

**U.S. Chamber of Commerce (CoC)
Defense and Aerospace Export Council Recommendations (June 8, 2018)**

Observations & Insights

General

In response to White House publication of a revised Conventional Arms Transfer (CAT) policy on April 19, 2018, the U.S. Chamber of Commerce Defense and Aerospace Export Council developed and provided a comprehensive set of recommendations for consideration by key players within the U.S. Government and Industry. This analysis of the U.S. CoC's June 8, 2018 memorandum is intended to provide the Department of Defense (DoD) Security Cooperation community, DoD acquisition workforce, and supporting industry with observations and insights regarding potential CAT policy implementation concepts and ideas.

International Cooperative Programs (ICPs): The U.S. CoC's memorandum focuses primarily on Foreign Military Sales (FMS) and Direct Commercial Sales (DCS)-related recommendations and does not mention International Cooperative Programs (ICPs). Potential ICPs must be explored by the DoD acquisition workforce as a viable alternative to 'domestic-only' programs based on Title 10 legislative requirements and DoD 5000 series acquisition policy. While FMS and DCS are important U.S. Government (USG) and DoD Security Cooperation tools, they are not the only mechanisms available to achieve desired USG/DoD International Acquisition & Exportability (IA&E) outcomes for the U.S., its allies, and friends. Depending on the circumstances, ICPs can provide advantages over FMS and DCS arrangements by more effectively addressing – and in some area entirely avoiding – some of the 'problem areas' described in the U.S. CoC memorandum of June 8, 2018. Accordingly, specific **ICP advantages** related to some of the U.S. CoC recommendations below are highlighted in ***italics*** to ensure DoD Security Cooperation and acquisition workforce personnel are aware of the potential benefits that can accrue to both U.S. Government and Industry through establishment of ICPs, when appropriate.

Specific U.S. Chamber of Commerce Recommendations

I. Institutionalize Focus on Economic Implications of Export Policy

Theory: At a conceptual level, this proposal is quite sensible because neither DoD or the Interagency routinely performs economic Business Case Analyses (BCAs) on proposed FMS or DCS arrangements at any point in either the FMS or USG export control processes or USG/DoD Technology Security and Foreign Disclosure (TSFD) review/approval process (which supports

both FMS and DCS). The only known systematic use of this type of risk/cost benefit analysis within DoD is the Defense Exportability Features (DEF) program, which requires a qualitative & quantitative BCA (including economic aspects) in the development of a program-level DEF Feasibility Study for DEF programs (Note: Unlike the U.S. CoC recommendation, DEF BCAs focus on an entire program rather than individual Significant Military Equipment (SME)/Major Defense Equipment (MDE) FMS or DCS transactions.)

Practice: The details of the U.S. CoC proposal are complex, and would involve many USG interagency players – plus requiring additional transaction-by-transaction economic BCA “Report to Congress” for each potential SME/MDE FMS and DCS sale – which seems impractical. Also, based on DoD DEF experience, BCAs of this type (even at the individual program level) are highly subjective since they are based on several assumptions that are more conjecture than fact. *By comparison, each proposed ICP must conduct an economic BCA to determine if the contributions from proposed ICP partner nation(s) and benefits from future ICP and FMS sales outweigh the potential costs of DEF modifications prior to ICP international agreement signature.*

Alternative: Rather than try to accomplish status quo improvement through transaction-by-transaction economic BCA assessments of all potential SME/MDE defense sales, consider establishing a DoD-wide requirement to perform annual International Acquisition & Exportability (IA&E) BCAs on a program-by-program basis for programs with substantial SMD/MDE sales potential. DoD could be asked to report the results annually in each program’s Selected Acquisition Reports (SARs) to Congress (which are public domain reports available to everyone in the USG interagency/industry).

II. Institutionalize Focus on U.S Dominance in Emergent Technologies (ETs)

Theory: Conceptually, this proposal has merit since it attempts to focus more attention on establishing measures that will enable U.S. Gov’t and Industry programs to “run faster” in ET areas – thereby maintaining/increasing U.S dominance in ETs -- rather than using a “slow the competitors down” approach which employs USG export control restrictions to try to maintain technological superiority in ET areas.

Practice: Based on lack of knowledge regarding CoC recommendations 2.a. and 2.c., this assessment of the U.S. CoC recommendations will focus solely on recommendation 2.c. (DoD USD(R&E) annual written assessment of “emergent technologies vital to national security”). Sounds kind of like the Military Critical Technology List (MCTL) doesn’t it? Does anyone remember what a ‘great success’ the MCTL was ‘back in the day’? (Hint: it wasn’t!) At present, DoD requires each DoD acquisition program to identify Critical Program Info (CPI)/Critical

Program Technology (CPT) on a program-by-by program basis. These program-level CPI/CPT assessments are used to make decisions on Anti-Tamper (and other) program protection measures as well as support TSFD “pipe” process analyses. USD(R&E) actually oversees this overall process and is supposed to ‘enforce’ the results in the program protection area for all DoD acquisition programs. In practice, however, many programs attempt to avoid identifying CPI/CPT and try to obtain waivers to employ less than adequate program protection measures due to pressures to ‘keep overall acquisition program costs down.’ *By comparison, each proposed ICP must identify CPI/CPT and address the international aspects of program protection as an integral element of the program’s systems security engineering efforts prior to ICP international agreement signature and during ICP implementation. ICP partner funding helps pay the associated costs to achieve an acceptable level of overall domestic and international program protection. Once accomplished, the resulting “exportable system” program protection configuration is ready for sale to both ICP partner nations and most (if not all) future FMS customer nations.*

Alternative: The DOD Anti-Tamper Executive Agency (ATEA) has published a classified CPI Horizontal Protection (HP) List – and is currently updating this to a CPI HP Guide that will provide additional best practice insights regarding CPI/CPT decision making at the program level – on behalf of USD(R&E) and USD(A&S). Effective use of ATEA’s CPI/CPT horizontal protection perspectives by DoD Acquisition Executives and acquisition program Milestone Reviews could markedly increase the domestic and international program protection designed into our systems from early development phases onward, ensuring adequate ET protection.

III. Modernize DoD Technology Security and Foreign Disclosure (TSFD) Policy Procedure

Theory: In view of the current shortcomings of the DoD Arms Transfer Technology Release Senior Steering Group (ATTR SSG) and TSFD Office (TSFDO) operations observed by many (see DoD Directive 5111.21 for details on these organizations), improvements in this area are sorely needed. The U.S. CoC’s recommendations focus on potential improvements intended to enhance the ATTR SSG’s overall impact and effectiveness re: both precedent-setting FMS and DCS transactions as well as ‘generic’ DoD ‘critical technology’ release areas that affect the breadth and depth of USG/DoD TSFD decision making.

Practice: Since past experience has shown that the “devil is in the details” re: TSFD reform, here’s a recommendation-by-recommendation analysis of the U.S. CoC’s memo.

3.a. ATTR SSG/TSFDO Realignment under USD(A&S): Could succeed if: a) USD(A&S) is willing to devote the time and effort to make ATTR SSG/TSFDO process ‘work better’ for all concerned (including Industry); and, b) USD(P) doesn’t care/doesn’t want to fight against this proposed

shift in ATTR SSG and TSFDO responsibilities (Note: experience has shown it is advisable to avoid bureaucratic turf wars if possible).

3.b. COCOM Annual SME/MDE and Interoperability Priorities: Could be very useful if COCOMs were actually able to produce an “annual classified report” with sufficient accuracy and granularity (Note: past experience indicates this would be a challenging task for most regional COCOMs based on lack of staff level resources/talent ...)

3.c. COCOM Notification of SME/MDE FMS Denials/Heavy Provisos: Not needed -- the Joint Staff reps to the ATTR SSG and TSFD pipes (e.g., NDPC, CNSS, LO/CLO, RSC, etc.) should be doing this now.

3.d. TSFDO Assessment of SME/MDE Denials/Return without Action (RSA)(FMS & DCS): Is it logical to assume that TSFDO assessments sent to TSFD pipes and USG export control organizations that made such decisions in the first place would change outcomes? Unlikely ...

IV. Promote Industrial Security Mechanisms of Foreign Partners to Allow Increased Defense Technology Release

Theory: Great idea!

Practice: The overworked staff at DTSA that currently performs this function is severely under-resourced. Without additional resources (i.e., more experienced and talented people) -- and A&S/R&E “collateral duty” support to them – this initiative won’t get very far.

V. Assess and Adapt to the Impact of Russian and Chinese Exports on Israel’s QME

Theory: The recommended Office of the Director of National Intelligence (ODNI) process could help if the DoD QME ‘process’ was more transparent and better defined.

Practice: Based on observation, the current DoD QME process is neither transparent nor well-defined, so why would a rational, objective ODNI input to the QME process materially improve results? (Note: the DoD QME process does not appear as a TSFD pipe on the DoD-produced TSFD pipes chart ... wonder why not? ...)

VI. Address Workforce Deficiencies

Theory: Having more, better trained and experience personnel in the overall USG Security Cooperation workforce and DoD Acquisition Workforce with Int'l Acquisition and Exportability (IA&E) knowledge, skills, and abilities is a wonderful (but not a new) idea.

Practice: Experience has shown that it is much easier to accomplish this on the USG/DoD Security Assistance 'side of the house' (using FMS Admin and FMS Case funding) than it is on the USG/DoD O&M 'side of the house. (Note: O&M funding is used for USG/DoD TSFD pipe personnel staff, State export control staff, DoD Component ICP and TSFD subject matter expert staff, and DoD Foreign Disclosure Officer (FDO) staff.)

VII. Institutionalize Competitive Standards for Overcoming "Strong Presumption of Denial" for MTCR CAT I Unmanned Aerial Systems (UAS) Exports

Theory: Many DoD personnel would strongly support the line of argument in this recommendation based on the many challenges currently faced in attempting to sell U.S. developed and produced CAT I UASs to allied and friendly nations who need them for both coalition and national defense missions.

Practice: The challenge in this controversial area is to overcome a longstanding Executive Branch 'standoff' between the non-proliferation community – supported by influential members of Congress -- and the USG Security Cooperation (sales) community on CAT I UAS export policy. A 'negotiated settlement' between the parties is sorely needed since the status quo is not working well for either DoD or industry in the global defense marketplace.

III. Streamline Contracting and Modernize Pricing Structure for FMS to Increase American Competitiveness

Theory: The premise this U.S. CoC recommendation is based on -- that is 'FMS P&A/LOA pricing is [typically/routinely] inflated by the USG/DoD Security Cooperation and Acquisition Workforce personnel and further inflated by the FMS Congressional Notification (CN) process' – is flawed.

Practice: In 2016, the USG/DoD processed 1700 new FMS Letters of Offer and Acceptance (LOAs). If you add the number of FMS Price & Availability (P&A) and LOA Amendments that are processed annually, a rough estimate of the total number of P&A/LOA Amendment/LOA is around 3000/year. Many observers believe that only a few hundred (or less) of the 3000 suffer from the "problem premise" described in this Recommendation. Why not focus in on the few hundred (where FMS estimate inflation can be a problem) rather than describe this as a

“problem premise” for all 3000 (or more) annual transactions? Moreover, the actual goal should be to achieve a “Goldilocks Principle” outcome for pricing of all P&As/LOA Amendments/LOAs – not too high, not too low, but just right – rather than starting from the “problem premise” that the current Security Assistance system is based on a policy, practice, and culture of pricing inflation. *Unlike FMS, ICP international agreement cost estimating efforts are conducted by DoD acquisition workforce personnel based on U.S. defense acquisition laws, regulations, and practices subject to DoD independent cost estimating requirements and internal DoD, OPM, and Congressional budgetary scrutiny.* Similar to other areas, the “devil is often in the details” so here’s a recommendation-by-recommendation analysis of the U.S. CoC’s memo.

8.a. Suggested cost and pricing improvements to the current P&A/LOA process should be focused, as appropriate, on the complex, challenging P&As and LOAs in the “few hundred” rather than the entire 3000.

8.b. Eliminating FMS Undefined Contract Awards (UCAs) – a worthy goal -- largely depends on increasing DoD acquisition workforce contracting process personnel resources to definitize FMS contracts within 180 days (same as DoD’s goal for “domestic” contract UCA definitization).

8.c. The FY 17 NDAA Section 830 Firm Fixed Price (FFP) ‘requirement’ for FMS contracts should be eliminated so the DoD acquisition workforce can use the same DoD contracting guidance and approaches used for DoD “domestic” contracts in order to achieve optimal outcomes for FMS customer nations.

8.d. An “FMS Expedited Contracting” addition to Federal Acquisition Regulations (FAR)/Defense Federal Acquisition Regulations Supplement (DFARS) could be quite helpful (or not) depending on the quality of specific Working Group recommendations offered.

8.e. FMS Cost and Pricing regulatory changes also could be helpful (or not) depending on the quality of the specific Working Group recommendations offered.

IX. Modernize FMS Congressional Notification (CN) Process

Theory: Good idea, but doesn’t go far enough.

Practice: Seasoned observers of the Arms Export Control Act (AECA) CN process marvel how the AECA Section 27 CNs move along on a standard, predictable timeline while the AECA 36b and 36c process is routinely subject to interminable delays between DoD and State, then within Executive Branch (including the NSC in some instances), then with Congress.

Alternative: What should be proposed is eliminating the AECA 36b and 36c ‘informal’ notification processes entirely and replacing this cumbersome, outdated arrangement between the Executive Branch and Congress with an AECA Section 27 CN approach. **The AECA Section 27 CN approach for ICPs involves sending the formal CN to Congress (as specified in the law), waiting 30 calendar days for Congressional comments, then proceeding with ICP international agreement signature unless there are violent objections from one or more influential members of Congress).** If Congress needs more than 15 days (the current legislative requirement in AECA 36.b. and 36.c), amend the AECA to make the formal AECA 36.b. and 36.c CN review period 30 days to provide Congress with the time it needs to engage the Executive Branch on the relatively small set of important, complex, and/or precedent-setting FMS and DCS sales that truly require further Executive Branch – Legislative Branch discussion.

X. FMS Non-Program of Record (POR)/Non-Standard Acquisition/FMS Only Programs

Theory: The U.S. CoC “problem statement” is too broad since Non-POR/Non-Std Acq programs are one problem while the FMS Only Program issue described in the recommendation is a separate, but unrelated, problem. Most informed observers believe that DoD’s handling of Non-POR and Non-Std Acq program areas requires substantial attention and improvement, especially within the DoD acquisition workforce, which bears most of the burden of dealing with the many challenges associated with these specialized international acquisition program types.

Practice: There is a substantial difference in practice between a Non-POR program (which may not even have a ‘logical’ DoD Program Management Office (PMO)) at all) versus a Non-Std Acq Program (which normally has a logical PMO which may (or may not) want to support the FMS or FMS/DCS hybrid effort desired by the customer country/ies and U.S. industry advocate(s)). Moreover, as noted above, the FMS Only program area is not adequately described in the Recommendation’s “problem statement.” Most “FMS only” policies on systems and equipment are driven by TSFD pipe decisions outside the control of both State and OUSD(Policy)/DSCA. These three “problem areas” should be the subject of separate Working Group efforts to assess specific issues and potential solutions in each area rather than dumping them all together in one generic “problem statement.” Here are a few thoughts on the specific recommendations in the U.S. CoC’s memo in this area.

10.1. The ability and authority of the DoD Security Cooperation community and DoD Component Int’l Program Offices (IPOs) to adequately address Non-Std Acq Program issues (primarily a funding problem) and Non-POR issues (who, if anyone, can work these problems within the DoD Component) is quite limited. USD(A&S) and the DoD Component Acquisition

Executives (CAEs) are key players that must participate in efforts to improve the status quo to have any chance of success.

10.b. Solving the existing problems in the “FMS Only” program area – which are largely driven by TSFD pipe decision making and DoD Component TSFD policies -- will require ATTR SSG engagement and empowerment (See Recommendation III, above).

XI. ITAR Exceptions for Australia, UK, and Axiom NTIB & Trade Treaty Implementation of Legislation

Theory: The proposal to side-step Defense Trade Cooperation Treaty (DTCT) implementation issues with the U.K. and Australia by passing legislation to provide these nations (plus New Zealand) with an equivalent to the ‘Canadian ITAR exemption’ contained in the Arms Export Control Act (AECA) would, if implemented, resolve DTCT implementation issues by rendering the DTCTs ‘obsolete.’

Practice: Congress has opposed this solution in the past – that’s why we have DTCTs! – and it’s unclear that the current Congress would support an AECA legislative change of this magnitude. As a result, the U.S. CoC-proposed AECA change is unlikely to occur. Even if it does, the use and positive impact of the current Canadian exemption in current ITAR industry practice is relatively modest, especially with the impact of US Munitions List (USML)-to-Commerce Control List (CCL) Export Control Reform revisions over the past few years that have transferred most ‘benign’ USML items to the much less burdensome controls required by the Export Administration Regulations (EAR).

Alternative: Why not ask State and DoD to find a way to make the Global Program/Project Export License (GPL) authority already in the ITAR work? (Note: this GPL authority in the ITAR has never been effectively used but at least one ICP program is currently exploring GPL use to improve their Government-Industry team’s export control performance at the prime and subcontractor level.)

XII. Offset Policy Engagement

Theory: Offsets have always been a challenging and problematic aspect of defense sales, particularly complex, large scale FMS and FMS/DCS hybrid programs.

Practice: There have been many attempts to improve the status quo in the offset area in the past few years, most notably the DFARS revised rule 225.7303-2 “Cost of Doing Business with a Foreign Government or an International Organization.” *By comparison, each ICP international*

agreement addresses this problem directly in the Contracting and Work Sharing (Industrial Participation) provisions, which are normally based on DoD “best value” contracting policies and practices that apply both U.S. and foreign industry team members. Since DoD normally funds 50% (or more) of ICP international agreement costs, it must control contract costs and incentivize ICP contract performance and avoid all offset arrangements, which are essentially forbidden in ICPs anyway by AECA Section 27. Here are a few thoughts on the specific recommendations in the U.S. CoC’s memo in this area.

12.a. The idea of increasing State and DoD ‘moral suasion’ engagement with allied and friendly nations who have “onerous” offset policies makes sense, but hasn’t been very effective in the past.

12.b. The U.S. CoC recommendation to require DoD acquisition program personnel to include industry offset arrangements in TSFD and export control decision processes -- including pertinent TSFD pipe and DoD Component TSFD and export control reviews -- is a best practice that should be expanded.

XIII. Track Progress of USG Initiatives Undertaken to Implement the Conventional Arms Transfer Policy

Clearly a good idea, but it is unclear why the U.S. CoC recommends that State (rather than State and DoD jointly) produce a status report to the President on implementation of the U.S. CoC recommendations. How about the NSC itself?