

Chapter 3. Nonproliferation Controls and Treaty Compliance

The Office of Nonproliferation Controls and Treaty Compliance (NPTC) administers U.S. multilateral and unilateral export controls on nuclear, missile, and chemical and biological items (i.e., goods and technologies) controlled for nonproliferation reasons; ensures compliance with U.S. obligations under the Chemical Weapons Convention (CWC) and Biological Weapons Convention (BWC); administers controls on the export of materials in short supply; and administers requirements related to technology transfers to foreign nationals in the United States.

The United States is a member of the Nuclear Suppliers Group (NSG), the Missile Technology Control Regime (MTCR), and the Australia Group (AG). These multilateral export control regimes focus on preventing the spread of weapons of mass destruction and their delivery systems. NPTC represents the Department in international negotiations on the export controls of the NSG, MTCR, and AG, and represents the Department on U.S. delegations to the administrative and policy meetings of the CWC, and the negotiating sessions on issues related to establishing an administrative and policy framework for the BWC. NPTC also is responsible for all policy actions, export licenses, commodity classifications, and advisory opinions pertaining to items subject to nuclear, missile technology, chemical, biological, and short supply controls, and the control of technology transfers to foreign nationals, known as “deemed exports.”

NPTC conducts its work through five divisions: Nuclear Technology Controls, Missile Technology Controls, Chemical and Biological Controls, Deemed Exports and Short Supply, and Treaty Compliance.

Nuclear Technology Controls Division

Overview of the Nuclear Suppliers Group

Following the 1974 testing of a nuclear device by India, the United States proposed the formation of the NSG, and initially approached six other major supplier states including Canada, Germany, France, Japan, the United Kingdom, and the Soviet Union, to create an informal group of nations concerned with the proliferation of nuclear weapons. The NSG was formally established in 1992 and its membership now totals 39 members.

The two documents that guide NSG members in establishing national controls are the NSG Guidelines and the Annex. The NSG Guidelines establish the underlying precepts of the regime and provide a degree of order and predictability among suppliers, ensuring harmonized standards and interpretations of NSG controls. The NSG Guidelines also call for consultations among members on sensitive cases to ensure that transfers do not contribute to risks of conflict and instability.

The Annex contains the list of 70 categories of dual-use items subject to NSG controls. The Annex also contains a General Technology Note, which ensures that exports of technology directly associated with listed items will be subject to the same degree of scrutiny and control as the items themselves. NSG members must establish national licensing procedures for the transfer of Annex items. Overall responsibility for NSG activities lies with the member states; the NSG proceeds on the basis of consensus.

Since the early 1990s, formal annual plenary meetings have been held to provide the opportunity for multilateral consultations. The plenary meetings also provide the opportunity for members to review the Annex and the Guidelines to ensure that NSG controls properly focus on sensitive nuclear technology and that they are meeting evolving nuclear proliferation challenges.

Recent Actions

The United States hosted the annual NSG plenary session (plenary) in Aspen, Colorado, during the week of May 6, 2001, at which the United States assumed the chairmanship of the NSG for the coming year. The NSG approved the restructuring of the administrative operations of the NSG, reaffirmed the requirement for full-scope International Atomic Energy Agency safeguards for NSG membership, adopted a proposal to develop an NSG Web site, and welcomed Slovenia to its first plenary. Reflecting the new NSG administrative structure, the plenary agreed to establish a new Consultative Group (CG) that will meet twice a year to review the NSG Guidelines, control lists, and procedures; share information; promote transparency; and conduct outreach activities. The CG will replace the NSG Dual-Use Regime, the Information Sharing Working Group, and the Transparency Working Group. Members took advantage of the opportunity that the plenary provided to share information on nuclear-related export license denials and engage in a multilateral exchange of intelligence information on the nuclear programs of various countries of concern. The plenary also accepted the Czech Republic's offer to chair the 2002 plenary and authorized the U.S. chairman to continue coordinating outreach efforts with non-NSG members.

As in prior years, BXA continues to issue license denials for NSG-controlled dual-use items as part of the "no undercut" provision. Under this provision, a denial notification received from an NSG member country is intended to preclude other member countries from approving similar transactions, thereby assuring that the earlier denial is not undercut by other NSG members. Procedures exist for member countries to consult on specific denials if they disagree with the original denial decision. BXA has also been active in reporting "catch-all" denials for uncontrolled items destined to end-users of nuclear proliferation concern.

Missile Technology Controls Division

Overview of the Missile Technology Control Regime

On April 16, 1987, the United States and its G-7 trading partners created the Missile Technology Control Regime (MTCR), the focus of which is to limit the proliferation of missiles capable of delivering

weapons of mass destruction. The MTCR is not a treaty-based regime, but rather an informal group of 33 countries that have agreed to coordinate their national export controls to help prevent missile proliferation.

The MTCR Guidelines and the Equipment and Technology Annex form the basis for U.S. missile technology controls. The MTCR Guidelines provide licensing policy, procedures, review factors, and standard assurances on missile technology exports. The Annex is the list of items of missile-related commodities subject to control and is divided into two categories. Category I items include missile subsystems, production facilities, and production equipment for missile systems capable of delivering a 500 kg payload to a range of at least 300 km. Category II items include missiles with a 300 km range, regardless of payload, and the major subsystems, production facilities, production and test equipment, materials, and components of missile delivery systems.

BXA administers controls on exports of dual-use manufacturing equipment for Category I items and on all dual-use items in Category II. A considerable portion of the license applications reviewed for missile-related concerns are for commercial aviation exports, including avionics, navigation, telemetry, composite materials, and test equipment.

Recent Actions

An MTCR plenary and associated technical experts meeting was held the week of October 9, 2000, in Helsinki, Finland. The missile nonproliferation global action plan, a series of procedures, processes, and actions that all countries will be encouraged to subscribe to in support of missile nonproliferation, was first proposed and outlined at the plenary. Discussions at the technical experts meeting resulted in a tightening of export control parameters on turbine engines, global positioning system receivers, integrated navigation systems, and definitions of missile range and payload. Unfortunately, little progress was made on these issues at a second technical experts meeting held in Moscow, Russia, during May 2001, but meeting attendees agreed to revise export controls to permit bulk graphite exports in sizes or shapes that are not amenable for use in fabricating rocket nozzles and re-entry vehicle nose cones.

At the Reinforced Point of Contact (RPOC) meeting in Paris that began on March 26, 2001, South Korea participated as a member of the MTCR for the first time. Further discussion at the RPOC resulted in an agreement to establish a group to review comments from member-nations on the draft missile nonproliferation global action plan, which subsequently evolved into the International Code of Conduct Against Ballistic Missile Proliferation (ICOC). Using the comments received, the group was charged with suggesting revisions or complementary language for the ICOC proposal subsequently reviewed at the September 2001 Plenary.

Held in Ottawa, Canada, during the week of September 23, 2001, the MTCR plenary and technical experts meeting focused on implementation plans for the ICOC. The draft of the ICOC will be circulated among MTCR member and non-member nations as soon as possible, and a series of negotiating sessions in which all countries are invited to discuss the parameters of ICOC participation

will begin. Any changes to the ICOC resulting from these negotiating sessions will be made by MTCR participant consensus only. The first negotiating session is tentatively scheduled for Paris in February 2002, with the Netherlands hosting an international conference for the final adoption of the ICOC at the end of 2002. At the September 2001 technical experts meeting, agreement was reached on changes to export controls on gas turbine engines. In addition, for the first time, an enforcement experts meeting was held to exchange views on export enforcement efforts. This meeting was well received and may become a regular part of each future Plenary.

Chemical and Biological Controls Division

Overview of the Australia Group

The Australia Group (AG), an informal multilateral forum, seeks to impede the proliferation of chemical and biological weapons through the harmonization of members' export controls, the exchange of information, and other diplomatic means. The group was formed in 1985 when, in response to the use of chemical weapons during the Iran-Iraq war, Australia called for a meeting of like-minded countries to consider harmonizing export controls on chemical weapons precursor chemicals. The AG later expanded its focus to include chemical production equipment and technologies. In 1990, the scope of the AG was expanded further to include measures to prevent the proliferation of biological weapons. Today, the AG remains a viable, effective mechanism through which participating governments demonstrate their commitment to international nonproliferation objectives.

Thirty-three countries currently participate in the AG. The group primarily focuses on coordinating export controls on an agreed list of dual-use items that can be used in producing chemical and biological weapons. In accordance with the AG control list, BXA maintains export licensing requirements on relevant precursor chemicals, microorganisms and toxins, equipment, and technology.

Recent Actions

Turkey and Cyprus became the newest members of the AG at the plenary held in Paris, France, on October 2-6, 2000. After years of discussion, the AG agreed on a revised formula for the licensing of chemical mixtures containing AG-controlled chemicals, bringing AG policy in line with recent decisions made regarding the CWC. The AG also agreed with U.S. technical proposals, drafted by BXA, to revise certain export control parameters on several items, including centrifugal separators and diagnostic and food testing kits containing AG-controlled precursor chemicals. The final rule amending the Export Administration Regulations (EAR) to implement the understandings reached at the plenary was published in the *Federal Register* on September 28, 2001.

The AG maintains a denial notification procedure by which members agree to notify the group when a license for a controlled item is denied. This procedure is coupled with a “no undercut policy” whereby members agree not to approve an identical sale without first consulting any member issuing a denial notification for essentially the same transaction.

The AG continues to engage in a wide range of contacts to promote greater awareness and understanding of the important role that national export licensing measures play in preventing the proliferation of chemical and biological weapons. These activities include bilateral contacts and a program of regional seminars and briefings for non-participating countries on export licensing practices.

Deemed Export and Short Supply Division

Transfer of Technology to Foreign Nationals in the United States

U.S. companies and other organizations are required to obtain prior approval from BXA before foreign nationals from certain countries are allowed to have access to certain controlled technologies in the United States. The EAR treats any release of controlled technology or source code to a foreign national as a “deemed export” to the home country of that foreign national. BXA reviews license applications under the licensing policies that apply to the actual export of the technology or source code in question to the home country or countries of the foreign national. The “deemed export” rule is most often encountered in the employment context where a company intends to release controlled technology or source code to a foreign national.

During FY 2001, BXA processed 1,026 deemed export cases, slightly more than during FY 2000. During this period, the processing time for deemed export license applications increased from 70 to 75 days. In FY 2001, BXA initiated the use of a pilot program to improve the deemed export license process. Under this program, companies that hire a significant amount of foreign technical personnel can obtain a one-time approval for the technology proposed for transfer. After the interagency community authorizes the technology for export, additional foreign nationals can be added to the Deemed Export License by amendment, subject to referral to the intelligence community. Three companies currently are participating in the program.

Short Supply Controls

The EAA authorizes the President to prohibit or curtail the export of goods “where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.” The President is authorized to monitor exports of certain goods to determine the impact of such exports on the domestic supply and whether this impact has an adverse effect on the U.S. economy.

BXA also administers export controls on certain goods under the Energy Policy and Conservation Act (EPCA), the Mineral Leasing Act (MLA), the Naval Petroleum Reserves Production Act (NPRPA), the Outer Continental Shelf Lands Act (OCSLA), and the Forest Resources Conservation and Shortage Relief Act of 1990 (FRCSRA), as amended.

During FY 2001, BXA controlled the export of certain domestically produced crude oil and unprocessed Western Red Cedar timber harvested from federal and state lands. Section 7(k) of the EAA specifies that for purposes of export controls imposed under the EAA, the shipment of crude oil, refined petroleum products, or partially refined petroleum products from the United States for use by the Department of Defense or United States-supported installations or facilities should not be considered as exports. Section 14(a)(13) of the EAA requires a report on any monitoring program conducted pursuant to the EAA or Section 812 of the Agricultural Act of 1970. (See Appendix E, which contains a report by the Department of Agriculture on its monitoring activities during FY 2001.)

Crude Oil and Refined Petroleum Products

Exports of most domestically produced crude oil continued to be subject to statutory restrictions in FY 2001. Four separate statutes require the Department to administer various restrictions on the export of domestically produced crude oil.

- Section 103 of the EPCA requires the President to restrict the export of domestically produced crude oil.
- The MLA restricts exports of domestic crude oil transported by pipeline over federal rights-of-way granted under Section 28(u).
- The NPRPA restricts exports of petroleum (crude or refined products) produced from the Naval Petroleum Reserves.
- The OCSLA restricts exports of crude oil or natural gas produced from federally owned submerged lands of the Outer Continental Shelf.

All of these statutes establish stringent tests (e.g., consumer savings through lower prices for replacement oils) that a license applicant must meet before BXA can authorize crude oil exports. BXA can authorize exports only by a national interest finding issued by the President or his delegated representative. The President has retained the authority to make national interest findings under three of

the statutes, but has delegated to the Secretary of Commerce the authority to make findings under EPCA.

Since the EPCA's enactment, there have been only five national interest findings providing exemptions from the statutory prohibitions: (1) in 1985, the export to Canada of crude oil produced in the lower 48 states; (2) in 1989, the export of 50,000 barrels per day (B/D) of Alaskan North Slope (ANS) crude oil pursuant to the U.S.-Canadian Free Trade Agreement; (3) in 1985, the export of Alaskan Cook Inlet crude oil to Pacific Rim energy markets; (4) in 1992, the export of 25,000 B/D of California heavy crude oil having a gravity (i.e., weight) of 20 degrees API or lower (a standard of the American Petroleum Institute); and (5) in 1996, exports of ANS crude oil, when transported on U.S.-flag tankers, were determined to be in the national interest.

Exports of Crude Oil from the Lower 48 States

During FY 2001, BXA approved 19 licenses for exports of crude oil originating from the lower 48 states. These licenses involved a total of 40.7 million barrels of crude oil or approximately 111,507 B/D. Specifically, BXA issued eight licenses totaling 34 million barrels for shipment to Canada of crude oil produced in the lower 48 states. BXA also issued 11 licenses to export 25,000 B/D of California heavy crude oil. The 11 licenses were for 6.99 million barrels of crude oil. The bulk of the heavy crude oil exported was for use as bunker fuel for vessels engaged in foreign trade.

Exports of Crude Oil from Alaska

On May 31, 1996, BXA amended the short supply provisions of the EAR by establishing License Exception Trans-Alaska Pipeline Authorization Act (TAPS) authorizing exports of Alaskan North Slope crude oil with certain conditions. License Exception TAPS was based on: (1) Public Law 104-58, which permits the export of crude oil transported by pipeline over right-of-way granted pursuant to Section 203 of TAPS; (2) the President's April 28, 1996 determination that such exports are in the national interest; and (3) the President's direction to the Secretary of Commerce to issue a license exception with conditions for the export of TAPS crude oil. During FY 2001, there was no activity under this program.

The Department also authorizes the export of crude oil derived from state-owned submerged lands in Alaska's Cook Inlet under an individual validated license unless the oil has been or will be transported by a pipeline over a federal right-of-way granted pursuant to the Mineral Leasing Act or the Trans-Alaska Pipeline Authorization Act. In FY 2001, there was no activity under this program.

Wood Products

BXA administers short supply export controls on Western Red Cedar (WRC), as mandated by Section 7(i) of the EAA. BXA also administers the ban on exports of unprocessed timber originating from public lands in all or parts of 17 western states pursuant to the FRCSRA.

Western Red Cedar

The EAA prohibits the export of unprocessed WRC harvested from state or federal lands. This prohibition applies to those contracts entered into after September 30, 1979. However, exports of unprocessed WRC harvested from state or federal lands under contracts entered into before October 1, 1979, are permitted under an export license. During FY 2001, BXA did not issue any export licenses for WRC.

FRCSRA

Under FRCSRA, the Department administers the ban on the export of unprocessed timber originating from public lands in 17 western continental states. (In the alternative, the affected states can request the Secretary of Commerce to authorize them to administer their own programs.) The last log export order remaining in effect was issued under Title VI of the Department of the Interior and Related Agencies Appropriations Act of 1998 (Public Law 105-83), which required the Secretary of Commerce to make permanent the total prohibition on the export of unprocessed timber from public (state) lands contained in the FRCSRA. Specifically, Public Law 105-83 prohibits the export of unprocessed timber originating from state lands in states west of the 100th meridian in the contiguous 48 states with more than 400 million board feet of annual sales volume of such timber. As the Secretary of Commerce has delegated the authority for carrying out the policies and programs necessary to administer laws regarding the control of U.S. exports to the Under Secretary of Commerce for Export Administration, the Under Secretary issued the order required under P.L. 105-83 on January 9, 1998. The practical effect of the order is to make permanent the ban on the export of unprocessed timber originating from Washington state public lands. This order remained in effect during FY 2001.

The Enhanced Proliferation Control Initiative (EPCI)

When the U.S. Government became aware that Iraq, on the eve of the Persian Gulf War, had enhanced its weapons of mass destruction capability by obtaining imported goods that were exempt from a license requirement, President George H. W. Bush launched the Enhanced Proliferation Control Initiative (EPCI) in December 1990. EPCI led to the imposition of chemical, biological, and missile end-use and end-user based controls that were similar to the nuclear end-use and end-user based controls already in effect. The EAR requires exporters to obtain a license for the export of an item, even if one is not normally required, if they know or are informed by BXA that the export is for use in nuclear, chemical or biological weapons or missiles, or facilities engaged in such activities. U.S. persons are also restricted from activities in support of nuclear, chemical or biological weapons, or missile-related projects. These regulations are designed to prevent exports of non-listed items that would make a material contribution to proliferation projects of concern, but are not intended to affect legitimate commercial trade.

EPCI began as a unilateral control, but with U.S. leadership, virtually all of the NSG and MTCR member countries have adopted some form of catch-all controls, and the United States continues to encourage other countries to adopt similar measures. Information exchanges on EPCI export denials have also enhanced multilateral awareness of proliferation projects of concern.

Treaty Compliance Division

Overview of the Chemical Weapons Convention

The Chemical Weapons Convention (CWC), signed by more than 150 countries, bans the development, production, acquisition, stockpiling, retention, use, and direct or indirect transfer of chemical weapons, and provides for an extensive verification regime. The CWC, ratified by 145 states, entered into force on April 29, 1997.

Implemented through the establishment of a CWC Annex, specified chemicals are grouped into three schedules based on their toxicity and other properties enabling their use in chemical weapons. The toxic chemicals and precursors identified on Schedule 1 pose the highest risk and have few commercial applications; the chemicals and precursors identified on Schedule 2 pose a significant risk, but have certain commercial applications. The chemicals and precursors identified on Schedule 3, while they pose a risk for purposes of the CWC, have wide commercial applications. Chemical agents deemed to have direct military applications are controlled by the State Department under the International Traffic in Arms Regulations.

The CWC, which is administered by the Organization for the Prohibition of Chemical Weapons (OPCW), is the first major arms control treaty to have a significant impact on the private sector. The CWC requires certain commercial chemical production, consumption, and processing facilities to submit data declarations and to permit international inspections. U.S. implementing legislation to compel domestic industry compliance with the CWC was enacted on October 21, 1998. Modifications to the EAR implementing the provisions of the CWC were promulgated on May 18, 1999. Companies exceeding certain production, processing, consumption, and export or import thresholds for scheduled chemicals are required to submit the appropriate declarations or reports to BXA.

Recent Actions

BXA is the agency responsible for collecting data declarations from U.S. companies engaged in chemical activities covered by the CWC and escorting OPCW inspection teams at U.S. companies. In FY 2001, 915 declarations and reports from 290 chemical companies representing 812 plant sites were received and verified by NPTC staff and forwarded to the OPCW. NPTC hosted 16 on-site inspections of U.S. facilities engaged in chemical-related activities during FY 2001.

In response to requests from U.S. companies for specific assistance in preparing their facilities for inspection, NPTC conducted 17 site assistance visits (SAVs) at various U.S. plant sites. SAVs assist

industry personnel in preparing pre-inspection briefings and draft facility agreements, and provide industry with methods for identifying and handling confidential business information and other key elements of CWC industry inspection activities.

With the cooperation and assistance of the American Chemistry Council and the Synthetic Organic Chemical Manufacturers Association, NPTC hosted a CWC outreach seminar in Atlanta, Georgia, on November 2, 2000. Over 100 industry participants attended the seminar to hear representatives from BXA, the Defense Department, and the FBI present general guidance to the chemical industry on plant site preparation for CWC inspections.

Biological Weapons Convention

The Biological Weapons Convention (BWC) entered into force in 1975 to prohibit the development, production, and stockpiling of biological agents or toxins of types or in quantities that do not have “justification for prophylactic, protective, or other peaceful purposes.” The Third Review Conference of State Parties to the BWC agreed in 1991 to consider ways to strengthen the implementation and effectiveness of the BWC.

The United States agreed in 1994 to participate in an ad hoc group to negotiate a protocol to the BWC that would “enhance confidence in compliance.” On July 25, 2001, after in-depth interagency review, the United States announced that the draft protocol text was unacceptable and could not be satisfactorily revised. Instead, the United States proposed a set of alternative actions to strengthen the BWC, which were to be presented at the BWC Review Conference scheduled for November 2001.

Industry Interaction and International Consultations

Beyond the routine contacts that are a necessary part of the export licensing process, NPTC’s staff participated in many industry briefings, trade association seminars, and one-on-one consultations with exporters to clarify the scope of U.S. nuclear and missile technology controls, explain the responsibilities of U.S. industry under the CWC, and clarify regulatory actions taken to control the export of chemical and biological commodities. These efforts support U.S. industry by reassuring parties of the legitimacy of proposed export sales and advising them of their export control obligations, and by explaining the rights and obligations of the U.S. chemical industry in their compliance with the CWC.

NPTC’s staff also actively engages in bilateral and multilateral consultations with U.S. trading partners who share our nonproliferation goals, and with countries who do not yet have export control systems in place. In the last year, NPTC participated in numerous consultations under the auspices of the multilateral control regimes and international treaty organizations and in support of BXA’s overall international outreach effort to educate non-participatory countries about the benefits and obligations of export control cooperation.

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