



Compliance

Compliance course

Discussion topics/syllabus

- Introduction to US regulations,
- ITAR
- ITAR/EAR effect on industry.
- US persons Third country and other Hot issues.
- TAA MLA requirements.
- Limitations for Dutch industry.
- Personal pitfalls. (Criminal violations)
- Opportunities for Dutch Industry.
- Compliance responsibilities.
- Export control compliance systems.

I am not a US Person, or Citizen or permanent resident alien.

Create a USP through compliance

International:

In 2004 the United Nations Security Council adopted Resolution 1540, which requires all member States 'to develop appropriate ways to work with and inform industry and the public regarding their obligations:

Records are to be kept for the purposes of ensuring compliance and to enable the Government to meet its international reporting commitments, including to the UN Arms Register and the Wassenaar Arrangement.

EXTRADITION TREATY WITH THE KINGDOM OF THE NETHERLANDS

TREATY DOC. No. 97-7

1980 U.S.T. LEXIS 133

June 24, 1980, Date-Signed

17. An offense against the laws relating to importation, exportation or transit of goods, articles, or merchandise, including violations of the customs laws.

Introduction to US regulations

What is an Export?

- An actual shipment or transmission of items subject to the EAR or ITAR out of the United States
 - Disclosing (including oral or visual disclosure) “technical data” or “technology” to a “foreign person,” whether in the United States (“**deemed export**”) or abroad
 - Performing technical assistance, training, or other “defense services” for, or on behalf of, a “foreign person,” whether in the United States (“**deemed export**”) or abroad
 - Reexporting from foreign countries U.S.-origin goods or technical data, goods incorporating U.S. components, or goods manufactured from U.S. technology or reexporting U.S.-origin “technical data” or software
-
- Approach is based on the idea that the technology itself requires control, no matter what the end use.

See through rule

State's "see through rule", and the significance of resolving jurisdiction issues early in the development/ production cycle. Recent experience has highlighted the vulnerability of major airframe manufacturers having their civil aircraft become subject to State jurisdiction based on their incorporation of relatively low level parts that were themselves under State jurisdiction.

Take care ! Know your products, and product origin (be it patent design, manufacture etc.)

Requirement

Even if there is a government-to-government agreement applicable to the defense service, e.g., a Memorandum of Understanding (MoU) for JSF cooperation, a TAA is still required to cover the activities of the U.S. company. Furthermore, it is necessary for all parties to sign the TAA or MLA, even if the same parties have signed a MoU.

This is to ensure that each party, U.S. or foreign, involved in activities covered by the agreement understands and accepts its responsibilities, including the requirement for prior written consent from the DoS for any retransfer or change in end use.

When is a license needed?

Request for Information (RFI).

A US company may release a general Request for Information (RFI) to potential suppliers to ascertain their capabilities. This allows the US company to prepare a shortlist of the potential suppliers to approach as part of a more detailed quote or proposal.

Request for Quotation (RFQ).

The US company may send out Request for Quotes (RFQs)/Request for Proposals (RFPs) to suppliers on the shortlist. Typically the RFQ will include technical data so a TAA will be required for the transmission of ITAR sensitive information before the RFQ may be sent to Dutch companies. A US company will require information from an Dutch company before it can prepare a TAA .

Licenses

Types of Licenses

- **DSP-5** Authorises the permanent export of unclassified defence articles and technical data.
- **DSP-53** Also known as an International Import Certificate, the DSP -53 is submitted to the Department of State by US importers. When required by a foreign government, the DSP -53 is used to authorise the temporary or in-transit importation of defence articles into the US . It contains a statement by the importer and the US Government that the imported products will be disposed of responsibly. The exporter must notify the US consignee of the need to obtain the certificate.
- **DSP-61** The DSP -61 is a Temporary Import Licence used by the Department of State to authorise the in-transit shipment of any unclassified defence article or when any unclassified defence items are returned to the US for modification, upgrade or repair.
- **DSP-73** A DSP -73 authorises the temporary export of unclassified defence articles. This licence is often used for demonstrations at trade shows or to potential customers.
- **DSP-83** A Iso known as a “Nontransfer and Use Certificate.” A DSP -83 may be required at any time by the Directorate of Defense Trade Controls. Its use is mandated whenever defence articles to be exported are identified in the US Munitions List as ‘Significant Military Equipment (SME),’ when the proposed exports are classified. It also covers technical data that is to be used for the manufacture or production of SME.
- **DSP-85** This form is used to authorise the permanent or temporary export or temporary import of classified defence articles and technical data.
- **DSP-94** A uthorises the export of defence articles and related technical data under a Foreign Military Sales (FMS) program.
- **DSP-119** The DSP -119 is used to authorise minor changes to the details on previously issued licenses.

Types of Agreements

- Manufacturing Licence Agreement (MLA)
- Technical Assistance Agreement (TAA)
- Warehouse and Distribution Agreement

US Department's involved



**Bureau of Industry
and Security (BIS)**



**Export Administration
Regulations (EAR)**



**Directorate of
Defense Trade
Controls (DDTC)**



**International Traffic
in Arms Regulations
(ITAR)**



**Office of Foreign
Assets Control
(OFAC)**



**Foreign Assets
Control Regulations
(FACR)**

License Quantities

The overall number of permanent export license applications authorized under Section 38 in Fiscal Year 2006 was 35,991. The number of authorizations for manufacturing license agreements, technical assistance agreements, and amendments was 5,656.

In FY 2006, the office took final action on 70,000 cases, with case volume increasing at about 8% per year.

Therefore:

PLAN AHEAD

ITAR Definitions

Permanent export:

A permanent export is an export for four years or over.

Export of a “defense article” with a transfer of title.

Regulated by the Department of State.

Permanent import:

Regulated by the Department of the Treasury.

Controlled Unclassified Information

Controlled unclassified information (CUI) is unclassified information that is protected pursuant to the laws and regulations of the originating country. In its simplest form, official U.S. government information can be considered controlled information; it belongs to the U.S. government. Just as the improper use of a company's proprietary information may damage the company that originated it, so too could the improper use of certain categories of government information likely cause damage to the government or its employees. It is for this reason that the DoD has several policy directives covering the disclosure of official information.

Itar and Export

Under the ITAR, an “export” includes not only physically taking a defense article out of the United States but also “disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.” It also includes performing a defense service “on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.”

Assistance.

For example, if a U.S. defense company provides controlled technical data to its foreign supplier so the latter can manufacture a component to certain specifications, the U.S. company is performing a “defense service” for which it will require a “technical assistance agreement” despite the fact that it would seem that it is the foreign company that is providing a “service” or “assistance” to the U.S. company.

Business Unit Challenges

- **Physical access / disclosure**
 - Visitors, suppliers/vendors, subcontractors, customers
- **Oral, visual, documentary disclosure**
 - Meetings, teleconferences, phone / fax / email, public affairs, publications / presentations, exhibits
- **Physical shipment / receipt**
 - Shipping; express carriers
- **Travel**
 - Business/personal; transport of data, tools, equipment
- **Multi-site / team issues**
- **Subcontractors**

We Have an Export License! (US Company for us)

- Do your planned activities comply with any **limitation, proviso, or other conditions and restrictions** contained in the license, exemption, or exception approval?
- How are you **interpreting** the limitations?
- Have the limitations, provisos, or other conditions and restrictions been **communicated** to those performing the effort?

(How are you addressing **subcontractor** activity?)

(Have you included **transportation** entities in your scope?)

- Have you **documented** their understanding?
- Are your deliverables **marked** correctly?
- have you **down-flowed** all the requirements to your subcontractors?

TECHNICAL ASSISTANCE AGREEMENT (TAA) ITAR 120.22

An agreement for the performance of a defense service(s) or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles. Assembly of defense articles may be included, but providing production rights or manufacturing know-how are not conveyed. Should such rights be transferred, a Manufacturing License Agreement would be required.

MANUFACTURING LICENSE AGREEMENT (MLA) ITAR 120.21

An agreement whereby a U.S. person grants a foreign person an authorization to manufacture defense articles and which involves or contemplates:

- a. The export of technical data or defense articles or the performance of a defense service; or
- b. The use by the foreign person of technical data or defense articles previously exported by the U.S. person.

A MLA involves the licensing of a manufactured defense article abroad, which requires the U.S. party providing manufacturing know-how to the foreign party (i.e., teaches the foreign party how to manufacture the item). A MLA can also involve just the assembly of hardware abroad and no actual manufacturing, if the foreign party requires manufacturing data in order to complete the assembly.

ELEMENTS OF TAA AND MLA PACKAGES

1. Transmittal Letter per ITAR 124.12 (see Sections 3.0 and 5.0)
2. One original Certification Letter per ITAR 126.13 (see Section 8.0), signed by an empowered official.
3. Proposed agreement, preferably unsigned—since DTCL may impose changes that must be made prior to signature (see Sections 4.0 and 6.0).
 - a. Required ITAR 124.7 information contained within the main body of the agreement.
 - b. Required ITAR 124.8 and ITAR 124.9 clauses (if applicable) contained within the main body of the agreement.
 - c. Signature block for each party at end of main body of the agreement.
4. Attachments, Appendices or Annexes (i.e., such as Statement of Work, defense articles to be exported). Be sure to cross-reference—that is, reference the attachments in the body of the agreement and properly reference the agreement in the attachments.
5. Supporting technical data, white paper, etc. (i.e., relevant to technology export issues). This is generally material not directly referenced in the agreement but may help support an approval decision (see Section 10.5).

OBJECTIVE OF AMENDMENT

*Provide a full list of the changes being requested in this proposal. Provide in bullet format. Make a **short explanation of why each change is being made** (purpose). Examples of modifications include but are not limited to:*

Expand scope to include:

- Addition of new parts or components.
- Expansion of Statement of Work.
- Transfer of additional technical data.
- Increase of hardware for export.
- Expansion of sales or marketing territory to add (*country*).
- Addition of new programs (*list program or projects*).

Extend term of agreement from (*current date*) to (*proposed date*).

Add U.S. or foreign parties.

Make administrative changes.

Change name of U.S. or foreign signatory from (*company*) to (*company*).

Increase value of agreement.

Helpful Hints in Preparing Technical Information

Explain in simple and concise English.

Focus on the basic elements of a license: country, commodity, end-user and end-use.

Explain what you are doing.

Explain case history if pertinent and provide back up material.

Explain what you are not doing (may be more important).

Avoid jargon and do not rely on program names.

Review previous license provisos and incorporate into the language.

Cite previous cases – more than one case is fine.

List current Government Points of Contact.

Verify information provided.

If DoD is not involved, then what service would be interested (ITAR 124.12(a)(4)).

Realize that not all countries are handled equally.

Explain how will you maintain control of the data.

Realize that Government and Industry end-users will be treated differently.

Be realistic with quantities and state how you will maintain control of commodities.

Recognize possible compliance issues before and after licensing.

List Internet web sites to assist in the technical review.

Export Approval and License Process

There is one constant in the export control process. There is no central decision-making authority. The export control process can involve cabinet departments:

- The President;
 - Department of State;
 - Department of Defense;
 - Department of Energy;
 - Joint Staff;
 - National Security Council; and
 - National Economic Council;

Several interagency working groups included the following:

- Advisory Committee of Export Policy (ACEP);
 - Economic Defense Advisory Committee (EDAC);
 - Committee on Foreign Investment in the U.S. (CFIUS), etc.;
 - Three interagency escalation groups (e.g., resolution of interagency disputes);
 - Three different intelligence agencies,
 - Two independent agencies; and
 - Three enforcement agencies.

Key Players in Tech Transfer and International Program Security

Arms Export Control Act (AECA)

Dept. of State

**Direct. of Defense
Trade Controls
(DDTC)**

ITAR

Munitions List (ML)

Dept. of Defense

**Undersecretary
(Policy)**

Export Administration Act (EAA)

Dept. of Commerce

**Bureau of Industry
and Security (BIS)**

**EAR, Commerce Control
List (CCL), Country List**

**Undersecretary
(Intelligence)**

**Undersecretary
(Acq Tec & Log)**

Canadian exemption:

Canada's military industry has been dependent on exports to the US for more than 60 years. In the later years of the Second World War, the 1941 Hyde Park agreement formed the basis for cooperation in military production and trade between the United States and Canada. By 1956 the two countries had established the Defence Production Sharing Arrangement (DPSA), reinforced by the Defence Development Sharing Arrangement of 1963, whereby Canadian military industry was allowed to compete with US firms for Pentagon contracts on a commercial and competitive basis. Long before the Free Trade Agreement or the North American Free Trade Agreement, the DPSA created open trade in military goods between Canada and the US.

THIRD COUNTRY FOREIGN NATIONALS AND DUAL CITIZEN EMPLOYEES

Third Country Foreign National Employees. The U.S. Government does need each third country foreign national employed by a foreign signatory identified in the agreement. Approval of these individuals is contingent on their country of origin. In this situation, the agreement must specifically list the countries of all third country foreign nationals that may be employed. This information must be covered in the ITAR 124.7(4) statement. Non-Disclosure Agreements (NDAs) must be completed on each individual and kept on file for 5 years after termination of the agreement by the U.S. prime company.

Each agreement will be reviewed with a different level of scrutiny depending upon the sensitivity of the technology and the commodity involved. Some cases may require individuals to be listed due to national security concerns. Most agreements are approved by country, as the integration of world bodies such as the European Union has resulted in a greater number of agreements requiring foreign national employment.

Working in the Defense industry ??

The Canadian company could not allow her to work on the program covered by the TAA unless her participation was approved by DDTC. Moreover, it may be impossible to obtain DDTC approval, because China is a proscribed country under section 126.1 of the ITAR. DDTC's "Guidelines for Preparing Agreements" (October 2003) state that "dual nationals of proscribed ITAR 126.1 countries will not be authorized."

The Mentioned ITAR 126.1 Countries.

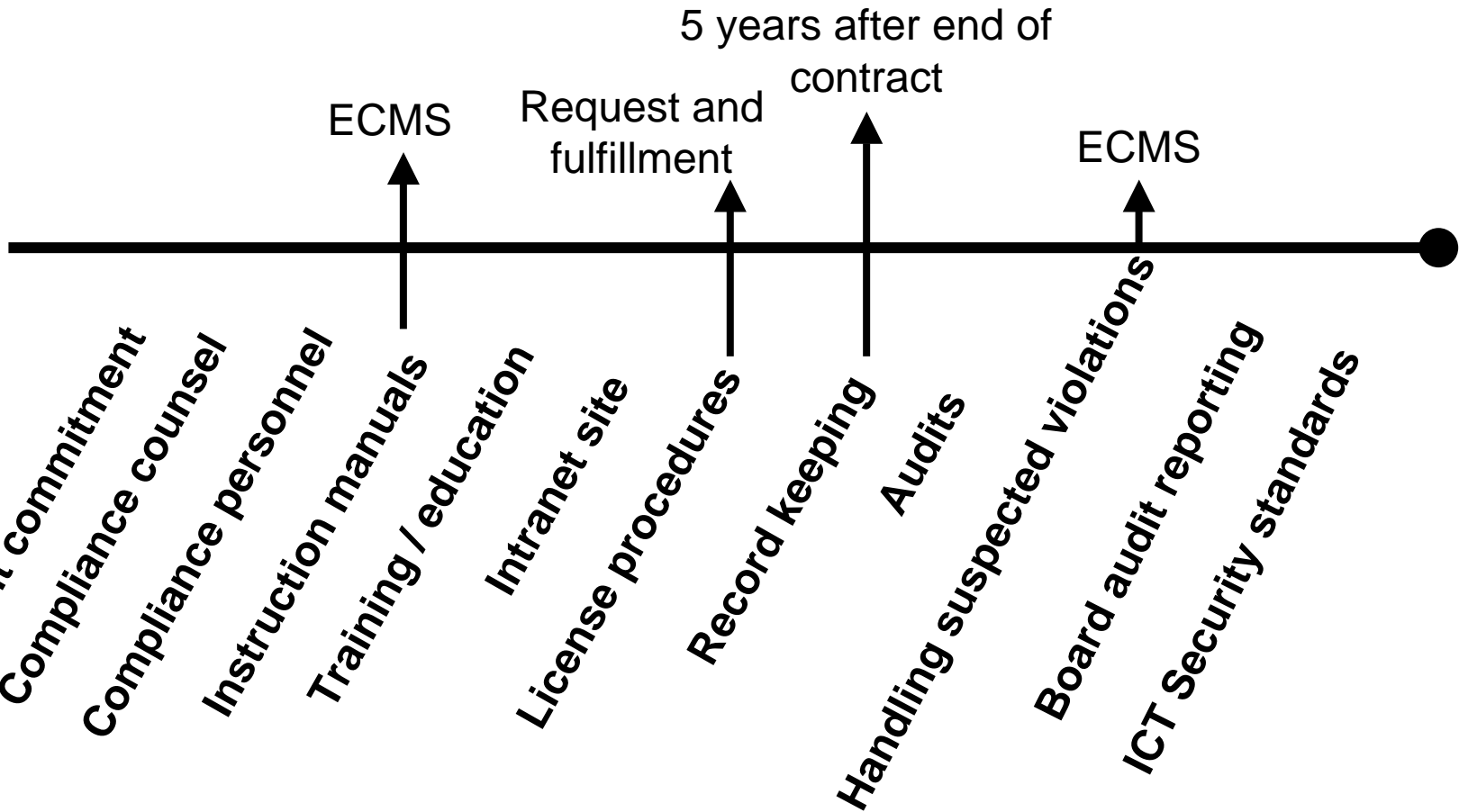
Afghanistan: 126.1(g) ; 129.5(d) footnote
Belarus: 126.1(a)
Burma: 126.1(a)
China: 126.1(a)
Congo, Democratic Republic of: 126.1(i); 129.5(d) footnote
Cote d'Ivoire (see Ivory Coast)
Cuba: 126.1(a), (d)
Cyprus: 126.1(a) footnote; 129.5(c) footnote
Eritrea: 126.1(a) footnote; 129.5(c) footnote
Fiji: 126.1(a) footnote
Guatemala: 129.5(c) footnote
Haiti: 126.1(j)
Indonesia: 126.1(a) footnote
Iran: 126.1(a), (d); 129.5(d) footnote
Iraq: 126.1(f); 129.5(d) footnote
Ivory Coast (Cote d'Ivoire): 126.1(a) footnote; 129.5(d) footnote
Lebanon: 126.1(a) footnote; 129.5(d) footnote
Liberia: 126.1(a); 129.5(d) footnote
Libya: 126.1(k)
North Korea: 126.1(a), (d); 129.5(d) footnote
Palestinian Authority/Hamas: 126.1(a) footnote
Rwanda: 126.1(h); 129.5(d) footnote
Sierra Leone: 126.1(c) footnote; 129.5(d) footnote
Somalia: 126.1(a); 129.5(d) footnote
Sudan: 126.1(a), (d); 129.5(d) footnote
Syria: 126.1(a), (d)
Venezuela: 126.1(a)
Vietnam: 126.1(l)
Yemen: 126.1(a) footnote, 129.5(c)
Zimbabwe: 126.1(a) footnote

NOTE: THESE NATIONALS/ DUEL NATIONALS WILL ALWAYS BE REFUSED !!

Dutch responsibilities

- Completed the NDA's section 124.8 and 124.9 ?
- Completed the Dual and Third country national NDA's?
- Have they been sent to the Prime?
- Are they endorsed and Okay'd?
- Do our subcontractors have a compliance management system?
- Can you check it?
- Is the freight forwarder following procedures ?
- Etc etc.

Compliance management system components.



Pitfalls

Lack of management attention

- Having export compliance personnel report to sales/marketing (Red Flag!)
- Assigning compliance functions to clerical or traffic employees with low rank and authority, and unlikely to try to stop a shipment or report a suspected violation.

Failure to train all employees

- Training traffic personnel but not engineers and sales & marketing

Failure to adequately screen names and investigate red flags

Failure to distribute and follow license provisos

More Export Control Pitfalls

Use of exemptions w/o authority

Providing EAR 99 goods with services to non-US military

Brokering ITAR items & services

Failure to notify, certify, or file timely reports

Inadequate recordkeeping (antiquated software, untrained employees)

Lack of regular audits

What should one do?

Clarity !!

WARNING - This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., Sec 2751, et seq.) or the Export Administration Act of 1979, as amended (Title 50, U.S.C., App. 2401 et seq.). Violations of these export laws are subject to severe criminal penalties.

Marking/tagging of ITAR Items....

Single consistent answers and actions...

The need for an independent European knowledge base or intermediary.

(The question could start the investigation)

Work on an Australian/UK type exemption.

Use the JPO.

Ensure Compliance in our Industries.....

Team together and fight our corner

Get compliance right for maintenance valley

Best Price ? Best compliance.....!!