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Advisory Committee Claims Encryption Foreign Availability

The Bureau of Industry and Security's (BIS) Information Systems Technical Advisory Committee (ISTAC) has submitted a 461-page report to the agency providing extensive details on the foreign availability of encryption capabilities outside the membership of the Wassenaar Arrangement. While encryption controls are exempt from decontrol for foreign availability reasons, the Nov. 12 report provides the same evidence that would go into a foreign availability assessment, including information showing that encryption technology and products are available in fact and in sufficient quality and quantity to negate the value of current export restrictions. The report focused especially on major encryption providers in China and Israel, Huawei and Check Point, but also mentioned firms in Taiwan and India.

> The report comes as the BIS Office of Technology Evaluation is also studying encryption controls, and the agency is preparing for another round of changes to the encryption regulations. An effort to simplify encryption controls in 2008 did not satisfy all of industry's concerns (see **WTTL**, Nov. 9, page 1).

"The network infrastructure devices (switches/routers), operating systems, and chips/components described within this document implement controlled encryption algorithms," the report notes. "These implementations are based on protocols that are publicly and widely available. The ISTAC respectfully submits this Report to BIS with the hope that the data herein will be used to inform future policy making with respect to export controls on encryption," it adds. "Many of the Encryption Items that comprise foreign availability are wholly developed and produced by indigenous suppliers in the PRC. In addition, there are important indigenous sources of foreign availability in other countries including Taiwan and Israel," it states.

The report also contends that "the Chinese government is actively invested, and encouraging, the creation of indigenous operating systems for all devices, including computers, mobile phones and converged devices like smart phones and pocket pcs."   A Chinese five-year plan has a "goal of enabling the market share of domestic operating system to grow remarkably and become key operating system based on domestic CPU hardware system and domestic high performance cluster server products," it states.

Emerging Technology Panel Wants to Test Its Methodology

Members of the BIS Emerging Technology and Research Advisory Committee (ETRAC) Dec. 9 said they want BIS to test their proposed methodology for determining which technologies

should be subject to deemed export controls before they submit a final proposal to the agency. If the test captures too many technologies, several members said they could not support the draft methodology they have developed. Some members also continued to question the need for deemed export rules at all; complaining that they have not been shown data justifying the requirement despite their secret security clearances. One member also stressed that the method- ology they recommend has to be "a very objective, reproducible system."

> Committee members recognized that they are behind schedule and risk having their advice disregarded. While they said they hoped their advice would play a role in the current, broader White House review of export controls, one member noted that the "train is leaving the station." It was not clear how long it would take to test the panel's draft methodology (see **WTTL,** Oct. 5, page 4).

"The goal is to create essentially very, very limited things that would fall on the deemed export [list]," said ETRAC co-chairman Richard McCullough, vice president of research at Carnegie Mellon University. "I don't support this until it is tested and the outcome is that," he added. "If you plug this in and end up getting a big, giant CCL list, then I personally would never support such a thing," he said. Committee member Bruce Thompson of the Ames Laboratory echoed those views. "The key to this document is how it performs in test cases," he said. "We need to decide how we are going to do those test cases," he added. "The results of those test cases, at least in my case, will determine how I respond to the ideas we have draft," he stated.

Congress Still Has Questions about Defense Trade Treaties

Members of the Senate Foreign Relations Committee still have concerns about the ability of the U.S. to enforce export control laws under pending defense trade treaties with Australia and the United Kingdom and about how Congress will be able to assert its traditional oversight of defense exports if the treaties are ratified. At a Dec. 10 hearing on the treaties, committee members asked administration witnesses to provide copies of the draft changes the State Department intends to make to the International Traffic in Arms Regulations (ITAR) and the implementing arrangements. Committee chairman John Kerry (D-Mass.) said he wants the drafts submitted by mid-January so the committee can prepare to move the treaties to the Senate floor early next year (see **WTTL**, April 13, page 3).

> The committee still has questions about enforcement under the treaties despite a letter from Justice, which claimed it has the authority to enforce controls under the existing powers in the Arms Export Control Act (AECA) and ITAR. Senate action on the treaties has been held up for almost two years because of the committee's concerns that separate, new legislation might be needed to insure export controls can be enforced under the pacts.

"We are confident that if someone, the same as is done today, someone illegally diverts some- thing from the Munitions List, inappropriately, illegally, [that person] can be brought to court in the United States and prosecuted," Associate Deputy Attorney General James Baker told the committee. If the draft ITAR regulations and implementing arrangements submitted in January don't satisfy the committee on this point, however, sources say the committee may still be able to provide strong advice, if not mandatory requirements, on how the treaties should be enforced in the ratification resolution that would accompany the treaties to the Senate.

"I still have concerns about what the role of the Senate ought to be and how much should be included in the treaty as opposed to being written by Justice and State in regulations, which might conceivably be changed by another administration," the committee's Ranking Member, Sen. Richard Lugar (R-Ind.) told WTTL after the hearing. "This is an oversight responsibility that we take seriously, and constitutionally, we should," he said. The Bush administration had submitted draft ITAR rules to the committee in September 2008 after the first hearing on the treaties in May 2008 raised concerns about implementation of the treaties. Committee members say they want to make sure the Obama administration has the same views as their predecessors

on the treaties. Lugar said it is still "hypothetically possible" that the committee might choose to enact separate legislation to deal with the enforcement and oversight issues, but, for now, he said he "will see what the response is" from the administration. "I certainly share the enthusiasm of the chairman for moving on with this," he said. Action has been delayed because the administration "has not been as forthcoming as we had hoped," Lugar said. "This is an important treaty and important relationships, and it is important to move on with it," he said.

Pair Plead Guilty to Falsifying NAFTA Origin Certificates

Two businessmen have pleaded guilty in Laredo, Texas, U.S. District Court to selling and using fraudulent NAFTA Certificates of Origin to ship apparel to Mexico, falsely claiming products were U.S.-made. Vahram Aynilian, 59, president of <u>N.Y. Aynilian & Co.</u> in New Jersey, and Fred Lukach, 50, a businessman from San Diego, Calif., who temporarily worked in Laredo as a freight forwarder, each pleaded guilty Dec. 3 to one count of illegally exporting goods from the United States into Mexico. According to the Justice Department, Aynilian, from 2005 to 2009, received about $199,201 for providing and/or allowing fraudulent NAFTA Certificate of Origin documents and fraudulent U.S. invoices to be provided for 243 shipments.

> During the same time period, Lukach paid for and obtained fraudulent NAFTA Certificate of Origin documents and fraudulent U.S. invoices from Aynilian for numerous textile shipments, the department said. As part of his plea agreement, Aynilian agreed to forfeit and pay to the United States at or before sentencing his $199,201.20 profit from the scheme. The case was investigated by Immigration and Customs Enforcement and the Mexican Fraud Task Force.

Wassenaar Plenary List Changes Include Encryption Security

The annual plenary meeting of the Wassenaar Arrangement, the multilateral export control regime, in Vienna Dec. 2-3 adopted a long list of changes to the international control list, including in sections dealing with encryption security, composite materials, computers, imaging systems and avionics. "The Arrangement continues to keep pace with advances in technology, market trends and international security developments involving the spread of military and dual-use goods and technologies," the group said in a statement. "The Plenary agreed to a significant number of amendments to the control lists, including some in technically complex and challenging areas such as Security of Information (encryption) and reception equipment for Global Navigation Satellite Systems," it explained.

> A major change in encryption controls for ancillary security systems involved the addition of a note to Category 5 Part 2 saying this section "does not apply to items incorporating or using 'cryptography'" and when cryptographic functionality "is limited to supporting their primary function or set of functions." But such cryptography cannot provide "information security" or be used for "sending, receiving or storing information (except in support of entertainment, mass commercial broadcasts, digital rights management or medical records management)."

A change to Section 9.D.3 removes the term "required for" from the controls for software specially designed or modified for the "use" of Full Authority Digital Electronic Engine Control Systems (FADEC Systems) and in its place adds specific controls for FADEC Systems' software "in digital electronic controls for propulsion systems, aerospace test facilities or air breathing aero-engine test facilities" and fault-tolerant software used in FADEC systems "for propulsion systems and associated test facilities." Also, a note was added under 9.E.3.h. to say this section "does not apply to technical data related to engine-aircraft integration required by the civil aviation certification authorities to be published for general airline use (e.g., installation manuals, operating instructions, instructions for continued airworthiness) or interface functions (e.g., input/output processing, airframe thrust or shaft power demand)."   A revision

on composite materials control, states that provisions of Category 1.A.2 "does not apply to composite structures or laminates, made from epoxy resin impregnated carbon 'fibrous or filamentary materials', for the repair of 'civil aircraft' structures or laminates" not exceeding one square meter in size, but with new specifications that allow for export of longer and narrower strips of material (see **WTTL,** Nov. 2, page 3). In addition, controls were liberalized for tape-laying machines used in applying composite materials. The changes in global navigation system rules bring under Wassenaar's control global positioning systems that have been developed in Europe and Brazil and compete with U.S. global position satellites. The new rules "level the playing field," BIS Acting Assistant Secretary Matthew Borman told WTTL.

Meanwhile, BIS finally published amendments to the Export Administration Regulations (EAR) in the Dec. 11 Federal Register implementing the Wassenaar plenary changes adopted in December 2008. On Dec. 10, it published an extensive revision of the EAR to implement separate changes Wassenaar has adopted to clean up errors and text problems in the control lists. The clean up was the work of the Wassenaar Task Force on Editorial Issues (TFEI), which made over 2,000 editorial revisions to clarify language, remove extraneous text or correct typographical errors, such as the removal of commas.

* * * Briefs * * *

<u>BIS</u>: President Obama Dec. 2 sent Senate nomination of David Mills to be BIS assistant secretary for export enforcement. Currently in D.C. offices of <u>DLA Piper</u> law firm, Mills formerly worked at Treasury's Office of Foreign Assets Controls for 18 years and before that was in office of Commerce Department's chief counsel for export administration. Meanwhile, Senate Banking Committee's vote on nomination of Eric Hirschhorn to be BIS under secretary is expected on Dec. 17.

<u>TRADE PREFERENCES</u>: Ways and Means Committee Chairman Charles Rangel (D-N.Y.) and trade subcommittee chairman Sander Levin (D-Mich.) Dec. 11 introduced bill (H.R. 4284) to extend Generalize System of Preferences (GSP) and Andean Trade Preferences Act for one year. House is expected to take up bill during week of Dec. 14, committee said (see **WTTL**, Nov. 23, page 2).

<u>EXPORT ENFORCEMENT</u>: BIS Nov. 20 imposed Temporary Denial Order on Corezing International, a Singapore-based electronics firm, while it investigates allegation that company illegally shipped equipment to China through Singapore and Hong Kong. BIS Office of Export Enforcement claimed Corezing's directors in Hong Kong and Singapore "used various tactics or stratagems" to ship TriQuint-brand power amplifiers and components to China, including by providing false information to U.S. exporters.

<u>AES</u>: Census Bureau has revised its reporting system so that USPPIs can now request and obtain reports on all shipments under their EIN, including routed transactions filed by freight forwards, according to Dale Kelly, assistant chief of Census trade data collection division. She also told BIS advisory committee Dec. 9 that bureau is aiming to propose revisions to Federal Trade Regulations, including new rules for post-departure filing under Option 4, by end of February 2010.

<u>INDIA</u>: ITC report released Dec. 11 could become major U.S. negotiating tool in Doha Round talks with India on tariffs. Report says U.S. farmers lose millions of dollars annually in potential sales to India due to country's high tariffs and nontariff measures (NTMs). It notes that India's bound tariffs on farm goods average 114% and are among the highest in world. While applied tariffs have declined since 1991, they still average about 34%. "U.S. agriculture firms are active participants in the Indian market through foreign direct investment," ITC notes. "FDI allows U.S. firms to adapt products to local needs and requirements and bypass tariffs and NTMs that constrain exports," it states.

<u>EAR</u>: BIS in Dec. 4 Federal Register proposed eliminating sending paper license approval notices.

<u>TRADE FIGURES</u>: U.S. goods exports in October jumped 3.6% from September but at $93.5 billion were still down 10% from October 2008. Services exports of $43.3 billion were off 5.6% from year ago. Goods imports of $138.4 billion dropped 21% from last October; while service imports were down 7.2%.

<u>CORRECTION</u>: Second zero in former Deputy USTR Peter Allgeier's "three-zero" proposal for reaching Doha deal referred to U.S. use of "zeroing" in antidumping investigations and not U.S. requests for "zero-for-zero" tariff cuts in sectoral negotiations, as we reported incorrectly (see **WTTL,** Nov. 23, page 1).