

International Seminar on Enhancing Industry-Government Cooperation in Nuclear Export Control

Seminar Summary

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Supporters: World Nuclear Association and Carnegie Endowment for International Peace
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Forty participants from government, industry, non-governmental organizations, and academia met in Seattle on May 28-29 to discuss industry-government cooperation in nuclear export control. The seminar, held under the Chatham House Rule, emphasized the importance of industry engagement and the role of public-private partnership in preventing illicit acquisitions of sensitive technologies and controlled goods, including nuclear capabilities. Across ten working sessions, the participants discussed efforts to date, current challenges, and potential future approaches.

Overview of Global Nuclear Industry and Technology Base

Trade in nuclear technology and materials is set to grow, with commerce in components for new nuclear power plants growing to US \$26 billion per year and a total value of planned build between now and 2030 topping US \$1.2 trillion. Technology transfer is also changing the production location for many power plant components. The transfer is not simply from “West” to “East,” but a broader interrelationship among the world’s nuclear manufacturers.

One participant emphasized that companies are the targets of proliferators, not governments. A critical role for governments is to identify what they can do to motivate companies to incorporate nonproliferation into their practices. There is a distinction between export control compliance and nonproliferation, and while compliance is necessary—and can be streamlined in partnership with government—an active nonproliferation stance is important as well.

Globally, nuclear trade occurs under national export control legislation, which frequently is aligned with the Nuclear Suppliers Group (NSG) guidelines. Major firms recognize the importance of regulatory compliance. One governmental representative noted that the domestic relationship between industry and government was still regulation-based, but moving to a partnership was a key goal for the future.

Global compliance standards are one approach to helping companies ensure that their business activities do not generate proliferation risk. At the regime level, the NSG guidelines are a standard. This standard is implemented through many legislative routes for NSG Participating Governments, and there is no industry-level standard to ensure that operations reflect national standards and NSG-led global norms. One participant suggested an ISO-like standard, potentially similar to the ISO 22000 series of standards for societal security.

Several participants expressed concern that a standard could become a “check-the-box” activity that could undermine the organic compliance thought exercise that companies must undertake today. One participant warned that the point is to not just meet a standard, but to strengthen the company’s reputation by partnering with government to share insights on what industry sees as new proliferation trends and techniques. Another viewpoint was to consider a standard to help in conversation between industry and government, but still require that discussion to occur.

Industry Perspectives on Good Practices for Export Control and Nonproliferation

One participant described a sophisticated corporate internal compliance program (ICP) with a compliance structure independent of operating divisions. The compliance officers report to the company’s CFO, COO, and CEO. Deemed exports, taking place within a country and between a national of that country and a foreign national, and intangible technology transfers, in which technology leaves a country via email, telephone, or other electronic means, are a major focus for the firm—particularly since globally-distributed engineering team members are inclined instinctually to help a (foreign) customer solve their problems. These types of export control risks are distinct from malicious actors with proliferation goals, but they still represent compliance challenges.

The supply chain is a significant challenge for this firm, particularly because it can find itself caught between the conflicting regulations of the countries in which it operates. The participant noted that there can be internal tensions within a firm about how much to work with its supply chain to ensure compliance and whether this opens up the prime company to liability risks. Ultimately, the firm decided that supporting their contractors was in their interest because “if they have a violation and become debarred, it hurts us.”

A representative from another firm described the company’s export delivery model. To reduce the profit incentive to divert items, the firm manages its own distribution networks. The individual stated that “diversion is possible only through possession of controlled goods.” While brokers can facilitate the transaction, company policies and procedures require that only the end user can take physical possession of the company’s export-controlled products. One useful benefit of this approach is that it increases the company’s visibility into its own distribution network, enabling optimization. The individual noted that this approach to reducing diversion risk is superior from a financial perspective. Some of the company’s sales representatives for uncontrolled commodities have asked to adopt this delivery model for their orders because it is a better business process regardless of the nonproliferation benefits.

One participant reported that some smaller companies do not always trust their judgment of the regulations and whether they are in complete compliance. This can slow down transactions because at times a company may want assurance from its government and request a specific license when an open license is available and would be sufficient. Attendees felt that education could go further to instill more confidence in such companies.

Good Practices and Communication

Communication between industry and government is a critical function that enables a broader partnership. Government needs communications from industry to inform its licensing and enforcement processes, while industry needs communications from government to understand changing risks and

new regulations. One government representative described the licensing process for a new firm as analyzing their activities and their history of compliance. Once there is a more trusting relationship, more trusting licensing schemes such as global, or open, licenses are more likely to be available.

A government official mentioned that a significant challenge is trying to reach companies that are completely unaware of the export control regime and its relevance to their business. Furthermore, academic institutions can pose a cultural challenge because some researchers do not like encroachments on what they perceive to be their academic freedoms.

A government official described a desire to improve interaction with the public so that companies can better understand export controls and their compliance responsibilities. The individual noted that NSG Participating Governments often have one of two approaches in their communications relationship with industry. Some states, often those that have state-owned enterprises leading the country's nuclear work, do not believe that the NSG needs to communicate regulations to companies. Others, primarily those with private nuclear industries, see a role for greater communication. In these states, a key challenge is that there is a barrier between what the government knows and what companies know.

Separations between government and industry create issues with respect to internal compliance. One area for innovation would be to improve communication across this barrier. A possible approach could be a user's group to discuss issues and collect information so that government officials can better identify significant changes occurring within companies that could impact regulation. A government official cited the need to provide more transparency, even with the recognition that transparency may not necessarily relate to efficiency, but it may lead to better decision-making. An individual described one country's approach, which includes an end-user list in a database that explains what the company does, the contact information, and other details.

Nonproliferation as an Element of Corporate Governance and Social Responsibility

Corporate governance and social responsibility have emerged as potential manifestations of a firm's commitment to nonproliferation. A participant noted that people care about social consciousness and like to see companies doing the same. Several participants described existing efforts to link corporate responsibility to nonproliferation. One participant cautioned, however, that the "why" of corporate responsibility mattered less than the "how" of effecting change within the companies.

Reporting is found frequently in other social responsibility domains, but does not yet exist for nonproliferation. Discussants varied in their views on reporting, with some finding that specific measures such as sharing trade requests could cause legal uncertainty, while others thought that transparency "naming and shaming" those found out of compliance could yield benefits.

Good Practices in Import-Export Licensing

One individual noted that approval times for export licenses of equipment and material range among countries. These variations can cause challenges for companies, which operate globally-distributed businesses. The participant recommended the adoption of risk-weighted controls, extending the trusted economic operator program, making greater use of general and project licensing, and examining policies on electronic transfers. The speaker also called on industry and government to work together to strengthen communication on areas of proliferation risk, to promote good practices through outreach, and to consider industry standards for compliance.

A participant noted that export controls are confusing, even for the experts, and that this creates value for a globally harmonized approach. The individual noted that the list controls generally come from the NSG and commodity classifications and definitions are broadly similar. There may be opportunities to harmonize licensing activities to avoid unnecessary activities related to low-risk transactions.

Intangible technology transfers were noted as a challenge, particularly for companies with staff in multiple countries but also for managing information flow between companies and suppliers. Cyber security was also seen as a challenge that everyone has to face. It was mentioned that companies increasingly hire lawyers to handle all of their export issues and now regulators receive thick files demonstrating how the company is meeting requirements with the actual company representative not as involved and often not as knowledgeable as previously when a company representative would deal directly with the regulator.

One participant described two principles for export licensing. First, the government does not want to contribute to the development of a weapon of mass destruction. Second, the government wants to strike the correct balance between trade, commercial interests, and security. Several good practices can advance both principles, including harmonization of regulations, a variety of licenses to fit the specific case, and control lists that are up-to-date and proportionate, and transparency from the government about its policies.

There may be opportunities to increase efficiency in licensing through governments recognizing the work done by other governments. After one NSG Participating Government has done significant due diligence on a firm, it would be valuable to companies if other governments would take advantage of that analysis to expedite their own reviews. It may be possible to accomplish such an approach without any legislative changes. One unique case is the NSG's guidance on cooperative enrichment enterprises, which laid a foundation for supply to all of the entities participating in the enterprise, rather than a nation-state-based supplier-recipient relationship.

Good Practices and Internal Compliance Programs

A participant described one company's very public experience with a compliance failure, which led to a complete cultural turnaround at the firm. Though the financial damage was hard to quantify, the reputational damage was severe. The company now makes export control a top priority and has strong investments in compliance IT infrastructure and human resources.

Another firm described its internal compliance program (ICP). The globally-distributed company considers its export control from geographical, business, and functional perspective. The firm has faced a range of challenges in the implementation of its ICP, including a view of export compliance as a cost rather than a facilitator, too many disparate systems, physical segregation of controlled technologies, and difficulty finding high-caliber staff.

One participant noted that U.S. laws do not require a company to have an ICP. Congress and executive branch agencies provide guidelines on what it should cover, but they are careful to emphasize that implementation decisions are the sole responsibility of individual companies. However, Department of Justice sentencing guidelines provide a mitigating benefit if the government can see that the company

took efforts to have an effective compliance program. One government stated that it tries to motivate its companies to establish ICPs by providing access to global licenses, while retaining the ability to conduct outside audits.

The group broadly agreed that companies cannot take a one-size-fits-all approach to internal compliance. However, there may be ways to identify key performance indicators that are generally intercomparable while remaining specific to a given firm's size and function. One example would be to encourage companies to have effective procedures to verify deliveries rather than a metric of avoiding the use of brokers. Key performance indicators could enable benchmarking or enable firms to validate their performance to regulators. Several participants emphasized that metrics should not have specific numbers or percentages, but should be appropriate and scalable for a firm.

Participants reported that they felt comfortable benchmarking with others in the industry as well as through conversations at appropriate forums. These exchanges allow the dissemination of best practice while avoiding any conversations about customers or company-proprietary information. Major firms track events globally, and a compliance violation in the United States will lead companies worldwide to assess their own risks.

Collaboration and Sharing Information on Illicit Procurement Attempts

As noted above, industry is the target of proliferation. Suspicious inquiries represent intelligence leads for companies and governments seeking to stop proliferators from abusing global supply chains. One participant described a "third party" approach to information sharing that would enable firms to anonymously share information among themselves. Some companies have seen value in this sort of collaboration because it leverages their compliance resources with those across industry. Others expressed concerns about the legal risks of voluntary information sharing. A legislative mandate, similar to the Suspicious Activity Reports required of financial institutions, could provide confidence to firms.

Another participant emphasized the importance of two-way information flow between government and industry. The individual emphasized that "better compliance within companies means better detection rates." Governments need to work harder to provide unclassified information to businesses to inform their decision-making. One speaker described an open-source tool that tracks entity lists as well as develops a "grey lists" of aliases and associated entities. This sort of research goes beyond name-matching and can help stop proliferation.

A key question in information sharing is to define what is "suspicious." Many reasonable individuals could make different decisions about what constitutes suspicious activities. One participant noted that there is an essential distinction between "suspicious" and "illegal." Companies still need to make their own sales decisions, given the information available.

The Future of Industry-Government Partnership: Where Do We Go from Here?

Advancing a Risk-Based Approach

Participants broadly agreed upon the value of risk-based approaches to enable commerce while avoiding proliferation. The Nuclear Suppliers Group guidelines embrace a risk-based approach that include factors such as type of facility under consideration and a "catch-all" nonproliferation principle, among others.

Partnership on risk means treating licenses as living documents as projects evolve. Special license types such as open or project licenses also expand industry and government's collective abilities to manage risk. A further point was that the requirements for shipping a steam generator to Brussels should not be the same as shipping it to Iran. The focus should be on end-use and end-user.

Some participants advocated outcome-oriented regulations versus prescriptive regulations. One industry representative stated that government officials should not impose a solution, but ask the questions that prompt the company to figure out what is best for them to support nonproliferation. Others, however, noted that some governments have legislative requirements that any regulation must meet, limiting flexibility of implementation. Even in these systems, there are opportunities for interpretation through public comment periods.

Group members proposed several actions that industry and government could take to advance a risk-based approach, including:

- Making unclassified summaries of the risk basis for decision-making available to industry
- Regularly reviewing technical control lists and assessing whether foreign availability has undermined the rationale for control
- Improving the speed of securing government-to-government assurances

Engaging Supply Chains

Complex, worldwide supply chains are a reality of modern commerce. Some participants noted that while in the past they were tightly vertically-integrated, single-nation firms, today they are globally diffuse for business reasons. Export control regimes will need to recognize this shift, particularly in areas such as cloud computing. One participant noted that export control should not distort trade by preferentially encouraging some jurisdictions over others. One industry representative noted that this challenge was particularly acute for multi-national companies with individuals working from different countries. Participants asked if export control should be consistent globally, how can industry work with high-performing governments and companies work to harmonize globally by "raising the bar" rather than "racing to the bottom"? One participant thought it might be possible to build some type of "trusted group of compliant partners" in cases of regulating a supply chain involved in a particular project to cut down on repetitive regulation.

Standardization

The notion of standards was raised in several sessions. At the regime level, the Nuclear Suppliers Group's guidelines and control lists represent a global standard for nuclear export control. Governments, for a variety of reasons, will continue to implement national export control regulation in non-standard ways. Several participants suggested that industry, seeking efficiencies, would benefit from an ability to standardize their export control compliance processes.

The value of an industry standard is that it enables national authorities to know there is a similar procedure underway in several companies based in many locations. One participant suggested an approach in which all NSG Participating Governments shared a system of accepting license applications

from another country as equivalent, and in exchange an industry ICP standard would give all Participating Governments assurance about the quality of corporate controls. This would remove variability among countries, improving certainty and predictability.

Some questioned the value of standardization, wondering whether standards would then lead to legal requirements. Furthermore, some national authorities may not be in a position to provide a benefit to companies using a standard. Other regulators may still need to retain the ability to conduct independent audits, eroding the value to corporations for adopting a standard.

Despite these questions, one participant noted that “there seems to be a pent-up demand to have some sort of standard.” This is particularly true in light of the range of guidance documents available from governments worldwide. Among globally-dispersed companies, efforts to simplify compliance across jurisdictions while remaining aligned with NSG guidelines appeared to be welcome. Such a standard could represent a sort of “Good Housekeeping Seal of Approval” that could make the company eligible for certain benefits. Even without benefits, one participant noted that a standard would still help remove the risk of being involved in an illicit transaction.

Steps for the Future

- Expand the discussion to include small- and medium-size companies, dual-use commodity manufacturers, and professional associations
- Define approaches for regulators to provide better guidance, making it more transparent and user-friendly so that companies have more confidence that they are doing the right thing.
- Develop forums for exchange of internal compliance information (cases and good practices) and industry-government communication—perhaps through the World Nuclear Association or EU
- Understand the role of the financial sector in encouraging nonproliferation
- Identify standards for further development

One participant summarized the current status of nonproliferation efforts by stating that there is a sense that proliferation is changing; the business model is changing. The rules have to evolve along with this changing environment, which means there must be flexibility. Governments probably have a good sense of what and where that risk is, while industry may not. There seems to be a possibility for better proliferation information sharing and analysis. The question that motivated the workshop, and for which next steps may emerge, is how to create that dialogue and then develop the tools and metrics necessary for a discussion.

The seminar adjourned recognizing the unusual nature of having industry representatives and government officials on equal ground, sharing their views and experiences. Participants expressed interest in continuing the dialogue.