

6. Office of Chemical and Biological Controls and Treaty Compliance

The Office of Chemical and Biological Controls and Treaty Compliance (CBTC) administers BXA's statutory and regulatory requirements governing the export of items controlled for chemical and biological warfare purposes. CBTC implements export controls to prevent the proliferation of chemical and biological weapons in accord with the tenets of the 31-nation Australia Group regime. CBTC also is preparing to undertake a major role in overseeing U.S. industry compliance with the Chemical Weapons Convention (CWC) and is developing programs to implement the provisions of the CWC pertaining to U.S. industry compliance, including collecting, validating and aggregating data declarations; educating industry about treaty rights and obligations; hosting inspections of U.S. business facilities; and implementing CWC trade restrictions. In addition, CBTC administers requirements related to technology transfers to foreign nationals in the United States and materials subject to short supply restrictions. The office consists of the Chemical and Biological Controls Division, the Treaty Compliance Division and the Foreign Nationals and Short Supply Programs Division.

Australia Group Regime

Conceived in the wake of the Iran-Iraq war, the Australia Group (AG) was formed in 1985 by countries seeking to harmonize controls and measures individually imposed by like-minded countries to address the proliferation of chemical weapons. In 1990, the group expanded its focus to include biological weapons proliferation. The AG is an informal, consultative arrangement through which participants commit to cooperate in achieving chemical and biological weapons (CBW) nonproliferation goals and to coordinate effective export controls designed to prevent the development and use of chemical and biological weapons.

The AG's central thrust is the coordination of export controls for listed items determined to be useful in the production of chemical and biological weapons. All AG member countries agree to impose export license requirements for these items. The AG achieves its objectives through the harmonization of export control policies, the exchange of information on proliferation activities, and contacts with other countries to encourage adoption of AG measures. The thirty-one members (30 nations plus the European Community) of the AG meet annually in plenary session, most recently in Paris October 12-15, 1998, following a Technical Experts Meeting held on October 9-10, 1998.

Multilateral Control Actions

AG members engage in ongoing consultations both multilaterally in their annual

plenary and working group sessions as well as bilaterally throughout the year. The annual plenary session serves as the forum for the major work, encompassing a technical experts review of control list items, the sharing of implementation and enforcement experiences, and the exchange of information about the global problem of proliferation. The October 1998 meeting presented one of the most extensive AG agendas in recent years, spanning both technical and policy issues. At the meeting, the AG undertook an extensive review of several control list items in the first major technical review since the adoption of controls on chemical and biological production equipment in 1993. In preparation for this meeting, BXA reviewed and analyzed numerous proposals from the other AG member nations and originated some based on export licensing experiences. The issues under discussion involved controls on biological agents, including genetically modified organisms, chemical and biological equipment, and chemical mixtures. The Technical Experts Group recommended clarifications to the control list entries for toxic gas monitoring systems and biological safety cabinets. Implementation discussions centered on greater harmonization of export control elements, such as the no undercut policy, “catch-all” controls, post-shipment verification, and end-user undertakings.

In keeping with their strong commitment to both treaties, all AG members are States Parties to the Chemical Weapons Convention (CWC) and the Biological and Toxin Weapons Convention (BTWC). They have agreed that continued maintenance of effective export controls is an important element in curbing the spread of proliferation and reinforces the implementation of these treaties. Some non-aligned States Parties oppose AG export controls, alleging that they deprive developing countries of technological advances in chemical and biological activities. While the AG does not endorse this view, participants have agreed to review national export licensing policies to ensure that they promote the object and purpose of the CWC and are applied fairly.

Export Control Liberalizations

Mixtures containing chemical precursors controlled under ECCN 1C350 may be shipped without a license if they qualify for a de minimus exemption based on the weight percentage of the controlled chemical within the mixture. In accordance with an AG agreement, the Export Administration Regulations (EAR) required that the weight percentage be calculated on a “solvent free basis.” This method of calculation proved difficult to implement for both exporters and AG member governments. Consequently, at the October 1997 AG meeting, participants decided to change the method of calculation from “solvent free basis” to “absolute weight.” BXA published a rule revising the EAR to conform with this change on March 24, 1998 (63 FR 14028). This revision will simplify calculation and improve the coordination of the mixtures policy among AG members.

International Agreements

Chemical Weapons Convention

At the United Nations Conference on Disarmament in 1993, over 150 states completed negotiations on the Chemical Weapons Convention (CWC) which bans the development, production, acquisition, stockpiling, retention, use, and direct or indirect transfer of chemical weapons. The Convention also requires States Parties to collect data from their chemical industries on production and use of certain toxic chemicals. The United States ratified the Convention on April 25, 1997 and it entered into force on April 29, 1997. As of December 1, there were 121 states that had ratified the convention.

The Convention, which is administered by the Organization for the Prohibition of Chemical Weapons (OPCW) in The Hague, The Netherlands, is the first major arms control and nonproliferation treaty to have a significant impact on the private sector. Certain commercial chemical production, consumption and processing facilities will be required to submit data declarations and to permit international inspections. On October 21, 1998, Congress passed legislation to implement these requirements in the United States.

BXA will implement the Department of Commerce's lead agency responsibilities for compelling data declarations from and hosting OPCW inspections at U.S. companies engaged in chemical activities covered by the Convention. CBTC activities include: (1) designing secure hardware and software to receive and process declarations; (2) training staff to perform chemical determinations; (3) creating a dedicated CWC Website that will contain necessary forms and information on CWC requirements; (4) hiring, training, and certifying chemical engineers to host OPCW inspections; (5) conducting mock inspections; (6) conducting site assistance visits to prepare facilities for OPCW inspections anticipated to begin in the second half of 1999; and (7) holding seminars in Fiscal Year 1999, in cooperation with the Chemical Manufacturers Association, the Synthetic and Organic Chemical Manufacturers Association, BXA's Office of Exporter Services, the Federal Bureau of Investigation, the Arms Control and Disarmament Agency, and the Defense Threat Reduction Agency, to inform industry of its CWC obligations.

CBTC cooperates with other U.S. government agencies regarding U.S. participation in participating in the various meetings and daily operations of the OPCW. In Fiscal Year 1998, CBTC participated in the facilitator's, Executive Council, and Conference of States Parties meetings addressing industry issues, such as model facility agreements, transfers of saxitoxin, and inspection procedures. Participation in these sessions affords BXA the opportunity to represent U.S. industry concerns in the inspection planning process as well as to interact with OPCW staff and foreign delegations.

Outreach

Over the course of Fiscal Year 1998, CBTC engaged in a concentrated outreach effort to industry to maintain a dialogue about the possible impact of CWC requirements and to provide information on industry's rights and obligations, the completion of declarations, and onsite inspection protocols. Pursuant to the enactment of CWC implementing

legislation, CBTC will implement a comprehensive outreach plan, to include seminars, pamphlets, and a dedicated Website to educate industry about its declaration and inspection requirements under the Convention.

Biological and Toxins Weapons Convention

The Biological and Toxins Weapons Convention (BWC) entered into force in 1975 to prohibit the development, production, and stockpiling of biological agents or toxins that do not have peaceful uses. The Third Review Conference of States Parties to the BWC agreed in 1991 to consider ways to strengthen the implementation and effectiveness of the Convention.

CBTC is cooperating with other U.S. Government agencies in the development of an enforcement protocol to the BWC that can be supported by industry. Industry's concerns about the protection of confidential business information are a significant consideration in crafting the protocol. CBTC works with industry organizations to coordinate and promote cooperation with government in addressing BWC issues. CBTC provides representation for multilateral and bilateral discussions relevant to the BWC, including an Ad Hoc Group working to develop the enforcement protocol. In November 1996, CBTC joined the U.S. delegation to the Fourth BWC Review Conference (Revcon) which affirmed support for the basic principles of the convention and endorsed the work of the Ad Hoc Group. CBTC attended sessions of the Ad Hoc Group held in 1998 during which work progressed on the development of specific elements of a protocol. In addition, CBTC participated in bilateral discussions and in discussions with small groups of like-minded countries throughout the year.

Convention on Biological Diversity

The Convention on Biological Diversity (CBD) aims to conserve the world's biological diversity by stemming the loss of the earth's species, their habitats, and ecosystems. The United States has signed but not ratified the treaty, and therefore is not a party. However, as the largest exporter of biotechnology products, the United States is playing a constructive role in the development of a Biosafety Protocol.

In 1995, an international Ad Hoc Working Group was formed to develop the Biosafety Protocol. A primary focus of this Protocol is the regulation of the movement of any living modified organism that may adversely affect threaten the environment of the importing country. It is envisioned that the Protocol will require that an exporting country provide advance notice to an importing country of its intent to export a living modified organism or a product containing one. CBTC participates in the interagency Biosafety Working

Group (BWG), chaired by the Department of State, to develop the U.S. position on the potential impact of the protocol on U.S. trade in biotechnology products and agricultural commodities.

Transfers of Technology to Foreign Nationals in the United States

The Department of Commerce requires U.S. companies to obtain prior approval from BXA before foreign nationals are allowed to work on projects involving technology that requires an export license to the home country of the foreign national. An export license is required because the EAR considers any release of controlled technology or software to a foreign national to be a “deemed export” to the home country of the foreign national. BXA reviews license applications under the licensing policies that apply to the actual export of the technology or software in question to the country of the foreign national. The “deemed export” rule is most often encountered in the employment context where a company will release controlled technology or software to a foreign national.

During Fiscal Year 1998, there was a substantial increase in “deemed export” license applications. During this time frame, BXA processed approximately 800 “deemed export” cases, up from 300 cases during Fiscal Year 1997. At the same time, the license processing time dropped from approximately 70 days during Fiscal Year 1997 to about 54 days last year. BXA expects “deemed export” license applications to grow because of greater industry awareness of the requirements, as well as the Congressional action to increase the number of H1b work visas for foreign nationals to 115,000 annually.

Short Supply Controls

Sections 3(2)(c) and 7 of the Export Administration Act of 1979, as amended (the Act), authorize 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." In support of this objective, Section 7 also authorizes the President 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 under the Energy Policy and Conservation Act, the Mineral Leasing Act, the Naval Petroleum Reserves Production Act, the Outer Continental Shelf Lands Act, and the Forest Resources Conservation and Shortage Relief Act (FRCSRA) of 1990, as amended. BXA continued to conduct economic, policy, regulatory, and technical analyses of Congressionally-mandated controls for domestically produced petroleum and unprocessed timber.

During Fiscal Year 1998, as authorized by Section 7 of the Act, the Department of Commerce controlled certain domestically produced crude oil and unprocessed Western

Red Cedar timber harvested from Federal and state lands. Section 7(k) of the Act specifies that for purposes of export controls imposed under this Act, 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 Act requires a report on any monitoring program conducted pursuant to this Act or Section 812 of the Agricultural Act of 1970. Therefore, this chapter includes a report by the U.S. Department of Agriculture (USDA) on its monitoring activities during Fiscal Year 1998.

Crude Oil and Refined Petroleum Products

Exports of most domestically produced crude oil continued to be subject to statutory restrictions in Fiscal Year 1998. Four separate statutes require the Department to administer various restrictions on the export of domestically produced crude oil.

- C The Energy Policy and Conservation Act (EPCA) requires the President to prohibit the export of domestically produced crude oil (Section 103).
- C The Mineral Leasing Act (MLA) prohibits exports of domestic crude oil transported by pipeline over Federal rights-of-way granted under Section 28(u).
- C The Naval Petroleum Reserves Production Act (NPRPA) of 1976 restricts exports of petroleum (crude or refined products) produced from the Naval Petroleum Reserves.
- C The Outer Continental Shelf Lands Act (OCSLA) restricts exports of crude oil or natural gas produced from federally owned submerged lands of the Outer Continental Shelf.

Licensing Actions

All of these statutes establish various stringent tests a license applicant must meet (e.g., consumer savings through lower prices for replacement oils) before BXA can authorize crude oil exports. BXA can authorize exports only if there is 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 legislation came into effect, there have been only five national interest findings providing exemptions from the statutory prohibitions. The President issued one finding that,

as of 1985, allows the export to Canada of crude oil produced in the lower 48 states; and a second finding that, as of 1989, permits the export of 50,000 barrels per day (B/D) of

Alaskan North Slope (ANS) crude pursuant to the U.S.-Canadian Free Trade Agreement. In 1985, the Secretary of Commerce issued a finding allowing the export of Alaskan Cook Inlet crude oil to Pacific Rim energy markets. On October 23, 1992, the President authorized the export of 25,000 B/D of California heavy crude oil having a gravity (i.e., weight) of 20 degrees API or lower. On April 28, 1996, the President determined that exports of ANS crude oil when transported on U.S.-flag tankers are in the national interest.

During Fiscal Year 1998, exports of domestically produced crude oil resulting from exports to Canada, ANS crude oil pursuant to License Exception TAPS (Trans-Alaska pipeline), and exports of California heavy crude oil pursuant to a Presidential determination totaled 28.9 million barrels or 79, 178 barrels per day. The discussion below reviews exports from the lower 48 states and exports from Alaska.

Exports of Crude Oil From the Lower 48 States

During Fiscal Year 1998, BXA approved 12 licenses for exports of crude oil originating from the lower 48 states. These licenses involved a total of 5.79 million barrels of crude oil or approximately 15,863 B/D. This included:

- C Exports to Canada: During Fiscal Year 1998, BXA issued one license totaling approximately 0.9 million barrels for shipment to Canada of crude oil produced in the lower 48 states.**
- C Crude Oil For Testing Purposes: The Department can authorize the export of small quantities of domestically produced crude oil for testing purposes under a license. In Fiscal Year 1998, no licenses of this nature were issued.**

Temporary Exports for Convenience or Efficiency of Transportation: Pursuant to Section 7(d) of the Act, the Department permits Alaskan North Slope (ANS) crude oil to be shipped to U.S. East Coast, Gulf Coast, and Caribbean ports through approved non-U.S. transshipment terminals and approved temporary non-U.S. storage facilities. Participating companies report monthly to BXA on the quantities of ANS crude oil leaving Valdez, Alaska; the quantities entering, leaving, or in temporary storage at transshipment terminals; and the quantities en route and discharged at various U.S. terminals. During Fiscal Year 1998, there was no activity under this authority.

The Department also authorizes temporary exports to Canada and Mexico for convenience and efficiency of transportation. During Fiscal Year 1998, there was no activity under this authority.

Exports of California Heavy Crude Oil: During Fiscal Year 1998, BXA issued eleven licenses pursuant to the California rule making to export 25,000 B/D of California heavy

crude oil. The eleven licenses were for 4.89 million barrels of crude. The bulk of the heavy crude oil exported was for use as bunker fuel for vessels in foreign trade.

Exports From Alaska

Alaskan North Slope Crude Oil: On May 31, 1996, BXA amended the short supply provisions of the Export Administration Regulations by establishing License Exception TAPS authorizing such exports with certain conditions. The License Exception TAPS was based on: 1) Public Law 104-58, which allows for the export of crude oil transported by pipeline over right-of-way granted pursuant to Section 203 of the Trans-Alaska Pipeline Authorization Act (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 Fiscal Year 1998, U.S. firms exported 29 cargoes of ANS crude oil totaling approximately 22.7 million barrels, pursuant to License Exemption TAPS. These exports had a market value of \$348 million.

Crude Oil from Cook Inlet: The Department authorizes the export of crude oil derived from state-owned submerged lands in Alaska's Cook Inlet by 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 Fiscal Year 1998, there was no activity under this program

Wood Products

BXA administers short supply export controls on Western Red Cedar, as mandated by Section 7(i) of the Act. 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 Forest Conservation and shortage Relief Act (FRCSRA).

Western Red Cedar: Section 7(i) of the EAA prohibits the export of unprocessed Western Red Cedar (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 Fiscal Year 1998, BXA did not issue any export licenses for WRC.

FRCSRA: Under FRCSRA, the Department of Commerce is responsible for administering 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. BXA has undertaken the following actions implementing FRCSRA:

- C First Log Export Order:** On August 23, 1993, the Secretary of Commerce signed a General Order prohibiting the export of unprocessed timber originating from non-federal public lands located west of the 100th meridian in the contiguous United States.
- C Advance Notice of Proposed Rule Making:** On June 7, 1995, BXA published in the Federal Register an advance notice of proposed rule making requesting comments on regulations the Department was considering to administer FRCSRA.
- C Second Log Export Order:** On September 29, 1995, the Secretary of Commerce issued a second Order, as required by Section 491(b)(2)(B) of FRCSRA. The Order applies to states with annual unprocessed timber sales greater than 400 million board feet. It prohibits the export of the lesser of 400 million board feet or that State's annual sales volume of any unprocessed timber originating from public lands. The Order became effective January 1, 1996. Washington State is currently the only State with over 400 million board feet in annual timber sales.
- C Third Log Export Order:** On September 30, 1996, Congress passed and the President signed Public Law 104-208. Section 319 of Title III of Section 101(d) of Title I of Public Law 104-208 required the Secretary of Commerce to extend until September 30, 1997, the Order issued under Section 491(b)(2)(A) of the FRCSRA prohibiting the export of non-Federal timber originating from public lands in states with annual sales greater than 400,000,000 board feet (i.e., Washington state). Section 319 also requires the Secretary of Commerce to make effective on October 1, 1997, the prohibition of section 491(b)(2)(B) of FRCSRA of the export of only the lesser of 400,000,000 board feet or the annual sales volume of unprocessed timber originating from public lands in states west of the 100th meridian in the contiguous 48 states with more than 400,000,000 board feet of annual sales volume of such timber. Effective October 1, 1997, therefore, the export of such timber that is in excess of 400,000,000 board feet was permitted, unless prohibited by any other provision of law. 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, the Under Secretary issued the order required under Public Law 104-208 on October 18, 1996.
- C Fourth Log Export Order:** Title VI of the Department of the Interior and Related Agencies Appropriations Act of 1998 (Public Law 105-83) required the Secretary of Commerce to make permanent the total prohibition of exports of unprocessed timber from public (state) lands contained in the Forest Resources Conservation and Shortage Relief Act of 1990, as amended. 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 400,000,000 million board feet of annual sales volume of such timber. The Under Secretary issued the Order required by Public Law 105-83 on January 9, 1998. The practical effect of the Order was to make permanent the ban on the export of unprocessed timber originating from Washington state public lands.