec. 121.8(a) of this subchapter) or component (see Sec. 121.8(b) of this subchapter) that is controlled as a defense article on the USML, regardless of the origin."

The definition would exclude training in organizational-level (basic-level) maintenance of a defense article lawfully exported; mere employment of a natural U.S. person by a foreign person; servicing of an item subject to the EAR that has been integrated or installed into a defense article; providing law enforcement, physical security, or personal protective services to a foreign person using only public domain information; or serving as a drafted member of a foreign regular military force.

* * * Briefs * * *

EXPORT CONTROL REFORM: BIS May 20 launched two new "web-based decision tools" to help exporters apply CCL Order of Review and new 'specially designed' definition. For more information, go to BIS website: **http://beta-www.bis.doc.gov/index.php/decision-tree-tools**.

ITC: Commission is having trouble filling two key posts and is advertising, seeking applications for jobs of general counsel and director of Office of Unfair Import Investigations.

TRADE PEOPLE: Deputy USTR Miriam Sapiro named acting USTR May 23 upon Demetrios Marantis' departure to San Francisco tech firm Square (see **WTTL**, May 13, page 1). White House advisor Mike Froman has been nominated for the permanent post and his paper has been sent to Senate Finance Committee, but his confirmation hearing has not been scheduled.

SUGAR: By vote of 45-54, Senate rejected amendment to pending Farm Bill (S. 954) May 22 to revise U.S. sugar program. Amendment tracked provisions of Sugar Reform Act (H.R. 693/S. 345), which would reduce restrictive market measures in current law.

TUNISIA: U.S. launched initiative for small and medium-sized businesses under existing TIFA with Tunisia May 20. Led by USAID, initiative will provide training on the U.S. small business development center model in Tunisia.

TPA: Business groups launched "Trade Benefits America Coalition" May 20 to promote U.S. trade agreements and advocate for the passage of Trade Promotion Authority.

EX-IM BANK FRAUD: Luis E. Moy, owner of Denver steel supply company, was sentenced May 14 in Denver U.S. District Court to 30 months in prison for defrauding Ex-Im Bank of approximately $11 million. Moy pleaded guilty May 16, 2012, to one count of conspiracy to commit wire fraud and one count of wire fraud. In addition to prison, Moy was sentenced to five years' supervised release and was ordered to pay $11,183,274.79 in forfeiture.

KORUS: Some small and medium-sized businesses benefit from U.S.-Korea FTA, while others still face challenges in exporting to Korea, according to ITC report (Pub. 4393) released May 23. FTA entered into force March 15, 2012.

RELATED-PARTY TRADE: Census Bureau annual report on share of exports and imports going to related parties shows increase in such transactions in 2012, although still within historic range. On import side, 50.3% of merchandise came to U.S. subsidiaries of foreign companies. On export side, about 29.1% was shipped to foreign subsidiaries of U.S. companies. With European Union, 32.2% of U.S. exports to EU went to U.S. subsidiaries, while 61.8% of imports from EU came to EU subsidiaries in U.S.

EXPORT-IMPORT BANK: Report from Government Accountability Office (GAO) May 23 complains that bank doesn't adequately explain shortcomings in how it estimates that its financing supported 255,000 jobs in 2012 (GAO-13-446). Ex-Im agreed with GAO recommendation to report more detailed information in its fiscal 2013 annual report, GAO said.

CATFISH: In two related cases May 23, CIT Senior Judge Kenton Musgrave agreed to Commerce request to remand department's results in sixth administrative review of antidumping duty order on three species of *Pangasius* fish from Vietnam (slip ops. 13-63, 13-64). Order responds to suit by Catfish Farmers of America challenging how ITA's selected surrogate prices in Philippines. "The court here again emphasizes it is not substituting judgment for that of Commerce on these issues, it is merely observing; Commerce's expressed preference for farm-gate prices may give way to a reasonable determination that they are not the 'best' data for purposes of surrogate country selection if it provides a reasonable explanation for the choice, but thus far that explanation is lacking," Musgrave wrote.