



Emerging International Standards : If a dream could come true

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One basic condition

Future of nuclear energy is constrained by the possibility to **develop nuclear trade**

- Trade of materials, equipments and technologies
- National, regional and/or international cooperation

International Nuclear Trade Exchanges

Principle

**General trade principles established by the WTO
(smooth, predictable and free) are politically
and legally overturned**

- Principle : Prohibition
- Trade : Exception

No transfer without (export) authorisation

Might even lead to prohibition for specific technologies

Article XXI of the GATT Agreement

Security Exceptions : Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to **its essential security interests**; or
- (b) to prevent any contracting party from taking **any action** which it considers necessary for the **protection** of its essential security interests
 - (i) **relating to fissionable materials or the materials from which they are derived**;
 - (...)
 - (iii) taken in time of war or other **emergency** in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the **United Nations Charter for the maintenance of international peace and security**

Article XXI interpretation ?

- Allow States to adopt restrictive measures : **national** export control provisions
Emerging **national standards** in spite of international standards
- Protection of State **essential security interests**
Often raise tension between States but usually resolved by international pressure and diplomacy not through WTO bodies
Cuban Liberty and Solidarity Act, Iran and Libya Sanction Acts
- No WTO Dispute Panel have had to formally consider a case relating to **nuclear trade**

Possible interpretations

Minimum : exempts only “national security essential interests” related restrictions

Nuclear trade could be restricted for “non proliferation concerns”

Maximum : exempts all nuclear trade restrictions

Nuclear trade could be limited to ensure/protect national energy needs

Raise the definition of **conditions of supply** and the necessity to define international standards

Nuclear export control regime....s

Since the Atoms for Peace Plan and the creation of the COCOM, States have tried **to coordinate their national export control policy** through :

- **Legally** and/or **politically** binding instruments

Largely rules by **informal regulation** (soft law) which requires the adoption of national regulation instruments. Risk of an incomplete implementation or an “à la carte” implementation

- **Universal, regional** and **national** instruments

- NPT, European Regulation, National Regulation and sometimes Sub-national Regulation

- IAEA, European Commission, National Agency,...

Finding standards through regimes diversity

An export control regime should normally integrate three elements:

1. an **authorisation** system to analyse the transfer application
2. a control and **verification** system to verify the end-users and uses of the items transferred
3. **sanctions** to penalise infringements

Authorisation system

1. **Implementation field** : list of items to be controlled, catch-all clause, black/white countries list, operations concerned
2. **Decision making process**: conditions and criteria
3. **Procedure** : authorities, licences application forms, custom controls, appeal procedure,...
4. **Information exchange system** : authorisations granted, denied, no undercut mechanism, on risks,...

Emerging International Export Control Standards : focus on the implementation feel

Caveat : Difference between legally or politically binding instruments will not be considered.

A Common implementation field

A list of nuclear items

States take the commitment to control :

- **UNSCR** : *nuclear weapons including related materials*
- **NPT** : *(a) source or special fissionable material, or
(b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material*
- **Zangger Committee** established a list of nuclear items in regard of the NPT definition (INFCIRC 209.Rev.2.mod.1):
Memorandum A (nuclear materials) and Memorandum B (material and equipment)
- **Nuclear Suppliers Group** (INFCIRC 254/Rev.9/Part.1) *items or related technology identified in the trigger list*
7 categories of items

Essentially one common element

Controlling nuclear materials equipments as defined by Zangger Committee

- Restrictive access group but the list is included in its Guidelines published by the IAEA

- Zangger Committee Nuclear List is almost recognised by the NPT

NPT Review Conference 1975 : *the Conference notes that a number of States suppliers of material or equipment have adopted certain minimum, standard requirements for IAEA safeguards in connection with their exports of certain such items to non-nuclear-weapon States not party to the Treaty*

NPT Review and Extension Conference 1995 : *The Conference invites all States to consider applying these understandings of the Zangger Committee in connection with any nuclear cooperation with non-nuclear-weapon States not parties to the Treaty (INFCIRC482)*

Nuclear Suppliers Group extended formally the control to

- **Related technology**

"Technology" means specific information required for the "development", "production", or "use" of any item contained in the List. This information may take the form of "technical data", or "technical assistance"

- **Nuclear related dual use, equipment, material, software and related technology**

As defined as items that could make a major contribution to a "nuclear explosive activity," an "unsafeguarded nuclear fuel-cycle activity" or acts of nuclear terrorism

- **Catch-all clause**

Suppliers should ensure that their national legislation requires an authorisation for the transfer of items not listed in the Annex if the items in question are or may be intended, in their entirety or in part, for use in connection with a "nuclear explosive activity." Suppliers will implement such an authorisation requirement in accordance with their domestic licensing practices.

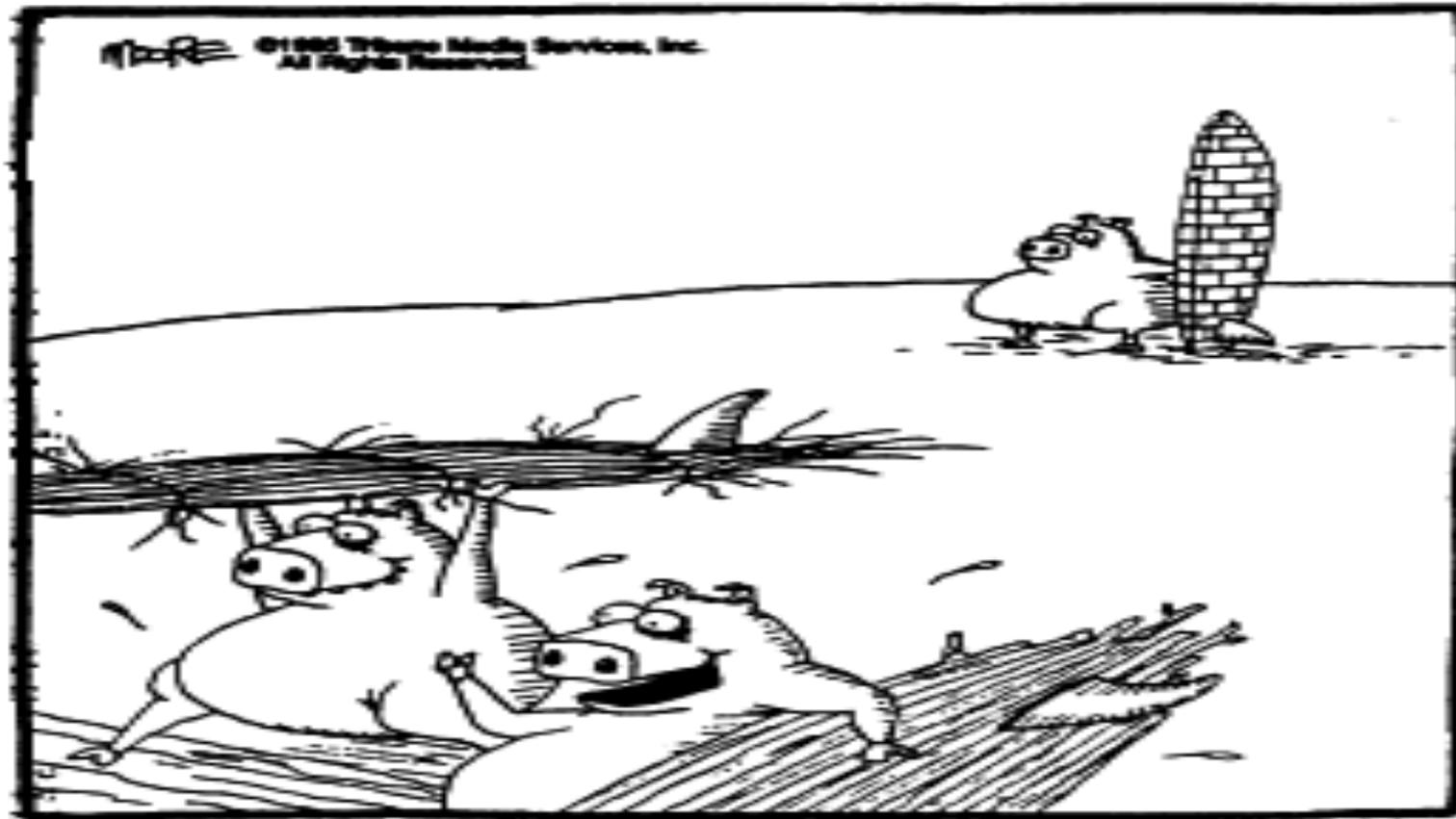
Could the NSG lists be considered as international standards ?

- Control of dual use items and technologies **in the line of the UNSCR 1540** commitment
July 2008 report stated that 62 states have included the control of technologies in their national list of controlled items, more than NSG participating States
- Restrictive access group but both lists are included in Guidelines **published by the IAEA**
- **Few** potential and existing nuclear **suppliers states outside** of the NSG : India, Pakistan, Israel, North Korea, ...
- **Implemented** formally and informally **by non NSG Participating States** such as Mexico, India, Pakistan, Israel, Thailand,...

It is not only a question of establishing standards...

IN THE BLEACHERS

By Steve Moore



The pig watched his two friends run into the surf with boards made of straw and sticks. Later however, his smug sense of security - along with his board of bricks - vanished in about 40 feet of water.

If NSG guidelines could be considered as an international standards for export control regime, would such standards be equally implemented by States Parties?

Case one : The list of controlled items and technologies

European Union implementation

List of NSG (trigger and dual-use) items **fully implemented** by the EU Regulation 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology

Establishment of **one** list of dual use items requiring export **or** transfer authorisations (Annex I and IV)

Specific system of references (9 categories)
no direct link with TARIC.

- The list should be considered **comprehensive and compulsory** for Member States
- But some EU Member States consider that they have **space for appreciation or interpretation** if an item should be on the list

Concerns essentially components of controlled items

- Therefore some items and technology are submitted to export authorisation in some Member States and not in others
- Might just be the implementation of a catch-all clause...

Case two : catch-all clause

NSG Dual use Guideline established the principle : *Suppliers should ensure that their national legislation requires an authorisation for the transfer of items not listed in the Annex if the items in question are or may be intended, in their entirety or in part, for use in connection with a “nuclear explosive activity.” Suppliers will implement such an authorisation requirement in accordance with their domestic licensing practices.*

How such clause is implemented within the European Union

Not listed items can be controlled by EU Member State on the basis of **catch-all clause** implementation (article 4 of the Dual Use Regulation 1334/2000)

1. Two of them are **compulsory** for Member States Authorities

1. Member States Authorities, require, through a **notification to exporters**, an export authorisation for an item not listed if there is risk that this item might be used in weapons of mass destruction program.
2. **Obligation** for the exporter to **notify** to its National Authorities if he is **aware** that an item he intends to export will contribute ...

2. One is optional for Member States Authorities (adopted by 16 MS)

“**suspicion clause**”, establishes the **possibility** for EU Member State to impose an export authorisation if the **exporter has grounds for suspecting** that the item not listed he intends to export, will contribute ...

Therefore the catch-all clause provision is **not implemented equally** by the 27 Member States

Case three : the control of technology

Definition of technology used by the EU Regulation 1334/2000 is **exactly the same** that the one used by the NSG Guidelines even for the exception provision:

NSG Guideline 254/Rev.9/Part.1 : *Controls on "technology" transfer **do not apply** to information "in the public domain" or to "basic scientific research"*.

EU Regulation Nuclear Technology Note: *Controls on "technology" transfer **do not apply** to information "in the public domain" or to "basic scientific research"*.

The **understanding** of such provision does not seem to be similar between European Union Member States :

For **Germany** (BAFA) industry does not conduct basic research because the industry's aim is always to develop a marketable product, and so the industry will not publish their results unrestricted.

In this regard any export of technologies will be submitted to authorisation in Germany.

Others EU Members States do not share such understandings and therefore such export will not be submitted to an export authorisation.

Case Four : NSG Safety clause

NSG trigger list items **conditions of supply** : End-user State should have brought into force an agreement with the IAEA requiring the application of **CSA**

Two exceptions:

- **Grandfather clause** commitments of the suppliers linked to contracts signed before its NSG membership
- **Safety clause** : transfers to a non-nuclear-weapon State when they are deemed **essential** for the **safe operation of existing facilities** and only if **safeguards** are applied to those facilities.

Before granting such authorisation suppliers should inform and, if appropriate, consult in the event that they intend to authorise or to deny such transfers.

Safety clause has never been used except twice by Russia

In **2001** to supply fuel assemblies for the Indian Tarrapur nuclear plant.

Such transfer faced strong opposition of a large majority of NSG Participating States

- Not essential for the safe operation of an existing facility
- In reaction, proposals has been tabled to amend and reinforce the provision (Safety might included “shutting down the facility”).

In **2006** to supply fuel assemblies for the same plant. Such transfer faced few opposition

The Indian/US deal has been tabled in the time between

To conclude

- Potential International Export Control Standards has been established since the 90'
- Main issue : necessity to harmonise their implementation by States parties
- The establishment of a efficient *no undercut mechanism* legally binding should be considered