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NASA Needs to Do More to Protect Technology, IG Says

Two years later, NASA has not fully implemented the recommendations of the Government Accountability Office (GAO), due in part to “a lack of effective collaboration and communication,” according to a NASA inspector general (IG) report released May 26.

A 2014 GAO report found that weaknesses in the export control policy and implementation of foreign national access procedures at some NASA centers increase the risk of unauthorized access to export-controlled technologies (see **WTTL**, May 19, 2014, page 8).

As of Dec. 31, 2015, the agency had implemented five of GAO’s seven recommendations, the IG report (IG-16-022) said. “Some Center officials raised concerns that several requirements in the draft Agency policy –specifically those requiring fingerprints from foreign nationals not living in or likely to visit the United States –are not practical and will impose undue burdens on their projects and programs,” it noted.

“Due to a lack of effective collaboration and communication, NASA did not fully capitalize on opportunities to address these and other concerns. Consequently, completion of policy revisions and the foreign national access manual needed to address several recommendations has taken longer than expected,” the report said.

“The Committee will continue to press NASA to do everything it can to not only protect sensitive technologies, but also hold accountable those who have taken a cavalier, casual and negligent approach to enforcing export controls and foreign national access,” House Science Committee Chairman Lamar Smith (R-Texas) said in a statement May 31.

U.S.-India Relationship on Upswing Though Gaps Remain

At least one analyst is optimistic about U.S.-India ties ahead of Prime Minister Narendra Modi’s visit to the U.S. June 7-8 where he will address a joint meeting of Congress and

meet privately with President Obama. As of the two-year anniversary of Modi's election, Richard Rossow, senior fellow at the Center for Strategic and International Studies (CSIS), has seen "a bit of wind in the sails" on security and economic relationships between the two countries, he said on a conference call June 3.

This positive trend is in contrast to the late 2013 relationship that "spiraled downward" due to trade concerns and the arrest of an Indian diplomat in N.Y., Rossow noted.

Despite a dispute over domestic solar panel production, India expects that the U.S. will be one of several foreign countries that invests heavily in India's energy sector (see **WTTL**, May 16, page 6). On May 12, the Indian government submitted its application for membership in the Nuclear Suppliers Group (NSG) and is expected to be the subject of the NSG summit in Vienna June 9-10. Toshiba Corp's Westinghouse Electric is in discussions with India to build six AP-1000 nuclear reactors. Rossow gave 50/50 odds that a deal will be announced during Modi's visit.

India's NSG application was submitted a week before Pakistan's; Modi is likely to press Obama to back India's NSG membership and make the case for the U.S. to have stronger ties to India rather than Pakistan, Rossow predicted.

Despite the increased military and economic cooperation between the countries, gaps remain, particularly with regard to the bilateral investment treaty (BIT). The U.S. adopted its most recent model in 2012 and India in 2015. The U.S. model contains a most favored nation clause, while the Indian model does not. The Indian model also excludes taxation while under the U.S. model, foreign investors can make claims against the government if there is an expropriation of foreign investment.

Dispute settlement is another sore point; under the Indian model, foreign companies have to litigate for five years in domestic courts before they can pursue a claim in international court. The U.S. and OECD model is six months.

U.S. and Indian officials have met to discuss the outstanding issues. India's grievances revolve around the H-1B and L-1 visa fee increases. The two countries held consultations at the WTO May 11-12 (see **WTTL**, May 16, page 7).

In another sign of the friendship between the two countries, the U.S. and India signed a Memorandum of Understanding (MOU) June 2 to combat wildlife trafficking and promote conservation efforts in India. Under Secretary of State for Economic Growth, Energy, and the Environment Catherine Novelli and Indian Ambassador to the U.S. Arun K. Singh signed the MOU on behalf of their respective countries.

Services Talks Aim to Cut Negotiating Losses from U.S. Elections

Sheer walls are rising in the minds of services negotiators struggling to deliver sought-after ambition against uncertain, and possibly undesirable, U.S. election results, negotiators said toward the end of nine days of talks on the Trade in Services Agreement

(TiSA) in Geneva. European and other trade officials have called on countries to prioritize objectives in a bid to cut possible negotiating losses stemming from the new administration.

“We certainly still need more ambition,” European Union (EU) Trade Commissioner Cecilia Malmstrom said June 1 in Paris, according to an EU press release. “We may not be far from reaching an agreement on TiSA by the end of this year,” she said.

Services negotiators in the corridors speculated on the U.S. leadership change and its effect on the likelihood of reaching an agreement, said a negotiator, who was “afraid” of potential trade policies associated with a Trump administration even though they haven’t been clearly elucidated.

The negotiating group recently added meeting days to consider revised market access offers, and to try to garner a deal before the U.S. elections, negotiators suggested. Work after the next meeting in July will have to be prioritized, one said. Negotiators are hoping all revised offers will be submitted by October, he added.

While there was concern in the hallways, some progress was made in the conference rooms. Almost all parties have made offers, another negotiator said. That’s an indication of engagement prompted by ministers at the World Economic Forum annual event this year in Davos, another said. They called for a swift conclusion to negotiations, but much work is needed to reach a suitable level of ambition, she added.

Offers were assessed using seven criteria during this round, a negotiator said: 1) comparison to GATS [General Agreement on Trade in Services] commitments as the minimum floor; 2) the quality of commitments; 3) whether commitments were offered at least the level of a country’s best free trade agreement (FTA); 4) ambition for removing policy space reservations; 5) the level of commitment for so-called “mode 4” on movement of natural persons; 6) the level of commitment on removal of reservations for new services; and 7) the level of transparency of measures below the federal level.

However, some negotiators saw offers as backtracking on previous commitments. GATS market access is based on a positive list, whereas TiSA is based on a negative list for national treatment, a negotiator said.

The U.S. has not made “mode 4” market access commitments in the TiSA talks, but it has made GATS market access commitments, a negotiator said. About half the participants have not taken so-called “mode 4” commitments either, a negotiator said. Lack of mode 4 market access commitments could jeopardize the credibility of the agreement, she said.

Several parties would like specific rules for financial services, a negotiator said. Which rules and their scope still are being discussed, but some progress reportedly was made on transparency and domestic regulation for financial services, including an EU-U.S. compromise proposal on the issue. A solution for dispute settlement also will be needed before the agreement is multilateralized, a negotiator said.

EU Officials Still Concerned About Privacy Shield

As the U.S. and European Union (EU) signed the “Umbrella” agreement on transatlantic data protection June 2, EU officials expressed remaining skepticism on the controversial EU-U.S. Privacy Shield framework, which was finalized in February (see **WTTL**, April 18, page 6).

European Data Protection Supervisor (EDPS) Giovanni Buttarelli published a draft adequacy decision on the Privacy Shield May 30. “The draft Privacy Shield may be a step in the right direction but as currently formulated it does not adequately include, in our view, all appropriate safeguards to protect the EU rights of the individual to privacy and data protection also with regard to judicial redress. Significant improvements are needed should the European Commission wish to adopt an adequacy decision,” he wrote.

“In particular, the EU should get additional reassurances in terms of necessity and proportionality, instead of legitimizing routine access to transferred data by U.S. authorities on the basis of criteria having a legal basis in the recipient country, but not as such in the EU,” Buttarelli wrote.

Four days earlier, the EU Parliament noted that U.S. “bulk collection of personal data and communications of non-U.S. persons is still permitted in six cases,” it said in a resolution May 26. The parliament also pointed out “that such bulk collection only has to be ‘as tailored as feasible’ and ‘reasonable’, which does not meet the stricter criteria of necessity and proportionality as laid down in the Charter.”

Parliament also “welcome[d] the introduction of the redress mechanism for individuals under the Privacy Shield; call[ed] on the Commission and the U.S. Administration to address the current complexity in order to make the procedure user-friendly and effective.” In addition, it called on the European Commission to “seek clarification on the legal status of the ‘written assurances’ provided by the U.S.”

The “umbrella” agreement “sets high standards for the protection of personal data transferred by law-enforcement authorities. It also strengthens legal certainty and enhances the rights of citizens,” said a joint statement following the EU-U.S. Ministerial Meeting on Justice and Home Affairs in Amsterdam, which Attorney General Loretta Lynch attended.

Export Agencies Issue Partial List of Harmonized Definitions

A year to the day after publishing their parallel proposals for harmonized definitions, the Bureau of Industry and Security (BIS) and State’s Directorate of Defense Trade Controls (DDTC) published a final, but only partial list June 3, while punting the controversial ones down the road. Export control officials had predicted this outcome earlier this year, as DDTC had received almost 12,000 comments from gun owners protesting what they call the “prior restraint” provision of the proposed definition of public domain (see **WTTL**, April

25, page 1). The BIS final rule, for its part, includes the definitions of “access information,” “technology,” “required,” “foreign person,” “proscribed person,” “published,” “results of fundamental research,” “export,” “reexport,” “release,” “transfer,” and “transfer (in-country).”

The DDTC interim final rule includes comparable amendments to its definitions of “export,” “reexport,” “release,” and “retransfer,” while the remaining definitions, including the controversial “technical data,” “directly related,” “public domain,” and the results of “fundamental research,” will be the “subject of separate rulemakings,” the agency said.

Both rules will be effective Sept. 1, that is 90 days from the date of publication, responding to comments that a delayed effective date would “enable non-U.S. companies to understand and prepare for compliance with the revisions,” BIS said.

In the parallel rules, both agencies responded to public comments they received. For example, BIS did not adopt the proposed definition of “peculiarly responsible” in its final rule. “In this final rule, peculiarly responsible is defined within the scope of the already existing definition of required, thus providing a definition while guaranteeing no expansion of scope,” it said.

The BIS rule also adds a description of activities that are not deemed reexports. This description formerly appeared as interpretative guidance on BIS’ website and “closely tracks the regulatory text of the ITAR,” the agency noted. “The new section describes three situations in which that party may release the technology or source code without obtaining a license from BIS,” it added.

In addition to the revised and new definitions, the DDTC rule details “the scope of licenses, unauthorized releases of controlled information and revises the section on ‘exports’ of technical data to U.S. persons abroad,” it said. Finally, the agency also “consolidates regulatory provisions on the treatment of foreign dual and third country national employees within one exemption,” it wrote.

In a few cases, BIS did not include clarifications in the regulatory text, but will issue Frequently Asked Questions (FAQs) to address public comments. However, then agency confirmed that License Exception TMP “is available for remote access if its provisions are met,” it said. In addition, it also confirmed that “taking an encrypted device is an export,” it said. “Devices are commodities and therefore not eligible for paragraph (a)(3), which authorizes only technology,” BIS wrote.

Commerce Continues Its War on Global Steel Glut

Commerce handed down two affirmative preliminary determinations in steel antidumping investigations June 1. The department launched investigations in November 2015 into imports of certain iron mechanical transfer drive components produced in Canada and China (see **WTTL**, Dec. 14, 2015, page 9). Baldor Electric Company failed to respond to Commerce’s request for information, so using adverse facts available Commerce calculated

preliminary dumping margin of 191.34% for the Canadian company and 100.47% for all other Canadian producers/exporters. In its investigation of several Chinese companies, Commerce calculated a preliminary dumping margin of 2.17% for the more than 20 named respondents and a China-wide rate of 401.68%. TB Woods' Incorporated (Pa.) petitioned for these investigations, and Commerce final determinations are expected Oct. 20.

Bull Moose Tube Company and EXLTUBE, both of Missouri, Wheatland Tube (Ill.) and Western Tube & Conduit (Calif.) filed antidumping petitions in October 2015 on imports of circular welded carbon-quality steel pipe from Oman, Pakistan, United Arab Emirates (UAE) and Vietnam (see **WTTL**, April 11, page 12). Commerce calculated a preliminary dumping rate of 11.80% for all Pakistan producers/exporters and a 7.86% for Oman producers/exporters.

Ajmal Steel Tubes & Pipes Ind. LLC and Universal Tube and Plastic Industries, LLC – Jebel Ali Branch/Universal Tube and Pipe Industries, Ltd./KHK Scaffolding and Framework LLC (collectively, Universal), at preliminary dumping margins of 6.10% and 9.25%, respectively, and at 7.86% for the rest of UAE.

SeAH Steel VINA Corporation and Vietnam Haiphong Hongyuan Machinery Manufactory Co., Ltd. were calculated at margins of 0% and 1.19% (de minimis), respectively, and Hoa Phat Steel Pipe Co. at .38% (de minimis). All other Vietnam producers/exporters are subject to a 113.8% rate based on adverse facts available. Commerce final determinations are expected Oct. 15.

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LIBERIA: DDTC will review applications for ITAR licenses to export or temporarily import defense articles and services to or from Liberia on case-by-case basis, agency announced May 27. UN Security Council sanctions against country were terminated May 25.

TTIP: U.S. and EU officials are hedging on whether TTIP talks will finish this year. EU Trade Commissioner Cecilia Malmstrom said May 31 in Stockholm that negotiators “will do our utmost to get this done,” but if “it is not possible for different reasons, it is not in anybody’s interest to declare, ‘rest in peace and go on.’” USTR Michael Froman reiterated that there is no “Plan B” if talks don’t conclude this year and delays could cause serious repercussions. “If it gets delayed three years, to five years, to seven years into the future because of whatever the remaining differences are, that doesn’t mean the status quo is going to remain either,” said Froman. He added that if U.S. and EU don’t conclude agreement that will allow other countries to step in and set future trade agendas not necessarily in line with American values.

NORTH KOREA: Treasury announced June 1 finding that North Korea is a “jurisdiction of ‘primary money laundering concern’” under Section 311 of PATRIOT Act. Treasury, via Financial Crimes Enforcement Network (FinCEN), recommended additional measure to isolate North Korea from international financial system by “prohibiting covered U.S. financial institutions from opening or maintaining correspondent accounts with North Korean financial institutions, and prohibiting the use of U.S. correspondent accounts to process transactions for North Korean financial institutions.” Treasury action consistent with North Korea Sanctions and Policy Enhancement Act enacted Feb. 18 and UN Security Council Resolution 2270 adopted March 2 (see **WTTL**, March 21, page 3).

WTO: Thirteen former members of WTO Appellate Body wrote to WTO Dispute Settlement Body (DSB) Chair Xavier Carim May 31 regarding U.S. objection to reappointment of Seung Wha Chang of South Korea (see **WTTL**, May 30, page 2). Former members deemed U.S. action political that could potentially undermine impartiality of DSB. “Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the very future of the entire WTO trading system at risk,” they wrote. Alumni proposed abolishing current system of reappointment in favor of single longer term.

TREASURY: American Council of Life Insurers (ACLI) May 31 praised Treasury and USTR for new policy addressing data and IT infrastructure localization barriers in financial services sector. Treasury’s change in negotiating approach to financial data storage will not change TPP and would only impact data rules for TPP countries also participating in TiSA. “ACLI believes this policy allows for the elimination of digital protectionism while still giving governments the access they need for prudential regulation and oversight,” association said.

USTR: Officials from Australia, Canada, EU, Japan, Korea, New Zealand and U.S. pledged to intensify work on WTO Environmental Goods Agreement (EGA) and “to find common ground on an EGA that will improve environmental protection, promote economic growth, and create green jobs, through an increase in global trade in environmental goods,” according to USTR. Officials met June 2 in Paris. Group aims to conclude EGA with all participants ahead of September G20 Leaders meeting in Hangzhou.

CHINA: Do not grant China market economy status was the message 18 bipartisan senators sent to EU Trade Commissioner Cecilia Malmstrom May 27. Led by Sens. Sherrod Brown (D-Ohio) and Jeff Sessions (R-Ala.), senators outlined ways in which China has failed to meet market economy status (MES) under EU law. “Granting China market economy status before it has met the EU criteria will have significant negative implications for the global economy,” they wrote (see **WTTL**, May 16, page 8).

MORE CHINA: Coalition of Services Industries joined industry letter to China Insurance Regulatory Commission Chairman Xiang Junbo June 1 outlining industry’s objections to Chinese provisions that “could constitute a disguised restriction on international trade” by barring transfer of data collected in China to outside country. Industry letter asked for postponement of adoption to allow for further “stakeholder input.” China notified WTO of its provisions April 19.

BURUNDI: OFAC June 2 added three Burundi officials to its SDN List, including two pro-government officials and one member of armed opposition group, who is former senior Burundian army officer. Agency in April issued abbreviated Burundi sanctions regulations, implementing November 2015 executive order imposing sanctions on government officials of central African country (see **WTTL**, April 18, page 8).

TRADE FIGURES: Merchandise exports in April fell 6.9% from year ago to \$120.1 billion, lowest level since March 2011, Commerce reported June 3. Services exports gained 0.05% to \$62.7 billion from last April. Goods imports dropped 6.9% from April 2015 to \$178.9 billion, as services imports gained 2.3% to \$41.4 billion.

ITC: ITC released public version of Generalized System of Preferences: Possible Modifications, 2015 Review (Investigation No. 332-556) May 27. Confidential version of report submitted to USTR April 26. ITC provided advice on likely impact on U.S. imports, competing U.S. industries and U.S. consumers of addition and removal of Harmonized Tariff Schedule (HTS) subheadings, as well as impact of waivers for four HTS subheadings.