

FOREIGN POLICY EXPORT CONTROLS**1. Introduction**

Export controls maintained for foreign policy purposes require annual extension according to the provisions of Section 6 of the Export Administration Act of 1979, as amended (the Act). Section 6(f) of the Act requires the Secretary of Commerce, through authority delegated by the President, to submit a report to Congress to extend the controls. Sections 6(b) and 6(f) of the Act require the report to include certain considerations¹ and determinations² on the criteria established in that section. This report complies with all the requirements set out in the Act for extending, amending or imposing foreign policy controls.

The Department of Commerce is acting under the authority conferred by Executive Order No. 12924 of August 19, 1994, and continued by notices of August 15, 1995, August 14, 1996, August 13, 1997 and August 13, 1998. Therein, the President, by reason of the expiration of the Act, invoked his authority, including authority under the International Emergency Economic Powers Act, to continue in effect the system of controls that had been maintained under the Act. Under a policy of conforming actions under the Executive Order to those under the Act, the Department of Commerce, insofar as appropriate, is following the provisions of Section 6 of the Act with regard to extending foreign policy controls.

With this report, the United States is extending all foreign policy controls in effect on December 31, 1998. The Department of Commerce is taking this action at the recommendation of the Secretary of State. As further provided by the Act, foreign policy controls remain in effect for replacement parts and for parts contained in goods subject to such controls. The controls administered in accordance with procedures established pursuant to Section 309(c) of the Nuclear Non-Proliferation Act of 1978 likewise remain in effect.

Each chapter that follows describes a particular category of foreign policy controls and delineates modifications that have taken place over the past year. One particular category of foreign policy controls has attracted additional attention in the last year. This is the use of unilateral sanctions by the United States. Since 1993, the United States has turned to sanctions with increasing frequency. More than half of the sanctions that the United States has applied since World War II have been levied in the past five years. While the United States has imposed broad unilateral economic sanctions only in the most egregious cases, such as North Korea, Iran, Cuba and Sudan, as the use of sanctions has increased, the effectiveness of sanctions and of the guidelines by which the United States applies them have come under increasing review.

Multilateral sanctions are generally more effective in enforcing international norms, advancing U.S. interests and defending U.S. values. Sanctions seem to be moderately to highly effective when the United States is able to garner the support and participation of a significant number of countries with economic and political weight to impose sanctions based on shared multilateral norms related to international peace, non-proliferation or prevention of a military buildup. Multilateral sanctions maximize international pressure on the offending state while minimizing damage to U.S. competitiveness. Examples of multilateral financial or trade sanctions which have been effective include Iraq, Libya, the Federal Republic of Yugoslavia, and South Africa.

However, there are also times when important national interests or core values are at stake, and the United States must show leadership by acting unilaterally in imposing sanctions on another State whose behavior warrants it. Unilateral sanctions against Cuba for the past 37 years, Iran for the past four years, as well as Sudan and Burma for the past two years, serve vital U.S. interests.

Unilateral sanctions are of varying degrees of effectiveness, depending on their goal and the nature of the country they are targeted against. In general, they are less likely to be effective than are multilateral sanctions. In today's interdependent, global economy, the ability of the United States to unilaterally deny certain trade or financial benefits to a target country is limited. Within the realm of unilateral sanctions, some measures which are not subject to foreign substitution such as denial of a U.S. quota, withdrawal of port privileges or landing rights, and actions in international financial institutions to withhold loans and assistance cannot be undone or overcome by the target country. Unilateral financial or trade sanctions, however, appear much less likely to advance United States goals.

Financial sanctions seem to be somewhat more effective than trade sanctions, given the central position of the United States in international finance. The United States plays a pivotal role in the international financial market, so the nonparticipation of U.S. financial institutions in a given transaction make it relatively more difficult for sanctioned countries to gain foreign financing. It is yet unclear whether the European Union's adoption of a single currency, the Euro, and the emergence of foreign financial centers will diminish the effect of U.S. financial sanctions. Increasing resort to unilateral financial sanctions could, however, erode international confidence in the U.S. financial system and its international role.

Since there are few products or services for which the United States is the sole provider, the economic effectiveness of trade sanctions in most cases is measured in terms not of denial but of a potentially higher price to an end-user in a sanctioned country. Removing U.S. firms from the market could restrict supply, especially for large projects or high-technology items. For widely available items, such as trucks or personal computers, the large number of alternative suppliers probably results in no increase in purchase price for the sanctioned

country. Trade sanctions could impose a cost on the sanctioned country by making it pay more for imports of less widely available items such as power plants, earth moving equipment, and commercial aircraft, and there has been some evidence that end-users in sanctioned countries may pay a higher price to acquire items from a foreign supplier who faces less competition for the sale as a result of sanctions. This potential increase in cost to the sanctioned country could be weighed against the cost to the U.S. in lost sales to provide one measure of the utility of sanctions.

Unilateral sanctions are not only less likely than multilateral sanctions to be effective, but they also impose costs on other U.S. interests ranging from conflicts with key allies to losses for American businesses and U.S. workers. With regard to the recently imposed unilateral trade sanctions on India and Pakistan, for example, exporters have provided examples of Indian companies who have announced they will no longer do business with U.S. companies and are designing out U.S. parts or components. This “designing out” phenomenon, as has been frequently noted, can damage the position of U.S. exporters beyond the loss of markets in the sanctioned country itself.

Most of the statistical data presented in the report are based on fiscal year export licensing statistics, unless otherwise noted. Commerce generates that data from the computer automated system it uses to process and track export license activity. Due to the tabulating procedures used by the system in accounting for occasional license applications that list more than one country or destination, the system has certain limitations as a means of gathering data. In addition, Commerce based the data in the report on values contained in export licenses it issued. Such values may not represent the values of actual shipments made against those licenses, because in some cases an exporter may ship only a portion of the value of an approved license.

Highlights of 1998

Embargoed Countries and Entities:

On March 20, 1998, the President announced that the United States would take a number of steps to expand the flow of humanitarian assistance to the people of Cuba, and to help strengthen independent civil society and religious freedom in that country. On May 13, 1998, Commerce helped implement these measures of resuming licensing of direct humanitarian flights to Cuba and streamlining procedures for the sale of medicines and medical equipment to Cuba. [Note: The President imposed the ban in 1996 and lifted it partially in 1998 for humanitarian flights.]

On July 29, 1998, Commerce revised the Entity List in Supplement 1 to Part 744 of the Export Administration Regulations (EAR) to add seven Russian entities under investigation by the Russian government for suspected export control violations involving weapons of mass destruction and missile technology. Exports or reexports of all items

subject to the EAR to these entities require a license, and applications will be reviewed with a presumption of denial.

Encryption:

In July 1998, Secretary Daley announced that the Clinton Administration had finalized guidelines to allow the export of encryption under a license exception to 45 eligible countries. This affects encryption exports for the world's 100 largest banks and almost 70 percent of the world's financial institutions. On September 22, 1998, Commerce issued regulations implementing these changes.

On September 16, 1998, Vice President Gore announced an update to the encryption policy which was based on input from industry groups but consistent with the protection of national security and law enforcement interests. This update will permit the export of strong encryption when used to protect sensitive financial, health, medical, and business proprietary information in electronic form. The new export guidelines will further streamline exports of key recovery products and other recoverable encryption products. In particular, for exports of non-recovery 56-bit products, the new guidelines eliminate the requirement for a commitment and business plan to develop key recovery encryption.

Commerce Control List:

In January 1998, Commerce published comprehensive changes to the Export Administration Regulations to implement the Wassenaar Arrangement's List of Dual-Use Goods and Technologies into the Commerce Control List (CCL). To simplify the classification process for exporters, Commerce also harmonized items on the CCL to conform to the European Union dual-use list and lists of other international control regimes to which the United States belongs. This January 1998 rule also imposed new requirements on exporters to report to Commerce exports of certain items made under the authority of certain license exceptions. BXA provides this information, excluding the exporter's name and dollar value of the export, to other participating countries to enhance international security and stability through the sharing of information. This rule also removed the ability for some Wassenaar Arrangement Very Sensitive List dual-use items to be exported from the United States without a license.

On July 14, 1998, the United States imposed an arms embargo on the Federal Republic of Yugoslavia (Serbia and Montenegro) in reaction to the use of excessive force by Serbian police forces against civilians in Kosovo and the acts of violence by the Kosovar Albanian extremists, consistent with United States obligations under United Nations Security Council Resolution 1160. Working in concert with the Department of State, the Department of Commerce maintains new license requirements and a policy of denial on the export on arms-related items and "crowd control" items that could be used in support of terrorist activities or to repress civilian populations. "Crowd Control" items consist of all items

already controlled for crime control reasons plus three new U.N.-based controls on water cannons (ECCN 0A989), bomb detection equipment (ECCN 2A993) and explosives (ECCN 1C998).

On December 15, 1998, Commerce notified Congress, via a Foreign Policy Report, on revisions to the Export Administration Regulations to strengthen controls on exports and reexports to Specially Designated Terrorists (STDs) and Foreign Terrorist Organizations (FTOs). A license is required for all exports and reexports by any person to STDs and FTOs of items on the Commerce Control List (CCL) and for all exports and reexports by a U.S. person of an item subject to the EAR. License applications will be reviewed under a general policy of denial. The interim rule was published in the *Federal Register* on January 8, 1999.

On December 31, 1998, Commerce notified Congress, via a Foreign Policy Report, that the Department was expanding controls on firearms items based on the Organization of American States (OAS) Model Regulations for the Control of the International Movement of Firearms. These regulations are designed to harmonize import and export controls over the legal international movement of firearms and to establish procedures to prevent the illegal trafficking of firearms among OAS member countries. Commerce anticipates publication of the interim rule in the *Federal Register* in the first quarter of 1999.

Under these provisions, the Commerce will require a license for the export of certain firearms, including shotguns, and parts, buckshot shotgun shells and parts, shotgun shells and parts, and optical sighting devices for firearms to all OAS member countries, including Canada, to prevent illegal trafficking in firearms. The Commerce already requires a license for export of all these items to all OAS member countries for human rights reasons, with the exception of Canada. In support of the OAS Model Regulations, the Commerce imposed a Import Certificate requirement on the export to all OAS member countries of those items affected by the regulations. In general, Commerce will approve license applications for the export of firearms to OAS member countries if the application is supported by an Import Certificate. Commerce will deny applications that involve end-uses linked to drug trafficking, terrorism, international organized crime, and mercenary and other criminal activities.

Unilateral Nuclear Controls:

In January 1998, a major decontrol of nuclear items took effect with the liberalization of unilateral U.S. controls on exports of pipes, valves, cranes, and pipe fittings that are used in the non-nuclear, or “balance of plant” portion of civilian nuclear power plants. Before this liberalization took effect, the turbines and generators in the non-nuclear portion of nuclear power plants did not require a license for export, while the export of the pipes, valves, and related equipment required to install them were subject to a license requirement.

On March 18, 1998, the President certified that China had complied with the nuclear non-proliferation conditions required for implementation of the 1985 U.S.-China Agreement for Peaceful Nuclear Cooperation and for lifting the 1989 Tiananmen Square Sanctions on nuclear technology exports to China. The certification allows the Commerce to approve the export of items to China controlled by the Department under the EAR, technology controlled by the Department of Energy (DOE) under 10 CFR part 810 and equipment and materials controlled by the Nuclear Regulatory Commission (NRC) under 10 CFR part 110. Lifting the sanctions had no direct effect on the Department's export control program. Items controlled for nuclear proliferation reasons still require a license and continue to be subject to interagency review by the Departments of Commerce, State, Energy, and Defense and the Arms Control and Disarmament Agency. The licensing process is the same as that accorded license applications for similar goods to other destinations.

Legislative Events:

In 1998, Commerce implemented provisions of the National Defense Authorization Act (NDAA) which require advance notification and post-shipment verification of exports or reexports of high performance computers above 2000 million theoretical operations per second (MTOPS) to end users in countries known in the EAR as Tier 3 countries (See Appendix IV). Exporters are required to submit notices to Commerce which are evaluated in conjunction with the Departments of Defense, Energy and State and the Arms Control and Disarmament Agency. If an agency raises an objection to the proposed export within ten days, the Commerce requires an export license; otherwise the exporter may ship. The Act also requires a post-shipment visit in each case, whether or not we required a license.

Signed into law on October 27, 1998, the International Religious Freedom Act of 1998 provides for the imposition of one or more diplomatic or economic sanctions against countries that have engaged in violations of religious freedom. The act also provides for the imposition of one or more economic sanctions against countries the President determines have engaged in or tolerated particularly severe violations of religious freedom. For such countries, the act also provides that the Commerce Department, with State Department concurrence, shall include on the Commerce Control List for reasons of crime control or detection and require export licenses for, items that are being used or are intended for use directly to carry out particularly severe violations of religious freedom. A general policy of denial for such items will apply to license applications to export to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights, pursuant to a determination under the Foreign Assistance Act.

In the 1998 National Defense Authorization Act, Congress mandated that all commercial communications satellites, including both those transferred by Presidential decision in 1992 and those transferred by Presidential decision in 1996, be returned to the U.S. Munitions List by March 15, 1999.

India and Pakistan:

President Clinton reported to the Congress on May 13th with regard to India and May 30th with regard to Pakistan his determinations that those non-nuclear weapon states had each detonated a nuclear explosive device. The President directed Department of Commerce to take the necessary actions to impose the sanctions described in section 102 (b)(2) of the Arms Export Control Act. On June 18, 1998, consistent with the President's directive, Commerce announced certain sanctions on India and Pakistan, as well as certain supplementary export control measures. On November 19, 1998, Commerce amended the EAR to codify the June announcement. Consistent with section 102 (b)(2) of the Arms Export Control Act, Commerce added §742.16 to the EAR codifying a license review policy of denial for the export and reexport of items controlled for nuclear proliferation (NP) and missile technology (MT) reasons to all end-users in India and Pakistan.

To supplement the sanctions of §742.16, Commerce added certain Indian and Pakistani government, parastatal, and private entities determined to be involved in nuclear, missile, or conventional weapons activities to the Entity List in Supplement No. 4 to part 744 of the EAR. License requirements for these entities are set forth in the newly added §744.11 and §744.12. Exports and reexports of all items subject to the EAR to government, parastatal, and private entities listed for their involvement in nuclear or missile activities require a license. Exports and reexports of all items subject to the EAR having a classification other than EAR99 require a license to listed military entities. The license applications will be reviewed with a presumption of denial, with limited exceptions.

Export Control Program Description and Licensing Policy

This part defines the export controls maintained for a particular foreign policy purpose that are imposed or extended for the year 1999. The licensing requirements and policy applicable to a particular control are described in this section.

Analysis of Control as Required by Section 6(f) of the Act

This part outlines the considerations or determinations, as required by Section 6(f)(2) of the Act, on the purpose of the control, criteria, alternative means, consultation efforts, and foreign availability. For each control program, the Department's conclusions are based on the following required criteria:

A. The Purpose of the Control

This section provides the foreign policy purpose and rationale for each particular control.

B. Considerations and/or Determinations of the Secretary of Commerce

- 1. Probability of Achieving the Intended Foreign Policy Purpose. This section considers or determines whether such controls are likely to achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology subject to control, and whether the foreign policy purpose can not be achieved through negotiations or other alternative means.**
- 2. Compatibility with Foreign Policy Objectives. This section considers or determines whether the controls are compatible with foreign policy objectives of the United States and with overall U.S. policy toward the country or the proscribed end-use subject to the controls.**
- 3. Reaction of Other Countries. This section considers or determines whether the reaction of other countries to the extension of such export controls by the United States is likely to render the controls ineffective in achieving the intended foreign policy purpose or to be counterproductive to other U.S. foreign policy interests.**
- 4. Economic Impact on United States Industry. This section considers or determines the effect of the controls on the export performance of the United States, its competitive position in the international economy, the international reputation of the United States as a reliable supplier of goods and technology, or the economic well-being of individual U.S. companies and their employees and communities exceeds the benefit to U.S. foreign policy objectives.³**
- 5. Enforcement of Control. This section considers or determines the ability of the United States to enforce the controls. Some enforcement problems are common to all foreign policy controls.⁴ Others are associated with only one or a few controls. Each individual control has been assessed to determine if it has presented, or is expected to present, an uncharacteristic enforcement problem.**

C. Consultation with Industry

This section discusses the results of consultations with industry leading up to the extension or imposition of controls. It also includes comments provided to Commerce by the Technical Advisory Committees (TACs); such comments are attributed to the TAC unless otherwise indicated.

D. Consultation with Other Countries

This section reflects consultations on the controls with countries that cooperate with the United States on multilateral controls, as well as with other countries as appropriate.

E. Alternative Means

This section specifies the nature and results of any alternative means attempted to accomplish the foreign policy purpose, or the reasons for extending the controls without attempting any such alternative means.

F. Foreign Availability

This section considers the availability from other countries of goods or technology comparable to those subject to the proposed export control. It also describes the nature and results of the efforts made pursuant to Section 6(h) of the Act to secure the cooperation of foreign governments in controlling the foreign availability of such comparable goods or technology. In accordance with the Act, foreign availability considerations do not apply to export controls in effect prior to June 12, 1985, to controls maintained for human rights and anti-terrorism reasons, or to controls in support of the international obligations of the United States.

General Comments from Industry

On October 13, 1998, the Department of Commerce, via the *Federal Register*, solicited comments from Industry on the effectiveness of export policy. In general, the comments indicated that Industry does not feel that unilateral sanctions are effective. A more detailed review of the comments is available in Appendix I.

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ENDNOTES

1. *Section 6(b)(2) requires the Department to consider the criteria set forth in Section 6(b)(1) when extending controls in effect prior to July 12, 1985. In addition, the report must include the elements set forth in Sections 6(f)(2)(A) (purpose of the controls); 6(f)(2)(C) (consultation with industry and other countries); 6(f)(2)(D) (alternative means attempted); and 6(f)(2)(E) (foreign availability).*
2. *Section 6(b)(1) requires the Department to make determinations regarding the criteria set forth therein when extending controls in effect after July 12, 1985. The report must also contain the additional information required in Section 6(f)(2)(A), (C)-(E) (as set forth in endnote 1, supra.)*
3. *Limitations exist when assessing the economic impact of certain controls because of the unavailability of data or because of the prevalence of other factors, e.g., currency values, foreign economic activity, or foreign political regimes, which may restrict imports of U.S.*

products more stringently than the United States restricts exports.

4. *When controls are implemented without the imposition of corresponding restrictions by other countries, it is difficult to guard against reexports from third countries to the target country, to secure third country cooperation in enforcement efforts, and to detect violations abroad and initiate proper enforcement action. The relative ease or difficulty of identifying the movement of controlled goods or technical data is also a factor. Controls on items that are small, inexpensive, easy to transport or conceal, or that have many producers and end-users, are harder to enforce.*