

THE IMPACT OF ARMS LIMITATION AGREEMENTS AND EXPORT CONTROL REGULATIONS ON LAUNCH ACTIVITIES

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INTRODUCTION

It has been commonly observed that the commercial launch industry is a global one. For example, a commercial launch operator located in Australia may use a Russian launch vehicle, along with its associated technical data, equipment and software, while utilising European or Australian technology in relation to launch safety analysis or control mechanisms and engaging United States consultants to assist in the venture.

The involvement of a number of States will also, invariably, give rise to legal and political constraints relating to the (un)willingness of the various participants to “share” their space-related technology, either for reasons of national security or commercial primacy. For example, the recently released United States Administration document “The National Security Strategy of the United States” evidences all too clearly the deep concerns that State has in relation to maintaining its military technology supremacy.

This paper looks at some of the significant implications and regulatory impact of arms

limitation treaties, notably START, and export control regulations of Australia, Russia and the United States on the operations of a commercial launch operator.

THE START RÉGIME

Negotiated between the United States and the Soviet Union (as it then was), the START régime was intended to limit the number of “strategic offensive arms” deployed in both States. The types of missiles affected by the START régime are intercontinental ballistic missiles (“ICBM”) and submarine launched ballistic missiles (“SLBM”). The régime comprises two main treaties: the 1991 START I agreement, which provided for the basic framework of reductions in ballistic missiles; and the 1993 START II framework, which provided for a further reduction of missiles in Russia and the United States and has not as yet been implemented by the parties.¹

Article IV(1) of START I limits the number of non-deployed ICBMs that either State can keep in storage. Paragraph 1(a) of Article IV limits the number of non-deployed ICBMs to 250, except for “retired” ICBMs with only single warheads that are exempt pursuant to the Thirty-

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Seventh Agreed Statement of the Agreed Statements Annex to START.²

Article IV(4) limits the number of ICBMs and SLBMs for space launch purposes in several ways. Firstly, the parties are allowed no more than five space launch facilities, which cannot overlap as ICBM bases. Article IV(11)(c) further requires that each space launch facility to be located no less than 100km from any ICBM base for silo or rail launchers or ICBM deployment areas. Space launch facilities are not subject to inspection under the START régime. In the Memorandum of Understanding of 1 January 2002, the most recent of the regular reporting instruments required under START, the United States indicated that the Vandenberg Space Launch Complex was its only space launch facility, containing converted ballistic missiles with two launchers. In the case of Russia, Nenoksa, Svobodny and Plesetsk are space launch facilities containing a total of eight launchers, with four ICBMs also located at Svobodny.

As for the launch vehicles themselves, Article IV(4) provides that the total number of launchers must be limited to twenty, with mobile and silo launchers limited to twelve.³ The number of ICBMs or SLBMs allowed at each space launch site is limited by the number of launchers permitted at the site. The reason for limiting the number of civilian launches of converted ballistic missiles is to prevent either State from testing their missiles under the guise of civilian space launches.

Russia and the United States did not agree as to the implications of the START régime on the conversion of Soviet SS-25 missiles into launch vehicles. The issue was resolved in the Joint Statement No. 21 of 23 September 1995 of the Joint Compliance and Inspection Commission ("JCIC"). In that Joint Statement, the "Start" launch vehicle, which comprises one SS-25 first stage, one SS-25 third stage and one or two SS-25 second stages, would not be

considered to be an ICBM being stored in stages or to be a variant of an ICBM that is prohibited under START. The number of converted Start vehicles would nonetheless be limited by Article IV(4) of START I. While it is not necessary under START for space launch facilities to be inspected, the Joint Statement requires the provision of technical data, development plans, schematic drawings or photographs and telemetric changes.

One significant provision in the Joint Statement is the allowance for Russia to export its converted launch vehicles, particularly the Start, to other countries. The Joint Statement affirmed that START did not prohibit the movement of space launch vehicles to facilities outside Russia or the United States but that the country concerned must retain ownership and control of the space launch vehicles, their launchers and support equipment during its transportation. As a result, it would be necessary for Russia to maintain ownership and control of any exported Start vehicles.

In the case of Australian launch operators, Australia and Russia concluded the 2001 Agreement on Cooperation in the Field of Exploration and Use of Outer Space for Peaceful Purposes (referred to as the "Intergovernmental Agreement" or the "IGA"), partly with the view of allowing Russian Start vehicles to be launched from Australian facilities. As Russia must maintain ownership and control of Start launch vehicles under the START régime, it poses additional difficulties for its compliance with launch licensing and regulatory frameworks of other countries, as well as the applicability and export and import controls.

EXPORT CONTROLS

The globalised nature of the space launch industry means that it is inevitable that launch operators will have to import launch vehicles, payloads, components, software, technology and know-how. As space

technology is generally sensitive in the context of the geopolitical military and strategic balance, States such as Australia, Russia and the United States have all implemented regulations in compliance with their international obligations on export controls relating to space technology.⁴ The two main international treaty regimes on export controls that impact on launch services are those implemented under the Wassenaar Agreement on Export Controls for Conventional Arms and Dual Use Goods and Technologies (the “Wassenaar Agreement”) and the Missile Technology Control Regime (“MTCR”), to which all three countries are parties.

The Wassenaar Agreement

The Wassenaar Agreement entered into force in 1996 as the successor regime to the Coordinating Committee on Multilateral Strategic Export Controls (“COCOM”) of the North Atlantic Treaty Organisation (“NATO”) that was established during the Cold War. It has 33 founding members, which include Australia, Russia and the United States.⁵

The Wassenaar Agreement imposes two major obligations on its members:

- the notification of arms transfers and the reporting of transfers or denials of transfers of items contained in the agreed lists;⁶ and
- the maintenance of export controls through domestic legislation to ensure that the transfer of items in the agreed lists do not contribute to the development of military capabilities that undermine international and regional security.⁷

Article III of the Wassenaar Agreement sets out the Control Lists, which comprise the Dual-Use Goods and Technologies List and the Munitions List. The Dual-Use List is further divided into a general list (Tier 1) as well as two annexes of sensitive items (Tier

2) and very sensitive items (Subset Tier 2). The responsibility for implementing export controls on the two Control Lists rests with the governments of the member States.⁸

The items relating to space launches that are contained in the Munitions List include:

- rockets, missiles and related equipment or accessories (ML4);
- various propellants capable of being used in rockets, except for liquid oxygen (ML8); and
- technology and equipment used for the production of controlled items in Part 1 of the Munitions List (ML18).

The items relating to space launches that are contained in Part 3 of the List include:

- telemetry and telecontrol equipment in launch vehicles (5A101);
- space launch vehicles (9A004);
- liquid propulsion systems (9A005);
- solid propulsion systems (9A007);
- hybrid propulsion systems (9A009);
- any components or sub-systems of the above vehicles or systems;
- software designed or modified for the development, design, modelling and simulation of systems, vehicles and related equipment or technology (9D001 and 9D103); and
- technology for the production of any of the above (9E001).⁹

The transparency framework for notifications of arms transfers under the Wassenaar Agreement requires disclosure by governments of items exported, as well as denied applications and reasons for such denials. The arms transfers notification requirements are:

- 1) licences for the export of dual-use goods and technologies denied to

- non-member States and the reasons for their denial, to be notified to member States on an aggregate basis;
- 2) all licences issued or denied to non-member States for the export of sensitive items on the Dual Use List and the reasons for any denials, to be notified to member States on an individual basis; and
 - 3) all transfers of items on the Munitions List to non-member States to be notified to member States on an aggregate basis.¹⁰

The MTCR Guidelines

The MTCR was concluded in 1987 between Canada, France, Germany, Italy, Japan, the United Kingdom and the United States to limit the proliferation of nuclear weapons technology. This was achieved by requiring member States to impose export controls on technology related to missile systems. The MTCR applies to systems capable of delivering a 500kg warhead to a distance of 300km. Since 1987, a further 25 States, including Australia and Russia, have become members of the MTCR.¹¹ As a result of the Persian Gulf War, the MTCR was extended in 1992 to cover smaller missiles capable of deploying chemical or biological weapons over short or intermediate ranges.

The MTCR Guidelines for Sensitive Missile Related Transfers require member States to exercise restraint in transferring items on the MTCR Annex to “any destination beyond the Government’s jurisdiction or control” and to consider such transfers on a case-by-case, rather than a general categorical basis.¹²

In considering the transfer of any items on the MTCR Annex, the Member State is required to take into account:

- concerns relating to the proliferation of weapons of mass destruction;
 - the missile and space capabilities of the recipient State;
 - the significance of the transfer in the context of the development of delivery systems for weapons of mass destruction by the recipient State; and
 - any assurances given by the recipient State in relation to their use and restraint from re-exporting.¹³
- The member States are required under the MTCR Guidelines to obtain assurances from the recipient State that, without the consent of the original Member State:
- the items received will not be used for proliferation purposes;
 - no changes will be made to the use of the items;
 - no modifications or replications of the items will be undertaken; and
 - the items will not be transferred to a third State.¹⁴
- The MTCR Annex comprises two categories of items, which include both the hardware and equipment and the relevant technology, including software and technical data. Category I items, comprising Items 1 and 2, are items of the greatest sensitivity in the framework of MTCR export controls. All other Items in the MTCR Annex constitute Category II and are less sensitive in the context of technology transfers.
- The items relating to space launches that are contained in Category I of the MTCR Annex include:
- complete rocket systems and space launch vehicles (Item 1); and
 - complete sub-systems used in rockets and launch vehicles as well as equipment used in the production of individual rocket stages, engines and re-entry systems (Item 2).

The items relating to space launches that are contained in Category II of the MTCR Annex include:

- rocket motor cases and liquid propellant control systems (Item 3);
- propellants and constituent chemicals for propellants (Item 4);
- structural materials and structures usable in Item 1 systems;
- flight control systems and related technology for Item 1 systems;
- launch support equipment, facilities and software for Item 1 systems; and
- specifically designed software and modified computers for modelling, simulation or design integration of Items 1 and 2 systems.

DOMESTIC IMPLEMENTATION

Each member State of the Wassenaar Agreement and the MTCR has legislated to implement a system of export controls on space and missile related technologies. Some States have opted to implement controls on the Control Lists of the Wassenaar Agreement and the items of the MTCR Annex only, while others have supplemented them with additional items also considered to be of a sensitive nature.

Australia

In Australia, those export controls required under the Wassenaar Agreement and the MTCR are implemented through the *Customs (Prohibited Exports) Regulations 1958* (Cth) and s 112 of the *Customs Act 1901* (Cth). Part 1 of the Defence and Strategic Goods List directly implements the Munitions List contained in the Wassenaar Agreement. Part 3 of the Defence and Strategic Goods List implements the Dual Use Goods and Technologies List contained in the Wassenaar Agreement.¹⁵ The items in the

MTCR Annex are also incorporated into the Australian List.

In the case of launch operators, it may be necessary from time to time to export, temporarily or permanently, software or hardware items on the Defence and Strategic Goods List that were created in Australia or, perhaps more likely, previously imported into Australia from a third State. The Department of Defence has responsibility for administering export controls on relevant items on the List under the Regulations.¹⁶ The Regulations require a licence to be obtained from the Australian Government for the export of items contained on the List.

Table 1. Australian Export Permits

PERMIT / LICENCE		COVERAGE
PART I	Military Export Approval (MEA)	Export of a specified quantity of goods to a single specified recipient.
	Military Export Licence (MEL)	Export of unspecified quantities of goods to one or multiple recipients.
	Military In-Principle Approval (MIP)	Marketing of goods to potential customers (does not permit export).
	Military Temporary Export (MTT)	Goods that will be returning to Australia (eg. trials or demonstrations).
	Military Return to Manufacturer (MRM)	Returning goods to overseas manufacturers (eg. for warranty repairs).
	Military Return to Owner (MRO)	Returning goods to overseas owners.
PART 2/3	Individual Export Permit (IEP)	Export of a specified quantity of dual-use goods to a single recipient.
	Export Distribution Licence (EDL)	Multiple shipment of an unspecified quantity of dual-use goods overseas.
	General Export Licence (GEL)	Export of a range of dual-use goods to recipients in specified States.
	Maintenance Return and Repair (MRR)	Returning or sending dual-use goods for repair or repaired goods overseas.
	Service Supply Licence (ESS)	Goods shipped in support of a maintenance or service program.

In order to obtain an export permit or licence under the Australian export control régime, it is necessary to provide the required supporting documentation. For goods contained in the Munitions List (or Part 1 of the List), the exporter would be required to supply an "End-User and Non-Transfer Certificate" that satisfies the requirements of Paragraph 5 of the MTCR Guidelines relating to assurances from recipient States. Alternatively, the recipient State may supply an International Import Certificate to indicate that it intends to control any intended or unintended re-export of the goods. For dual use goods contained in Part 3 of the Defence and Strategic Goods List, a "Statement by the Ultimate Consignee or Purchaser" is required, setting out the intended use of the item by the recipient State.

Russia

In Russia, the *Law on Military-Technical Cooperation of the Russian Federation with Foreign States 1998* requires governmental approval before exports of "military products" can be made.¹⁷ "Military products" are defined as "arms, military equipments, operations, services and the results of intellectual activity, including the exclusive rights to them (intellectual property), and information in the military-technical sphere".¹⁸

"Arms and military equipment" is defined to include:

- delivery and launch systems;
- relevant facilities, equipment and technologies for the development of delivery and launch systems; and
- telemetry and telecontrol devices.¹⁹

The law effectively provides for a monopoly on the export of controlled items from Russia for the Russian Government and organisations with a government majority ownership.²⁰ As a result, only the Russian Government and agencies or

entities established by the Government can engage in the export of launchers and launch related technologies.

In the case of foreign launch operators seeking the export of technology, the regulatory procedure is implemented by the (rather grandly named) 1998 Government Decree on Authorisation of the Procedure for the Consideration of Official Applications from Foreign Customers and Interdepartmental Coordination of Decisions for the Conduct of Foreign Economic Transactions with Products for Military Applications. This Decree provides for the mechanism by which foreign entities may apply for the export of Russian technology.

The United States

The International Traffic in Arms Regulations ("ITAR")²¹ were enacted under s 38 of the *Arms Export Control Act 1976*, which gave authority to the Department of State for the regulation of the export of articles, services and technology related to defence. The export controls under ITAR operate by prohibiting exports to certain countries or requiring the licensing of certain activities in relation to items on the U.S. Munitions List.

On the launch vehicle side of the equation, Category IV of the U.S. Munitions List includes launch vehicles and any apparatus, device, material or technical data for handling, control, activation, monitoring, detection, protection, discharge or detonation of launch vehicles. As for the payload side, Category XV includes spacecraft and their ground control stations, as well as associated equipment, accessories, attachments and technical data.

The definitions provided under ITAR include software within the term "technical data". As we have already seen, the list of articles on the MTCR Annex also includes launch support equipment, facilities and software, including those specially designed

for modelling, simulation or design integration. The MTCR Annex is incorporated as s 121.16 of the United States Munitions List.

The main requirements of the ITAR are:

- 1) any United States manufacturer or exporter of Munitions List articles is to be registered;²²
- 2) any temporary import, temporary or permanent export of an article on the Munitions List, including technical data, is to be licensed,²³ unless it is imported for the purpose of exhibition or marketing;²⁴
- 3) the export of technical data relating to articles on the Munitions List is to be licensed;²⁵
- 4) the provision of technical assistance by U.S.-based specialists or consultants to foreign parties requires approval; and
- 5) exports to a defined list of countries are prohibited as being contrary to the security and foreign policy of the United States or its efforts against terrorism.²⁶

In the case of United States launch operators, these provisions would require a licence for the temporary import of any non-U.S. payload for the purpose of launch, along with any non-U.S. launch vehicle, component, software or technology. If the launch operator is utilising technology from foreign sources, a temporary import licence under ITAR or a licence for the permanent import regulated by the Department of the Treasury may be required.²⁷

In the case of foreign launch operators, there are several implications arising from ITAR:

- 1) the use of any U.S.-based defence article or equipment in relation to the launch must be exported;

- 2) if the payload is of U.S. origin, the export of the satellite is governed by the Department of State under ITAR;
- 3) the import of any equipment, software or technical data for a U.S.-based consultant to provide technical assistance requires a temporary import licence;
- 4) the use of any U.S.-based software or technical data would similarly have to be exported; and
- 5) the engagement of any U.S.-based specialists or consultants would constitute technical assistance and require State Department approval.

With the exception of temporary import, most of the regulatory requirements relating to export and technical assistance from the United States can be covered by an approved technical assistance agreement deposited with the State Department.

IMPLICATIONS FOR COMMERCIAL LAUNCH OPERATORS

The START Régime

One unique feature of the commercial launch industry is that, regardless of the location and nature of ownership or control of a particular launch operator, it is nevertheless part of a global and interdependent industry. As a result, there is often a heavy reliance on the flow of launch systems, equipment and technology across national boundaries.

There are three important implications of the START régime on a non-Russian commercial launch operator. Firstly, Russia is required to maintain ownership and control of the Start launch vehicle even if it is exported to another country. This makes compliance with local licensing and regulatory laws somewhat difficult for launch operators. The launch operator can choose to ask the domestic government to defer to the competence of the Russian

officials operating the launch vehicle, or it would have to “export” and “import” any relevant documentation and technical data to satisfy the local regulatory agencies.

Secondly, if Russia maintains ownership and control of the launch vehicle, it is unclear whether the launch vehicle and the relevant control equipment would have left the “territory or control” of Russia. If the applicability of export controls depend on territorial boundaries, then Russia would nevertheless have exported the items and require compliance with export controls, even though the exporter and the importer would have remained the same Russian entity. This would also have the effect of limiting the number of countries that can operate Start launch vehicles to those that can satisfy Russia of their peaceful intentions in utilising the technology. Conversely, if they depend on the jurisdictional control of the items, then a persuasive argument can be made that export controls would not be applicable. This may well be contrary to the spirit of the export control régime, as missile technology would have left Russian territory and no controls would have been imposed on their possible proliferation.

It should also be noted that the export control régimes of some countries, for example ITAR, require the importer of controlled items to be a domestic entity rather than a foreign one. This would prevent a Russian entity undertaking the import of Russian technology into the United States without a United States entity as partner.

Thirdly, JCIC Statement No. 21 requires the disclosure of technical data, development plans, schematic drawings or photographs and telemetric changes in relation to converted ICBMs used as launch vehicles. Where a payload has been integrated into a launch vehicle, this may require trade secrets or other confidential information to be disclosed by the launch operator or its customer. Without further

clarification, this may inhibit the willingness of commercial payload operators to utilise Start launch vehicles for their launch requirements.

Export Controls

In the global launch industry, the flow of technology between countries has become an important feature for the survival and development of the industry. A launch operator in Australia, for example, that relies on Russian technology would be required to import:

- the launch vehicle, either as a complete system or as a combination of complete sub-systems;
- all related equipment, software and technology relating to the development, control, modelling, simulation and operation of the launch vehicle;
- telemetry and telecontrol systems on board the vehicle and the ground segment of such systems;
- all technical data in relation to the items above; and
- the payload.

As mentioned previously, the launch vehicle and its sub-systems constitute Items 1 and 2 of the MTCR Annex, while the other items are controlled in Category II of the MTCR Annex. All of these items are provided for in the Dual-Use Goods and Technologies List of the Wassenaar Agreement. As a result, export approvals would have to be obtained from the Russian Government and other relevant States and import licenses from the Australian Government before any of the above technology transfers can take place.

There may be instances where a launch operator may require re-export of the imported technology. For example, a launch operator in South Africa may have

incorporated Russian technical data or launch vehicle specifications into launch control software that it has developed internally, in relation to which the domestic regulatory laws may require certification or review by an independent expert that is located in the United States. In this case:

- 1) the original technical data or specifications would have to be exported from Russia;
- 2) the technical data and specifications would have to be imported into South Africa;
- 3) the launch control software, as a controlled item, cannot be exported without a relevant export licence from the South African Government;
- 4) as the launch control software contains Russian controlled items, it may be necessary to obtain licences or permits for the re-export of those items from the Russian Government;
- 5) the launch control software would have to be temporarily imported into the United States where the certifying export consultant is located;
- 6) the return of the software to South Africa may attract export and import controls, though in some States the return of items to manufacturers after temporary import is exempt from export controls;
- 7) any modifications or even the report containing technical data produced by the American consultant would itself be a controlled item that would have to be exported from the United States to South Africa; and
- 8) if the contents of the report have to be disclosed to a Russian entity (as it concerns their launch vehicle), the report would have to be exported from South Africa and then imported into Russia, attracting any applicable export controls.

The issues would be further complicated if the launch control software itself was imported from a State other than Russia, as it would also attract the application of export controls of that State for the export and re-export of the software to South Africa and the United States.

It is clear that commercial launch operators and, perhaps more importantly, their specialist legal advisers, must have a good working knowledge of domestic and foreign export controls and their application in order to comply with all requirements.

CONCLUSIONS

Although generally high on the list of concerns in the commercial operation of a launch operator, the implications of the START framework and export controls do not appear to have been the focus of any major academic and legal analysis.

It is important in the interests of world peace and international security to maintain strict technology controls in relation to the flow of space launch and related technology. However, there is no reason why the Governments concerned should not recognise the economic importance and the global nature of the space industry and implement special streamlined and uniform rules of export controls. For example, a protocol to the Wassenaar Agreement may be developed to allow for a "Global Export Control Licence" which may be issued by a member State for the import-export of a specific list of items and technologies. Such a development can be subject to the existing transparency and accountability requirements of the Wassenaar Agreement and yet allows for a simplification of the regulatory burden of export controls as imposed on commercial launch operators.

Notes

This paper is written in the personal capacity of the authors and does not necessarily represent the views of any organisations with which they are associated.

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¹ Following the abandonment by the United States of the 1992 Antiballistic Missile Treaty in June 2002, the Russian Administration responded by declaring that it was no longer bound by the START II framework.

² "Retired" ICBMs, according to the Definitions Annex, are ICBMs of a type deployed when START entered into force but all of which were rendered non-deployed by virtue of the conversion or elimination of their launchers, other than test launchers and space launch facilities.

³ The original START I treaty limited the number of mobile and silo launchers at space launch facilities to 10, which was subsequently raised by the Joint Compliance and Inspection Commission Agreement No. 45 of 17 July 2001 to the present limit of 12, of which the maximum number of mobile launchers is limited to 10.

⁴ It is interesting to note that other major space nations are also implementing increasingly stringent regulations intended to restrict the export of missile and space-related technology. For example, China has recently introduced new regulations which it claims are stricter than the standards imposed under the Missile Technology Control Regime (MCTR).

⁵ The member States to the Wassenaar Agreement are Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Slovakia, South Korea, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom and the United States.

⁶ Wassenaar Agreement, Art IV.

⁷ *Ibid.*, Art II.

⁸ *Ibid.*, Art II.

⁹ The reference numbers referred to are those contained in the Australian Defence and Strategic Goods List, which correspond to the numbers used in the Dual-Use Goods and Technologies List under the Wassenaar Agreement.

¹⁰ Wassenaar Agreement, Arts V and VI.

¹¹ The member States to the MTCR are Argentina, Australia, Austria, Belgium, Brazil, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand,

Norway, Poland, Portugal, Russia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom and the United States.

¹² MTCR Guidelines, Para 1.

¹³ *Ibid.*, Para 3.

¹⁴ *Ibid.*, Para 5.

¹⁵ Part 2 of the Defence and Strategic Goods List contains nuclear and nuclear-related items.

¹⁶ *Customs (Prohibited Exports) Regulations 1958* (Cth), Reg. 13E.

¹⁷ *Law on Military-Technical Cooperation of the Russian Federation with Foreign States 1998*, Art 6.

¹⁸ *Ibid.*, Art 1.

¹⁹ *Ibid.*

²⁰ *Ibid.*, Arts 6 and 12.

²¹ 22 CFR 120-130.

²² International Traffic in Arms Regulations, s 122.1.

²³ *Ibid.*, s 123.1.

²⁴ *Ibid.*, s 123.4.

²⁵ *Ibid.*, s 125.2.

²⁶ *Ibid.*, s 126.1.

²⁷ The permanent import of defence items contained in the U.S. Munitions List are regulated by the Department of the Treasury under 27 CFR 47, 178 and 179.