International Lawyer

Volume 33
Number 2 *International Legal Developments in Review: 1998*

Article 6

1999

Economic Sanctions and Export Controls

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I. Introduction

Changes to U.S. export controls and economic sanctions were driven by two competing, diametrically opposed, trends in 1998. On the one hand, we heard heightened calls for limiting export controls and sanctions, particularly unilateral measures or those with a broad extraterritorial reach. On the other hand, we saw a continuing proliferation of new sanctions programs and frenzied pleas for more restrictive export controls. This policy tug-of-war served as a reminder that these complex legal regimes are constantly shaped by domestic political forces, as well as the foreign policy, national security, and nonproliferation concerns that they are designed to address. Despite growing calls for reform and retrenchment, recent experience suggests that export controls and economic sanctions are likely to remain fixtures of American diplomacy and security policy for years to come.

While we have made every effort to identify major changes to these ever-evolving legal regimes, the issues identified below are by no means exhaustive. The political and policy debates that drove changes to U.S. export controls and sanctions regimes in 1998 are, in large measure, beyond the scope of this article. Instead, we focus on the end result—namely, statutory and regulatory developments that impose new or different compliance obligations on U.S. persons and companies engaging in international business activities. Consistent with similar surveys in prior issues, we focus below on changes to (1) the Commerce Department's Export Administration Regulations; (2) the State Department's International Traffic in Arms Regulations; and (3) trade and economic sanctions administered primarily by the Treasury Department's Office of Foreign Assets Control. All of these regulatory programs have been created and modified—over many years—through a combination of legislative and executive action. As a result of this shared parentage, which is not always cooperative, the policy direction of these regimes often breeds tension or even open conflict between the U.S. Congress and the White House.

Given the overlapping nature of various export controls and sanctions measures, it is difficult and somewhat artificial to organize them in a coherent fashion. As suggested above, these

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regulatory regimes are typically based on multiple layers of legislative and executive pronouncements, and they often bear the scars of interagency wrangling even within the Executive Branch. In this sense, 1998 was no different from prior years. Many of the developments discussed below, particularly sanctions measures, were implemented by several government agencies, in a number of different regulatory programs, acting under various statutory authorities. Despite their hybrid nature, however, we have divided these developments into two general categories: (1) sanctions, which tend to be directed at particular countries or groups, and (2) export controls, which generally apply to a broader range of transactions based on the nature of the products or technology being shipped.

II. Sanctions: New and Evolving Programs

In 1998, the federal government created a number of new sanctions programs, issued implementing regulations for others already in place, and made modifications to certain long-standing regimes.

A. Measures Targeting Specific Countries

1. *India and Pakistan*

In response to a series of nuclear weapons tests by India and then Pakistan in May, President Clinton imposed statutorily-mandated sanctions under the Nuclear Proliferation Prevention Act of 1994 (NPPA), otherwise known as the Glenn Amendment. The Glenn Amendment, a provision in the Arms Export Control Act that previously caught little attention, mandates a menu of sanctions against any "non-nuclear" state that "detonate[s] a nuclear explosive device."[1] Ambiguities in the statute generated considerable confusion—both within government and the business community—about the exact nature and scope of the sanctions to be imposed. At the same time, the unilateral and rigid nature of the sanctions caused both the Clinton Administration and the Congress to look for ways to make these sanctions more flexible and, more generally, to reconsider how future legislative sanctions measures should be drafted and implemented.

The first step under the Glenn Amendment was simple and swift. Almost immediately following India's surprise nuclear tests, President Clinton issued a determination that India had "detonated a nuclear explosive device on May 11, 1998," and he directed the relevant government agencies to impose sanctions under the NPPA.[2] The President issued a similar determination with respect to Pakistan shortly after its detonation of a nuclear device on May 28, 1998.[3]

a. Dual-Use Exports

Implementation of the sanctions, however, was no easy matter. Turning to the broad list of penalty measures required under the NPPA, the Administration struggled to figure out what a number of the provisions actually meant. One of the export-related measures, for example, required the "authorities of section 2405 of title 50 . . . shall be used to prohibit exports to [the targeted country] of specific goods and technology."[4] This provision raised more questions than answers, particularly since the Export Administration Act (EAR) had not even been in

1. Nuclear Proliferation Prevention Act of 1994, 22 U.S.C. § 3201 (1994).
2. *See* Presidential Determination No. 98-22, 63 Fed. Reg. 27,665 (1998).
3. *See* Presidential Determination No. 98-25, 63 Fed. Reg. 31,881 (1998).
4. 22 U.S.C. § 2799aa-1(b)(2)(G) (1994).

effect since 1994.[5] Based on previous experience, some practitioners expected the government to interpret this provision narrowly to require the denial of all new license requests for goods and technology that were already subject to license requirements for export to India.[6] At the same time, the Commerce Department was under considerable pressure from other agencies—most notably the State Department—to impose a virtual export embargo against India. With little guidance from the plain meaning of the statute, this issue took many months to resolve.

On June 18, the Commerce Department announced a licensing policy of denial for exports and reexports of items controlled for nuclear nonproliferation and missile technology reasons to India and Pakistan, with limited exceptions.[7] In addition, the announcement indicated that the Department would soon publish a list of entities in both countries for which export license requirements would be expanded. More than six months later, on November 19, 1998, the Commerce Department issued the long-awaited list of entities in India and Pakistan that are now subject to strict export sanctions.[8] The new list added more than two hundred government, parastatal, and private entities to the Commerce Department's "Entity List," set forth in part 744 of the EAR. Exports and reexports to the designated entities are now subject to license requirements and, in most cases, a policy of export denial. This list filled a legal and policy void that had existed since the Glenn Amendment sanctions were first announced in May.

The new EAR export restrictions are curious in a number of respects. First, it is by no means clear that they were mandated by the Glenn Amendment. On the contrary, they arguably go beyond the scope of what was required by the ambiguous provision cited above. Indeed, the Commerce Department has indicated that these nonproliferation controls, which reach a broad range of commercial entities in India, were intended as a compromise between more limited restrictions and a total export embargo that was pushed for by the State Department. In any event, these sanctions are likely to remain in place for the foreseeable future, even though certain other Glenn Amendment sanctions were lifted even before these were imposed.

The EAR controls also take the unusual step of creating a favorable licensing policy for exporters that can establish a history of business dealings with certain sanctioned entities. This policy strikes some practitioners as a bit odd, given that it appears to reward those companies that have been dealing with these entities of proliferation concern, while effectively penalizing companies that have conducted little or no business with them. In a similar vein, the new regulation included a thirty-day savings clause for goods that were already "in-transit" when the regulation was published on November 19. This undoubtedly benefitted companies that had continued to conduct business as usual, notwithstanding the June 18 warning that a sanctioned entities list was imminent. At the same time, companies that had shown restraint while

5. The EAA lapsed in 1994 and has remained dormant ever since. In the absence of EAA renewal legislation, the President has extended the Commerce Department's export control regulations under the statutory authority of the International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1994).

6. Such an approach would have been consistent with the Commerce Department's interpretation of a similar provision in the Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, 106 Stat. 2571 (1992). Under that law, Commerce took the position that a provision barring exports of "items subject to control under section 5 or 6" of the EAA applied only to items that were already subject to an export license requirement for export to Iran or Iraq. While those two countries were, of course, subject to far broader trade restrictions, the Iran-Iraq Arms Non-Proliferation Act was not used as the basis for imposing additional export licensing requirements.

7. This licensing policy was never published in the Federal Register or the EAR. Instead, it was posted on the Commerce Department's web site. If it continues, this practice of "alerting" the business community only through unofficial means could raise due process and rule of law questions.

8. *See* 63 Fed. Reg. 64,322 (1998) (to be codified at 15 C.F.R. pts. 742, 744).

the regulations were being promised for months—and held up shipments to India—could not take advantage of the savings clause.

b. Munitions List Controls

A second export restriction, more clear on its face, was implemented by the State Department's Office of Defense Trade Controls (ODTC) only one week after the presidential declaration. On May 20, 1998, ODTC amended its International Traffic in Arms Regulations (ITAR) to impose a policy of denial for any new requests to export Munitions List items to India.[9] In addition, ODTC announced that all outstanding ITAR licenses and approved agreements involving transfers to India were suspended.[10] ODTC implemented a similar policy with respect to Pakistan, shortly after Pakistan conducted its own nuclear tests.[11]

c. Financial Sanctions

The Glenn Amendment also included a number of far-reaching financial sanctions, including a restriction on lending by U.S. banks which created considerable confusion. One prohibition—the denial of any credit, credit guarantees, or other financial assistance by the U.S. government—made both sanctioned countries ineligible for *new* programs or assistance offered by the U.S. Export-Import Bank, the Overseas Private Investment Corporation, the Trade and Development Agency, and the Agency for International Development.[12] Other sanctions mandated under the statute included termination of all foreign military financing to India and Pakistan.[13] As noted above, the most confusing and controversial financial sanction was the prohibition against the extension of loans or other credit by U.S. banks to the Indian government. For months following the announcement of sanctions, the Administration and the banking community struggled to figure out how to implement these restrictions—which agency would implement them; did the term "loan or extension of credit" include letters of credit and other banking activities in support of commercial transactions; would the prohibition extend to entities owned or controlled by the government of India or Pakistan? With the exception of the prohibition against lending by U.S. banks to the government of India (which was never implemented), all of these financial sanctions were imposed in the spring and later lifted by presidential waiver as authorized by new legislation.[14]

d. Efforts to Scale Back

While the Administration struggled to implement the mandatory sanctions, Congress took two legislative steps to lessen the impact of the sanctions and to provide greater flexibility to the Administration. In July, faced with the prospect of losing millions of dollars in wheat sales, Congress passed a law that effectively excepted U.S. agriculture credit guarantees from the sanctions.[15] The President signed the bill only one day before U.S. exporters were able to bid on a major Pakistani wheat purchase. He argued that the waiver legislation "ensure[d] that

9. *See* 63 Fed. Reg. 27,781 (1998). The revocation was effective as of May 13, 1998.
10. *See id.*
11. *See* 63 Fed. Reg. 33,122 (1998). This revocation also took effect retroactively, on May 30, 1998.
12. *See* 22 U.S.C. § 2799aa-1(b)(2)(A) (1994).
13. *See* 22 U.S.C. § 2799aa-1(b)(2)(C) (1994).
14. *See infra* note 17 and accompanying text.
15. Agriculture Export Relief Act of 1998, Pub. L. No. 105-194, 112 Stat. 627.

U.S. wheat and other products will not be the unintended victims of an important nonproliferation law."[16]

Congress also enacted a broader bill, the India-Pakistan Relief Act of 1998,[17] which gave the President the option of waiving a number of the sanctions imposed against India and Pakistan. (This step reflected concerns about the rigid and permanent nature of the mandated sanctions, as well as complaints from the Administration that it lacked the necessary diplomatic flexibility to manage the crisis or provide incentives to the targeted governments to change their behavior.) In exercising this authority on December 1, 1998, President Clinton restored the Eximbank, OPIC, and TDA programs with respect to India and Pakistan, and avoided having to impose the restrictions on the activities of U.S. banks.[18]

2. *Yugoslavia*

In June, responding to Serbia's continued repression of ethnic Albanians in Kosovo, President Clinton issued an executive order blocking property of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republics of Serbia and Montenegro, and prohibiting new investment in Serbia.[19] The June executive order was intended to parallel the European Union's decision to impose a similar investment ban and asset freeze on Yugoslavia.

On October 13, 1998, these multilateral sanctions were implemented—in the form of regulations—by the Treasury Department's Office of Foreign Assets Control (OFAC).[20] While these sanctions do not impose a trade embargo, they make it extremely difficult to effect payment in connection with lawful trade transactions. Exports of goods to the targeted governments or government entities[21] are permitted under a regulatory exception, but only if payments are made in accordance with the form of payment restrictions set forth in section 586.513(a) (payment within thirty days in bank notes, currency of any kind, or barter).[22] These payment limitations, which OFAC officials say also bar payments through any Serbian bank, have made it virtually impossible for U.S. companies to conduct business in Serbia, even for permitted trade transactions or dealings with private entities that are not caught by the blocking order.

3. *Burma*

In May of 1998, OFAC issued its long-awaited regulations implementing the ban on new investment in Burma.[23] Almost exactly one year earlier, President Clinton had issued an executive order imposing the new investment ban, but certain key terms remained to be defined.[24] The President's action was taken under the so-called "Cohen-Feinstein Amendment," adopted by Congress in response to the Burmese government's repressive policies.[25] Consistent with the

16. Statement by the President (visited Jan. 6, 1999) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1998/7/15/11.text.1>.

17. *See* Pub. L. No. 105-277, 112 Stat. 2681 at 48 (1998). Referred to as the "Brownback waiver authority".

18. Presidential Determination No. 99-7 (visited Feb. 3, 1999) <http://pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1998/12/2/7.text.1>.

19. Executive Order No. 13,088, 63 Fed. Reg. 32,109 (1998).

20. *See* 63 Fed. Reg. 54,575 (1998) (to be codified at 31 C.F.R. pt. 586).

21. As defined in the Executive Order and the Regulations, the term "Government of the Federal Republic of Yugoslavia" is defined broadly to include any entity or organization that is owned or effectively controlled by the government. *See* 63 Fed. Reg. 32,110 (1998); 31 C.F.R. § 586.306 (1999).

22. 31 C.F.R. § 586.513 (1999).

23. 63 Fed. Reg. 27,846 (1998) (to be codified at 31 C.F.R. pt. 537).

24. Executive Order No. 13,047, May 20, 1997, *available in* 1997 WL 272472.

25. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-121, 3009-166.

statute, OFAC's investment ban applies to all "U.S. persons." U.S. persons are defined to include U.S. citizens, residents, and companies organized under the laws of the United States—including their foreign branches. Although foreign subsidiaries of U.S. companies are not directly covered, a prohibition barring U.S. persons from approving or facilitating any new investment by non-U.S. persons could implicate the U.S. parent of any foreign subsidiary making new investments in Burma. Also consistent with the statute, the term "new investment" is defined broadly to include virtually any transaction or contractual commitment involving the economic development of resources in Burma. The executive order and the regulations define "resources" to include "natural, agricultural, commercial, financial, industrial, and human resources" located within Burma. "New investment" does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology.[26]

Although Burma is a significant market for relatively few U.S. companies, the sanctions illustrate the continuing propensity of the United States to use trade and economic sanctions as instruments of foreign policy. Moreover, like recent sanctions measures against Iran, Libya, and Sudan, the new investment prohibition is a unilateral U.S. initiative, without any comparable multilateral restrictions.

4. *Sudan*

On July 1, 1998, nearly eight months after sanctions against Sudan were imposed by executive order, OFAC issued regulations implementing those sanctions.[27] Consistent with the executive order, the regulations blocked all Sudanese government assets subject to U.S. jurisdiction and prohibited virtually all trade and investment transactions between the United States and Sudan. Like most recent sanctions programs, these restrictions do not apply directly to the activities of foreign subsidiaries of U.S. companies, but they strictly prohibit any U.S. person or parent company from "approving or facilitating" otherwise permitted third country trade with Sudan.

Perhaps the most newsworthy feature of OFAC's Sudan sanctions is that they offer OFAC's first regulatory guidance on the meaning of facilitation. Section 538.407 defines "facilitation" as "any action . . . that assists or supports trading activity with Sudan by any person." This includes financing a trade, insuring trade, or warranting the quality of goods sold by a subsidiary to the Government of Sudan.[28] The regulations confirm, however, that certain passive activities (such as reviewing reports of a foreign affiliate's business in Sudan) are not prohibited. These definitions are consistent with OFAC's established practice under other sanctions programs, but this is the first time they have been articulated in regulations. While they may help to interpret parallel prohibitions against approval or facilitation in other sanctions regimes, OFAC takes the position that each regulatory program is different, even to the point where similar language can have different meaning.

In addition to the new regulatory program, Congress attempted to codify the ban on imports from Sudan as part of the Religious Persecution Act.[29] This effort failed, however, in the House Ways and Means Committee because of committee jurisdiction concerns, as well as broader opposition to the imposition of additional unilateral sanctions.[30]

26. *See* 31 C.F.R. § 537.314 (1999) ("U.S. person"); 31 C.F.R. § 537.308 (1999) ("new investment"); 31 C.F.R. § 537.311 (1999) ("resources"); 31 C.F.R. 537.204 (1999) ("exempt transactions").

27. *See* 63 Fed. Reg. 35,809 (1998) (to be codified at 31 C.F.R. pt. 538).

28. 63 Fed. Reg. 35,815 (1998) (to be codified at 31 C.F.R. § 538.407).

29. *Ways and Means Strikes Sudan Import Ban from Religious Persecution Bill*, 16 INSIDE U.S. TRADE, May 8, 1998, at 28.

30. *Id.*

5. *Iran*

The Clinton Administration made several changes to the Iran sanctions regime during 1998. Although it would be a stretch to characterize them as liberalizations, the White House did take a number of steps that limited the extraterritorial reach of U.S. sanctions and prevented a possible expansion of existing sanctions.

a. Reduced Reporting

On November 10, OFAC trimmed back a regulatory provision requiring foreign affiliates of U.S. companies to report certain oil-related transactions in Iran, including transactions involving petrochemicals and oilfield supplies, equipment, and services.[31] Although the U.S. sanctions imposed in 1995 did not subject foreign subsidiaries of U.S. companies to the person-based controls under the Iran sanctions, OFAC imposed this reporting requirement in an effort to prevent U.S.-based oil companies from circumventing the sanctions by channeling Iran business through their foreign affiliates. The recent amendment to the regulation "eliminates Iranian-origin petrochemicals from the definition of 'reportable transactions' and terminates the reporting requirements for subsidiaries' sales of [oilfield] services and goods."[32] Certain transactions must still be reported, however, including those involving crude oil and natural gas.[33]

b. Waiver of ILSA Sanctions

In an effort to head off criticism from the European Union (and a possible challenge at the World Trade Organization), the Clinton Administration declined to impose sanctions under the Iran and Libya Sanctions Act (ILSA). Enacted in 1996, ILSA mandates the imposition of sanctions against any person—including foreign individuals or companies—that, among other things, invest in the petroleum sector in Iran or Libya.[34] Citing the statutory authority to waive sanctions in the name of the national interest, Secretary of State Albright announced in May 1998 that the Administration would not pursue sanctions against Total S.A. of France, Gazprom of Russia, and Petronas of Malaysia in an agreement worth over $2 billion.[35] Secretary Albright asserted that the waiver would enhance cooperation with the EU and Russia on "inhibiting Iran's ability to develop weapons of mass destruction and support of terrorism."[36] Perhaps more importantly, the waiver of sanctions helped ease U.S.-EU tensions over unilateral sanctions and thus averted, at least for the time being, an EU case against the United States at the WTO.

Many in Congress criticized the Administration for the waiver, including Senate Majority Leader Trent Lott, Banking Chairman Alfonse D'Amato, Foreign Relations Chairman Jesse Helms, and House International Relations Chairman Benjamin Gilman. Efforts to amend ILSA to eliminate the waiver provision, however, failed.[37]

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31. 60 Fed. Reg. 47,061 (1995) (to be codified at 31 C.F.R. pt. 560).
32. 63 Fed. Reg. 62,940 (1998) (to be codified at 31 C.F.R. pt. 560).
33. 63 Fed. Reg. 62,941 (1998).
34. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541.
35. *See* Secretary Madeleine K. Albright, Statement on Iran and Libya Sanctions Act (ILSA): Decision in the South Pars Case (visited Jan. 5, 1999) <http://Secretary.State.gov/www/statements/1998/980518.html>.
36. *Id.*
37. *See Gilman Announces Intent to Remove U.S. Ability to Waive ILSA Sanctions*, 16 INSIDE U.S. TRADE, June 5, 1998, at 1.

c. Additional Missile Sanctions Averted

On June 23, the President vetoed a new sanctions bill, the Iran Missile Proliferation Sanctions Act of 1998.[38] This legislation would have required imposition of sanctions against foreign individuals and companies if there was "credible information" indicating that such entities assisted Iran's missile program, or attempted more than once to provide such assistance. The sanctions included a prohibition on the sale of defense articles and services; exports of certain dual-use items; and U.S. government assistance. In vetoing the bill, the President argued that the legislation was "indiscriminate, inflexible, and prejudicial to [nonproliferation] efforts, and would in fact undermine the national security objectives of the United States." At the same time, the Administration, acting on its own initiative, imposed sanctions against several Russian entities alleged to have assisted Iran in its nuclear/missile program.[39] These steps were viewed widely as an effort to forestall additional legislative sanctions.

d. August 1997 Executive Order Awaiting Regulatory Implementation

One non-development in 1998 with respect to U.S. sanctions policy towards Iran is worthy of note. OFAC failed to issue long-awaited regulations implementing an August 1997 executive order that modified, in a number of respects, the scope of the Iran embargo. On August 19, 1997, after almost two years of official silence with respect to the Iran sanctions, President Clinton issued an executive order that superseded the May 1995 Order.[40] Although the 1997 order stated that it was to "clarify the steps taken" in the previous executive order, it modified the scope of several provisions in the original sanctions.[41] The 1997 order, still awaiting regulatory implementation, appears to reflect the U.S. Government's emerging view that U.S. persons should be barred from playing any role in a broader range of third-country transactions involving Iran.

6. *Iraq*

In November, consistent with U.N. efforts to encourage Iraq to pursue the "oil-for-food" program, OFAC amended its regulations to permit U.S. companies to enter into executory contracts for the sale of oilfield parts and equipment to the Government of Iraq.[42] Issued on February 20, 1998, UNSCR No. 1153 authorizes the Government of Iraq to produce and export $5.26 billion in petroleum and petroleum products every six months to fund humanitarian efforts in Iraq. To enable Iraq to achieve the level of exports authorized in UNSCR No. 1153, the U.N. Security Council issued UNSCR No. 1175, which permits exportation to Iraq of certain oilfield parts and equipment. Consistent with these resolutions, on November 10, 1998, OFAC issued a general license amending the Iraqi Sanctions Regulations (31 C.F.R. pt. 575)

38. *See* Iran Missile Proliferation Sanctions Act of 1998: Veto Message From the President of the United States, 144 CONG. REC. H5071-02 (daily ed. June 24, 1998).

39. *See id.*

40. *See* Executive Order No. 13,059, 3 C.F.R. 217, 220, § 7 (1997).

41. Among other things, the 1997 Executive Order includes a more explicit and expansive definition of prohibited exports of services. The 1997 Executive Order also prohibits, for the first time, reexports of services to Iran. The previous Executive Order, as well as OFAC's implementing regulations, barred transactions by U.S. persons relating to goods or technology of Iranian-origin or owned or controlled by the Government of Iran; but U.S. persons were not explicitly prohibited from engaging or participating in otherwise permitted reexport activities. Another departure of the 1997 Order from the original Executive Order is in its new and expanded articulation of the prohibition on facilitation or approval of certain third country transactions.

42. *See* 63 Fed. Reg. 62,942 (1998) (to be codified at 31 C.F.R. pt. 575).

to permit U.S. persons to enter into executory contracts for the sale of oilfield parts and equipment to the Government of Iraq in conformity with United Nations Security Council Resolutions (UNSCR) Nos. 1153 and 1175.[43]

On its face, section 575.522(a)(4) authorizes U.S. companies to enter into executory contracts for the supply of oilfield parts to the Government of Iraq without a license, provided that performance of the contract is expressly conditioned upon OFAC approval. OFAC officials have confirmed that a U.S. person is not required to file a license application with OFAC *prior* to being awarded a contract by Iraq. Nonetheless, several limitations still apply to executory contracts with Iraq. First, the entry into executory contracts pursuant to section 575.522(a), including all related financing, insurance, transportation, delivery, and other incidental contracts, must be consistent with UNSCR No. 986 (which established the "oil-for-food" program), all other relevant U.N. Security Council Resolutions, and any applicable guidance from the U.N. Iraq Sanctions Committee.[44] Second, contract performance must be contingent upon the prior approval of other U.S. Government agencies, if such contracts involve the exportation, reexportation, transfer, or supply of any goods, technology, or services that are subject to license requirements of another U.S. Government agency.[45] Third, this general license does not authorize U.S. persons to travel to Iraq to negotiate such executory contracts.[46]

III. Other Sanctions Initiatives

Despite calls for limiting or scaling back unilateral sanctions, the United States introduced a number of new and rather innovative sanctions programs in 1998. This section describes these new measures, which could trigger the imposition of sanctions for a host of new reasons.

A. International Religious Freedom Act

In the final days of the 1998 session, Congress passed the International Religious Freedom Act of 1998.[47] As its name suggests, this new law seeks to curb religious persecution overseas by directing the President to impose sanctions against countries that flagrantly violate individuals' religious freedom. The legislation passed the Senate on October 9, 1998,[48] and the House one day later.[49] The President signed it into law on October 27, 1998.[50] The final legislation differed substantially from the original version of the bill, the Freedom From Religious Persecution Act, which had passed the House on May 14, 1998.[51] The enacted bill represented a compromise between conservative supporters of the tough sanctions legislation and opponents of unilateral sanctions, including the administration.[52] Among the most significant compromises was a change

43. *See* 31 C.F.R. § 575.522(a)(4) (1998).

44. *See id.* § 575.522(c)(1) (1998).

45. *See id.* § 575.522(c)(2) (1998).

46. *See id.* § 575.522(d) (1998).

47. *See* International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787.

48. *See* 144 Cong. Rec. S12091, S12099-05 (daily ed. Oct. 9, 1998) (98-0 vote).

49. *See* 144 Cong. Rec. H10434-01 (daily ed. Oct. 10, 1998) (under suspension of the rules).

50. Statement by the President (visited Nov. 22, 1998) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1998/10/28/7.text.1>.

51. 144 Cong. Rec. H3263-03, H3293 (daily ed. May 14, 1998).

52. *See Religious Sanctions Bill Gains Passage, Administration Support*, 16 Inside U.S. Trade, Oct. 16, 1998, at 12. House conservatives complained that the Senate bill "stretche[d] flexibility almost to the breaking point." Miles A. Pomper, *House Passes Bill to Combat Persecution*, 56 Cong. Q. Wkly., Oct. 17, 1998, at 2835 (quoting Rep. Christopher H. Smith).

in the presidential waiver authority: the original bill gave the President very limited waiver authority, while the bill that became law permits him to waive sanctions if the imposition of sanctions would interfere with an "important national interest."[53]

As enacted, the International Religious Freedom Act requires the President to take certain actions against governments that violate the religious freedom of its citizens. It establishes two categories of violating governments: (1) one that "engages in or tolerates violations of religious freedom;"[54] and (2) those that "engaged in or tolerated *particularly severe* violations of religious freedom."[55] "Particularly severe" violations are defined as "systematic, ongoing, egregious violations of religious freedom," such as torture, enforced and arbitrary disappearances, or arbitrary prolonged detention.[56]

For the first category of countries—the less severe violators—the President must take one or more of a series of fifteen actions.[57] These steps include: making a private or public demarche (diplomatic protest); condemning the practice in public; delaying scientific or cultural exchanges; delaying official travel; or imposing economic sanctions.[58] Alternatively, the President may enter into a binding agreement with that country which obligates that government to take steps to end religious persecution.[59]

For the second category of countries—the severe violators—the President must impose one or more of the following measures: end development assistance; ban Export-Import Bank, OPIC, or Trade and Development Agency loans or activities; cease security assistance; oppose all loans at international financial institutions, such as the World Bank; ban the issuance of export licenses for goods or technologies to the government, agency, instrumentality, or official responsible for the violation; prohibit U.S. bank loans of more than $10 million to that government; or prohibit U.S. government procurement of goods or services from the violating foreign government.[60] The President may waive the sanctions if he finds that the government has ceased violations, finds waiving the sanctions would further the purposes of the Act, or determines that an "important national interest of the United States" requires waiver of the sanctions.[61] Again, the President may instead enter into a binding agreement to end religious persecution.[62]

B. Implementation of Chemical Weapons Convention

Although it is not designed as sanctions legislation, the new statute implementing U.S. obligations under the Chemical Weapons Convention includes a number of potentially far-reaching sanctions provisions. In the final days of the 1998 legislative session, Congress passed the Chemical Weapons Convention Implementation Act of 1998 (the Act).[63] The Senate gave its advice and consent to the underlying treaty, the Chemical Weapons Convention (CWC),[64]

53. International Religious Freedom Act of 1998, Pub. L. No. 105-292, § 407, 112 Stat. 2787, 2808.
54. *Id.* § 401.
55. *Id.* § 402 (emphasis added).
56. *Id.* § 3(11).
57. *Id.* § 401(b)(1), at 2801.
58. *Id.* § 405(a), at 2806-2807.
59. *Id.* § 405(c), at 2807.
60. *Id.* § 405.
61. *Id.* § 407.
62. *Id.* § 402(c)(2), at 2803.
63. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (most portions of this act will be codified at 22 U.S.C. §§ 6701-6771).
64. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993) [hereinafter Convention].

in April 1997,[65] but the implementing legislation had become bogged down in partisan wrangling and an unrelated battle over a bill to impose sanctions on Russia for exports of missile technology to Iran.[66]

1. *Inspection Regime*

The CWC is one of the most ambitious arms control treaties in history. It outlaws the development, use, or stockpiling of chemical weapons and establishes a new international agency, the Organization for the Prohibition of Chemical Weapons (OPCW), to conduct inspections and collect data to verify compliance. As a signatory state, the United States and its chemical facilities—including private facilities—are subject to inspection, particularly sites where the most dangerous categories of listed chemicals are produced, processed, or consumed. As such, it is the first arms control treaty to widely affect the private sector.

The U.S. implementing legislation establishes a legal framework for implementing U.S. commitments under the CWC. It designates the Department of State as the "National Authority" for the international inspection regime, and provides authority for the conduct of inspections.[67] The Commerce Department's Bureau of Export Administration will be responsible for issuing implementing regulations, which should provide further details on the inspection and reporting requirements. Although no U.S. facility makes chemical weapons, many chemicals that could be used to make chemical weapons—so called "dual-use" or "precursor" chemicals—are produced by U.S. companies. The CWC "lists" these dual-use chemicals and provides for monitoring of their production and sale.[68] Consistent with the terms of the treaty, the implementing legislation also prohibits the development, production, acquiring, transfer, receipt, stockpiling, retaining, owning, possessing, or threatening to use, any chemical weapons or assisting, attempting, or conspiring to do any of the above.[69] The legislation establishes severe criminal penalties for violating these prohibitions.[70]

2. *New Basis for Sanctions*

Because the CWC permits international inspectors from the OPCW to monitor and inspect the facilities of U.S. companies, some in Congress and the private sector expressed concern about the potential loss of proprietary or confidential business information arising from the inspections.[71] The inspection teams will likely include individuals from countries whose companies (or governments) compete with the U.S. chemical industry and the fear is that these individuals may steal proprietary information under the guise of the CWC inspection regime. To protect against the loss of such information, the implementing legislation establishes a

65. 143 CONG. REC. S3568 (daily ed. Apr. 24, 1997).

66. The CWC implementing legislation was included in the Iran Missile Proliferation Sanctions Act of 1998, which was vetoed by the President on June 24, 1998. H.R. Doc. No. 105-276, 144 CONG. REC. H5071 (daily ed. June 24, 1998).

67. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277 § 101, 112 Stat. 2681.

68. The Convention establishes three "schedules" of chemical agents according to the risk that they pose. *See* Convention, *supra* note 64, at 821.

69. Chemical Weapons Convention Implementation Act § 229.

70. *Id.* The Act establishes criminal penalties, including imposition of the death penalty, if the violation results in the "death of another person." *Id.* § 229A. It also imposes civil penalties of up to $100,000 per violation and revocation of export privileges. *Id.*

71. *See Chemical Weapons Implementation Legislation: Hearing on S. 610 Before the Senate Comm. On the Judiciary*, 105th Cong. 552 (1997).

complex set of protections which include a new basis for imposing sanctions. Most notably, the legislation permits U.S. persons to bring a legal claim against the U.S. government for a "taking of property without just compensation" or for any tort arising because of the CWC inspections.[72] Loss of proprietary information would be construed as both a taking and a tort and thus actionable under the new legislation. The Act also authorizes civil actions by U.S. nationals against any foreign national or company for the "unauthorized or unlawful acquisition, receipt, transmission, or use of property" as a result of CWC inspections.[73] (In many cases, however, U.S. courts may not have jurisdiction over these nationals or companies.)

In addition, the implementing legislation imposes a visa ban on any foreign person who (1) works or worked for the OPCW and revealed confidential business information, (2) "traffics" in U.S. confidential business information, (3) is a corporate officer, principal, or controlling shareholder in any company which "has been involved in the unauthorized disclosure of United States confidential business information," or (4) is a spouse, minor child, or agent of an excludable person.[74] These provisions are similar to entry restrictions set forth in Title IV of the highly-controversial Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, commonly known as "Helms-Burton."[75]

If the U.S. government is held liable for the theft of proprietary information, it must in turn impose sanctions against (1) any member of the OPCW inspection team which stole the information, or (2) any foreign person, company, or foreign government which "knowingly assisted, encouraged or induced, in any way, a foreign person" in the theft of such information.[76] The sanctions are mandatory and shall be imposed for not less than ten years for companies and five years for foreign governments. Sanctions may be waived by the President, however, if he determines that such waiver is "necessary to protect the national security interests of the United States."[77] In addition, the President is authorized to suspend the sanctions upon recoupment for the amount for which the U.S. government was held liable.[78] For a foreign company, the sanctions include: a ban on arms exports, a prohibition on the export of any controlled goods or technologies, a ban on any loan or assistance by international financial institutions, a prohibition on Export-Import Bank transactions, a prohibition on all private bank transactions, the blocking of assets, and a denial of landing rights.[79] The sanctions against a foreign government include the same sanctions as above plus termination of U.S. government assistance.[80]

C. Narco-Terrorist Controls

The Office of Foreign Assets Control continued its practice of designating certain terrorists and narcotics traffickers as "Specially Designated Terrorists," "Foreign Terrorist Organizations," and "Specially Designated Narcotics Traffickers" (SDNTs) subject to U.S. sanctions.

72. Chemical Weapons Convention Implementation Act § 103(a)-(b). Before bringing suit, the person must give the U.S. Government one-year notice during which it can seek remedies from the person or the OPCW. *Id.* § 103(a)(2). The Act waives sovereign immunity for these causes of action. *Id.* § 103(c).
73. *Id.* § 103(d)(3), at 2681-862.
74. *Id.* § 103(f), at 2681-865.
75. 22 U.S.C.S. § 6091 (Supp. II 1996).
76. Chemical Weapons Convention Implementation Act § 103(e)(2)(A), (3)(A)(ii).
77. *Id.* § 103(e)(5).
78. *Id.* § 103(e)(4).
79. *Id.* § 103(e)(2).
80. *Id.* § 103(e)(3).

Such designation imposes a blocking order on any funds held by these individuals or organizations in the United States. In late 1997, OFAC designated thirty additional terrorist organizations, mostly from the Middle East, as "Foreign Terrorist Organizations."[81] During 1998, OFAC designated six more individuals and twenty-one entities as SDNTs because of their "significant role in international narcotics trafficking centered in Colombia."[82] This trend is likely to continue in the future as U.S. policymakers struggle to address threats that do not stem from a particular government.

D. Reform Efforts?

Although sanctions continue to be the foreign policy tool of choice for both the Administration and the Congress, both branches of government are at least paying lip service to the need for systematic reform of U.S. sanctions policy. The reform initiative began in 1997 with the introduction of congressional legislation that would have required formal consultations between the Administration, Congress, and industry prior to the imposition of any new sanctions programs. Although no such law has been enacted, both the House and the Senate will likely continue to consider ways to adopt a more disciplined approach to sanctions policies.

The Administration's own sanctions review gained momentum in the Spring of 1998 following the imposition of statutorily-mandated sanctions against India and Pakistan in response to their detonation of nuclear devices. The Administration complained from the outset that the rigid, mandatory nature of the sanctions impeded U.S. nonproliferation efforts by not allowing flexibility and a means for easing the sanctions to reward concessions offered by the two countries. At the same time, the President exercised his authority under the Iran-Libya Sanctions Act (ILSA) to waive possible sanctions against European oil companies that would have created substantial diplomatic friction and a possible challenge at the World Trade Organization. While controversial with ILSA's congressional supporters, the waiver generally was applauded by foreign governments and industry interests. Most recently, the Administration has announced plans to liberalize certain aspects of the long-standing embargo of Cuba.

Meanwhile, in a classic "Jekyll and Hyde" scenario, both branches of government have continued to implement new and expanded sanctions measures. The most prevalent example in 1998 was the International Religious Freedom Act, which could lead to sanctions against countries determined by the State Department to flagrantly violate individual religious freedom. Despite a waiver provision, the broad menu of sanctions and their potential application to important U.S. trading partners (including China, Russia, and Saudi Arabia) could create additional friction in 1999.

While key members of Congress and U.S. industry have labeled sanctions reform as a top priority for 1999, there is no sign yet that the reform debate has slowed the rate at which the U.S. government makes sanctions of various types a primary tool of its foreign policy. Indeed, states and municipalities have continued to expand their own use of sanctions, even in the face of a federal district court ruling that a Massachusetts law targeting entities that trade with Burma was invalid on constitutional grounds. Absent a fundamental shift in the political landscape that makes sanctions an easy if not effective option, the obstacles to genuine sanctions reform are likely to remain in 1999 and the years to come.

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81. 62 Fed. Reg. 67,729 (1997) (to be codified at 31 C.F.R. ch. V).
82. 63 Fed. Reg. 28,896 (1998) (to be codified at 31 C.F.R. ch. V).

1. *State and Local Sanctions*

Despite increasing concerns about their constitutionality, state and local governments across the United States have continued to enact sanctions measures against various foreign governments and companies that do business in targeted countries. Typically based on human rights concerns, state and local sanctions measures generally consist of selective purchasing, contracting, or investment measures.[83] Currently, twenty-five state and local governments have sanctions laws in effect, including twenty-three directed against Burma, five against Nigeria, and one against Cuba, Indonesia, Switzerland, and Tibet (China). At least four cities imposed new sanctions in 1998: Los Angeles (Switzerland, July 1998); Portland (Burma, July 1998); Cambridge, Massachusetts, (Burma, June 1998 and Indonesia, Aug. 1999); and Somerville, Massachusetts (Burma, February 1998).[84]

While state and local governments continued to impose sanctions in 1998, the National Foreign Trade Council (NFTC)[85] initiated an aggressive legal campaign to put an end to these measures. In April 1998, the NFTC filed a lawsuit[86] challenging the constitutionality of a Massachusetts law prohibiting the state government from purchasing goods or services from any company doing business with the Government of Burma.[87] In November, Judge Nauro of the federal District Court in Massachusetts ruled that the Massachusetts law was unconstitutional because it "impinges on the federal government's exclusive authority to regulate foreign affairs."[88] The State of Massachusetts announced on November 10, 1998, that it will appeal the district court decision to the First Circuit Court of Appeals.[89] A Circuit Court decision is expected in 1999.

Looming over the NFTC lawsuit is a European Union threat to call for a dispute panel at the World Trade Organization challenging the legality of the Massachusetts law under WTO principles. The European Union's head of delegation, Hugo Paemen, sent a letter to Under Secretary Stuart Eizenstat in March 1998 warning of WTO action unless there is a "satisfactory outcome of th[e] matter."[90] At this point, the European Union appears content to wait for

83. U.S. International Trade Commission, *Overview and Analysis of Current U.S. Unilateral Economic Sanctions*, Pub. No. 3124, Investigation No. 332-391, at 2-18 (Aug. 1998).

84. *See* Organization for International Investment (OFII) (visited Feb. 23, 1999) <http://www.ofii/org/issues/sanction.html> (current list of state and local sanctions); *see also* USA*ENGAGE, States and Municipalities with Proposed or Enacted Sanctions Laws (visited Feb. 23, 1999) <http://usaengage/org/resources/map3.html> (sanctions map).

85. NFTC is a broadly based trade association which deals exclusively with U.S. public policy affecting international trade and investment. Its membership consists of more than 550 U.S. manufacturing corporations, financial institutions, and other U.S. firms having substantial international operations or interests.

86. *See* Complaint For Declaratory, Injunctive and Other Relief, National Foreign Trade Council v. Baker (visited Feb. 23, 1999) <http://usaengage.org/background/lawsuit/complain.html>; *see also* Michael S. Lelyveld, *Industry group takes Massachusetts to court over Myanmar sanctions*, J. OF COM., May 1, 1998, at 3A. Burma has been renamed Myanmar by the current regime, but many observers continue to use the former name.

87. Mass. Gen. Laws, Ch. 7, §§ 22G-22M (Supp. 1998). The law allows procurement from companies on the "restricted purchase list" only if the procurement is "essential," the purchase is medical supplies, or there is no comparable low bid. *Id.* § 22H(b).

88. National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 291 (D. Mass. 1998) (order granting Plaintiff's Motion for Memorandum & Summary Judgment and Motion to Amend the Complaint).

89. *See Massachusetts to Appeal Court Decision on Burma Sanctions Law*, 16 INSIDE U.S. TRADE, Nov. 13, 1998, at 13.

90. *EU Threatens WTO Panel Without Quick End to State Sanctions Fight*, 16 INSIDE U.S. TRADE, Mar. 20, 1998, at 1, 18.

the final outcome of the Massachusetts suit, but further WTO action against state or local sanctions remains a possibility.[91]

2. *Friction with Trading Partners*

Throughout 1998, the European Union and United States sparred over the extraterritorial reach of various U.S. sanctions measures. Two laws, both enacted in 1996, have been the target of intense diplomatic criticism, blocking legislation, and the threat of a WTO challenge: the Iran and Libya Sanctions Act of 1996 (ILSA)[92] and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (also know as Helms-Burton).[93] It is the broad extraterritorial reach of these laws, which some commentators believe exceed international law norms, that have been at the heart of the controversy.[94]

Since the passage of the Helms-Burton legislation in 1996, the Clinton administration has been attempting to broker an agreement to avert an EU challenge to these laws at the World Trade Organization.[95] With the goal of avoiding a WTO challenge, Under Secretary Eizenstat reached an agreement with the European Union in May 1998.[96] Under the terms of the agreement, the United States agreed to waive sanctions against the companies engaged in the Iranian pipeline transactions, to continue the waiver of private suits under Title III of the Helms-Burton Act, and to seek waiver authority under Title IV of the Act. Title IV imposes a mandatory denial of visas to individuals who "traffic" in confiscated property. In return, the European Union agreed to a series of "disciplines" that ban investment in any illegally expropriated property in the future and set up a claims registry on which claimants who contend that their property has been expropriated can file a claim. The EU also agreed to forestall any WTO action. As of the end of 1998, however, the agreement remained precarious and had yet to be implemented. Congress has not acted on the necessary amendment to Title IV of Helms-Burton and there is continuing disagreement on the interpretation of the EU disciplines agreement.[97]

IV. Export Policy Developments

Apart from the sanctions initiatives discussed above, both Congress and the Administration continued to address important policy questions under U.S. export control laws. Largely a relic of the Cold War, during which the United States and its COCOM partners sought to limit the flow of militarily useful goods and technology from the West to the Soviet block, U.S. export control laws face new challenges as we approach the twenty-first century. To name

91. The European Union filed an amicus curiae brief in support of the NFTC. For a copy of the brief, see Amicus Curiae Brief in Support of Plaintiff National Foreign Trade Council, Nat'l Foreign Trade Council v. Baker (No. 98-CV-10757 (JLT)) (visited Feb. 23, 1999) <http://usaengage.org/resources/nftcbrief.html>.

92. 50 U.S.C. § 1701 (Supp. II 1996).

93. 22 U.S.C.S. §§ 6021-91 (Supp. II 1996).

94. *See American Bar Association, Section of International Law and Practice, Recommendation and Report*, (Nov. 1998) (urging the U.S. Government to refrain from adopting or maintaining extraterritorial foreign trade controls).

95. The EU requested the formation of a panel to consider the compatibility of Helms-Burton with WTO commitments, but suspended proceedings to allow bilateral negotiations to proceed. *See* Dan Balz, *U.S. Eases Stand on Cuba, Iran Sanctions; Helms Condemns, Europe Hails Move*, FIN. TIMES, May 19, 1998, at A15.

96. *See* Understanding with Respect to Disciplines for Strengthening of Investment Protection (visited Feb. 4, 1999) <http://presid.fco.gov.uk/news/1998/May/18/invest.txt>.

97. *See, e.g., Gilman Renews Effort to Conclude U.S.-EU Talks on Helms-Burton*, 17 INSIDE U.S. TRADE, Jan. 22, 1999, at 1, 20.

a few, these include: How to address the threat posed by non-conventional weapons of mass destruction, which are becoming easier to develop and deploy? How to deal with international terrorism that often defies national boundaries and is not tied to any particular government? How to administer and enforce controls over transfers of new and emerging technologies, particularly where transfers—or "exports"—of technology can now be accomplished electronically and securely with the stroke of a computer key? How to balance national security and human rights concerns with respect to nations like China against new global business realities? The policy debate in 1998 was a direct reflection of these issues.

A. Implementation of Wassenaar Reporting Requirements

To fulfill U.S. obligations under the so-called "Wassenaar Arrangement," the successor regime to COCOM, the Commerce Department's Bureau of Export Administration (BXA) revised its Export Administration Regulations on January 15, 1998.[98] Unlike COCOM, the Wassenaar Arrangement does not target specific countries of concern, and it does not have the power to block the transfer of sensitive items to particular destinations. Instead, the thirty-three signatories to Wassenaar have agreed to increase transparency in transfers of conventional arms and related dual-use goods and technology by preparing biannual reports that detail all exports of these items to countries that are not signatories to the Arrangement.

The EAR revisions imposed two new obligations on U.S. exporters. First, it forced them to reexamine and adjust the Export Control Classification Numbers (ECCNs) assigned to their products and technology and confirm that license exceptions for exports of those items are still available. In order to bring U.S. export controls into line with those of other Wassenaar countries, BXA decontrolled and reclassified goods and technology in most categories of the Commerce Control List (CCL) and removed the availability of license exceptions for certain items that the Wassenaar signatories considered most critical to military applications.

Second, U.S. exporters are now required to submit biannual reports to BXA if they are shipping certain Wassenaar-controlled items.[99] The United States is required to prepare a report that details all exports of commodities, software, and technology that are controlled under certain ECCNs. BXA will compile statistics for exports of these reportable goods and technology from license applications and certain other official submissions that it receives from exporters. Since BXA is not able to track shipments made under license exceptions, however, U.S. exporters must compile and submit a report of all exports (but not reexports) of reportable commodities that were shipped to non-signatory countries under any of the following license exceptions: GBS, CIV, TSR, LVS, CTP, and GOV.[100]

Within the multilateral framework of the Wassenaar Arrangement, the United States is continuing to work with its trading partners to develop common controls on exports of sensitive goods and technology.

B. Liberalized Encryption Export Policy

As a conservative wave washed over many aspects of the United States' export control policy in 1998, the Clinton administration surprisingly announced dramatic liberalizations to its export policy for encryption hardware and software. On December 31, 1998, the Commerce Depart-

98. 63 Fed. Reg. 2452 (1998) (to be codified in 15 C.F.R. pts. 732, 740, 742, 743, 744, 746, 762 and 774).

99. *Id.* at 2458 (to be codified at 15 C.F.R. 743.1).

100. *Id.*

ment amended its Export Administration Regulations to allow exports of stronger encryption products to an expanding universe of countries and end-users.[101] The new regulations introduce a new License Exception "ENC," under which approved encryption products may be exported without an export license. Eligibility for export under License Exception ENC is based either on the strength of the algorithm or the nature of the entity to which the product is being shipped.

Under the product-based approach, items limited to a 56-bit DES or equivalent algorithm may—subject to a one-time technical review by the Commerce Department—be exported to all non-terrorist countries. Products that have already received a technical review (through a license or classification ruling) are immediately eligible for export under License Exception ENC. Where a product has not been reviewed, or where there is a change in algorithm or key-length to a previously approved item, some form of approval by the Commerce Department is required prior to export under License Exception ENC.

The customer-based version of License Exception ENC can be used for products that go far beyond the 56-bit technical limitation described above. Again subject to a one-time technical review, the new regulation allows very robust encryption products to be exported to foreign subsidiaries and branches of U.S. companies on virtually a worldwide basis. In addition, the new rule permits exports under License Exception ENC of limited purpose strong encryption products to financial institutions, insurance agencies, health and medical companies, and on-line merchants in forty-five specified countries. Although the new regulation defines each of the eligible sectors broadly, exports to them are restricted for use in inter/intra-company transactions, transactions between the company and its clients, or protection of proprietary information and medical records. No customer-to-customer communications or transactions are authorized.

C. Congressional Rollback?

In highly-publicized challenges to the Clinton Administration's export control policies, particularly with respect to China, the U.S. Congress is calling into question several long-standing assumptions about the appropriate direction of U.S. export controls. With the end of the Cold War and the accompanying demise of the Soviet Bloc in the early 1990s, the United States and its former COCOM allies removed national security export controls on hundreds of products and related technologies. The basis for this dramatic liberalization of multilateral export controls was the assumption that traditional military threats to the West had dissipated and that the world trading system was entering a new era of global cooperation and integration.

In recent months, however, this trend has become subject to political criticism, legislative action, and extremely negative portrayals in the press. Citing high-profile accounts of sensitive technology transfers to China and other "countries of concern," many members of Congress—on both sides of the aisle—are calling for more stringent export licensing requirements and more aggressive enforcement by administrative authorities. Perhaps the most concrete evidence of this shift in policy is a recent classified House Intelligence Committee Report that is reportedly highly critical of U.S. export policies and practices with respect to China over the past twenty years.

These calls for export "recontrols," often fueled by disgruntled Defense Department officials opposed to liberalization efforts,[102] have led to expanded unilateral export controls on high

101. 63 Fed. Reg. 72,156 (to be codified at 15 C.F.R. pts. 740, 742, 743, 772, and 774).
102. *See, e.g.*, David S. Cloud, *Beijing Export Battle*, Wall St. J., Nov. 27, 1998, at A12.

computers and commercial satellites. If this trend continues in 1999, U.S. exporters could face a dramatic return to unilateralism and competitive pressures in the international marketplace that multilateral regimes are designed to guard against.

1. *High-speed computers*

The National Defense Authorization Act for Fiscal Year 1998 (NDAA) required the Department of Commerce to conduct post-shipment verifications of all shipments of high performance computers to sensitive countries.[103] This new inspection requirement was imposed because of Congressional concerns about possible diversions of high-speed computers to end-users of concern in Russia, China, and other potential adversaries or entities engaged in the proliferation of weapons of mass destruction. The law was opposed by the Clinton Administration (and the Commerce Department in particular), on the premise that the verification requirements amounted to unilateral controls that went beyond those set within the context of the Wassenaar Arrangement.

2. *Satellite Technology*

In response to growing concern about the spread of sensitive technology and the allegations of illegal transfers to the People's Republic of China, Congress shifted control over the licensing of commercial satellites from the Commerce Department to the State Department. "Notwithstanding any other provision of law, all satellites and related items that are on the Commerce Control List of dual-use items in the Export Administration Regulation (15 CFR pt. 730 et seq.) on the date of the enactment of this Act shall be transferred to the United States Munitions List and controlled under section 38 of the Arms Export Control Act (22 U.S.C. 2778)."[104] The effective date of the jurisdiction transfer will be March 15, 1999.

3. *Other "Recontrols"?*

Additional recontrols loom on the horizon for 1999. On December 31, 1998, a House special committee on high-technology trade with China, the so-called "Cox Committee,"[105] completed work on a classified report. The Cox Committee charged that exports to China had harmed U.S. national security, and made thirty-eight specific recommendations to prevent further problems. While many of the details of the report remain classified, it apparently calls for tighter controls on exports of supercomputers, greater security at U.S. nuclear weapons labs, and stricter monitoring of foreign investment in defense-related industries.[106] Congressional action on these recommendations is a strong possibility in the coming year.

V. Conclusions

In 1998, we saw evidence that there is a continuing, if not growing, propensity in the United States to use sanctions measures and export controls as instruments of foreign policy.

103. *See* National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1213, 111 Stat. 1629 (1997).

104. *See* National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1513(a), 112 Stat. 2174 (1998).

105. *See* 144 CONG. REC. H4748 (daily ed. June 18, 1998) (creating Select Committee on U.S. National Security and Military/Commercial Concerns With the People's Republic of China). The Committee was chaired by Congressman Chris Cox (R-CA).

106. David S. Cloud & Carla Anne Robbins, *Report by House Panel on China Trade Backs Curbs on Supercomputer Exports*, WALL ST. J., Feb. 2, 1999, at A6.

Notwithstanding calls for reform and retrenchment, unilateral sanctions continue to flourish, both at the federal and state and local levels. Many of the these measures include aggressive extraterritorial features, which continue to irritate our trading partners and threaten to become the target of a legal challenge at the World Trade Organization. Meanwhile, in the absence of a strong statutory or multilateral framework, export controls are increasingly stirring up old Cold War themes and tendencies to impose unilateral export restrictions.

Apart from these policy shifts, U.S. sanctions and export control laws continue to raise various "rule of law" issues. At the macro level, the classic struggles between the legislative and executive branches, and between federal and state controls, add a degree of uncertainty for U.S. (and foreign) businesses and introduce certain constitutional questions. At a more fundamental level, regulatory implementation that is delayed, non-transparent, or internally inconsistent often creates additional compliance hurdles and a chilling effect that goes beyond the scope of the targeted activities. In this vein, the government's growing reliance on web sites and other unofficial publications to give policy guidance; the lack of transparency regarding agency interpretations, licensing policies, and enforcement actions; and the absence of judicial review under most legislative and regulatory programs make it more difficult for affected businesses and the private bar to achieve reform.