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ITA ASKS NAFTA PANEL TO REOPEN MAGNESIUM CASE

The International Trade Administration (ITA) has asked a NAFTA binational panel to reopen its ruling on ITA's "sunset review" decision on pure magnesium from Canada to consider a recent Extraordinary Challenge Committee (ECC) ruling on that case. Although the ECC said the panel had exceeded its powers, committee upheld the panel's decision against ITA's decision.

> The ECC's ruling is likely to be central argument in the extraordinary challenge the U.S. will file the week of Oct. 25 against another NAFTA panel's ruling on softwood lumber. Both cases involve the standard of review NAFTA panels must use in weighing ITA and International Trade Commission (ITC) decisions and the power of panels to order the agencies to reverse their determinations.

"The requested re-examination is necessary to consider the conclusions and observations made by the Committee, affirming the Panel's decision remanding to Commerce, but suggesting that the Panel correct its 'Order of the Panel' so that Commerce may conduct an appropriate review upon remand," ITA said in its motions. An ITA official told WTTL the agency wants the panel to give it guidance on how to apply the ECC's ruling, which seemed contradictory.

The ECC had found that the magnesium panel had erred on two of the three criteria upon which a panel ruling could be overturned, but it said all three criteria must be violated to warrant reversal of the panel. The committee determined that the panel had failed to apply the correct standard of review and that error materially affected its judgment. Nonetheless, the ruling didn't threaten the integrity of the NAFTA review process – the third criteria – because the panel had relied on current case law at the time of its decision.(see **WTTL**, Oct. 11, page 4).

The ECC also recognized that the NAFTA panel had ordered the remand and revocation of the sunset determination because ITA had not followed the panel's earlier advice to reopen the case to obtain additional evidence to support its decision. The committee invited ITA to seek permission to reopen the case so it "would look at the history of all of these remands as a whole and conduct the full and complete review that the panel wished for and that this case demands," the ECC stated. The ITA motion takes that advice.

DEFENSE SEEKS TO LIMIT LICENSE EXCEPTION FOR NIGHT VISION PRODUCTS

In what may foreshadow a broader attempt to tighten controls on other exports, the Defense Department has asked BIS to revised the Export Administration Regulations (EAR) to eliminate the availability of License Exception APR, which allows additional permissible reexports to

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close U.S. allies, for night vision products. Pentagon representatives provided a classified, closed-door briefing to the BIS Sensors and Instrumentation Technical Advisory Committee (SITAC) Oct. 26, reportedly to provide evidence that shows diversion of thermal imaging cameras from countries that supposedly apply multilateral export controls to the equipment.

> BIS for sometime has been restricting the use of APR as a condition for approving export licenses for thermal imaging cameras, BIS staffers note. APR has been removed "as a practical matter in your license conditions, but DoD has asked us to make a regulatory change to reflect that," BIS Deputy Assistant Secretary Matthew Borman told SITAC.

"We asked the Defense Department to present a classified briefing so you would understand what the on-the-ground reality is that underlies that request," Borman said. "My view was that it is very important before we launched that regulatory change that TAC members have that underlying factual basis that will be presented by DoD," he added.

BIS WINS APPEAL ON DEFINITION OF "SPECIALLY DESIGNED"

A 10-year-old legal battle over how the Bureau of Industry and Security (BIS) applies the phrase "specially designed" to products on the Commerce Control List (CCL) took another twist Oct. 25 when the First Circuit Court of Appeals upheld the agency's interpretation and rejected a claim that the language was unconstitutionally vague. In seeking to overturn the government's interpretation of "specially designed," the defendants in the case have handed BIS significant judicial backing to expand controls broadly on products related to those on the CCL.

> The definition of "specially designed" has to be considered in light of the purpose of the Export Administration Act (EAA), the appellate court ruled. "Given the depth of concern for national security in the EAA, it would hardly serve the statutory purpose to adopt a definition of 'specially designed' that excludes any item designed for use with embargoed commodities but capable of use with commodities that were not embargoed," wrote Judge Timothy Dyk for the court.

"An exclusive use definition would permit easy evasion of the regulation through the deliberate design of items that implicate national security concerns so that they have both permitted and prohibited uses," wrote Dyk who was assigned to the case from the Court of Appeals for the Federal Circuit. "Thus, statutory and regulatory concerns with national security cannot be achieved if the regulation is construed to allow the exportation of controls designed to be used with embargoed commodities so long as they had other potential uses," he continued.

The case, which began in 1993, involves the prosecution of Walter Lachman, Maurice Subilia Jr., Fiber Materials, Inc. (FMI) and Materials International. A federal jury in 1995 convicted them of knowingly and willfully violating the EAA, but Boston U.S. District Court Judge Douglas Woodlock withheld sentencing for eight years until 2003.

Although Woodlock called the defendants' actions "fundamentally reprehensible", he granted their motion for acquittal notwithstanding the verdict. During the eight-year lapse, Woodlock conducted an extensive examination of the history and application of "specially designed." That process included the review of classified minutes from meetings of the Coordinating Committee on Multilateral Export Controls (COCOM), which was the predecessor to the Wassenaar Arrangement, and testimony from current and past Commerce licensing officers.

The then-Bureau of Export Administration had charged the defendants with exporting a control panel for a hot isostatic press (HIP) to India in 1988 without an approved export license. The CCL controls HIPs, which can be used to make components for nuclear missiles, that have inside diameters of five inches or more. The exported control panel was made for a HIP that had a 4.9 inch diameter, but it also had the capability to be used with larger presses. In fact, the government claimed the company later assembled the panel to a larger HIP in India after it

was exported. The defendants had argued that BIS officials had used different interpretations of "specially designed" than they had applied to their HIP control.

> "While the defendants contend that Commerce officials arrived at conflicting interpretations of ECCN 1312A, the vast majority of those interpretations were not public," the court said. Nothing in past rulings on government interpretations of statutes "suggests that such non-public statements may create the kind of confusion that supports a due process violation," stated Dyk, who was joined in the ruling by Circuit Court Judges Jeffrey Howard and Bruce Selya.

The decision warns exporters against relying on statements that BIS officials make at public meetings. "We do not think that informal statements made at industry seminars are the types of interpretations on which the defendants may properly rely, particularly because, as noted earlier, there was a formal process by which the defendants could have sought an advisory opinion from Commerce's Bureau of Industry and Security regarding whether their control panel was subject to regulation and, if so, its appropriate ECCN classification," Dyk wrote.

The appellate court remanded the case to the district court for consideration, based on its ruling, of the defendants' motion for a new trial. The defendants, however, are expected to seek an en banc review of the appellate decision before the entire First Circuit Court. If the case is remanded, counsel for FMI expect Woodlock to grant the new trial. [**Editor's Note**: A free copy of the appellate court ruling will be sent to WTTL subscribers on request.]

INDUSTRY FACES DEFENSE OPPOSITION TO CHANGES IN CAMERA CONTROLS

A proposal made by the thermal imaging industry to get Wassenaar Arrangement support for decontrolling certain low-level night vision cameras got a cool reception from the chief licensing officer of the Defense Technology Security Administration (DTSA) Oct. 26. Despite the reaction from Michael Laychak, chief of DTSA's dual-use licensing division, the BIS Sensors and Instrumentation Technical Advisory Committee voted unanimously to recommend that BIS seek interagency approval to put the changes on the agenda for Wassenaar's 2005 review of the multilateral control list.

> The proposal would amend Wasssenaar item 6.A.3.b.4 so it would not control imaging cameras that can't have magnifier attachments added and have an instantaneous field of view greater than or equal to 1.4 mrad. "This proposal seeks to maintain control of cameras with long-range performance and thus, most military utility, while removing controls on some well-established commercial applications in industrial thermography and firefighting," the proposal explained.

While saying this was the first time he had seen the proposal, Laychak told the TAC that DTSA "is not inclined to support any decontrol." He said DTSA has been moving a large volume of night vision licenses more quickly than before and wants to find ways to improve the process further. DTSA is willing "to look at other ways to get a win-win solution," he said. Laychak acknowledged the need to keep the U.S. industry competitive in order to survive. "There are other ways than decontrol to maintain the viability of the industry," he assert.

The TAC's proposal comes as Wassenaar is still deadlocked over proposals to extend controls on focal plane arrays using amorphous silicon. The issue was addressed but not resolved by a Wassenaar experts group that met at the end of September and into October. The group will hold another meeting on the issue in the coming weeks in hopes of completing a proposal in time for the regime's annual plenary meeting in December (see **WTTL**, June 14, page 3).

BIS Deputy Assistant Secretary Matthew Borman told the TAC that BIS received 10% more license applications for thermal imaging products in the fiscal year that ended Sept. 30, 2004, compared to the year before, handling 3,068 applications v. 2,780 in 2003. Average processing time for those cases dropped to 40 days from 52, he noted. While most of the applications

were for the export of only one or two cameras, others were for bulk shipments of 20,000 or more. As a result, BISers estimate that 350,000 to 400,000 thermal imaging products were exported under licenses approved in 2004. The large volume of exports caused one TAC member to question the value of controls. In the next five years, at the current rate of shipments, there will be more than 2 million thermal imaging products distributed overseas, he noted. That number would suggest the equipment will be beyond control, he added.

BIS ADDS AUDIT REQUIREMENT TO SETTLEMENT AGREEMENT

After requiring one exporter to adopt a new export management system as a condition for a settlement agreement to settle export control violation charges, BIS has now added an audit requirement to a settlement with another firm (see **WTTL**, Oct. 25, page 1). As part of a settlement with BIS announced Oct. 28, OSPECA Logistics Management of Brownsville, Texas, agreed to conduct an audit of its internal export compliance program and provide BIS a copy of the results. It also agreed to pay a $60,000 civil fine.

> OSPECA agreed to conduct the audit between18 and 24 months after the BIS order implementing the agreement. "Said audit shall be in substantial compliance with the Export Management System audit module, which is available on the BIS website," the agreement states. A copy of the audit will be sent to the BIS field office in Dallas no later than Oct. 11, 2006, it added.

BIS agreed to suspend and then waive $15,000 of the civil fine, if OSPECA remains in compliance with export controls for a year. The firm will be allowed to pay the balance of the fine in three equal $15,000 payments stretching to September 2005. OSPECA was charged for its role in 12 shipments of hydrogen fluoride to Mexico without approved licenses. Honeywell, as part of a separate settlement last December, agreed to pay a $36,000 civil fine for its part in the shipments (see **WTTL**, Jan. 5, page 4).

* * * BRIEFS * * *

EXPORT ENFORCEMENT: BIS applied successor liability to Symmetricom of San Jose, Calif., for exports of firm, Datum, Inc., it acquired in 2002. Symmetricom will pay $35,500 civil fine for Datum exports of cesium frequency standard equipment to Malaysia without license and ovenized quartz crystal oscillator to Indian organization that was on BIS Entity List without license.

FSC/ETI: After President Bush quietly signed JOBS Act to revoke and replace FSC/ETI tax rules Oct. 22, EU Trade Commissioner Pascal Lamy Oct. 25 said he would recommend to EU Council to lift EU sanctions on U.S. exports. At same time, EU will ask WTO to review JOBS bill to make sure provisions, especially grandfathered and phased out rules, are not incompatible with WTO requirements.

OFAC: Added to $6.5 million in fines it previously agreed to pay to settle criminal and civil charges related to illegal exports of cryogenic pumps to Iran, Ebara International also has agreed to pay $44,000 civil fine to OFAC to settle charges of facilitating trade with Iran (see **WTTL**, Sept. 27, page 1).

URUGUAY: U.S. and Uruguay signed Bilateral Investment Treaty Oct. 25.

TRADE PEOPLE: William Clements, former international trade counsel for GE, has become partner in D.C. law office of Foley & Lardner....Richard Cupitt, former special advisor to BIS Under Secretary Ken Juster, has become senior consultant with D.C. export control consults MK Technology. Cupitt is also scholar-in-residence at American University's School of International Service.

SUNSET REVIEWS: ITC voted 6-0 on determination Oct. 28 that revoking current antidumping order on natural bristle paint brushes from China would likely lead to renewed injury to U.S. industry. On Oct. 18, commission decided that lifting dumping order on preserved mushrooms from Chile, China, India and Indonesia would likely lead to renewed injury to domestic industry.

LIBYA: Venue for first U.S.-Libyan Economic Summit scheduled for Dec. 6-7 has moved to Corinthia Hotel in Tripoli, Libya, from Geneva. Details on visa and travel arrangements can be obtained from summit sponsor, The CWC Group, at www.thecwcgroup.com or pmorris@thecwcgroup.com.