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Export Control of Intellectual Property.

SCOPE NOTE

§ 27.01 gives an introductory overview and perspective on U.S. controls on the export of technical data, software and defense services. The hierarchy and categories of controls are explained, starting with prohibited exports and proceeding to exports that can be made without asking permission from the government. The impact of U.S. control regimes on global networking and international development is explored.

§ 27.02 then reviews U.S. Patent and Trademark Office (P.T.O.) practice with foreign filing licenses and secrecy orders, the field of export control law generally most familiar to patent lawyers.

§ 27.03 explains the Export Administration Regulations (EAR) under which the Department of Commerce administers and controls most dual use U.S. exports through its Bureau of Industry and Security (BIS), formerly the Bureau of Export Administration (BXA). The focus of this Chapter is on technical data, which data is now controlled in separate entries in the Commerce Control List (CCL), but the relationship of technical data controls to controls on the export of goods makes it necessary to explain some aspects of the export of goods. General principles are discussed and are illustrated by examples of certain fields of technology in the Commerce Control List (CCL).

§ 27.04 provides a contrast by exploring the much stricter procedures of the International Traffic in Arms Regulations (ITAR) administered by the Office of Defense Trade Control (DTC), formerly the Office of Munitions Control (OMC), now part of the Center for Defense Trade (CDT) in the Department of State. This includes discussions of how to determine whether a product or technology is on the Munitions List, and how to work with DTC to export such technology. Although munitions imports are officially controlled by the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department, they are closely related to ITAR and are treated in this section.

§ 27.05 considers Department of Energy (DoE), BIS and the Nuclear Regulatory Commission (NRC) rules on the export of technology related to nuclear power production, materials and weapons.

* This chapter was prepared by Richard H. Burgess. Mr. Burgess is admitted to and inactive in the bars of Ohio, New York, Delaware and U.S. Patent and Trademark Office and retired as senior counsel in the Legal Function of E.I. du Pont de Nemours and Company. He is now a consultant in trade and treaty compliance in Newark, Delaware. He was the founding chair of the Special Committee on Export Control of the American Intellectual Property Law Association (AIPLA) and was a member of the Board of Directors of AIPLA from 1991 to 1994.

§ 27.06 discusses the role of the Department of Defense (DoD) in working with the other agencies on the export of goods, technology and software and in clearing defense-related technology for public release.

§ 27.07 explains the embargoes administered by the Treasury Department as foreign policy instruments which permit applying economic pressure without resorting to force.

§ 27.08 goes into various special problems including relations of foreign parent companies with domestic U.S. subsidiaries which may not be free to share all their technology with the parent. The Exon-Florio provision gives the President authority to overturn acquisitions. Also discussed are problems with employed aliens in companies and special circumstances of universities. Current activities with Eastern Europe and the former Soviet Union, China, Iran, Syria, North Korea and Pakistan, in addition to those discussed earlier in the Chapter, are portrayed briefly by taking "snapshots in time" because they are important to this entire field, but the reader should consult the daily newspapers and the Federal Register to stay on top of these developments. The interrelations of the proliferation controls and an export management system are explored. The Chemical Weapons Convention and the Biological Weapons Convention are described, and developments in enforcement, judicial review and sentencing guidelines are discussed.

§ 27.09 presents conclusions and summarizes important factors.

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§ 27.01 Introduction

The United States controls the export of technical data and software under a few different regimes. Most exports having dual uses for civilian and military purposes are controlled by the Department of Commerce. Military and certain space-related exports, including defense articles, technical data and services, are controlled by the Department of State. Controls on technical data and software are generally determined by the goods to which they are related. The U.S. Patent and Trademark Office controls not just foreign filing but also public disclosure of certain patent applications. Other agencies have jurisdiction in certain fields.

COCOM dissolved itself March 31, 1994. Negotiations were completed for the creation of a COCOM Successor Regime (CSR) have been called the New Forum (NF), now known as the Wassenaar Arrangement (WA), after the Dutch city in which the final high-level negotiations were held on December 18 and 19, 1995.

The current multilateral export control arena was well described by John Schlosser, the Director of the Office of Export Controls and Sanctions in State Department's Bureau of Nonproliferation, at a Transshipment Enforcement Conference in Barcelona Spain, mainly for Middle-Eastern States, back on May 20, 2002. He said there are three main multilateral treaty organizations and four non-treaty multilateral export control regimes. Although the numbers of members have changed, the basic structure remains much the same.

The Treaty on the Non-Proliferation of Nuclear Weapons, the NPT, entered into force in 1970 and now has 188 parties. Israel, India and Pakistan have not joined the NPT, and North Korea has withdrawn. It is supplemented by the IAEA Additional Protocol with 63 full adherents, which the United States submitted to the Senate for ratification on May 9, 2002, still not ratified in 2005. The International Atomic Energy Agency (IAEA), which is much involved in administering the NPT, has 137 Member States. The Biological Weapons Convention or BWC entered into force in 1975 and now has 154 States Parties. The BWC has 15 signatory states which have not yet ratified and 25 non-signatory states. Negotiations on a Protocol to improve its verification failed in November, 2001. The Chemical Weapons Convention or CWC entered into force in 1997 and has 168 States Parties. The CWC has 15 signatory states which have not yet ratified and 11 non-signatory states

Then there are the non-treaty regimes. The Missile Technology Control Regime now has 34 members. It maintains an Annex list of items to be controlled, and develops the MTCR Guidelines which members enforce unilaterally. In addition to the members, several states adhere unilaterally to the Annex and Guidelines. The Australia Group or AG was founded in 1985 in response to concerns about the use of chemical weapons in the Iran-Iraq war. It now has 39 members with the admission of Ukraine. The AG regularly meets to decide whether to adjust its lists of controlled chemical, biological and equipment items. The Nuclear

Suppliers Group or NSG was formed in 1975 after India tested its nuclear explosive capability, and it now has 44 members, including China. The Wassenaar Agreement started in 1994 as a partial successor to COCOM to keep track of conventional arms exports and now has 34 members. It operates on the basis of reporting after the fact and voluntary non-undercutting of denials by other members.

When Russia began coordinating with NATO as a junior partner on May 28, 2002, much of the tension of the former Cold War was finally put to rest. There is still a place for export control, but it is now much more focused on counter-terrorism than on East-West conflicts. Russia will be participating in many of the deliberations of NATO, but without a veto, especially on such matters as membership. With the addition of Poland, the Czech Republic, Hungary, Slovakia, Slovenia, Latvia, Lithuania, Estonia, Romania and Bulgaria, NATO now has 26 members.

The WA supplements, and does not replace, the three non-proliferation regimes previously in place. These are the Australia Group for chemical and biological weapons, precursors and equipment, the Missile Technology Control Regime, and the Nuclear Suppliers Group. The WA operates based on national discretion, in contrast to the consensus approach of COCOM.

The WA membership has been expanded from the 17 COCOM members and 8 cooperating countries to 31 founding members and now 34 members. This is the result of the addition of Russia, Poland, Hungary, the Czech Republic, the Slovak Republic and 6 of the 8 COCOM cooperating countries. Hong Kong and South Korea are the two cooperating countries that were not among the initial members. However, South Korea, Argentina and the Ukraine have now joined. China is not a member.

[1]—Overview

One should pay close attention to export control developments to avoid disadvantages versus domestic and foreign competitors and to keep professional advice appropriate. Orientation and perspective in this field are particularly important and difficult to acquire, partly because of the way the regulations are written and interpreted. Non-proliferation controls put more burdens on the exporter to know to whom they are exporting and to what uses their products will be put.

Since changes occur before they can be reported in revisions of this Chapter, keep a close watch on news and trade reports and the Federal Register.

With the major changes in U.S. export controls since the end of the Cold War, a review of the history is useful to put in perspective where we are now and where we may be heading in the future.

United States export controls have existed since the Customs Service began its work soon after the founding of the Republic. During the first and second World Wars, controls were used to prevent trading with the enemy. Subsequently, the United States and its allies, in 1949, instituted an informal, non-treaty organization known as the Coordinating Committee or COCOM¹ (acronyms and abbreviations are defined in Appendix 27A) for the multilateral control of strategic exports. The purpose of COCOM was to deny to the Soviet Union and its allies, known as the East Bloc, access to advanced technology and goods that could enhance their military capabilities. The Peoples' Republic of China had been in an intermediate category of control with higher levels of technology being approved for export to China than for export to the rest of the former East Bloc.²

As reported in *The New York Times* on November 29, 1993, Congress passed the Friendship Act, which applied to "Emerging New Democracies" (ENDs) and disposed of most references to the international communist conspiracy. The Act changed many laws to be friendlier to the former Soviet Union and its former allies. The Jackson-Vanik amendment to the 1974 Trade Act, which had restricted trade with the Soviet Union because of its anti-Semitic policies, remains on the books but continues to be waived. Several of the FSO states have been lastingly exempted from the Jackson-Vanik Act, and more are likely to be in the future.

Russian troops, Poland, the Czech Republic and Hungary joined the NATO activities in the Bosnia peace agreement implementation. With a carefully designed command structure, the Russian troops reported to a Russian general who "coordinates with" the American commander who also wears another hat as the head of the NATO Operations. Thus, the Russians troops were there cooperating, but are not officially part of NATO operations.

There is a very useful review of the European Union's progress toward its Common Foreign and Security Policy (CFSP) in the November 1995 *NATO Review*. This shows the history, status and overlap of several organizations, including the EU and its security organization, the Western European Union (WEU), the Partnership for Peace (PFP), NATO, the Council of Europe, and the Organization for Security and Cooperation in Europe (OSCE), otherwise known as the Conference on Security and Cooperation in Europe (CSCE). It is a valuable resource in gaining an understanding of the post-cold-war political,

¹ COCOM representatives met continuously in Paris to consider harmonization and changes in regulations, and to decide whether to approve individual exports in categories that require approval. The member states were those of the North Atlantic Treaty Organization (NATO) except Iceland, plus Japan and Australia. Thus, the seventeen members were: the United States, Canada, the United Kingdom, West Germany, France, Italy, Belgium, Netherlands, Luxembourg, Denmark, Norway, Greece, Turkey, Spain, Portugal, Japan, and Australia. The eight cooperating countries were Austria, Finland, Sweden, Switzerland, Ireland, Hong Kong, New Zealand and South Korea.. The WA includes more.

² See § 27.07[8] *infra*.

foreign policy and security ties within and among the EU, Eastern Europe and the FSU.

The United States used the term “the geographical area of the former Soviet Union” for export control purposes, but in recognition of current political realities the term “former Soviet Union” and “FSU” will be used generally herein. Now the names of the republics are used in U.S. export control. The term “Emerging New Democracies” (END) will apply to some of the FSU.

It should be noted that Yugoslavia had been treated as a Free World country for many years, but the United States had followed the European Union (EU) and the U.N. in establishing an arms embargo against the former Yugoslavia, and a trade and financial embargo against the new Federal Republic of Yugoslavia (Serbia and Montenegro) and Serbian-controlled areas of Croatia and Bosnia Herzegovina.³ Since May 29, 2003, few controls or sanctions remain on the Balkan states which have arisen from Yugoslavia except for those on Specially Designated Nationals, individuals on certain lists.

The so called “East Bloc” is no longer a monolithic bloc, and the term has become “geographically misdescriptive.” Likewise, the term “Free World” is shifting in meaning as Central Europe evolves. It is now embodied in Country Group B, see Appendix 27P. However, until new terms come into general use, the old terminology is still useful in analyzing export control laws. It was long reflected in General License GFW. It has been suggested to switch to “World Community” as a euphemism to identify “us” versus “them.” The term “former East Bloc” will be used sometimes herein.

Based on a United States proposal, COCOM had formed a COCOM Cooperation Council with the FSU and Eastern European countries. This started making it easier to cooperate in non-proliferation controls. Major problems persisted in the sales by FSU states of conventional weapons.⁴

Some controls are in the category of national security controls. The Omnibus Trade and Competitiveness Act of 1988 (OTCA)⁵ mandated the lifting of most U.S. unilateral national security controls, other than those that were the subject of multilateral negotiation or that are also controlled for foreign policy or other purposes. Some parts of the OTCA have been implemented by notices in the

³ See § 27.07[8] *infra*.

⁴ See Olcott, *Central Asia's Catapult to Independence*. Foreign Affairs, Summer, 1992, 108 at 119, states Kazakhstan has permitted military factories and installations to sell their wares and share profits with the government, citing an account of the sale of SU-24 bombers in *Izvestia*, February 28, 1992. This is in addition to Russia's ongoing sales of lethal weapons to Iran.

⁵ Pub. L. 100-418, Aug. 23, 1988, 102 Stat. 1107.

Federal Register, while other parts that were considered by the Administration remained in limbo for a long time.⁶

There are three general categories of proliferation controls: nuclear (NSG); chemical and biological weapons, precursors and equipment (CBW); and the missile technology control regime (MTCR). These will still be maintained by the U.S. on a separate basis with smaller multilateral groups. Most controls are effective only if an adequate group of countries applies them in a coordinated fashion. The Administration does make substantial efforts to obtain cooperation from other countries.

Other remaining foreign policy controls include a few subcategories, such as crime control and prevention, and antiterrorism.

A seminal article by Samuel P. Huntington in the Summer 1993 issue of *Foreign Affairs* entitled *The Clash of Civilizations?* makes the point that future conflicts are more likely to be on the basis of broad civilizations rather than between mere nations or even regions. The civilizations he defines include Western, Islamic, Hindu, Confucian, Japanese, Slavic/Orthodox, Latin American and African. With working alliances in the making between most of the others on one side and Islamic on the other, he postulates the problems of the future. Subsequently, there have been enough problems between these two sides in Bosnia-Herzegovina, where it is still not so certain whether the Western side was neutral or allied with the Islamic side rather than the Slavic/Orthodox side. This article is where the use of the term "the World Community" is suggested as a successor to "Free World" to distinguish "our side" from "the other side." While other alliances and oppositions may well arise, he views them being based mainly on civilizations for the future.

Conflicts in 2002 — 2005 in the global war on terror, following the tragic events of September 11, 2001, have exacerbated the tensions between the West and much of the rest of the world, especially the Islamic States.

Less technology and goods are controlled now for East-West trade, but more are controlled for the North-South trade. With increasing emphasis on proliferation and terrorism, it is not enough to know one's products and their destinations. Now the end use and end user have become important features of export control. An exporter needs to know its customers and when to believe what the customer says about end uses.

⁶ 54 Fed. Reg. 8,281, Feb. 28, 1989, removed unilateral controls maintained for national security purposes. However, it warned that certain unpublished controls remained in effect and urged exporters to seek advice or submit classification requests on a case-by-case basis until the Commodity Control List (CCL) revision was accomplished. Unilateral foreign policy controls are not affected. Excerpts from this notice are in Appendix 27B *infra*. One change required by the OTCA, and not implemented until the 1996 overhaul, is putting a minimum of 25% value on U.S.-origin technical data content for reexport controls on direct products made with the data to be applicable.