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Treasury Narrows Meaning of "Controlled By" Under Sanctions

In court papers filed as part of a legal fight over the applications of trade sanctions against Russian officials, Treasury has significantly narrowed the meaning of when a third party is "owned or controlled by" a person placed on the "Specially Designated Nationals" (SDN) list. In effect, the department says an entity is "controlled" by an SDN only when the department says it is – at least under the Russian and Ukraine sanctions. It's 50% owned-by rule remains unchanged.

> Treasury's opinion was in a letter to the U.S. Court of Federal Claims in a suit by Space Exploration Technologies Corp. (SpaceX) to block a government contract with United Launch Services (ULS), a joint venture between Lockheed Martin and Boeing, for rockets for Defense launches. SpaceX claims the Russian rocket engines ULS uses come from NPO Energomash, which it says is controlled by Russian Deputy Prime Minister Dmitry Rogozin, who was named to the SDN list March 17 (see **WTTL**, May 5, page 1).

Claims Court Judge Susan Braden had issued a preliminary injunction blocking the contract and asked the government to comment on the sanctions. She lifted the injunction after receiving a May 8 letter from Bradley Smith, Treasury's chief counsel for foreign assets control. Smith told Braden Rogozin's control of the Russian firm, "if true, could be a potential basis" for the Office of Foreign Assets Control (OFAC) to block it.

"As we interpret it, however, Executive Order 13661 requires that the Department of Treasury make an affirmative determination to trigger blocking under the 'controlled' by provision of the order," Smith wrote. "As of today, no such determination has been made with respect to NPO Energomash, nor has OFAC made any determination that the property and interests in property of NPO Engergomash (sic) are otherwise blocked pursuant to Executive Order 13661," Smith wrote. Purchases from and payments to NPO Energomash don't violate the order, he said. SpaceX's response urged Treasury to "promptly review NPO Energomash's activities and make the appropriate determination."

Palestinian Authority May Renew Push for WTO Observer Status

The apparent breakdown of peace negotiations between Israel and the Palestinian Authority has raised speculation that the Palestinians may renew their push for observer

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status at the World Trade Organization (WTO) as part of their broader efforts to gain international recognition as an independent state. Palestinian officials attended the WTO ministerial in Bali in December and have been working steadily to adopt economic and trade reforms to meet WTO requirements. For now, however, "nothing is happening substantively" on their request, one source reported.

> The Authority first formally requested observer status in 2006 and renewed that request in 2009 and 2010. WTO consideration of the application, which was encouraged by former WTO Director-General Pascal Lamy, was dormant as peace negotiations were underway. New WTO Director-General Roberto Azevedo has not taken a public position yet on the request.

Since the filing of its latest request, the Authority has undertaken the adoption or proposal of several measures aimed at complying with WTO rules. Implementation of many of these changes has been hampered because Israel controls the borders and customs operations for goods and people entering Palestinian areas. Nonetheless, sources that have monitored the Authority's actions say they were "very impressed with what they have done." They also say they believe the Palestinians would be prepared to take over customs management as part of any peace settlement.

"The Palestinian Ministry of National Economy, and the Palestinian Mission in Geneva have been undertaking different consultations with different WTO Member States," an Authority fact sheet notes. "The missions and other representatives of Palestine are meeting with trade officials in their host states to make them aware of Palestine's application for WTO observer status. The delegations to Geneva will also meet with a range of missions to the WTO, including major WTO countries and other countries that are friendly toward Palestine," it adds.

The ministry has developed a "roadmap" for WTO accession, which would be its ultimate goal. As part of that plan, the Authority says it is working to reform regulations covering telecommunications, intellectual property, financial services, standards and transparency. It is also working with international organizations, including the World Bank, to fund these efforts. "A number of donors have been engaged directly and indirectly in the development of Palestine preparation to the WTO accession. The main direct engagements came from two main donors; the United States Agency for International Development (USAID), and the European Union (EU)," the fact sheet reports.

The request for observer status has never been taken up formally by the WTO General Council, despite support from Lamy, who met with the Palestinian economic minister during his tenure. Unofficially, it is believed that Israel and the U.S. have blocked the issue from the agenda. Sources also say the Palestinians have faced difficulties trying to attend meetings in Geneva because of travel restrictions imposed by Israel and as a result some meetings had to be cancelled.

Only Halfway to Export Goal, Commerce Launches Next Phase

With President Obama's National Export Initiative (NEI) after four years failing to get even halfway to its goal of doubling U.S. exports in five years, Commerce Secretary Penny Pritzker tried May 13 to tout a new, "next" phase for the initiative. Gone was any mention of the NEI's original aim. The new initiative, which will stress non-dollar goals,

comes as Census figures show that from 2009 to 2013, total U.S. exports of goods and services increased to $2.27 trillion from $1.58 trillion, an increase of less than 44%, with 2014 exports on track to increase just 4-5% more.

> Pritzker said the updated program, called NEI NEXT, is a "data-based, customer service-driven initiative to ensure that more American businesses can fully capitalize on markets that are opening up around the world." In a speech at an Atlantic magazine program in Washington, she said an important question is how the new initiative will be measured.

"Not only will we continue to track the overall dollar value of U.S. exports, but we will also dig deeper to collect additional data to inform our efforts, such as: the number of exporters in each region of the United States, the number of markets our exporters are reaching, the extent to which free trade agreements are helping our companies grow," Pritzker explained.

Among other efforts, NEI NEXT also includes a renewed promise for a "single window" for trade information, which means "businesses will be able to use just one electronic platform to complete the forms needed by dozens of federal agencies," Pritzker noted. "Under NEI NEXT, the Department of Homeland Security is spearheading a goal to implement the 'single window' by the end of 2016," she said. A "single window" concept for trade data, which administration officials have been promising for the last 20 years, was first introduced by Vice President Al Gore in 1993 (see **WTTL**, Feb. 24, page 6).

NEI NEXT will be implemented through the Export Promotion Cabinet and Trade Promotion Coordinating Committee (TPCC), which consists of representatives from 20 federal departments and agencies with export-related programs. Pritzker chairs the TPCC, which Congress created 22 years ago in the Export Enhancement Act of 1992.

Russian Sanctions Still Allow Use of License Exceptions

Exporters of goods and technology can continue to use license exceptions for exports to permitted Russian and Ukraine customers despite a broad BIS policy of denying applications for exports that could help Russia's military capabilities. "BIS has not announced any changes with respect to the use or availability of license exceptions to export items to Russia," BIS Assistant Secretary for Export Administration Kevin Wolf told WTTL in an email May 15.

> Wolf's statement, while vague, answers questions exporters have had about use of license exceptions that don't require BIS review or approval. In particular, questions have been raised about the availability of License Exception ENC for encryption products, which seems to be permitted.

As part of new sanctions the Obama administration imposed on certain individuals and entities in Russia and Ukraine April 28, BIS expanded its policy of holding pending licenses for Russia to say it would deny certain pending licenses and revoke others that "contribute to Russia's military capabilities." That notice also raised questions about how the agency is interpreting "military capabilities." BIS has not explained yet what that phrase means (see **WTTL**, May 5, page 1). "BIS has not released an interpretation of the referenced phrase, but, other than with respect to entities listed, BIS has not

imposed any new licensing obligations on items to be exported to Russia," Wolf said in his email. "Thus, BIS will review on a case-by-case basis items on applications to be exported to Russia to determine whether the license should be approved, denied, or partially denied," he added.

The BIS notice said: "Effective immediately, BIS will deny pending applications for licenses to export or re-export any high technology item subject to the EAR to Russia or occupied Crimea that contribute to Russia's military capabilities. In addition, the Department is taking actions to revoke any existing export licenses which meet these conditions. All other pending applications and existing licenses will receive a case-by-case evaluation to determine their contribution to Russia's military capabilities."

This notice, along with Wolf's statement, suggests that certain exports of clearly civil goods and technology to civilian entities in Russia could get approved. All export licensing policies, however, remain tentative as U.S. and European Union (EU) officials threatened May 15 to impose additional sanctions against Russia if Moscow interferes with Ukraine's presidential elections May 25.

"We agreed this morning that if Russia or its proxies disrupt the election, the United States and those countries represented here today in the European Union will impose sectoral economic sanctions as a result," Secretary of State John Kerry said after meeting with EU counterparts in London. Sectoral sanctions would go beyond those imposed on individuals and entities and could hit key Russian industrial sectors.

Kerry did not identify which sectors might be hit but said, "We know what they are. We're ready." He said U.S. and EU officials are working to define the sectors and to be sure any action would not hurt the U.S. and EU more than Russia. "Obviously, the purpose of it is to have a greater impact on the target than it is on the people imposing it, and so we will be thoughtful and we are being thoughtful and we're being very, I think, deliberative in trying to make determinations about what is appropriate and what is not appropriate," Kerry said.

Final Satellite Rules Reflect Pentagon's Control Concerns

Reaction to final transition rules on the transfer of products from Category XV (satellites) of the U.S. Munitions List (USML) to the Commerce Control List (CCL) was generally positive, while some in industry have more convincing to do. The interim rules that the Bureau of Industry and Security (BIS) and State's Directorate of Defense Trade Controls (DDTC) published in the Federal Register May 13, which are still open for public comment, reflect the interagency conflict over these controls.

> As far as the reform satellite controls, "the vast amount of homework has been done that needed to be done," Joel Johnson of Teal Group told WTTL. On balance, he said, the transfer of products is "obviously a good thing" but it still has the "fatal Chinese flaw" of 0% de minimis mandated by Congress under the National Defense Authorization Act. That restriction "has done nothing to slow the Chinese space race," he added.

Because the Defense Department insisted on additional restrictions on transfers, the final rule fell short of what some in industry had hoped for, as some sources had predicted

(see **WTTL**, May 5, page 7). For example, some products, including some spacecraft with commercial end-use but higher capabilities, were not moved for national security reasons. "Commenting parties recommended various articles that would be pertinent to the emerging civil and commercial space industry be moved from the USML to the CCL so as to facilitate its growth. The Department did not accept the premise of this recommendation," the State notice said. "To the greatest extent possible, the Department is revising the USML using the principle of control based on article capability and not article end-use," it explained.

> The Commercial Spaceflight Federation (CSF), whose efforts at decontrol seemed to be overruled, was diplomatic in its reaction. "While the overall export control reform effort is to be applauded, there is still much progress to be made on commercial spacecraft," said CSF President Michael Lopez-Alegria in a statement.

"Moving these vehicles to the CCL would give industry an opportunity to pursue global markets, enabling contributions to the U.S. economy and the growth of our space industrial base," he said. The group said it looks forward to "continued revisions to ensure that the U.S. remains a leader in spaceflight" (see **WTTL**, March 10, page 4). Others in industry hailed the final rules. Patricia Cooper, president of the Satellite Industry Association, called the changes a "truly comprehensive overhaul to the U.S. satellite export control system."

In the end, four main categories of products will move to the CCL: radiation-hardened microelectronic microcircuits; communication satellites that do not contain classified components or capability; remote sensing satellites with performance parameters below certain thresholds; and systems, subsystems, parts and components associated with these satellites. In response to industry lobbying, the agencies agreed to a two-step implementation timeline: changes to controls on microelectronic microcircuits will take effect 45 days (June 27) after publication of the rule, while the remainder of the changes take effect in 180 days (Nov. 10).

"Microelectronic circuit development has advanced to a stage where manufacturers are concerned that the next generation of purely commercial microelectronic circuits may meet or exceed the parameters" in Category XV, the BIS notice said. "It is necessary to quickly transition these items to the CCL to avoid requiring that these commercial manufacturers register with DDTC and obtain ITAR licenses for the development of these items," it added. The original proposed rules were published May 24, 2013. Included in that rule was a revised definition for defense services, which will be the subject of a separate rule, State said.

Wassenaar Weighs New Metric for Machine Tool Controls

Expert-level officials of the Wassenaar Arrangement of multilateral export controls are working on a new metric to measure the capability of machine tools subject to the regime's controls. The potential change would adopt the measurement of unidirectional repeatability to replace precision accuracy as the basis for controls. The change, which appears to have the support of most Wassenaar members, could be ready for consideration at the regime's plenary meeting in December if technical work on setting the new level of controls can be completed by September, according to BIS officials. A more

likely timeline, however, would put adoption off for another year. BIS staffers told the agency's Materials Processing Equipment (MPE) Technical Advisory Committee (TAC) that they are trying to make sure the change will not expand or decrease the coverage of controls or change the status quo, but it would provide a better measure of machine capability. The change, however, would mean that Wassenaar will use measurements for its controls that are different from those used by the Nuclear Suppliers Group (NSG).

> MPE members said their firms don't usually measure unidirectional repeatability because their machines operate bidirectionally. BIS staffers contend the measurements are available and firms would only have to recalculate their numbers to come up with a unidirectional number. The agency has collected data for machines that have been subject to control to determine how the proposed controls would apply to them. It is still looking for information on larger machines.

In addition to adopting the new method for measuring tool capability, Wassenaar will still have to decide what numbers to set as the new control level. Unidirectional repeatability is viewed as a better control measure because precision accuracy is subject to be manipulated and can be improved above identified specifications, BIS staffers said. The change may create some problems for exporters of used machine tools who usually rely on the specifications of original manufacturers to determine whether export licenses are needed. With a new standard, they will have to conduct their own testing to establish the unidirectional repeatability of machines they want to export.

Ahead of TTIP Negotiations, EU Publishes Negotiating Positions

As European Union (EU) negotiators headed to Washington for the next round of talks on a Transatlantic Trade and Investment Partnership (TTIP) May 19-23, the European Commission May 14 published negotiating positions in five controversial TTIP areas: chemicals, cosmetics, motor vehicles, pharmaceuticals and textiles. In all five areas, the EU acknowledges that many U.S. and EU regulations are too different to simply push for regulatory harmonization or cohesion, two buzzwords U.S. officials have used to describe the goal of talks.

> In the chemical paper, for example, the EU notes, "Industry associations, civil society and governments are aware that neither full harmonisation nor mutual recognition seems feasible on the basis of the existing framework legislations in the U.S. and EU." It says the EU's REACH rules for chemicals and the U.S. Toxic Substances Control Act (TSCA) "are too different with regard to some fundamental principles."

The EU says it supports "reduction of diverging requirements" in cosmetic rules," while seeking "standards approximation" in the textile sector. In general, the five papers focus on ways to: end the unnecessary duplication of product testing or plant inspections, recognize each other's existing regulations, or bring them more closely together; and align respective procedures for approving or registering new products, the EU notes.

In the pharmaceutical sector, it says both parties "should explore possibilities for the recognition of each other's Good Manufacturing Practices (GMP) inspections carried out in the EU and the US and in third countries." For autos, the EU agrees the "ultimate

goal" should be "the recognition of motor vehicles (and their parts and components, including tyres) manufactured in compliance with the technical requirements of one party as complying with the technical requirements of the other."

Data Privacy Looms as Growing Issue in Trade Talks

The U.S. is playing offense and defense as it tries to address trans-border data flow and data privacy issues in trade talks spanning the globe from Europe to Asia and at the WTO. While seeking to keep data borders open and prevent localization requirements, it is also fighting increasing efforts by trade partners to restrict the transfer of personal information. That effort hasn't been helped by revelations about National Security Agency (NSA) snooping.

> U.S. negotiators are also under pressure from a broad range of U.S. industries that rely on international data transfers for everyday business. Beyond financial transactions such as for credit cards, banking and insurance, U.S. industry is concerned about potential restrictions on "big data" that is generated from consumer and business records and information being processed and stored on the "cloud."

Trans-border data flow and privacy are on the agenda for a Transatlantic Trade and Investment Partnership (TTIP), which will have their next round May 19-23 in Washington. They are also part of talks on a Trans-Pacific Partnership (TPP), a WTO deal for a Trade in Services Agreement (TISA) and in the Asia-Pacific Economic Cooperation Forum (APEC). The U.S. and EU are also addressing the subject in negotiations to update the 2000 "safe harbor" agreement that allows more than 3,000 U.S. firms to transfer data from Europe to the U.S. in compliance with the EU data privacy directive.

In all these talks, the U.S. is seeking agreements that will assure the free movement of data along with the supply of services and a commitment not to require data to be stored on servers in the country of origin. "We're looking for commitments from our negotiating partners that would they would not require the purchase or building of local infrastructure as a condition of entering the market to provide services," Robb Tanner, director for telecommunications and e-commerce at the office of the U.S. Trade Representative (USTR), told a Chamber of Commerce program May 19.

Although EU officials have declared that they will not negotiate their data privacy rules, they are willing to talk about trans-border data flow issues in the TTIP talks. "We had a couple of very good, substantive legal discussions with them in the last two rounds," Tanner said. "I think we will continue to make progress there," he added. Tanner also noted that problems that have arisen in implementation of data transfer provisions of the U.S.-Korea Free Trade Agreement "has informed our thinking." The U.S. "has learned a lot from the implementation of KORUS," he said.

The U.S.-EU talks on the safe-harbor agreement stem from 13 recommendations the European Commission made in November to change the accord to increase transparency and enforcement. The U.S. is trying to find ways to address the concerns behind the recommendations but objects to at least one proposal that would require U.S. firms that are eligible to transfer data under the safe-harbor rules to publish the privacy provisions of contracts they have with third parties to which they transfer data. U.S. industry has

objected to that demand because of the burden of publishing potentially hundreds of contracts some firms have, including some that might be considered proprietary.

> "As we've approached the commission's recommendations, what we would like to see and what we would like to do with safe harbor is what is the most we can do to address European Commission concerns and assure that safe harbor is there for the companies that use it every day and serves its purpose," said Ted Dean, Commerce deputy assistant secretary for services.

"We are not there – no offense to my colleagues at USTR – to negotiate trade negotiating-style, fighting tooth and nail on each point, but rather what is the most we can do to make this the best possible program we can," he said. "I think that gets us, in fact, most of the way we need to go with the commission," he added.

With talks aimed to be completed this summer, Dean said he does not expect the revised safe-harbor program to look much different from its current version. He said he expects the changes will strengthen the safe-harbor mechanism, add requirements for eligibility and allow stronger, faster enforcement action against "bad actors." Some of the changes will merely involve improving the Commerce safe-harbor website to make it more usable, accessible and transparent.

The privacy issue gained additional attention May 13 when the European Court of Justice issued a ruling that could require Google and other online search engines to remove links to sites based on requests from individuals who object to their personal information on the site. "So far as concerns the extent of the responsibility of the operator of the search engine, the Court holds that the operator is, in certain circumstances, obliged to remove links to web pages that are published by third parties and contain information relating to a person from the list of results displayed following a search made on the basis of that person's name," the court explained in a press release. "The Court makes it clear that such an obligation may also exist in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful," it said.

NASA Export Policy Risks Unauthorized Access, GAO Finds

Weaknesses in the export control policy and implementation of foreign national access procedures at some National Aeronautics and Space Administration (NASA) centers increase the risk of unauthorized access to export-controlled technologies, the Government Accountability Office (GAO) found in a report released May 15 (GAO-14-315). The report responds to a request from House Science Committee investigations and oversight subcommittee chairman Paul Broun (R-Ga.), who sent a letter to GAO in October 2012 asking for the investigation (see **WTTL**, Nov. 5, 2012, page 3).

> In addition to the policies, GAO took issue with the lines of reporting at export centers. "NASA procedures do not clearly define the level of Center Export Administrator (CEA) authority and organizational placement, leaving it to the discretion of the Center Director," the report said.

"NASA headquarters export control officials and CEAs lack a comprehensive inventory of the types and location of export-controlled technologies and NASA headquarters

officials have not addressed deficiencies raised in oversight tools, limiting their ability to take a risk-based approach to compliance," it added. GAO's recommendations include: the NASA Administrator should establish guidance to better define the CEA function, assess CEA workload, establish time frames to implement foreign national access corrective actions and assess results, direct Center Directors to oversee implementation of export-related audit findings, and establish a more risk-based approach to oversight.

* * * Briefs * * *

FCPA: Joseph Sigelman, former co-CEO of oil and gas company PetroTiger, was indicted May 9 in Camden, N.J., U.S. District Court for violating FCPA by paying bribes to Colombian government officials in exchange for assistance in securing approval for oil services contract worth roughly $39 million. Sigelman's co-CEO, Knut Hammarskjold, pleaded guilty to same charge Feb. 18 and is awaiting sentencing in October (see **WTTL**, Feb. 24, page 9). Case was brought to Justice's attention through voluntary disclosure by PetroTiger, which cooperated with department's investigation, Justice said.

OIL COUNTRY TUBULAR GOODS: Ohio Senators Sherrod Brown (D) and Rob Portman (R) along with 55 other Democratic and Republican senators wrote to Commerce Secretary Penny Pritzker May 15 urging her to reconsider negative preliminary antidumping decision in February on OCTG from South Korea. "We ask the Department to closely verify and further analyze the information submitted by the Korean producers to ensure its accuracy. We are concerned that certain information used for the preliminary determination did not fully reflect the costs of production and sales for the Korean producers, such as profit information based on lower valued pipe products and certain affiliation issues that may impact which sales are used as the basis for the dumping calculation," senators wrote. Although Commerce had made negative preliminary determination on South Korean imports, it found dumping from India, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine and Vietnam.

DOHA ROUND: WTO Director-General Roberto Azevedo urged members May 12 to reexamine their positions on draft deal that failed to get agreement in 2008. "Be prepared to have some tough conversations," he told the WTO General Council. "I will be here to push you — and ask some difficult questions, such as: in 2008 you said you were prepared to do *this* — is this still the case today? You said you needed *that* — is this still the case? What are you prepared to put on the table to enable this trade-off?" he said. Azevedo said he was heading to China for APEC talks week of May 19. "But when I get back we will all need to be prepared for a busy June and July," he declared.

UKRAINE: EU Foreign Council imposed additional sanctions May 12 on 13 persons in Russia and Crimea and two Crimean firms. Most of individuals are different from those named by U.S., except for Vyacheslav Viktorovich Volodin, Russian President Putin's first deputy chief of staff. Crimean firms Pjsc Chernomorneftegaz, which has been sanctioned by U.S. and Canada previous, and Feodosia were named because they were confiscated by Crimean authorities, EU said (see **WTTL**, April 14, page 8). "In light of the recent developments and in the absence of any steps towards de-escalation the Council has agreed to expand the criteria allowing individuals and entities to be subject to visa ban and asset freeze," Council decided. "This will notably allow for the possible listing of natural persons responsible for actively supporting or implementing actions or policies which undermine the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine, or which obstruct the work of international organisations in Ukraine," it said.

SPORT SANDALS: Decker Corporation lost another legal fight over the classification of its sports sandals at Court of Appeals for Federal Circuit (CAFC) May 13 (see **WTTL**, May 13, 2013, page 8). Appellate court affirmed CIT decision backing CBP's classification of sandals as

falling under tariff subheading 6404.19.35 with 37.5% ad valorum tariff and not, as Decker claimed, subheading subheading 6404.11.80 with duty of $0.90 per pair plus 20% *ad valorem*. "In *Deckers I*, we construed subheading 6404.11. We are bound by that panel's interpretation of subheading 6404.11, as the Court of International Trade held below," wrote CAFC Judge Kathleen O'Malley for three-judge panel. "Because all of the Sports Sandals at issue in the present appeal indisputably do not have 'enclosed uppers,' the Court of International Trade correctly determined that the Sport Sandals could not be classified under subheading 6404.11.80 or 6404.11.90. If Deckers seeks to overturn the *Deckers I* court's construction of subheading 6404.11, it will need to seek review en banc," she added.

STEEL PIPE: CIT Judge Claire Kelly May 13 denied CBP motion to dismiss suit by LDA Incorporado seeking to have its electrical rigid metal steel conduit excluded from scope of antidumping order on circular welded carbon quality steel pipe from China (slip op. 14-54). Customs claimed its decision was not a protestable decision under 19 U.S.C. Section 1514(a)(2) and plaintiff was required to seek timely scope ruling from Commerce. "The court concludes that Customs' determination that Plaintiff's merchandise was not excluded from the scope of the Orders is a protestable decision of the type specified in Section 1514(a)(2). Therefore, the court denies Defendant's motion to dismiss," Kelly ruled.

CENTRAL AFRICAN REPUBLIC: President Obama issued new Executive Order May 13 declaring national emergency in Central African Republic (CAR) and "authorizing the imposition of sanctions to deal with the threat posed by the situation" in that country. Under EO, OFAC added five individuals to its SDN list, including former CAR president and former minister of public security. State added blanket policy of export and import license denial to country in April (see **WTTL**, April 21, page 7).