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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

November 29, 1990

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SECRETARY OF DEFENSE

MEMORANDUM FOR MR. CARNES LORD
Assistant to the Vice President
for National Security Affairs

MR. J. STAPLETON ROY
Executive Secretary
Department of State

COLONEL JOHN A. DUBIA
Executive Secretary
Department of Defense

MR. MICHAEL P. SKARZYNSKI
Chief of Staff
Department of Commerce

MS. ANN LAVIN
Director, Executive Secretariat
Department of Energy

MR. ROBERT HOWARD
Associate Director for National
Security & International Affairs
Office of Management and Budget

MR. JAMES R. PITTMAN
Executive Secretary
Central Intelligence Agency

COLONEL GEORGE L. SUMRALL, JR.
Administrative Assistant to the Chairman
Joint Chiefs of Staff

MS. BARBARA STARR
Executive Secretary
Arms Control and Disarmament Agency

SUBJECT: Deputies Committee Meeting (U)

Attached is the paper for tomorrow's Deputies Committee meeting prepared by the Department of State.

Kenneth J. Bit
for William F. Sittmann
Executive Secretary

Attachment
Tab A Implementing EPCI

cc: Andy Card

17-M-0561-A1

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IMPLEMENTING EPCI:
THE ENHANCED PROLIFERATION CONTROL INITIATIVE

Momentum has been building since before the Gulf crisis to impose stronger U.S. controls on CBW and missile proliferation-related exports. The recently passed DoD Authorization Act mandated a number of missile proliferation controls. On November 16, the President issued Executive Order 12735, which directs the Secretary of Commerce and the Secretary of State to impose CBW controls and directs the Secretary of State to pursue early negotiations to convince other countries to do the same.

The Nonproliferation PCC herewith forwards to the Deputies Committee a proposed Enhanced Proliferation Controls Initiative (EPCI). Agencies have reached substantive agreement on controls in the four areas outlined in Issue 1 below. These interlocking proposals would target goods, services, and technology; proliferant end-users; and knowing contributors to proliferation projects. They would implement E.O. 12735 and broader U.S. nonproliferation objectives.

The DC is asked to decide whether to:

-- condition imposition of any new controls on multilateral adoption of similar measures by our nonproliferation partners in the Australia Group (AG) and Missile Technology Control Regime (MTCR);

-- impose two additional controls, outlined in Issues 2 and 3 below, about which interagency consensus has not been achieved.

Issue 1. When to Impose Enhanced Proliferation Controls

Issue for DC Decision: Whether new export control measures designated A-D below should be implemented by the U.S., simultaneously with efforts to obtain multilateral adoption (all agencies but Commerce*); or whether U.S. implementation should await and be conditioned on consensus adoption of similar measures and harmonization of control mechanisms by all U.S. nonproliferation partners in relevant international organizations (Commerce).

All agencies believe that we should urge the AG (at its Dec. 11-13 meeting) to adopt the export control measures in A-D below and the MTCR to adopt the measures in items A and C, along with the results of the MTCR Annex review, currently

* Throughout, "all agencies but Commerce" refers to DoD, OJCS, ACDA, DOE, and State. The Intelligence Community has not taken a view on the policy desirability of these proposals.

being conducted in the PCC. Since little or no advance notice of these proposals will be given to the Australia Group, the prospects are not good for receiving considered views from Australia Group partners before June 1991.

All agencies but Commerce agree that at the same time we seek multilateral consensus, the U.S. should institute these controls unilaterally as soon as possible. This would effectively achieve our goals of preventing U.S. assistance to proliferation projects, strengthening our nonproliferation leadership role, and encouraging other countries to act.

Major trading partners, notably Germany and Japan, already apply restraints in one or more of these areas that are stronger than our own. The U.S. has a foreign policy/national security interest in preventing U.S. technology transfer to proliferation projects of concern. (A license review shows that between 1986 and 1989, U.S. equipment was repeatedly sent to what we now know are CBW and missile proliferators in Iraq.) If we condition U.S. action on unanimous steps by our nonproliferation partners, enhanced controls may not be instituted for years -- if ever. The Australia Group and the MTCR operate by consensus, which brings results to the lowest common denominator and generally makes for slow change. However, unlike in COCOM, members can and do exert leadership in reaching consensus by imposing their own controls beyond what has been agreed within the Group.

The Executive Order reflects the President's policy that the U.S. should lead multilateral efforts to control CBW exports. U.S. leadership would help achieve the consensus we all seek. On the other hand, awaiting consensus would delay indefinitely U.S. controls on CBW equipment and technology, starting with the list E.O. 12735 requires to be developed in 90 days. Any indication of delay in moving forward would also encourage Congress to legislate. All agencies agree that the interlocking character of the proposed controls is intended to pinpoint problem areas so as to have the least effect on U.S. foreign trade.

Commerce believes the only effective way to strengthen CBW controls is to do so multilaterally, as in COCOM. Multilateral consensus to strengthen CBW controls should occur swiftly because all Australia Group members already have COCOM comparable export control systems in place to adopt strengthened CBW reforms. Most Australia Group members have expressed support in principle for strengthening export controls in light of the Iraqi invasion of Kuwait. The chemical industry is the nation's seventh-largest export sector and has a positive record in the self-initiated denial of exports to CBW projects in countries of concern. Unilateral controls impair U.S. credibility as a reliable industrial supplier.

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Commerce further believes that unilateral controls weaken USG diplomatic negotiating leverage by placing allies at a competitive trade advantage which they may be reluctant to concede. By pursuing bold, specific and attainable consensus on the USG's proposals in the upcoming Australia Group and Missile Technology Control Regime (MTCR) meetings, the Administration can demonstrate leadership, implement the Executive Order, and avert public and congressional criticism. Since the upcoming Australia Group meeting will occur within the 90-day period specified for development of the initial list of controls under the Executive Order, the Administration should measure the prospects for multilateral consensus before determining the scope, if necessary, of unilateral controls, at least on CBW.

Proposed Measures

The following measures, for which there is interagency support, are interlocking but may be considered separately. In each case, the key issue is whether the control should be imposed now or only after our multilateral nonproliferation partners implement it.

A. Proliferation Activities of U.S. Citizens. U.S. law now strictly controls U.S. citizen participation in foreign nuclear and BW activities, but there is no similar law which broadly precludes U.S. persons from knowingly contributing to CW and missile proliferation (including services such as financial, legal or accounting). Germany has adopted strict controls on the foreign proliferation activities of its citizens. EPCI proposes expanding U.S. controls to impede knowing U.S. citizen participation in these areas. Germany has adopted strict controls on the foreign proliferation activities of its citizens.

B. Exports of Complete Chemical Plants. U.S. companies may now export all types of complete chemical production plants or related designs and technology, even to known CW proliferators, without a license requirement. Among other countries, Germany has instituted controls on such exports in response to German firms' unhindered work in building complete CW facilities for Iraq and Libya. EPCI proposes to require an IVL to export potentially CW-related complete chemical production plants and designs and technology for them.

IC no longer is arguing that Projects only should be published unclassified — spare [illegible] would [illegible]wise

C. End-user List of Proliferant Organizations. This proposal would require an IVL for any export destined for a publicly listed (in the Federal Register) company, ministry, project, etc., which is engaged in activities of proliferation concern. It would complement the lists described under item D below, enabling a sharper focus on our targets of concern and minimizing impact on legitimate trade.

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D. Listing Dual-use technologies and countries of concern. Current regulations would be supplemented by new lists of dual-use CW-, and BW-related equipment and technology to be controlled. A corresponding list of countries to which these items and technologies would be controlled would also be developed. For BW, U.S. agencies have agreed in principle on a list of "choke-point" technologies derived from an AG-agreed warning list. For CW, a dual-use list would be developed as soon as possible. (For missiles, a review of dual-use technologies in the MTCR Annex is nearing completion.)

It is not clear That any export Free Zone only applies to CBW

Proposal D would implement the requirement in E.O. 12735 to produce a list of CBW items of concern within 90 days, and to require an IVL for export of these items to all countries except those party to multilateral or bilateral CBW nonproliferation arrangements, or which have acceptable export controls.

ACTION: The DC is asked to decide whether these controls, singly or as an entire package, should be imposed now while simultaneously urging our nonproliferation partners to adopt them; or only after all these partners implement them.

Issue 2. Whether to Have a "Safety Net" Export Control Against CBW and Missile Proliferation

Issue for DC Decision - Whether to require an export license for any export the exporter "knows or is informed by the Department of State or Department of Commerce may be destined for" a CBW/missile project (all agencies but Commerce support).

Background: Even if the nonproliferation controls in issue are adopted, the USG may wish to prevent transfer of an item not on a control list (e.g., a new technology) or to an entity not on a control list (e.g., because of concerns about intelligence sources and methods). It is neither possible nor desirable to try to control every item of conceivable concern. The U.S. now cannot stop exports of uncontrolled items even if specific intelligence is available that they are destined for use in CBW or missile development.

The Defense Authorization bill recently signed by the President -- although it is not immediately effective because of the lapse of the Export Administration Act -- when it takes effect will provide that Commerce must require a license for any export the "exporter knows is destined for" a missile project or facility. Nuclear regulations require a license if an exporter "knows or has reason to know" an export will be used for certain sensitive nuclear end-uses. These regulations

have been extremely useful, and in practice have been implemented without exposing exporters to uncertainty or unreasonable risks of litigation.

Similarly, E.O. 12735 imposes sanctions on foreign firms which "knowingly and materially" contribute to a foreign country's efforts to use, develop, produce, stockpile or otherwise acquire CBW.

All agencies but Commerce agree we should impose similar controls for CBW and to implement the new missile law. They agree that a formulation similar to that proposed in the House version of the Iraq Sanctions bill would be appropriate. This would take the form of requiring a license if the exporter "knows or is informed by the Department of State or Department of Commerce" the export is destined for a CBW or missile project.

Supporters of this proposal believe it is necessary to give the USG flexible authority to block exports, even of goods not normally subject to export controls, when there is solid evidence that they are going to be used in foreign missile or chemical/biological weapons production. As with similar language in existing nuclear regulations, we would expect to use this authority only when (a) the exporter is knowingly acting as an agent or front for a foreign program (e.g. the Pervez case); or (b) we have hard intelligence that an otherwise uncontrolled commodity of considerable significance to such a program is being obtained from the U.S. Such cases will arise only rarely, and this provision should, therefore, have minimal impact on legitimate exporters.

The high standard implicit in a requirement for either actual exporter knowledge of a chemical weapons or missile end use or active USG intervention ensures that this control will not be applied indiscriminately to paper clips or other goods where there is merely a possibility of misuse. Even where the courts have applied the "reason to know" standard, they have required a high degree of evidence and not held companies liable on flimsy grounds.

Without the backup authority of this provision, we risk serious embarrassment in the event of another case like the Consarc furnaces, and potential Congressional or public pressure for the extension of nonproliferation export controls to broad categories of dual-use industrial commodities. Our experience in using similar regulations in the nuclear field to cover essentially similar dual-use commodities (e.g. electronic instruments, specialty steel, furnaces) should demonstrate to industry that we will employ this new authority responsibly and carefully.

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Commerce opposes such a regulation. This proposed regulation would apply to over $200 billion of annual U.S. export trade. These exports include, among other things, everything from paper and pencils, to calculators, to lower-level computers and machine tools, all of which can make a contribution (but not a significant contribution) to CBW development. The courts have ruled that "know" means "reason to know" too. This concept lacks the kind of precision necessary to inform industry as to the standard against which their export requires license approval. Industry will not know how to conform their conduct to the new regulation. The concept works only in the nuclear area because nuclear weapons projects and applications are more easily discernible than CBW projects.

these legal views are Commerce's they are not shared

In addition, Commerce believes the "notification" concept invites arbitrary enforcement because the USG does not have the intelligence resources to monitor this volume of exports fairly across all export sectors. Unequal enforcement will create a non-level playing field where targeted companies will be placed at a disadvantage relative not only to international competitors, but domestic competitors as well. The prospect of USG interference will damage U.S. industry's overall credibility as a reliable global supplier for legitimate commercial transactions.

Finally, Commerce believes the whole concept is symbolically appealing but ineffective in achieving nonproliferation objectives. Administration policy should seek, together with its allies, specific controls on only those products and technologies which make a direct and substantial contribution to CBW development as was proposed in the Export Administration Act recently approved by Congress. Further, the Administration should work with the chemical industry to expand application of its present self-initiated export guidelines which have already contributed to its excellent track record in avoiding sales to CBW projects.

ACTION: The DC is asked to decide whether we should adopt this control and, if so, whether we should do so simultaneously with seeking similar multilateral action or only after achieving multilateral action.

Issue 3. When to Impose Broader Controls on CW Precursor Chemicals

Issue for DC Decision: Whether the U.S. should join other leading AG partners by adopting worldwide license controls now on all 50 Australia Group CW precursor chemicals (all agencies but Commerce); or should wait to adopt worldwide controls until all partners agree to do so (Commerce).

Background: The twenty-nation AG's members have worldwide export controls on a "core list" of 11 precursors. Individual members may control some or all of the other 39 chemicals on the AG "warning list," but the Group operates on consensus. Several members control all 50 listed precursors worldwide: Germany, Japan, Belgium, Ireland and Australia. Others (UK and Netherlands) indicate they will follow suit in the near future. The U.S. controls worldwide only 11 of the 50 chemicals, and 17 of the 19 other AG members control more listed precursors than we do.

All agencies agree that the U.S. should advocate, before and at the December AG meeting, moving to a single list of precursors on which worldwide controls would be placed. They also support continuing review of the AG list of controlled precursors and a U.S. campaign to urge AG members to harmonize implementation of export controls.

All agencies but Commerce agree the U.S. should institute worldwide controls on all 50 AG precursors now and simultaneously urge the members of the Group to adopt the above measures. Waiting for unanimous controls on all 50 chemicals, however, could produce a long and possibly indefinite delay in U.S. action. The list of 50 contains chemicals technically known to be precursor CW agents and/or have been sought by proliferants for these purposes. AG members did an extensive review of the precursor lists prior to their June 1990 meeting, and no consensus for change was evident. Even in the current climate, given the slowness with which the Australia Group has traditionally reached consensus even for minor adjustments to the list, the prospect for consensus on a new list even within a year's time appears dim. With so many major industrial powers already controlling all 50 chemicals, pressing for yet another review would undermine effective U.S. leadership in the Australia Group.

Commerce believes that list content and harmonization of common licensing and enforcement standards must be coordinated together. This can be accomplished this year, perhaps by June 1, since all Australia Group members (except Iceland) have COCOM comparable systems already in place. All Australia Group members have proven the capacity to work fast and effectively on export control reform with respect to COCOM list review and procedure. The Administration should inspire the same goal at the upcoming Australia Group meeting.

In addition, Commerce believes that the current list of 50 precursors is overly broad. The list grew to 50 more as a political statement than a serious control list. This is why the Australia Group had to adopt a separate core list of 11 precursors for serious export control. This is also evidenced by the fact that Australia Group members cannot even agree to control all 50 precursors to Iran, Iraq, Libya and Syria.

Moreover, only about half of the 50 precursors appear to be under consideration for serious export control by the Geneva CW Convention negotiators. Now is the time to reconcile the current list of 50 with CW Convention proposals, strategic criticality and foreign availability outside the Australia Group member countries. Expanding worldwide controls on the current 50 precursors is a precipitous, unnecessary and ineffective act that is unlikely to attract multilateral consensus.

ACTION: The DC is asked to decide whether to impose worldwide license controls on the 50 AG precursors now, or to await Australia Group consensus to impose these controls multilaterally under a harmonized system.

Issue 4. Re-Exports

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OSD Appeal 3.3(b)(6)