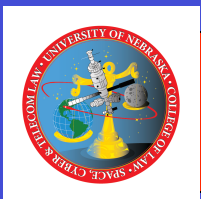


The law on traffic in dual-use goods – international and US

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The law on traffic in dual-use goods

30-09-2013

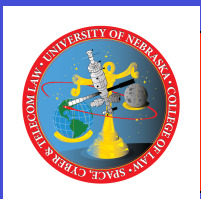
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1



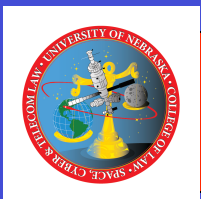
Introduction

- US national International Traffic in Arms Regulations (ITARs) most visible part of export controls on international traffic in sensitive dual-use technology
- ↔ Can only be properly understood in the broader framework of international efforts to limit such traffic



Non-Proliferation Treaty (1)

- 1968/1970; 189 parties
 - **Not:** only India, Israel, Nkorea, Pakistan, SSudan
- Three pillars
 1. Non-proliferation obligation
 - ◆ Art. I: 'NWS undertake not to transfer to anyone nuclear weapons, related devices or control over them & not to assist, encourage, or induce any NNWS to produce or acquire such weapons, devices or control'
 - ◆ Art. II: 'NNWS undertake not to receive any transfer, produce or otherwise acquire any such devices; and not to seek or receive any assistance in these matters'



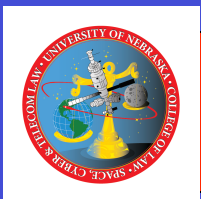
Non-Proliferation Treaty (2)

- Three pillars – *ctd.*
 2. Right to peaceful use of nuclear technology
 - ◆ Art. IV(1): ‘inalienable right of all states to develop research, production and use of nuclear energy for peaceful purposes’
 - & Art. V: Obligation of support NNWS by NWS therein
 3. Obligation to strive for disarmament (Art. VI)
- Right to withdraw: 3 months (Art. X(1))
 - If extraordinary events jeopardize the supreme interests of state concerned



The non-treaty track

- Onset Cold War after WW II
- ➔ CoCom, 1947
 - Coordinating Ctee. Multilateral Export Controls
 - Trying to assert embargo Western exports
 - ◆ Fear of high-key technology ending up in Soviet block
 - ◆ 17 states: Australia; Belgium; Canada; Denmark; France; Germany; Greece; Italy; Japan; Luxembourg; Netherlands; Norway; Portugal; Spain; Turkey; UK; USA
 - ◆ ‘Cooperating states’: Austria; Finland; Ireland; New Zealand; Sweden; Switzerland



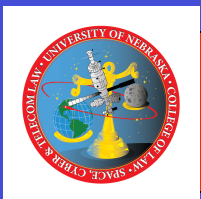
CoCom

- Voluntary & informal arrangement
 - No mechanism enforcing compliance
- Lists:
 1. International Atomic Energy List
 2. International Munitions List
 3. Industrial List (covering dual-use equipment)All: adding / removing item required unanimity
 - Import certificate / delivery verification to monitor export control compliance



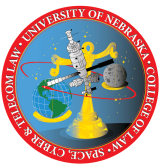
The example: Toshiba case

- 1982-1984 Toshiba → USSR:
 - 8 Computer-guided propeller milling machines
 - ◆ On the Industrial List
 - Improved ability USSR submarines to evade detection greatly (according to USA)
 - ◆ I.e. required additional efforts & costs USA to rebalance
- ➔ 1987: found in violation of CoCom 'regulations'
- ➔ 1988: US Congress banned Toshiba imports



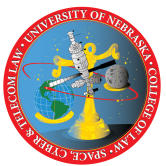
CoCom exit

- 1991: End USSR; Cold War fully over
 - CoCom now considered too US-dominated
 - Get Russia on board, don't leave it outside
- ➔ 1994: CoCom ceased to function
 - No immediate successor:
 - ◆ Dispute over already-agreed Russo-Iranian deal
 - USA preferred Russia to renege on deal ↔ EU & Japan preferred Russia on board of such a regime
 - ➔ Control list embargoed goods retained until Wassenaar Arrangement established 1996



Meanwhile ...

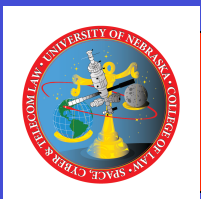
- 1980s: new threats to global security
 - From Cold War to multi-polarization
 - Including spread of WMD & delivery systems
 - ➔ Nuclear Suppliers Group
 - ➔ Australia Group (chemical & biological WMD)
 - ➔ MTCR (1987)
 - ... All following general CoCom approach
 - ➔ Wassenaar Arrangement (1996) really taking up CoCom's mantle



MTCR (1)

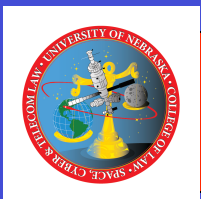
- Established 1987 – not a treaty either!
 - Original parties: Canada; France; Germany; Italy; Japan; UK; USA
 - To counter unwanted proliferation by maintaining / establishing control over & transparency on transfer to third states of missile equipment, material & related technologies usable for ***systems capable of delivering WMD***

Note: Originally focus only on nuclear weapons; as per 1993 also chemical & biological weapons



MTCR (2)

- Participating countries (34)
 - Argentina; Australia; Austria; Belgium; Bulgaria; Brazil; Canada; Czech Republic; Denmark; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Italy; Japan; Luxembourg; Netherlands; New Zealand; Norway; Poland; Portugal; Russia; SAfrica; SKorea; Spain; Sweden; Switzerland; Turkey; Ukraine; UK & USA
- Cornerstone: MTCR Guidelines on ...



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30-09-2013

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11



MTCR (3)

... “Sensitive Missile-Relevant Transfers”

- Set of common export policy guidelines applied to common list of controlled items: MTCR Equipment, Software & Technology Annex
- Decisions on guidelines & contents Annex taken by consensus & partner states regularly exchange information on export licensing issues
- ***Incl. rocket & other delivery systems, related equipment, material & technology***
 - ◆ Threshold: 300 km + 500 kg payload capability



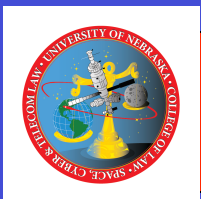
Wassenaar Arrangement (1)

- Established 1996 – not a treaty either!
 - To promote transparency & greater responsibility in transfers of conventional arms & dual-use goods & technologies
- Parties seek to ensure transfers do not enhance destabilizing capabilities
 - Decision ‘transfer’ / ‘no transfer’ remains national decision – ref. national policies & laws
 - Secretariat & meetings in Vienna



Wassenaar Arrangement (2)

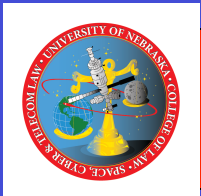
- Participating countries (41)
 - Argentina; Australia; Austria; Belgium; Bulgaria; Canada; Croatia; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Japan; Latvia; Lithuania; Luxembourg; Malta; Mexico; Netherlands; New Zealand; Norway; Poland; Portugal; Romania; Russia; Slovakia; Slovenia; SAfrica; SKorea; Spain; Sweden; Switzerland; Turkey; Ukraine; UK & USA



Wassenaar Arrangement (3)

■ Agreement to:

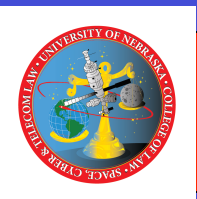
- Maintain national export controls on listed items
 - ◆ So: implementation via national law & regulation
- Report transfers & denials specified controlled items to destinations outside Arrangement
- Exchange information sensitive dual-use goods & technologies
- Develop & use Best Practices, Guidelines & Elements



Wassenaar Arrangement (4)

1. Munitions List & reporting 'obligations'

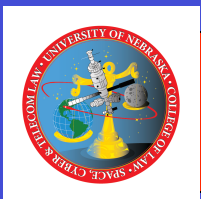
- Small arms, light weapons & ammunition
 - ◆ Incl. Man Portable Air Defence Systems
- Tanks & other military armed vehicles
 - ◆ Incl. large calibre artillery systems
- 'Combat vessels' (surface & submarine)
- Armoured & protective equipment
- Aircraft, helicopters, UAVs, engines & related equipment – ***incl. missiles / missile systems***



Wassenaar Arrangement (5)

2. List Dual-Use Goods & Technologies

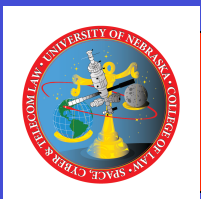
- Nine categories:
 - ◆ *Advanced materials*; Material processing;
Electronics; Computers; Telecommunications & information security; Sensors & lasers;
Navigation & avionics; Marine; *Propulsion*
- Annex I: Sensitive items
 - ◆ States suggested to refuse transfers outside
- Annex II: Very sensitive items
 - ◆ States strongly suggested to refuse such transfers



USA, space & security

Note: some efforts to address some of the security issues in national space laws

- NAS Act; Commercial Space Launch Act; Communications Act; Commercial Space Act; Land Remote Sensing Acts
- More importantly: national version of export control regime (post-Cold War!)
 - International Traffic in Arms Regulations *et alia*



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30-09-2013

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18



US export controls (1)

- Relevant for commercial space
 - Hinders export of satellite (technology)
- 1st focus on launch sector
 - Arms Export Control Act (1976) referred to United States Munitions List (USML)
 - ◆ 'Munitions' = broadly interpreted
 - Subject to jurisdiction Department of State
 - ITARs drafted to control export of systems & all related technology



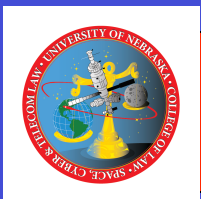
US export controls (2)

- Concurrent (competing) approach ...
 - Export Administration Act (1979) referred to Commerce Control List (CCL)
 - Subject to jurisdiction Department of Commerce
 - Export Administration Regulations (EARs) drafted to control export of systems & all related technology
- ➔ Constant 'tug-of-war' on satellites
 - Before 1992: DoS; 1992-1996: gradually to DoC; 1998-2009 DoS; new decision: back to DoC



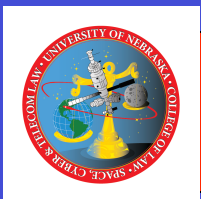
ITAR General Approach

- Baseline authority & scope
 - President (read Department of State with concurrence Department of Defense) designates 'defense articles' & 'defense services' → USML
 - Article / service = defense article / service if:
 - ◆ Specifically designed, developed, configured, adapted, or modified for a military application & does not have predominant civil applications – **OR** –
 - ◆ Specifically designed etc. for a military application & with significant military or intelligence applicability such that control is considered necessary



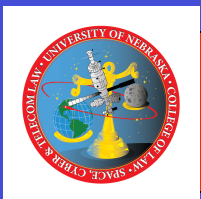
ITAR Definitions (1)

- ‘Defense article’ incl. ‘technical data’
- ‘Technical data’
 - Incl. info required for design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles; incl. blueprints, drawings, photographs, plans, instructions (incl. oral information ... !) & documentation
 - Incl. software directly related to defense articles



ITAR Definitions (2)

- ‘Defense service’
 - Furnishing of assistance (incl. training) to foreign persons in design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles
 - Furnishing to foreign persons of any controlled technical data



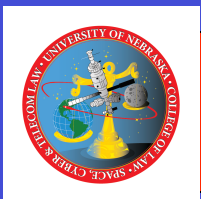
ITAR Definitions (3)

- ‘Defense service’ – *ctd.*
 - Military training of foreign units & forces, regular & irregular, incl. formal or informal instruction of foreign persons or by correspondence courses, technical, educational, or information publications & media of all kinds, training aid, orientation, training exercise & military advice
- ‘Public domain’ – exception
 - Information which is published & generally accessible or available to the public



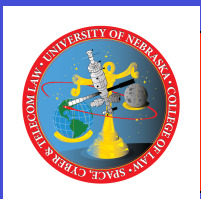
ITAR Definitions (4)

- ‘Export’
 - Sending or taking defense article outside USA in any manner, except by mere travel by person whose personal knowledge includes technical data – **OR** –
 - Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite on the USML – **OR** –
 - Disclosing (incl. orally or visually) or transferring defense article to embassy etc. in USA – **OR** –



ITAR Definitions (5)

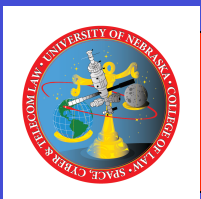
- ‘Export’ – *ctd.*
 - Disclosing (incl. orally or visually) or transferring technical data to a foreign person – **OR** –
 - Performing defense service on behalf of, or for the benefit of, a foreign person
 - Launch vehicle or payload in principle not ‘export’ for these purposes, but controls may still apply for certain limited purposes
- ➔ Requires license



The USML (1)

■ Categories

- I – Firearms, close assault weapons & combat shotguns
- II – Guns and armament
- III – Ammunition / ordnance
- IV – **Launch vehicles**, guided missiles, ballistic missiles, **rockets**, torpedoes, bombs & mines
- V – Explosives & energetic materials, **propellants**, incendiary agents and their constituents



The USML (2)

■ Categories – *ctd.*

- VI – Vessels of war & special naval equipment
- VII – Tanks & military vehicles
- VIII – Aircraft & associated equipment
- IX – Military training equipment & training
- X – Protective personnel equipment & shelters
- XI – Military electronics
- XII – Fire control, range finder, ***optical & guidance & control equipment***



The USML (3)

■ Categories – *ctd.*

- XIII – Auxiliary military equipment
- XIV – Toxicological agents, incl. chemical & biological agents & associated equipment
- XV – ***Spacecraft systems & associated equipment***
- XVI – Nuclear weapons, design & testing related items
- XVII – Classified articles, technical data & defense services not otherwise enumerated



The USML (4)

■ Categories – *ctd.*

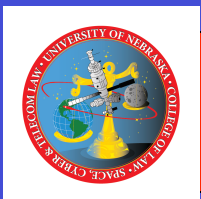
- XVIII – Directed energy weapons
- XIX – *Momentarily not filled*
- XX – Submersible vessels, oceanographic & associated equipment
- XXI – Miscellaneous articles
 - ◆ Any article so far not on USML with substantial military applicability & specifically designed, developed, configured, adapted, or modified for military purposes
 - ◆ Technical data & defense services directly related to such an article



Category IV

■ Includes

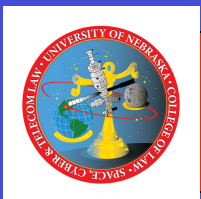
- Rockets (incl. meteorological & other sounding rockets) & launch vehicles
- Apparatus, devices, & materials for handling, control, activation, monitoring, detection, protection of any of the above
- Ablative materials fabricated or semi-fabricated from advanced composites
- Specifically designed or modified parts etc., or technical data related to the above



Category XV (1)

■ Includes

- Spacecraft, incl. communications satellites, remote sensing satellites, scientific satellites, research satellites, navigation satellites, experimental & multi-mission satellites
- Ground control stations for telemetry, tracking & control of spacecraft or satellites, or employing any of the cryptographic items of Cat. XIII
- GPS receiving equipment specifically designed, modified or configured for military use or with certain (enumerated) quality characteristics



Category XV (2)

■ Includes – *ctd.*

- Radiation-hardened microelectronic circuits that meet or exceed a number of (enumerated) quality characteristics
- All specifically designed or modified systems or subsystems, components, parts, accessories, attachments & associated equipment for any articles in Cat. XV, incl. satellite fuel, ground support equipment, test equipment, payload adapter or interface hardware, replacement parts & solid propellant orbit transfer engines



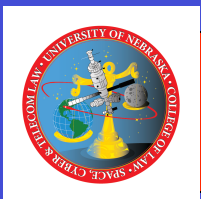
Exceptions

- Knowledge commonly taught in schools / colleges or already legitimately in public domain
- Armaments Cooperative Projects between USA & foreign states
- Canada, UK & Australia broader exceptions
- Technology used for the ISS



Recent development

- 1999 Strom Thurmond Act
 - Took discretion on Ch. XV items away from President → new law necessary for relaxation
- 2012 proposal for 2013 fiscal year
 - Allows President to remove commercial satellites and components from USML & allows him to decide which satellite technologies are the most important to protect
 - Still restricts export & transfer of technology to PRC, Cuba, Iran, North Korea, Sudan & Syria



Concluding remarks

- Complicated interplay between int'l 'law' security-sensitive export, US nat'l space law & US nat'l export regime
 - In particular as long as US components / technology indispensable for space systems
- ➔ May ultimately harm int'l security, & even US national security interests!
 - Lack of competitiveness US commercial industry & lack of involvement outside developments!

