DTAG Defense Trade Cooperation Treaty Working Group

Defense Trade Cooperation Treaty Between the United States and Australia

Citations	Description	Issue/Concern	Recommendation	Required Process	Priority/Comments
§126.16(d)	Exports are restricted to members of the Approved Community.	Participation in the approved community is unknown at this point, and future membership is hard to predict in terms of the numbers in Australia.	Consider simplification of the entry criteria to join the approved community analogous to US and Canadian registration criteria. Security Classification requirements apply to classified transfers only, and apply regardless of Treaty provisions; therefore should not be a prerequisite for approved community membership.	Update Implementing Arrangements.	Exemption usage has been limited due to the multi-party working relationships and expansive supply chain outside the membership community currently realized within the defense industry. Exemption will never be used for those instances. Hence its limited use currently.
§126.16(e)	Use of the exemption is restricted to Authorized End Uses.	The exemption applies only to authorized end uses as identified in the exemption. Exemption language identifies a broad scope of activities; however, in determination of authorized end use for a specific transaction, it is more complex due to regulatory requirements re specific programs and criteria not in the Treaty or Implementing Arrangements.	Consider including all programs meeting the criteria or publish a list of excluded programs versus identified programs. Add Australian government end use along with U.S. government end use. All unclassified transfers should be eligible.	Interagency MOU between State and DoD.	From the industry perspective, USG typically approves exports to Australia for unclassified transfers that are not excluded in Supp.1 to Part 126. So if the answer is always yes, then the exemption does not add further risk for USG in terms of technology transfer.

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Citations	Description	Issue/Concern	Recommendation	Required Process	Priority/Comments
§126.16(f)(2)	Process for identifying authorized end uses that are not publically identified requires a written determination.	Correspondence with and written determination from the USG creates a de facto approval requirement and undercuts the utility of the exemption. This is the same amount of effort as obtaining a license and provides no incentive to use Treaty exemption.	Consider modeling the authorized end use along the lines of the FMS exemption 126.6 with requirement for US or Australian government end use and flowdown to a government contract.		Publishing the complete community list would allow industry to plan teaming/partnering arrangements in advance based on treaty use considerations.
§126.16(g)(2)	Defense articles subject to anti-tamper measures requires written approval from DDTC.	Correspondence with and written determination from the USG creates a de facto approval requirement and undercuts the utility of the exemption. Notification/approval requirements dissuade exporters from using the exemption in favor of a license or agreement.	The issue is not specific to exemption 126.16 and undercuts the utility of using any exemption. Recommend DDTC/DoD consider reviewing current anti-tamper policy with regard to the Approved Community. There are other methodologies to impose program protection and this language should be removed from the exemption.	State and DoD agree for State to revise exemption language.	
§126.16(g)(3)	Export of classified defense articles or services requires USG written approval, contract, or directive.	Notification/approval to use the exemption creates a de facto approval requirement and undercuts the utility of the exemption. Notification/approval requirements dissuade exporters from using the exemption in favor of a license or agreement.	Modify language to authorize classified exports if party, program and technology are included, using current NISPOM procedures for export of classified.	State Dept.consult with DoD and revise exemption language.	

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Citations	Description	Issue/Concern	Recommendation	Required Process	Priority/Comments
§126.16(g)(4)	Export of defense articles specific to developmental systems require written Milestone B approval from DoD, or are pursuant to a DoD contract or solicitation.	Notification tied to lifecycle development stage sets an artificial construct and establishes additional criteria that is not material since the export can be limited by program and excluded technology.	Articles subject to the Treaty should be identified by program and excluded (or included) technology versus stage in life cycle development.		
§126.16(g)(5)	Defense articles not approved under the exemption embedded in larger system requires a separate DSP-5 license.	Tracking components of a larger system against the eligibility requirements of the exemption creates additional administrative burdens, costs and compliance risks for an exporter. These additional compliance burdens and risks dissuade exporters from using the exemption in favor of a license or agreement.	While we understand the sensitivity, application of the see-through rule to the Treaty increases analysis and labor that exceed approach to get a license. DTC should take the same approach as developed within the ITAR for other embedded technologies, and handle exports in same manner as engines with embedded excluded technologies (Note 8 to 126.1 Supplement 1).	DTC update language.	
§126.16(h)(2)	Transfers of articles and services are restricted to authorized end uses.	This requirement is already articulated in 126.16(e). What is purpose of restatement in 126.16(h)(2)?	Remove duplicative language.	DTC update language.	

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§126.16(h)(3)	Retransfers and reexports are restricted to members of the Approved Community and require a license or prior written approval from DDTC.	This requirement is already in 126.16(d).	Remove duplicative language.	DTC update language.	
§126.16(h)(4)	Change from an authorized to an unauthorized end use of previously exported or transferred defense articles or services requires a license or written approval from DDTC.	Exporters or the approved community member should be able to request change in articles already exported from the U.S. under the provisions of 123.9.	Update language identifying changes in end use require authorization under 123.9.	DTC update language.	

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Citations	Description	Issue/Concern	Recommendation	Required Process	Priority/Comments
§126.16(i)(2)(i), §126.16(i)(3)	Change from an authorized to an unauthorized end use of previously exported or transferred defense articles or services requires a license or written approval from DDTC.	Exporters or the approved community member should be able to request change in articles already exported from the U.S. under the provisions of 123.9.	Update language identifying changes in end use require authorization under 123.9.	DTC update language.	

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Citations	Description	Issue/Concern	Recommendation	Required Process	Priority/Comments
§126.16(j)	Exemption requires marking of defense articles, technical data and defense services with legends distinct from marking requirements.	Identified marking requirements are unique to the exemption and distinct from marking requirements elsewhere in the ITAR. Implementing and ensuring compliance with these special markings places additional compliance, administrative and financial burdens on exporters.	Eliminate the special requirement and default to the standard ITAR requirements for marking exported defense articles.	DTC publish interpretive guidance, FAQs, etc. to identify the marking scenarios that represent compliance with the intent of this language, e.g. "where practical" to mark.	Administrative cost example: Marking technical data for transfer under the Treaty must be changed/altered in order to share the same data with another entity under a different export authorization. Process for marking and re-marking adds costs and handling. The same items may be delivered under the Treaty and under an export authorization, requiring different markings for the same item at the same recipient, and marking on the item is applicable only at the time of export.

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Citations	Description	Issue/Concern	Recommendation	Required Process	Priority/Comments
§126.16(k)	U.S. intermediate consignees are limited to DDTC-registered exporters, U.S. licensed customs brokers, or members of CRAF; Australian intermediate consignees are limited to Australian Community members or Authorized Australian Intermediate Consignees.	The exemption applies only to specific brokers, freight forwarders, registered exporter, Australian community members or Australian intermediate consignees. Typically freight forwarders identified on a license are NOT required to be registered with DTC if they are transferring unclassified defense articles.	Simplify/reduce requirements for intermediate consignee use that is consistent with license or other exemption requirements.	DTC update language.	
§126.16(l)	The exemption requires specific record keeping requirements concerning the transaction to include a copy of technical data exported.	The recordkeeping requirements specific to the exemption include records and export data in a particular format in excess of §§ 122.5 and 123.22. Additional and unique recordkeeping requirements dissuade exporters from using the exemption in favor of a license/ agreement or alternate exemption.	Amend recordkeeping requirements to conform in scope and format with other ITAR exemptions.	DTC update language.	Unique recordkeeping for this ITAR exemption versus any other ITAR exemption will add additional cost and discourage use based limited utility of the exemption.

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§126.16(o)	Exports that meet the Congressional notification monetary thresholds or for the manufacture of SME require notification to DDTC and 30 day waiting period prior to export.	Reporting requirements are consistent with Congressional Notification reporting and waiting periods for the ITAR set forth in §123.15 and §124.11.	None.	N/A	
Supplement 1 to Part 126	USML defense articles and services identified in the supplement are excluded from the exemption.	The exclusion list has not been updated since 2007 and should be re-examined in light of Export Control Reform and technology updates. Items are currently excluded which are routinely licensed to the UK and Australia.	DoD and Australian government review excluded technologies list in coordination with State Dept. to update the list.	Interagency and management board review and approval of recommended changes.	

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§126.17(d)	Exports are restricted to members of the Approved Community.	Participation in the approved community is small, entry into it is laborious, and US industry does not have access to a list of all companies currently approved.	Consider simplification of the entry criteria to join the approved community analogous to US and Canadian registration criteria. Security Classification requirements apply to classified transfers only, and apply regardless of Treaty provisions; therefore should not be a prerequisite for approved community membership.	Update Implementing Arrangements, consult with UK government regarding UK community structure and approval process, revise DDTC web site.	Exemption usage has been limited due to the multi-party working relationships and expansive supply chain outside the membership community currently realized within the defense industry. Exemption will never be used for those instances. Hence its limited use currently.
§126.17(e)	Use of the exemption is restricted to Authorized End Uses.	The exemption applies only to authorized end uses as identified in the exemption. Exemption language identifies a broad scope of activities; however, in determination of authorized end use for a specific transaction, it is more complex due to regulatory requirements re specific programs and criteria not in the Treaty or Implementing Arrangements.	Consider including all programs meeting the criteria or publish a list of excluded programs versus identified programs. add UK government end use along with U.S. government end use. All unclassified transfers should be eligible.	Interagency MOU between State and DoD.	From the industry perspective, USG typically approves exports to the UK for unclassified that is not excluded in Supp.1 to Part 126. So if the answer is always yes, then the exemption does not add further risk for USG in terms of technology transfer.

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Citations	Description	Issue/Concern	Recommendation	Required Process	Priority/Comments
§126.17(f)(2)	Process for identifying authorized end uses that are not publically identified requires a written determination.	Correspondence with and written determination from the USG creates a de facto approval requirement and undercuts the utility of the exemption. This is the same amount of effort as obtaining a license and provides no incentive to use Treaty exemption.	Consider modeling the authorized end use along the lines of the FMS exemption 126.6 with requirement for US or UK government end use and flow down to a government contract.	Coordination with DoD and UK MoD; amend ITAR.	
§126.17(g)(2)	Defense articles subject to anti-tamper measures requires written approval from DDTC.	Correspondence with and written determination from the USG creates a de facto approval requirement and undercuts the utility of the exemption. Notification/approval requirements dissuade exporters from using the exemption in favor of a license or agreement.	The issue is not specific to exemption 126.17 and undercuts the utility of using any exemption. Recommend DDTC/DoD consider reviewing current anti-tamper policy with regard to the Approved Community. There are other methodologies to impose program protection and this language should be removed from the exemption.	State and DoD agree for State to revise exemption language.	See A/T entry below regarding §126 Supp 1. Action should not require Congressional notification or amendment to Implementing Arrangements as the technology remains controlled by other measures.

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§126.17(g)(3)	Export of classified defense articles or services requires USG written approval, contract, or directive.	Notification/approval to use the exemption creates a de facto approval requirement and undercuts the utility of the exemption. Notification/approval requirements dissuade exporters from using the exemption in favor of a license or agreement.	Modify language to authorize classified exports if party, program and technology are included, using current NISPOM procedures for export of classified.		
§126.17(g)(4)	Export of defense articles specific to developmental systems require written Milestone B approval from DoD, or are pursuant to a DoD contract or solicitation.	Notification tied to lifecycle development stage sets an artificial construct and establishes additional criteria that are not material since the export can be limited by program and excluded technology.	Articles subject to the Treaty should be identified by program and excluded (or included) technology versus stage in life cycle development. Delete entry.		
§126.17(g)(5)	Defense articles not approved under the exemption embedded in larger system requires a separate DSP-5 license.	Tracking components of a larger system against the eligibility requirements of the exemption creates additional administrative burdens, costs and compliance risks for an exporter. These additional compliance burdens and risks dissuade exporters from using the exemption in favor of a license or agreement.	While we understand the sensitivity, application of the see-through rule to the Treaty increases analysis and labor that exceed approach to get a license. DTC should take the same approach as developed within the ITAR for other embedded technologies, and handle exports in same manner as engines with embedded excluded technologies (Note 8 to §126 Supplement 1).	DTC update language.	Transfer limitations remain to the approved community. Embedded items evaluated at the higher item they are embedded in is consistent with Note 8 regarding jet engine hot section components and digital engine controls.

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§126.17(h)(2)	Transfers of articles and services are restricted to authorized end uses.	This requirement is already articulated in 126.16(e). What is purpose of restatement in 126.17(h)(2)?	Remove duplicative language.	DTC update language.	
§126.17(h)(3)	Retransfers and reexports are restricted to members of the Approved Community and require a license or prior written approval from DDTC.	This requirement is already in 126.17(d).	Remove duplicative language.	DTC update language.	
§126.17(h)(4)	Change from an authorized to an unauthorized end use of previously exported or transferred defense articles or services requires a license or written approval from DDTC.	Exporters or the approved community member should be able to request change in articles already exported from the U.S. under the provisions of 123.9.	Update language identifying changes in end use require authorization under 123.9.	DTC update language.	

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§126.17(i)(2)(i) §126.17(i)(3)	Change from an authorized to an unauthorized end use of previously exported or transferred defense articles or services requires a license or written approval from DDTC.	Exporters or the approved community member should be able to request change in articles already exported from the U.S. under the provisions of 123.9.	Update language identifying changes in end use require authorization under 123.9.	DTC update language.	
§126.17(j)	Exemption requires marking of defense articles, technical data and defense services with legends distinct from marking requirements.	Identified marking requirements are unique to the exemption and distinct from marking requirements elsewhere in the ITAR. Implementing and ensuring compliance with these special markings places additional compliance, administrative and financial burdens on exporters.	Eliminate the special requirement and default to the standard ITAR requirements for marking exported defense articles.	DTC publish interpretive guidance, FAQs, etc. to identify the marking scenarios that represent compliance with the intent of this language, e.g. "where practical" to mark.	Administrative cost example: Marking technical data for transfer under the Treaty must be changed/altered in order to share the same data with another entity under a different export authorization.

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Citations	Description	Issue/Concern	Recommendation	Required Process	Priority/Comments
§126.17(k)	U.S. intermediate consignees are limited to DDTC-registered exporters, U.S. licensed customs brokers, or members of CRAF; UK intermediate consignees are limited to UK Community members or Authorized UK Intermediate Consignees.	The exemption applies only to specific brokers, freight forwarders, registered exporter, UK community members or UK intermediate consignees. The exporter is responsible for determining whether parties are members, creating additional compliance burden and risk not present in many other exemptions or licenses. Typically freight forwarders identified on a license are NOT required to be registered with DTC if they are transferring unclassified defense articles. Additionally, the requirement for specific transporting parties to be identified/approved is unique to the treaty exemptions. No other ITAR exemption requires this.	Simplify/reduce requirements for intermediate consignee use that is consistent with license or other exemptions requirements.	DTC update language.	This should only require a change to the regulation. There does not appear to be any controlling entry in the Implementing Arrangement regarding transportation to, from, or within the approved communities.
§126.17(l)	The exemption requires specific record keeping requirements concerning the transaction to include a copy of technical data exported.	The recordkeeping requirements specific to the exemption include records and export data in a particular format in excess of §§ 122.5 and 123.22. Additional and unique recordkeeping requirements dissuade exporters from using the exemption in favor of a license/ agreement or alternate exemption.	Amend recordkeeping requirements to conform in scope and format with other exemptions.	DTC update language.	Many defense companies have established electronic systems to maintain records. Unique and distinct requirements will add a financial burden to alter the electronic system in order to be compliant with the exemption.

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§126.17(o)	Exports that meet the Congressional notification monetary thresholds or for the manufacture of SME require notification to DDTC and 30 day waiting period prior to export.	Reporting requirements are consistent with Congressional Notification reporting and waiting periods for the ITAR set forth in §123.15 and §124.11.	None.	N/A	
Supplement 1 to §126	USML defense articles and services identified in the supplement are excluded from the exemption.	The excluded technologies list is too broad and vague resulting in only very narrow instances that the treaty can be effectively used.	Consult with DoD and the UK MoD to significantly reduce the vast swath of excluded technologies. A second option might be to reducing it for a portion of the exemption such as cooperative programs, rather than all of it.	Will require Congressional notification and amending the exemption.	Understanding the intent is to protect very sensitive technology, looking at the exemption as a whole, there appear to already be significant safeguards in place to accomplish that.

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Supplement 1 to §126	Supplement No. 1, USML Category I-XXI, "Defense articles and services specific to the existence or method of compliance with anti-tamper measures made at the U.S. Government direction".	There are currently many commodities that would appear to not meet this criteria except that the DoD has placed provisos on export license approvals that incorrectly place anti-tamper requirements on them. The DoD policy document cited is DoD Instruction 5200.39, Critical Program Information (CPI) Protection Within the Department of Defense, signed by the Under Secretary of Defense for Intelligence. The applicability of that document outside of the Department of Defense (5200.39 paragraph 2(b)) is limited to "DoD contractors performing work on or supporting DoD contracts with contractual terms that require the contractor to protect CPI."	Consult with DoD and amend the entry.	Amend the ITAR.	The result of this action would not remove any DoD developed systems with A/T. It would clear up confusion regarding A/T as at the application level, the program has expanded to the point of causing confusion that non-DoD systems contain industry protection measures that would be captured here.

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Supplement 1 to §126	Supplement No. 1, USML Category I-XXI, "Defense articles and services specific to reduced observables or counter-low observables in any part of the spectrum. See Note 2."	Supplement No. 1, USML Category I-XXI, "Defense articles and services specific to reduced observables or counter-low observables in any part of the spectrum. See Note 2." Note 2(a) states that the above applies to "…defense platforms, including systems, subsystems, components, and materials (including dual-purpose materials used for electromagnetic interference (EM) reduction technologies.	Delete and add specific signature reduction issues be addressed in the USML categories that are applicable rather than all 21 categories, many of which have absolutely no signature reduction equities.	Amend the ITAR.	The result of this action would not really remove any LO/CLO technology from the excluded list. What it would do is significantly help reduce confusion regarding what exactly is a LO/CLO technology. For example, there probably are not any LO/CLO technologies associated with USML Category I, Small Arms. Regardless, exporters must evaluate items against this criteria to where a daytime rifle scope (non-IR) could be judged to meet it.