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Wassenaar Adopts Best Practices for Export Compliance

After a three-year effort, the Wassenaar Arrangement at its Dec. 13-14 plenary in Vienna adopted advice for exporters on "Best Practices Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies." The Best Practice advice was one of four guidance documents the regime adopted, along with about 40 changes to international control lists.

> Many of the changes are "good housekeeping" measures that reflect the regime's attempt to keep ahead of commercial technology, one source noted. They were needed, he explained, because many mobile devices, such as cellphones, and personal computers are reaching capabilities that are close to control levels.

In addition to the dual-use guidance, Wassenaar issued advice on "Best Practices" for reexports of conventional weapons and the accumulations of conventional weapons plus controlling the transport of arms between third countries. A key change raised the adjusted peak performance (APP) for digital computers to 3.0 Gbit/s from 1.5 Gbit/s (Wassenaar number 4.A.3.b). Before the U.S. can implement this change, the president must file a report to Congress justifying the change. Just a year ago, the APP was raised to 1.5 Gbits from 0.75 Gbit/s (see **WTTL**, June 27, page 4). Wassenaar members had debated raising the level to 5 or 8 Gbit/s, but settled on 3 Gbit/s. Industry had pressed for 20 Gbit/s, arguing that is the level now in research and the higher level is needed to avoid deemed export requirements for foreign employees.

Among the list changes were new rules excluding less-protective body armor from controls (1.A.5); "consequential changes" in controls on frequency synthesizer signal generators (3.A.2.d); technology for the development and production of telecommunication equipment (5.E.1.c.1); new controls on lighter-than-air unmanned "airships" (9.A.12); new common controls on technology to manufacture cooling holes in gas turbine engines (9.E.3.c) and technology for the production and development of gas turbine engines (9.E.3.a.2) and technology for manufacturing hole shape ratios for engines (9.E.3.c.2).

Ruling on CVD Law Poses Dilemma for Congress

An appellate court ruling barring the imposition of countervailing duties (CVD) on non-market economies (NMEs) will put more pressure on Congress to enact legislation to reverse that reading of the law, but such a measure could put the U.S. in violation of World Trade Organization (WTO) rules. While pending legislation (H.R. 639) would allow Commerce to consider the undervaluation of the Chinese renminbi as a countervailable subsidy, the WTO has said

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applying both CVDs and antidumping duties to NMEs at the same time violates its rules on countervailing measures (see **WTTL**, March 14, page 4). In its Dec. 19 decision, the Court of Appeals for the Federal Circuit (CAFC) upheld a 2009 ruling by Court of International Trade (CIT) Judge Jane Restani in *GPX International Tire* but for different reasons. While Restani said the International Trade Administration (ITA) could not apply both AD and CVD duties on the same product unless it could create a methodology to avoid "double remedies," the appellate court said CVDs could not be applied at all on NMEs.

> The CAFC noted that its 1986 ruling in *Georgetown Steel* affirmed Commerce's discretion under the *Chevron* doctrine to apply or not apply CVDs to NMEs and its decision not to apply them. Since then, however, Congress has twice passed legislation clearly stating its position that CVDs cannot be applied to NMEs; thus eliminating that *Chevron* discretion. "Once Congress has ratified a statutory interpretation through reenactment, agencies no longer have discretion to change this interpretation," the appellate court ruled.

"Whether or not Congress's actions in 1984 amounted to legislative ratification, as Commerce argued in *Georgetown Steel*, its actions in 1988 and 1994 clearly did," the CAFC stated. The 1988 Omnibus Trade Act explicitly incorporated *Georgetown Steel*. "The 1988 legislative history shows that Congress rejected a proposal that would have made the very distinction among NME countries that Commerce urges now," the court said. In 1994 when Congress passed the Uruguay Round Agreement Act, it again ratified *Georgetown Steel* and Commerce's existing practice. "As we concluded in *Georgetown Steel*, if Commerce believes that the law should be changed, the appropriate approach is to seek legislative change," the ruling asserts.

"In light of this decision, hundreds of Chinese manufacturers and exporters can be expected to challenge the application of CVD duties to their products, which range from aluminum extrusions, steel grating and drill pipe to paper products, kitchen shelving racks and magnets," attorneys at Sidley Austin said in an alert to clients. "Similar challenges also can be expected from Vietnamese manufacturers and exporters. These challenges will involve ongoing CVD investigations and administrative reviews of existing CVD orders, as well as pending cases before the CIT and CAFC," they pointed out.

Proposed Brokering Rules Raise Concerns for Industry

Defense exporters have been waiting for eight years for State's Directorate of Defense Trade Controls (DDTC) to propose changes to the brokering rules in the International Traffic in Arms Regulations (ITAR). When DDTC finally proposed them in the Dec. 19 Federal Register, industry's reaction was mixed. Industry compliance managers and lawyers approved of provisions that would simplify registration and reporting requirements and provide some exemptions, but they also have raised concerns about DDTC's attempt to expand the types of persons and activities that would come under the rules.

> Under the proposal, a broker would be defined as "any person (as defined by Sec. 120.14 of this subchapter) who engages in brokering activities." Those brokering activities include: "any action to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service. Such action includes, but is not limited to: (1) Financing, insuring, transporting, or freight forwarding defense articles and defense services, or (2) Soliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service."

The proposed rules would apply to: (1) any U.S. person wherever located; (2) any foreign person located in the United States; (3) any foreign person located outside the United States involving a U.S.-origin defense article or defense service; (4) any foreign person located outside the United States involving the import into the United States of any defense article or defense service; or (5) any foreign person located outside the United States acting on behalf

of a U.S. person. The proposal would exempt various activities from brokering rules, including activities by a U.S. person in the U.S. limited exclusively to U.S. domestic sales or transfers; employees of the U.S. government acting in an official capacity; and activities that "do not extend beyond administrative services."

ETRAC Urges Resources to Track Emerging Technologies

The Bureau of Industry and Security's (BIS) Emerging Technology and Research Advisory Committee (ETRAC) urged the agency to add personnel and take a more active role in coordinating interagency efforts to track emerging technology. At its Dec. 15 meeting, the committee urged BIS to establish an Office of Emerging Technology Analysis; adapt and implement a tool similar to the Intelligence Advanced Research Project Agency's (IARPA) Aggregative Contingent Estimation, an online pilot project that uses crowdsourcing to predict events; request other TACs to provide alerts on emerging technology in their areas of expertise; and periodically update topical coverage and constituency of TACs.

> In addition to a crowdsourcing tool, it said BIS should use existing private sector resources like technology forecasts, think tanks and commercial vendors. Commerce staff should be provided subscription access to those resources, along with leading technology journals, and the agency should work with scientific, technical, engineering and mathematical (STEM) societies to solicit input on long-term emerging technologies, committee members recommended.

Justice Hit with Another Setback in Gun Show Prosecution

Justice's prosecution of 22 arms dealers who were caught in a government sting operation for allegedly violating the Foreign Corrupt Practices Act (FCPA) hit a setback Dec. 22 when a federal judge acquitted six of the defendants of one count of conspiracy to violate the FCPA, acquitted two of two counts of violating the FCPA, and dismissed all counts against one of the defendants. D.C. U.S. District Court Judge Richard Leon's ruling followed his declaration of a mistrial in the case against four other dealers in July (see **WTTL**, July 18, page 2).

> The six defendants in the latest ruling are John M. Mushriqui, Jeana Mushriqui, R. Patrick Caldwell, Stephen Gerard Giordanella, John Gregory Godsey and Marc Frederick Morales. The two counts dismissed against the Mushriquis involved travel and phone calls to Washington, D.C., "to discuss the corrupt Country A Deal," according to the superseding indictment filed in April 2010. Stephen Giordanella was acquitted of all outstanding counts against him. The trial of the six began Oct. 3 and is scheduled to continue in January on the remaining counts.

In his ruling, Leon granted a Rule 29 Motion for Judgment of Acquittal as to those counts and the conspiracy count, while denying motions for acquittal of several other counts. In September before their trial began, Leon also ordered the dismissal of a money laundering count against the six defendants, which he had also ordered in the earlier case against four other defendants.

Reform Proposals Published for USML Categories VI and XX

BIS and State issued parallel Federal Register proposals Dec. 23 to revise U.S. Munitions List (USML) Categories VI and XX and create new 600-series entries on the Commerce Control List (CCL). "In recognition of the significant difference between surface vessels of war and submarines," State proposed moving submarines and associated equipment from Category VI (Vessels of War and Special Naval Equipment) to Category XX (Submersible Vessels, Oceanographic and Associated Equipment). BIS proposed that submersible vessels, oceanographic equipment and related articles currently in Category VI or Category XX that no longer warrant

control on the USML would be controlled on the CCL in new ECCNs 8A620, 8B620, 8D620 and 8E620. In the second proposal, BIS noted that surface vessels of war and related articles that the president determines no longer warrant control under USML Category VI would be controlled under the CCL in new ECCNs 8A609, 8B609, 8C609, 8D609 and 8E609.

* * * Briefs * * *

BIS: Jeannette Chu, who served for many years as sole BIS representative in China and more recently at BIS headquarters, retired Dec. 31 after 31 years in government service. She is joining PriceWaterhouse Coopers (PwC) as director, export controls, starting Jan. 4 in McLean, Va., office.

STEEL WIRE HANGERS: M&B Metal Products Company Inc; Innovative Fabrication LLC/Indy Hanger; and US Hanger Company LLC filed antidumping and countervailing duty petitions with ITC and ITA Dec. 29 on imports of steel wire garment hangers from Taiwan and Vietnam.

WIND TOWERS: Wind Tower Trade Coalition filed antidumping and countervailing duty complaints at ITC and ITA Dec. 29 against utility scale wind towers from China and Vietnam.

CLOTHES WASHERS: Whirlpool filed antidumping and countervailing duty complaints with ITC and ITA Dec. 30 against imports of residential clothes washers from Mexico and South Korea. Petitions assert Samsung and LG Electronics have dumped their products into U.S. from plants in those two countries.

CHINA CURRENCY: Treasury Dec. 27 issued semi-annual report on foreign currency manipulation and again declined to name China. "Since the authorities decided in June 2010 to allow the exchange rate to appreciate, the renminbi has appreciated by a total of 7.5 percent against the dollar, as of December 16. Taking into account the higher rate of domestic inflation in China than in the United States, the renminbi has appreciated against the dollar on a real, inflation-adjusted basis by nearly 12 percent since June 2010 and nearly 40 percent since China first initiated currency reform in 2005," report states.

CUSTOMS: With Senate never acting to convert his recess appointment into permanent confirmation, CBP Commissioner Alan Bersin resigned Dec. 30. Under Constitution, his appointment would have ended Dec. 31. Deputy Commissioner David V. Aguilar will serve as acting commissioner and Assistant Commissioner for the Office of Field Operations Thomas Winkowski will serve as acting deputy commissioner.

GSP: Annual review of petitions for additions and removal of items for GSP eligibility produced only one removal, certain non-down sleeping bags because of import sensitivity, USTR announced Dec. 29. Sen. Jeff Sessions (R-Ala.) nearly blocked renewal of GSP over continued GSP for sleeping bags.

PHILIPPINES: WTO Appellate Body Dec. 21 mostly upheld dispute-settlement panel findings that Philippines violated WTO rules with excess taxes on imported distilled spirits (see **WTTL**, Aug. 22, page 2).

FCPA: Magyar Telekom, Hungary's largest telecommunications provider, and Germany's Deutsche Telekom, majority owner of Magyar Telekom, agreed Dec. 29 to pay $95 million in civil and criminal fines to SEC and Justice to settle charges of violating FCPA by bribing officials in Macedonia and Montenegro to win business. As part of agreements with Justice, they will pay $63.9 million in criminal fines, and in settlement with SEC they agreed to pay $31.2 million in disgorgement and interest. SEC also charged three ex-Magyar executives with orchestrating bribery schemes (see **WTTL**, July 4, page 4).

MORE FCPA: Nine ex-Siemens executives were charged Dec. 13 with bribery scheme to retain $1 billion government contract to produce national identity cards for Argentine citizens. SEC charged seven of them with FCPA violations, while eight were indicted in N.Y. U.S. District Court of conspiracy to violate FCPA, wire fraud, money laundering and conspiracy. Siemens AG and its subsidiary, Siemens S.A. (Siemens Argentina) pleaded guilty to FCPA violations in December 2008 and paid $1.6 billion to resolve charges with the SEC, Justice, and Office of Prosecutor General in Munich (see **WTTL**, Dec. 22, 2008, page 4).

MORE FCPA: Aon Corporation, Chicago-based provider of risk management services, insurance and reinsurance, agreed to pay $14.5 million to SEC to settle FCPA charges Dec. 20. It also will pay $1.764 million criminal fine in non-prosecution agreement with Justice. SEC claimed Aon's subsidiaries made over $3.6 million in improper payments between 1983 and 2007 to obtain or retain insurance business in various countries, including Costa Rica, Egypt, Vietnam, Indonesia, UAE, Myanmar and Bangladesh.

ENTITY LIST: BIS in Federal Register Dec. 16 added Infotec and Waseem Jawad in UAE to Entity List "based on evidence that they purchased U.S.-origin internet filtering devices and transshipped the devices to Syria," BIS said. BIS also removed from list two persons in Singapore and two persons in Taiwan.