Export Controls and Economic Sanctions

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I. Introduction and Summary

There were a number of important developments in the U.S. export control and economic sanctions laws in 1996. However, what may be most remarkable about the year was the degree to which U.S. policymakers failed to focus on reorienting U.S. law away from the defunct priorities of the Cold War era, which still govern the overall structure of U.S. export controls. The most noteworthy events were the initiatives of U.S. policymakers in the economic sanctions area, including the controversial unilateral and extraterritorial sanctions measures enacted against Cuba, Iran, and Libya. These measures triggered the greatest level of conflict between the United States and its foreign allies over U.S. sanctions policy since the Soviet gas pipeline episode of the early 1980s. In many ways, the new sanctions were a throwback to a bygone era and represented a retreat from multilateralist principles that had, until then, been ascendant in U.S. export control and sanctions policy.

In 1996, Congress and the executive branch again, for the sixth year running, failed to agree on a common vision for revision and reauthorization of the Export Administration Act (EAA). It was evident early in the year that export control reform was a low priority both for Congress and the president in an election year. Consequently, many interested U.S. private sector groups, frustrated by the failures of concerted efforts in the past, simply focused their resources on other issues. In the end, the old EAA was extended yet again by executive order.

In the absence of statutory reform, the Commerce Department completed a substantial reorganization of the Export Administration Regulations (EAR) that implement the established EAA. While this may simplify compliance with export licensing requirements for exporters to some extent, the action did not alter the fundamental structure or underlying principles of the law, which remain rooted in the expired statute. Indeed, the basic orientation of the EAR still reflects antedated Cold War era strategic concerns. Consequently, interagency initiatives in 1996 to liberalize export controls on high-technology products with civilian commercial applications, including computer, encryption, and satellite products, are expected to have limited practical effect. On a more hopeful note, the Wassenaar "New Forum" group finally came into being in 1996 as the successor to the former CoCom regime. However, the mission of this multilateral

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entity, and the specific changes it will bring to the U.S. export control laws, remained unclear at year's end.

In the end, 1996 may best be remembered as a year in which U.S. policymakers continued to be divided on questions associated with the challenge of reconciling evolving U.S. trade interests with the new strategic concerns of the post-Cold War era. As the failure in 1996 of the United States to ratify the multilateral Chemical Weapons Convention suggests, rather than try to come to terms with these issues, U.S. elected officials apparently focused on advancing short-term domestic political objectives and a domestic electoral agenda.

II. U.S. Unilateral Economic Sanctions Initiatives

Perhaps the most remarkable developments of 1996 were the statutory expansion of the U.S. sanctions regimes against Cuba, Iran, and Libya. Efforts by the 104th Congress to enact legislation to toughen the U.S. sanctions already in place against these countries did not come as a surprise. Congress has long taken a much more aggressive approach to sanctions issues than the executive branch of the U.S. Government. In the past, however, the executive branch has tempered such congressional initiatives and asserted itself on these issues under the president's constitutional prerogative with regard to national security and foreign policy issues.

Other sanctions initiatives in Congress in 1996 were diluted by executive branch intervention. One of these was an initiative that led to enactment in the fall of new sanctions against Burma (Myanmar), establishing a discretionary mandate for the president to take punitive action against the military regime in Rangoon for suppressing democratic reform and committing human rights abuses.[1] A similar but unsuccessful congressional sanctions effort in 1996 was directed against Nigeria based on similar human rights and democracy concerns.[2]

What was somewhat unexpected in 1996 was that the president of the United States would approve new sanctions laws with extraterritorial enforcement provisions clearly bound to aggravate tensions with important U.S. allies. Moreover, it was equally surprising that the president would enact laws that could significantly limit executive branch authority in this area of policy. However, that is exactly what President Clinton did when he signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act[3] and the Iran and Libya Sanctions Act of 1996.[4]

A. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (commonly known as the Helms-Burton law) was signed into law by President Clinton on March 1, 1996, in direct response to the downing of U.S. civilian aircraft by Cuban fighter aircraft over the Florida Straits late in February. Although the law was specifically intended to put further pressure on the Cuban Government to permit a transition to democracy, it was more the product of U.S. electoral politics than balanced strategic planning. Simply stated, in late February 1996, President Clinton and his political advisors were preoccupied with the president's campaign for reelection. Florida, and to a lesser extent New Jersey, were considered critical to that effort, and the

1. These sanctions provisions were enacted as an amendment to the Omnibus Appropriations Bill for 1997 in Title V section 101(c) of the final bill. Omnibus Appropriations Bill for 1997, Title V § 101(c), Pub. L. No. 104-208, 104th Cong. (1996).
2. *See* Nigeria Democracy Act, S. 1419 and H.R. 2697, 104th Cong. (1996).
3. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub. L. No. 104-114, 104th Cong. (1996).
4. Iran and Libya Sanctions Act of 1996 (ILSA), Pub. L. No. 104-172, 104th Cong. (1996).

Cuban-American communities in each of these states were viewed as important constituencies whose concerns needed to be addressed. Although the Clinton administration previously had strongly opposed the core provisions of the Helms-Burton initiative, it quickly reversed its position following the incident in the Florida Straits. Now that the bill is law, it presents the executive branch with significant challenges that have broader ramifications for U.S. economic sanctions policy.

1. *Private Right of Action*

Perhaps the most controversial provisions of the Helms-Burton law are the Title III provisions establishing a private right of action for U.S. citizens against persons who traffic in property allegedly expropriated by the Cuban Government.[5] Under the law's broad definition of trafficking, foreign companies with Cuban holdings, and companies that do business with Cuban entities, face the possibility of being sued in the U.S. federal courts by naturalized Cuban-Americans and other U.S. nationals with claims against Cuba.[6] In some cases, the law provides for the award of treble damages.[7] Moreover, the law expressly disallows use of the Act of State doctrine as a defense in such actions.[8] The Title III provisions, in particular, have been the focus of hostile responses—including the enactment of foreign blocking statutes and initiation of challenges in the World Trade Organization and under the North American Free Trade Agreement—by some of the United States' closest allies.

2. *Suspension of Private Right of Action*

Significantly, the new law gives the president authority to suspend the Title III private right of action provisions for six-month intervals.[9] President Clinton has already exercised this option on two occasions—in August 1996 and January 1997. In announcing the second such decision, the president indicated that he intended to extend these suspensions on an ongoing basis as long as U.S. allies continue to pressure Cuba to adopt reforms.

While President Clinton's actions were clearly intended to diminish the concerns of U.S. allies, they also prompted bitter criticism from some congressional champions of the new law and threats of possible future action in 1997 to force the administration to take stronger action under the law. As the events of February and March 1996 illustrate, unforeseen incidents involving Cuba could easily precipitate a crisis leading to a change in the president's position on the issue. Thus, considerable uncertainty continues to be associated with Title III of the Helms-Burton law, notwithstanding suspension of the private right of action provisions.

3. *Visa Restrictions*

Another controversial aspect of the Helms-Burton law is the provision, under Title IV, for the denial of visas to and exclusion from the United States of foreign persons, including foreign executives or their agents (and members of their families), if they are associated with trafficking in property allegedly expropriated by Cuba.[10] Such persons also may be subject to prosecution

5. LIBERTAD Act, Title III § 306(a). The private right of action provisions were initially scheduled to take effect August 1, 1996. However, as indicated below, the provisions were suspended for the balance of 1996 by President Clinton under discretionary authority granted to him under the law.

6. *See* LIBERTAD Act, Section 4(13).

7. *Id.* Title III § 302(a)(3).

8. *Id.* § 302(a).

9. *Id.* § 306.

10. *Id.*

by the U.S. Government and/or private U.S. citizens based on their corporate affiliation.[11] However, in 1996 the U.S. Department of State, which administers these provisions, took only limited action against the executives of several foreign companies.[12]

4. *Compromise of Executive Branch Discretion*

Finally, another important aspect of the Helms-Burton is its unprecedented codification of the U.S. economic sanctions against Cuba. Previously, the sanctions were principally authorized and implemented by a series of executive orders.[13] Title I of the new law gives force to these provisions as a matter of statutory law, however. Thus, the sanctions can only be scaled back or lifted henceforward by a formal act of Congress.

Accordingly, this provision significantly curtails the president's authority over the Cuban sanctions regime. As a practical matter, the president will now be forced to seek the approval of Congress in order to alter U.S. policy toward Cuba.[14] President Clinton's enactment of the law thus could be interpreted as a surrender of significant executive branch powers over national security and foreign policy concerns in the sanctions area. However, it can be expected that the administration would take a different view of this issue. Therefore, these provisions in particular provide a potential basis for further conflict between the president and Congress on sanctions issues.

B. Iran and Libya Sanctions Act of 1996

The Iran and Libya Sanctions Act of 1996 (ILSA) expands the preexisting U.S. embargoes against Iran and Libya by establishing a controversial secondary U.S. boycott against foreign companies otherwise exempt from U.S. jurisdiction for engaging in certain types of oil and gas sector investments in either country.[15] Although the preexisting U.S. sanctions already imposed extraterritorial restrictions on exports of U.S. goods to either country, the secondary boycott provisions of the new law have seriously antagonized U.S. allies worldwide.[16] Although the Clinton administration previously repudiated the secondary boycott provisions, the president reversed that position by signing the new law on August 5, 1996, apparently in response to pressures associated with the presidential election campaign and speculation that the explosion of TWA Flight 800 over Long Island was linked with international terrorism.

1. *Iran*

With regard to Iran, ILSA mandates imposition of U.S. sanctions against foreign companies that invest $40 million or more in one year in the Iranian petroleum sector.[17] However, the

11. *See id.* § 302(a)(1).

12. In July, the State Department initiated such action against executives associated with a handful of companies, including companies based in Canada, Mexico, and Italy.

13. *See* Cuban Assets Control Regulations, 31 C.F.R. Pt. 515 (1996).

14. Among other things, the law also mandates that the United States terminate foreign aid to Russia and other independent states of the former Soviet Union that provide assistance to or engage in nonmarket-based trade with Cuba. *See* LIBERTAD Act, Title I § 106(c).

15. The Iranian Transactions Regulations are codified at 31 C.F.R. Pt. 560 (1996). The Libyan Sanctions Regulations are codified at 31 C.F.R. Pt. 550 (1996).

16. Given the longstanding opposition of the United States to secondary boycotts imposed by other countries—especially the Arab boycott against Israel—it is particularly ironic that the Clinton administration would enact a law with such provisions.

17. ILSA § 5(a).

threshold may be lowered to $20 million for foreign companies that refuse to cooperate with U.S. efforts to isolate Iran.[18]

2. *Libya*

ILSA's sanctions against Libya are somewhat broader, consistent with the preexisting trade restrictions established by the multilateral U.N. embargo. ILSA calls for mandatory imposition of U.S. sanctions against any foreign company that violates the U.N. ban on exports to Libya of oil and gas sector equipment, goods or services that might facilitate Libyan acquisition of weapons of mass destruction, or goods or services associated with the Libyan aviation sector.[19] Like the measures against Iran, ILSA imposes mandatory sanctions against foreign companies that make investments of more than $40 million a year in Libya's petroleum sector.[20] However, unlike the provisions for Iran, this threshold may not be reduced.[21]

3. *ILSA Sanctions*

ILSA requires the president to impose at least two of six possible sanctions, for a period of two or more years, against foreign companies that violate the investment and trade restrictions against either Iran or Libya.[22] Potential sanctions include: (1) a ban on Export-Import Bank funding for exports to the entity concerned; (2) denial of U.S. export licenses for exports or reexports of U.S. products to the sanctioned entity; (3) a ban on loans exceeding $10 million by U.S. financial institutions in any 12-month period to a sanctioned entity; (4) prohibition of participation by a sanctioned entity in U.S. Government contracts; (5) a ban on imports of goods or services to the United States that are traceable to a sanctioned entity; and (6) a prohibition against the use of a sanctioned foreign financial institution as a repository for U.S. Government funds or as a primary dealer in U.S. Government debt instruments.[23]

4. *Implementation and Enforcement*

In 1996, the Clinton administration took a reluctant approach to implementation and enforcement of ILSA. Despite several high-profile oil and gas sector deals with Iran involving Turkey, Malaysia, and other countries, and calls for action by members of Congress, the administration refrained from taking any enforcement action under ILSA in 1996. Although State Department officials suggested that they would clarify their interpretation of ILSA's mandate and how they intended to apply the law in the fall, in the end the administration gave little indication of how it will proceed. Guidance with regard to these issues published by the State Department in December 1996 left open questions concerning what circumstances might lead to related enforcement actions by the United States.[24] Thus, the administration preserved as much as possible its ability to exercise discretion under the law.

18. *Id.* § 4(d).
19. *Id.* § 5(b)(1).
20. *Id.* § 5(b)(2).
21. *See* ILSA § 4(d) and ILSA § 5.
22. ILSA §§ 5(a), 5(b), and 9(b). ILSA sanctions apply only to "new" investments entered into after August 5, 1996, the effective date of the law. Investments initiated prior to that date are specifically exempt from the secondary boycott provisions. ILSA §§ 5(a), 5(b)(2). Notwithstanding guidance issued in December 1996, it remains unclear what types of investments may be treated as actionable by the State Department under ILSA. *See* 61 Fed. Reg. 66,067 (December 16, 1996).
23. ILSA §§ 6(1)-6(6).
24. 61 Fed. Reg. 66,067 (December 16, 1996).

C. Administration Approach to the New Sanctions Laws

The Clinton Administration's actions in 1996 with respect to the Iran and Libya Sanctions Act and the Helms-Burton law against Cuba, particularly following the U.S. election in November, were apparently intended to reassure U.S. allies that the United States would take a restrained approach to the new sanctions laws. However, the administration's actions sparked significant criticism by members of Congress, and threats of possible new unilateral sanctions initiatives in 1997. Therefore, at the close of 1996, it appeared that the successful unilateral sanctions initiatives of the 104th Congress against Cuba, Iran, and Libya might foreshadow a return to a trend in U.S. sanctions practice that lost favor following the Soviet gas pipeline sanctions episode of the early 1980s. At the same time, a variety of private sector initiatives opposing such measures took shape in response. Consequently, a significant debate on sanctions issues was joined by year's end.

III. Developments in the U.S. Export Control Laws

Perhaps most significant in 1996, for yet another year, Congress and the Executive Branch were unable to agree on how to revise the Export Administration Act.[25] Since 1990, when the EAA lapsed in the twilight of the Cold War, the statute has simply been extended from year to year by a series of executive orders. President Clinton continued that tradition in 1996, notwithstanding questions concerning the legal basis for these extensions of the export control law.[26] Despite a substantial reorganization of the Export Administration Regulations that implement the EAA, the fundamental structure and orientation of the export control regime remained essentially intact as the year came to a close. By the end of the year, it was evident that the officials charged with administration of the U.S. export controls were focused more on enforcement of established trade restrictions than reform of these laws. Thus, despite significant cosmetic changes, the underpinnings of U.S. export controls remained largely unchanged in 1996.

A. The Export Administration Regulations

Although the reorganized Export Administration Regulations published by the Department of Commerce in March 1996 caused some initial consternation to veteran export control practitioners, in most respects, the new regulations carry forward the substantive policies of the existing law.[27] While the new regulations reflect a change in the basic terminology associated with licensing requirements and exceptions, most newly decontrolled categories of goods and technology were previously eligible for unrestricted export under general license.

As a practical matter, and notwithstanding such superficial changes, the essential requirements governing submission and review of formal applications, when necessary to obtain written

25. Export Administration Act of 1979, *as amended*, 50 U.S.C. app. §§ 2401-2420.

26. Exec. Order no. 12924, 61 Fed. Reg. 42,527 (August 15, 1996).

27. The new EAR were published in the Federal Register on March 25, 1996. 61 Fed. Reg. 12,714 (March 25, 1996). The regulations are codified at 15 C.F.R. Pts. 730-774 (1996). The new EAR also reflect another noteworthy, if belated, development in January 1996, when the Commerce Department published regulations to lower the thresholds for EAR export restrictions and controls for computer technology. *See* 61 Fed. Reg. 2099 (January 25, 1996), codified at 15 C.F.R. Pts. 770-776, 785-787, 799 (1996). However, this relaxation of export restrictions lagged far behind technical developments in the computer industry and was the first such liberalization of these EAR controls since 1993.

authorization for exports from the Commerce Department, were not significantly changed. Although the new EAR simplify and reduce administrative paperwork requirements, with only limited exceptions, they do not implement significant changes in restrictive licensing policies.[28]

From an exporter's perspective, the new regulations may be viewed as an improvement to the extent that they consolidate, and therefore clarify, many of the special foreign policy and national security based trade restrictions governing specific countries and categories of products. For example, the new EAR include a consolidated chart that summarizes licensing requirements for specific countries and reflects some slight changes in country groupings consistent with prior changes of corresponding U.S. export control policy.[29] Thus, it may be somewhat easier for companies to determine what licensing requirements apply to a specific proposed export. Despite such simplification of the old export control regulations, however, the new EAR still may be daunting to the uninitiated and continue to impose significant impediments to U.S. exports.

Implementation of the new regulations presented veteran exporters with the tedious task of relearning the established regulatory framework. The new EAR harmonizes the ECCN commodity classification headings included in the Commerce Control List with the corresponding classification systems of the European Union and other countries. The change required U.S. exporters to undertake a global review and reclassification of their products. In a few instances, the new classifications resulted in more restrictive licensing policies for some items than previously applied.[30] Exporters were required to conform with the new regulations by January 1997, following a grace-period for conversion that was extended through the end of 1996.

B. Commodity Jurisdiction Transfers

In 1996, following great controversy and effort by U.S. officials and private sector interests alike, the Clinton administration approved some significant commodity jurisdiction transfers for certain dual-use items previously controlled under the Arms Export Control Act (AECA)[31] and corresponding International Traffic in Arms Regulations (ITAR).[32] In particular, the decisions affecting commercial communications satellites and hot-section technology and encryption products were hailed by U.S. officials as an important liberalization of U.S. export restrictions. However, these actions may have little practical effect.

1. *Satellite and Hot-Section Technology*

After a prolonged review, the determination transferring commodity jurisdiction for commercial communications satellites and hot-section technology from the State Department to the Department of Commerce was issued in October 1996.[33] At the same time, however, special

28. The new EAR also include changes intended to streamline procedures for the review of export license applications under a new and shorter 90-day deadline established by executive order in December 1995. Exec. Order No. 12981 (December 5, 1995), 61 Fed. Reg. 62,981 (December 8, 1995).

29. 15 C.F.R. Pt. 738, Supp. no. 1 (1996).

30. *See, e.g.*, J. Black, *Details, Details, Details—Converting to the New Regs*, The Export Practitioner (July 1996).

31. 22 U.S.C. § 2751 (as amended).

32. 22 C.F.R. Pt. 120, *et seq.* (1996).

33. 64 Fed. Reg. 54,540 (October 21, 1996).

foreign policy and national security restrictions that closely parallel similar restrictions previously applied by the State Department under the ITAR were also imposed on affected items.[34]

The commodity jurisdiction transfer for commercial communications satellites and hot-section technology had long been advocated by U.S. aerospace manufacturers. Accordingly, these companies publicly hailed the administration's decision. However, many industry representatives privately have expressed significant reservations about the new restrictions applied in review of related licensing issues under the new EAR.

As a general matter, the transfer mandates Commerce Department licensing for such exports to any destination other than Canada, as was the case under ITAR control. Related Commerce determinations are to be made on a case-by-case basis. The same agencies that previously were involved in State Department licensing decisions under the ITAR are also to have a role in determinations made under the EAR. However, unlike licensing procedures for other categories of products under the EAR, an interagency committee, rather than the Commerce Department itself, will have the final say in related licensing decisions. Thus, apart from the use of Commerce Department rather than State Department forms, it is unclear whether the transfer will result in any practical difference in the decision-making process, or provide any advantage to U.S. exporters.

2. *Encryption*

In October 1996, the White House also announced its decision to liberalize restrictions on exports of encryption technology by transferring commodity jurisdiction for certain encryption items from the State Department to the Department of Commerce.[35] Effective January 1, 1997, the action raised the export licensing threshold for control of encryption algorithms from a 40-bit to a 56-bit key length. However, the transfer places some significant burdens on U.S. exporters.

Under the determination, U.S. manufacturers seeking export licenses from the Commerce Department for such encryption products are required to develop a key recovery system within two years as a condition for licensing approval.[36] Moreover, the new interagency process established for Commerce Department review of related licensing questions, like that established for commercial communications satellites and hot-section technology, will involve the same agencies formerly involved in State Department review for such products, but with the addition of FBI involvement. Consequently, many in the private sector have been left wondering to what extent the "liberalization" of these controls will result in meaningful advantages for would-be exporters, and whether the new procedures will simply complicate the licensing process for items previously eligible for State Department licensing.

IV. Conclusions

The apparent focus of U.S. private sector groups in 1996 on efforts to combat the new trend of unilateralism in U.S. economic sanctions policy in some ways may be seen as a position

34. It should be noted that the transfer did not affect products classified as space launch vehicles. These remain subject to ITAR control. Production and manufacturing data, and related services and technical assistance, for satellites and other types of spacecraft also remain subject to State Department control under the ITAR.

35. The decision was implemented by executive order in November 1996. Exec. Order No. 13,026 (November 19, 1996).

36. *See* 61 Fed. Reg. 6,852 (December 30, 1996).

of retreat from efforts in previous years that concentrated on promoting a restructuring of the U.S. export control laws through revision of the Export Administration Act. Many of the same U.S. industry groups engaged in efforts to oppose the upsurge of unilateral U.S. sanctions in 1996 were at the forefront of previous initiatives to secure meaningful reform of the U.S. export controls. They recognized that 1996 was not so much a year of reform as it was a year in which U.S. lawmakers, preoccupied with domestic political priorities in an election year, retreated to the old artifices of a bygone era in U.S. export policy. Thus, by the end of the year, the issue of U.S. unilateral sanctions had taken center stage in the public debate on U.S. export control and economic sanctions policy.