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Economic Sanctions and Export Controls

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I. Introduction

U.S. export control laws and trade sanctions continued to undergo significant change in 1999. Although it is difficult to identify a single, unifying trend, we think it is fair to characterize many of the developments described below as "symptomatic" of the "pendular forces" that shape U.S. policy in these sensitive and complex areas of law. As we have seen now for several years, unilateral sanction measures continue to increase in number and diversity, even in the face of growing questions as to their efficacy. In the area of export controls, political pressures to expand controls and strengthen enforcement efforts compete with calls from exporters to eliminate controls on items and technology that pose little or no national security threat or that are readily available from foreign sources. These now familiar themes continued to shape legal and policy developments in 1999.

As in prior years, export controls and sanctions were implemented last year by a number of government agencies acting under various statutory authorities. Consistent with similar surveys in prior issues, we focus below on changes to (1) trade and economic sanctions administered primarily by the Treasury Department's Office of Foreign Assets Control; (2) the Commerce Department's Export Administration Regulations; and (3) the State Department's International Traffic in Arms Regulations (ITAR). Given the overlapping nature of various export controls and sanctions measures, it is often difficult and somewhat misleading to draw precise lines among the various regulatory regimes. Nonetheless, 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 transferred.

II. Sanctions: New and Evolving Programs

U.S. trade and economic sanctions policies appear to be suffering from a sort of identity crisis. On the one hand, there seems to be a growing recognition within the U.S. govern-

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ment that unilateral sanctions measures are often ineffective or even counter-productive. This has led to a limited "paring down" of certain sanctions programs, including the adoption of favorable licensing policies for exports of agricultural and medical products to certain embargoed countries. On the other hand, the U.S. government continues, at times seemingly reflexively, to impose aggressive and far-reaching unilateral sanctions in response to a growing number of perceived threats and foreign policy targets. In the face of these contradictory impulses, current policies are premised on the notion that unilateral sanctions can be effective only if they are sufficiently targeted and precise.

Recent attempts to refine U.S. sanctions along these lines paradoxically has yielded ever more complicated and opaque regulations. The resulting regulatory complexities, where clear answers are often scarce, reflect government efforts to impose precisely targeted sanctions while preserving maximum flexibility to block any given transaction that might raise concern. As a result, even as the sanctions are ostensibly narrowed, compliance challenges appear to be mounting.

With these general observations in mind, we turn to a discussion of several of the more noteworthy developments in U.S. sanctions law during 1999.

A. Measures Targeting Specific Countries

1. *Iran*

On May 7, 1995, President Clinton issued an executive order (1995 Order) that dramatically expanded the scope of U.S. restrictions on trade and business with Iran.[1] Notwithstanding the breadth of those sanctions, the 1995 Order—and implementing regulations that followed in September 1995—included a number of unusual provisions that limited the extraterritorial reach of the controls.[2] These provisions, however, left open a number of legal and policy questions regarding the precise scope and reach of the prohibitions. On August 19, 1997, President Clinton issued a new executive order (1997 Order) designed to supercede and clarify the scope of the 1995 Order.[3]

Almost two years after issuance of the 1997 Order, the Treasury Department's Office of Foreign Assets Control (OFAC) finally published implementing regulations in April 1999.[4] Although the government has characterized the 1997 Order and the implementing regulations as "clarifications" of existing law, they modify—and, in several respects, expand—a number of key prohibitions.[5]

OFAC's amended Iranian Transactions Regulations include the following: a more explicit and arguably more expansive prohibition against "facilitation or approval" by U.S. persons of transactions by foreign persons.[6] Among other things, the regulations state that prohibited facilitation occurs when a U.S. person changes the operating policies and procedures of a foreign affiliate "with the specific purpose of facilitating transactions that would be prohibited" as to a U.S. person.[7] More precise rules defining when exports from the United

1. Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995).
2. *Id.*; *see* 31 C.F.R. pt. 560 (1995).
3. Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (1997).
4. *See* 31 C.F.R. pt. 560 (1999) (implementing Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (1997)).
5. *See id.*
6. 31 C.F.R. § 560.417 (1999).
7. *Id.* § 560.417(c).

States to a third country—and reexports from a third country to Iran—are covered by the prohibitions.[8] A new provision, which comes close to a "deemed export" rule, describes how releases of technology or software in the United States can be treated as exports to Iran.[9] The provision also eliminated a limited "safe harbor" under the export of services prohibition for U.S. persons ordinarily resident abroad.[10] Taken as a whole, these rules confirm that U.S. persons are barred from authorizing, supporting, or participating in virtually any transaction involving Iran, even if the underlying transaction would otherwise escape the prohibitions. Thus, even in those cases where a foreign affiliate of a U.S. company may not be subject to the regulations, the U.S. parent company and all other U.S. persons are prohibited from acting in furtherance of any transaction between the foreign affiliate and Iran. As with many sanctions programs, these prohibitions must be read in conjunction with the Commerce Department's Export Administration Regulations (EARs), from which OFAC has borrowed a number of regulatory concepts and that impose separate controls on exports and reexports to Iran.[11]

The timing of the amendments to the Iranian Transaction Regulations was a bit peculiar, both because they were so long overdue and because they came at a time when U.S. relations with Iran were undergoing some semblance of a thaw. Nonetheless, their publication ranks among the more noteworthy developments for sanctions practitioners in 1999.

2. *Libya*

a. U.N. Sanctions Suspended

In April 1999, the U.N. Security Council suspended multilateral sanctions against Libya, in response to that country's finally handing over the two Libyan agents suspected in the 1988 bombing of Pan American Flight 103 over Lockerbie, Scotland. Under the authority of Security Council Resolution 1192,[12] the U.N. Security Council determined on April 5, 1999 that Libya had fulfilled enough conditions to allow for the immediate suspension of Security Council Resolutions 748 and 883.[13]

Citing Libya's refusal to cooperate in the investigation and prosecution of the Libyan agents implicated in the Lockerbie bombing, Security Council Resolution 748 had, since 1992, imposed an arms and aircraft embargo on Libya.[14] These limited multilateral sanctions prohibited U.N. member states and their nationals from providing military goods and services, and aircraft goods, spare parts, and services to Libya.[15] Security Council Resolution 748 also mandated that member states deny permission for overflights and landing of aircraft destined for, or originating in, Libya.[16] In November 1993, the U.N. sanctions were expanded to mandate a freeze of certain Libyan government assets and to prohibit, among other things, business transactions with the Libyan national airline and the sale of goods or services related to air transportation or certain oil field equipment to Libya.[17] All of these sanctions were covered by the U.N. suspension decision described above.

8. *See* 31 C.F.R. §§ 560.204-.205, .420, .511.

9. *See* 31 C.F.R. § 560.418.

10. *See* 31 C.F.R. § 560.410(d).

11. *See* 15 C.F.R. § 746.7 (1999).

12. S.C. Res. 1192, U.N. Doc. S/RES/1192 (1998).

13. *See Measures Against Libya Suspended on 5 April, Security Council Notes in Presidential Statement*, Press Release SC/6664 (1999).

14. S.C. Res. 748, U.N. Doc. S/RES/748 (1992); *see* S.C. Res. 883, U.N. Doc. S/RES/883 (1993).

15. *See* S.C. Res. 748 *supra* note 14.

16. *Id.*

17. *See* S.C. Res. 883, Annex.

b. U.S. Sanctions Still in Place

Notwithstanding the suspension of the U.N. sanctions against Libya, the U.S. sanctions, which predate and go far beyond the U.N. sanctions, remained firmly entrenched in 1999.[18] While the United States recognized the U.N. suspension, it emphasized that it would continue to enforce its long-standing unilateral embargo of Libya. The U.S. State Department noted that "some U.S. sanctions predate the Lockerbie bombing" and that "[t]hose will remain."[19] Thus, the U.S. sanctions currently in place against Libya are solely those sanctions imposed by the United States prior to U.N. action.[20]

3. *Yugoslavia*

a. Stricter Controls on Serbia

On Friday, April 30, 1999, in response to the continued crisis in Kosovo, President Clinton imposed a nearly total economic embargo on the Federal Republic of Yugoslavia (Serbia and Montenegro).[21] Executive Order 13,121 includes a comprehensive blocking order and trade embargo that go beyond the more targeted sanctions measures that had been in place since June, 1998.[22] Unlike the earlier Kosovo sanctions, which generally permitted trade transactions with private and even government entities in Serbia subject to certain payment limitations,[23] the new sanctions include broad import, export, and reexport prohibitions, as well as restrictions on activities of U.S. persons in support of virtually any transaction involving Serbia.[24]

The bulk of Executive Order 13,121, however, remains to be implemented by OFAC. Although OFAC has issued preliminary guidance on the new sanctions, it will likely be some time before regulations are published.[25]

The prohibitions in Executive Order 13,121 are limited in several respects. First, Montenegro remains generally excepted from the sanctions.[26] Second, consistent with a recent Clinton administration policy announcement, the executive order directs OFAC to adopt a favorable licensing policy with respect to commercial sales of agricultural commodities, medicine, and medical supplies for civilian use.[27]

b. Kosovo Carve-Out

In addition, Executive Order 13,121 directs OFAC to give "special consideration" to the humanitarian needs of refugees from Kosovo and civilians in Yugoslavia in its licensing

18. *See* U.S. Department of State, *Daily Press Briefing April 5, 1999, available at* <http://secretary.state.gov/www/briefings/9904/990405db.html>.

19. Gary G. Yerkey, *U.S. Sanctions Against Libya Will Remain in Place Despite Break in Lockerbie Case*, 65 Daily Exec. Rep. (BNA) A-14 (1999).

20. Following the suspension of the U.N. sanctions, the U.S. Commerce Department's Bureau of Export Administration amended its EARs retroactively to reinstate license exception "AVS" for temporary reexports to Libya of foreign registered aircraft subject to the EAR effective April 5, 1999. *See* 15 C.F.R. § 746.4(b)(2)(ii)(G) (1999).

21. *See* Exec. Order No. 13,121, 64 Fed. Reg. 24,021 (1999).

22. *See id.*; 31 C.F.R. pt. 586; Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (1998).

23. *See* 31 C.F.R. §§ 586.201(c), .408, .513(a); U.S. Treasury Dep't, Office of Foreign Assets Control, *What You Need to Know About U.S. Sanctions: A Summary Involving the Federal Republic of Yugoslavia* (1999), *available at* <http://www.treas.gov/ofac/t11yugo.pdf> [hereinafter *What You Need to Know*].

24. *See* Exec. Order No. 13,121, 64 Fed. Reg. 24,021.

25. *See What You Need to Know, supra* note 23.

26. *See What You Need to Know, supra* note 23, app. General License 2.

27. Exec. Order No. 13,121, § 7(c), 64 Fed. Reg. 24,021.

determinations.[28] OFAC issued a general license implementing this favorable policy toward Kosovo on August 17, 1999.[29] General License Number 4 generally authorizes U.S. persons to export, reexport, sell, or supply any services or non-U.S.-origin goods, software, or technology destined for end-use in Kosovo.[30] Subject to certain conditions (most notably, receipt of a Commerce Department license authorizing the underlying export), transactions ordinarily incident to the export or reexport of U.S.-origin, goods, technology, or software to Kosovo are also authorized.[31] "New Investment" in Kosovo by U.S. persons is also permitted under a general license.[32] Like the Taliban sanctions (discussed below in section II.A.6) and General License Number 2 on Montenegro, General License Number 4 reflects a new willingness of the U.S. government to draw distinctions among regions within a single state to craft sanctions measures that are narrowly tailored to comport with complicated political realities.

c. Commerce Department Controls

In a separate development that overlaps with the terms of Executive Order 13,121, the Commerce Department, on May 4, 1999, amended its EARs to restrict all exports and reexports of U.S.-origin items to Serbia.[33] This means that all goods, software, and technology covered by the EARs are now subject to a specific license requirement—and presumably a policy of denial—for export or reexport to Serbia.[34] Paralleling OFAC's General License Number 4, however, in November, the Commerce Department issued a general exemption from these restrictions for exports and reexports of U.S.-origin items to Kosovo.[35]

4. *Cuba*

In May 1999, the Commerce Department amended its EARs to create a favorable case-by-case licensing policy for sales of food and agricultural products to private individuals and entities in Cuba.[36] For purposes of this policy, the regulations define "food" to include items, whether in solid or liquid form, that are normally consumed by humans or animals.[37] "Agricultural commodities" is broadly defined to include insecticides, pesticides, herbicides, fertilizer, and seeds, but not farm equipment.[38] The "independent non-government entities" in Cuba eligible for this favorable licensing policy may not be owned, controlled, or op-

28. *Id.*

29. General License No. 4 to 31 C.F.R. pt. 586 (1999); *see What You Need to Know, supra* note 23, app. General License 4.

30. *See id.* § a.

31. *See id.* § b.

32. *Id.*

33. *See* 15 C.F.R. § 746.9 (1999).

34. Shortly after the Commerce Department published the May 4 regulations governing exports to Serbia, OFAC issued a general license authorizing most transactions ordinarily incident to BXA-licensed export and reexport transactions involving Serbia. *See What You Need to Know, supra* note 23, app. General License 3.

35. *See* 15 C.F.R. § 746.9.

36. *See* 15 C.F.R. § 746.2(b)(4)(iii). For additional information on this policy, see U.S. Dep't of Commerce, Bureau of Export Administration, *Do's and Don'ts for Exporting Food for Sale to Cuba, available at* <http://www.bxa.doc.gov/factsheets/DosandDonts4Cuba.html>.

37. 15 C.F.R. § 746.2(b)(4)(iii); *see also* U.S. Dep't of Commerce, Bureau of Export Administration, Fact Sheet, *Food and Agricultural Exports to Cuba, available at* <http://www.bxa.doc.gov/factsheets/CubaFacts.html>.

38. 15 C.F.R. § 746.2(b)(4)(iii)(A).

erated by the Cuban government and include, for example, religious organizations, private farmers, and other private undertakings (e.g., family restaurants).[39] This regulatory amendment follows President Clinton's January 5, 1999 initiative "to enhance [the United States'] support of the Cuban people to promote [a] transition to democracy."[40] OFAC regulations were also amended in May 1999 to, among other things, authorize transactions ordinarily incident to Commerce-licensed exports of food and agricultural commodities to Cuba.[41]

5. *Iraq*

The U.S. sanctions against Iraq remained largely unchanged during 1999. On the multilateral front, the United Nations' so-called "oil-for-food" program was extended for two additional 180-day periods, the second following several stop-gap measures necessary to prevent the program from lapsing as members of the Security Council wrangled over Iraqi compliance with U.N. weapons inspection obligations.[42] Under this program, the U.N. Security Council authorized a narrow range of trade transactions with the Government of Iraq, including the sale of certain goods intended for humanitarian purposes and the maintenance of Iraq's petroleum production capabilities, which are financed through U.N.-approved sales of Iraqi petroleum.[43] On June 11, 1999, U.N. Secretary-General Kofi Annan approved the current distribution plan (Phase VI), which projects Iraqi oil revenues of U.S.$4.2 billion for the period and details how some U.S.$3.004 billion of those funds will be expended on humanitarian purchases.[44]

6. *Afghanistan (Taliban-Controlled Regions)*

On July 4, 1999, citing the Taliban's alleged efforts to provide a safe haven in Afghanistan to Usama bin Laden and the Al-Qaida terrorist organization, President Clinton issued Executive Order 13,129, which imposes comprehensive economic sanctions on the Taliban and regions of Afghanistan deemed under Taliban control.[45]

39. *Id.* § 746.2(b)(4)(iii)(B).

40. 64 Fed. Reg. 25,807 (1999).

41. *See* 31 C.F.R. § 515.533(a), 64 Fed. Reg. 25,808 (1999).

42. *See* S.C. Res. 1242, U.N. SCOR, 4008th mtg., U.N. Doc. S/RES/1242 (1999) (extending oil-for-food program for 180 days from May 25, 1999); S.C. Res. 1275, U.N. SCOR, 4070th mtg., U.N. Doc. S/RES/1275 (1999) (extending current phase of the program (phase VI) to December 4, 1999); S.C. Res. 1280, U.N. SCOR, 4077th mtg., U.N. Doc. S/RES/1280 (1999) (extending phase VI of the program to December 11, 1999); S.C. Res. 1281, U.N. SCOR, 4079th mtg., U.N. Doc. S/RES/1281 (1999) (extending oil-for-food program for 180 days as of December 12, 1999); *see also* S.C. Res. 1284, U.N. SCOR, 4084th mtg., U.N. Doc. S/RES/1284 (1999) (reiterating importance of Iraqi compliance with all relevant U.N. Security Council Resolutions and creating the U.N. Monitoring, Verification, and Inspection Commission (UNMOVIC)—a subsidiary body of the Security Council to the Special Commission).

43. *See generally* S.C. Res. 986, U.N. SCOR, 3519th mtg., U.N. Doc. S/RES/986 (1995); S.C. Res. 1153, U.N. SCOR, 3855th mtg., U.N. Doc. S/RES/1153 (1998), S.C. Res. 1175, U.N. SCOR, 3893rd mtg., U.N. Doc. S/RES/1175 (1998); *Memorandum of Understanding Between the Secretariat of the United Nations and the Government of Iraq on the Implementation of Security Council Resolution 986*, U.N. Doc. S/1996/356 (1996), *available at* <http://www.un.org/Depts/oip/undocs/S1996356.htm>; United Nations, Office of the Iraq Programme, *Oil for Food: The Basic Facts* (visited June 11, 2000) <http://www.un.org/Depts/oip/reports/basfact.html>;United Nations, Office of the Iraq Programme, *Implementation of Oil for Food—A Chronology* (visited June 11, 2000) <http://www.un.org/Depts/oip/chron.html>.

44. *See* United Nations, Office of the Iraq Programme, *Secretary-General Approves Distribution Plan for Phase VI*, Press Release (last modified June 14, 1999) <http://www.un.org/Depts/oip/dp6pdf/sg6.html>.

45. Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (1999).

In terms of the sanctions measures imposed, Executive Order 13,129 reflects established practice. First and most important, it contains a blocking order prohibiting U.S. persons (individuals or entities) from dealing in any property or property interests of the Taliban.[46] Although implementing regulations have yet to be issued, OFAC typically interprets such blocking orders quite broadly to include any property interest—direct, indirect, present, future, or contingent. These broad blocking provisions thus effectively prohibit U.S. persons from engaging in any transactions that even tangentially involve the Taliban.

Second, the executive order prohibits the export or reexport of goods, software, technology, or services (regardless of origin) to the Taliban or Taliban-controlled regions of Afghanistan from the United States or by U.S. persons (wherever located).[47] Third, imports into the United States of goods, services, software, or technology owned or controlled by the Taliban or from designated regions of Afghanistan are prohibited.[48] In addition, any transactions intended to evade or avoid the Taliban sanctions are prohibited, as are conspiracies to violate the sanctions.[49] Thus, a U.S. company, for example, would be prohibited from referring business involving the Taliban to a foreign affiliate to circumvent the sanctions.

Notwithstanding these broad prohibitions, the executive order directs OFAC to "authorize commercial sales of agricultural commodities and products, medicine, and medical equipment for civilian end use in the territory of Afghanistan controlled by the Taliban under appropriate safeguards to prevent diversion to military, paramilitary, or terrorist end users or end use or to political end use."[50] This provision is consistent with the U.S. government's recent policy against using food and medicine for sanctions purposes except in extreme cases.[51]

While the substantive prohibitions mandated under Executive Order 13,129 are common sanctions measures, their precise geographic targeting is somewhat novel. The executive order targets only those regions of Afghanistan that are under Taliban control.[52] The term "territory of Afghanistan controlled by the Taliban" is, in turn, defined to include eighteen specifically enumerated provinces of Afghanistan.[53] Recognizing that this approach makes it difficult to draw precise lines, the Secretary of State, in consultation with the Secretary of the Treasury, is authorized to amend this definition.[54] On October 21, 1999, in accordance with section 4(d) of the executive order, the State Department modified the definition to include the capital city of Kabul as a sanctioned region.[55] This modification apparently was intended to correct an oversight in the original definition. At this writing, OFAC has yet to issue regulations implementing Executive Order 13,129.

46. *See id.* §§ 1, 2(a).
47. *Id.* § 2(b).
48. *See id.* § 2(c).
49. *See id.* §§ 2(d) & (e).
50. *Id.* § 3.
51. *See infra* pt. II.B.1.
52. *See, e.g.*, Exec. Order No. 13,129, 64 Fed. Reg. at 36,759-60, § 2(b) & (c).
53. *Id.* § 4(d).
54. *See id.*
55. *See* Exec. Order No. 13,129, 64 Fed. Reg. at 58,879, § 4.

7. *North Korea*

On September 17, 1999, President Clinton announced a decision to relax the long-standing sanctions against North Korea in exchange for a halt to North Korea's long-range missile testing.[56] According to the White House press statement,

> [t]he United States is taking this action in order to pursue improved overall relations with North Korea, support the Agreed Framework, and as a result of U.S.-North Korean discussions in Berlin [on] September 7–12, 1999. On the basis of these discussions, it is our understanding that North Korea will continue to refrain from testing long-range missiles of any kind as both sides move toward more normal relations.[57]

The White House cited a number of activities on which prohibitions would be loosened, including the following:

> importation of most North Korean-origin goods and raw materials into the United States; export and reexport of most non-sensitive goods and services of U.S. companies and their foreign subsidiaries such as most consumer goods, most financial services, non-sensitive inputs for investment in non-sensitive industrial sectors; investment in such sectors as agriculture, mining, petroleum, timber, cement, transportation, infrastructure (roads, ports, airports), travel/tourism; remittances from U.S. nationals to North Koreans; the transport of approved (i.e., non-sensitive) cargo to and from North Korea by commercial U.S. ships and aircraft . . . and commercial flights between the U.S. and North Korea.[58]

Although this shift in U.S. policy toward North Korea is undoubtedly significant, the sanctions against North Korea remained fully in place during 1999. Current sanctions regulations will continue in effect until the U.S. Departments of Commerce, Treasury, and Transportation amend their regulations to implement President Clinton's policy of détente toward North Korea.[59] The White House acknowledged that regulatory implementation "may take several months."[60]

Even after implementation of the new policy, a significant number of restrictions will remain. First, all sanctions imposed on North Korea due to its designation as a state sponsor of terrorism will remain intact, including prohibitions on exports of goods or technology listed on the U.S. Munitions List[61] or otherwise subject to national security controls under the Commerce Department's EARs.[62] Second, statutorily mandated sanctions, such as those governing missile technology, restrictions based on multilateral arrangements (e.g., the Wassenaar Arrangement), and nonproliferation controls will not be eased.[63] Third, all

56. *See* Statement by the Press Secretary, *Easing Sanctions Against North Korea* (last modified Sept. 17, 1999) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1999/9/17/16.text.1>.

57. *Id.*

58. The White House, *Easing Sanctions Against North Korea* (last modified Sept. 17, 1999) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1999/9/17/14.text.1> [hereinafter Fact Sheet].

59. *See* U.S. Treasury Department, Office of Foreign Assets Control, *What You Need to Know About U.S. Sanctions: North Korea* (last modified Feb. 23, 2000) <http://www.treas.gov/ofac/>.

60. Fact Sheet, *supra* note 58.

61. *See* 22 C.F.R. § 121.1 (1999).

62. *See* 15 C.F.R. pt. 774; Fact Sheet, *supra* note 58.

63. *See* 15 C.F.R. pt. 774.

North Korean assets currently frozen under the Trading with the Enemy Act[64] will remain blocked.[65]

8. *India and Pakistan*

Still reeling from the imposition in 1998 of comprehensive sanctions against India and Pakistan under the so-called "Glenn Amendment,"[66] both the Clinton administration and Congress struggled in 1999 to look for ways to loosen those controls as the nuclear proliferation issues that triggered sanctions in the first instance began "to cool." Although formal changes to U.S. legal restrictions have yet to be adopted, several developments in 1999 suggest that certain layers of controls will soon be "pared back."

In a classic example of the ebb and flow that often characterize U.S. sanctions policies, 1999 began with a State Department announcement that the "ultimate objective with India, as it is with Pakistan, is to remove all sanctions."[67] In February, President Clinton issued a statement commending the Prime Ministers of India and Pakistan for conducting a direct meeting and agreeing to intensify their efforts to contain their competition in nuclear arms.[68] Meanwhile, momentum for lifting sanctions against India and Pakistan gathered steam on Capitol Hill in the form of legislation sponsored by Senator Brownback (R-Kan.) calling for a five-year suspension of the sanctions. The so-called "Brownback Amendment," however, was opposed by the Administration (which wanted to preserve the sanctions as a nonproliferation policy lever) and was eventually dropped by its sponsors when armed conflict broke out between India and Pakistan.[69] In September, the International Trade Commission released a study (commissioned by Congress) that concluded that U.S. sanctions against both countries had injured U.S. business (particularly in the agricultural sector) more than the targeted governments.[70] These findings and legislative pushes from the farm states added fuel to the broader policy debate about using agricultural products as instruments of economic sanctions.

Later in the year, Congress renewed the President's authority to waive certain sanctions mandated by the Glenn Amendment.[71] On October 27, 1999, President Clinton acted on this authority by continuing waivers allowing both countries to remain eligible for certain U.S. government programs and financing by U.S. banks.[72]

Finally, in December 1999, the Commerce Department's Bureau of Export Administration announced that fifty-one Indian entities would be removed from the list of entities

64. 50 U.S.C. App. § 5(b) (1999).

65. *See* Fact Sheet, *supra* note 58.

66. Nuclear Proliferation Prevention Act of 1994, Pub. L. No. 103-236, tit. VIII, 108 Stat. 507 (as codified at 22 U.S.C. § 2799aa(b)-1) (1999).

67. *U.S. Officials Head to India, Pakistan, says Ultimate Goal to End Sanctions*, 16 Int'l Trade Rep. (BNA) 154, (1999) (statement of Karl Inderfurth).

68. Statement by the President (last modified Feb. 22, 1999) <http://www.pub.whitehouse.gov/uri/res/I2R?urn:pdi://oma.eop.gov.us/1999/z123/z.text.1>.

69. *See* Gary G. Yerkey, *Senator Brownback Withdraws Plan to Lift Sanctions Against India, Pakistan*, 16 Int'l Trade Rep. (BNA) 930 (1999).

70. International Trade Commission, *Impact of Economic Sanctions on India and Pakistan Appears Minimal, Reports ITC* (last modified Sept. 23, 1999) <http://www.usite.gov/er/nl1999/ERO923wl.htm>.

71. *See* Department of Defense Appropriations Act, Fiscal Year 2000, Pub. L. No. 106-79, 113 Stat. 12112 (1999).

72. *See* Presidential Determination No. 2000-04, 64 Fed. Reg. 60,649 (1999).

subject to sanctions under the EARs.[73] This step was "based on a consensus decision by the Administration to more tightly focus the sanctions on those Indian entities most directly involved in proliferation activities of concern."[74] While the "paring down" of the so-called "Entity List" has yet to be implemented in the form of regulation, this step is likely to be repeated in the relatively near future if India and Pakistan can continue to assuage U.S. proliferation concerns.

III. Other Sanctions Developments

A. Exemption for Food and Medical Products

On April 28, 1999, the Clinton administration announced the adoption of a more humane trade sanctions policy that would no longer use food and medicine as a foreign policy tool, "except under the most compelling circumstances."[75] Consistent with this new policy, OFAC has issued regulations—the so-called "AgMed Amendments"—amending the sanctions programs that target Iran, Libya, and Sudan. The new regulations, which took effect on July 27, 1999 and were published on August 2, create a detailed approval process and favorable licensing policy for commercial sales of food, agricultural commodities, medicines, and medical devices to these three sanctioned countries.[76]

The potential universe of items now eligible for favorable treatment is quite broad. The AgMed Amendments provide that the following items can qualify: (i) food for either humans or animals (including live animals or raw, processed, or packaged foods); (ii) seeds for food crops; and (iii) reproductive materials for the production of food.[77] Non-food agricultural commodities, such as cotton or tobacco, are not covered.

Medicines and medical equipment also qualify for the favorable licensing policy, provided the items are not subject to separate controls under the Commerce Department's EARs.[78] Because the AgMed Amendments do not define the terms "medicine" or "medical equipment," it is not clear whether they will be read to cover other health-related products, such as vitamin supplements or skin-care products.

Sales of eligible products to the targeted countries are permitted only if they are specifically licensed by OFAC. The AgMed Amendments establish a two-track licensing system with different procedures for bulk agricultural commodities than for other eligible goods. Sales of non-bulk agricultural products, medicines, and medical equipment are subject to a transaction-specific licensing process. OFAC has issued general licenses authorizing U.S. persons to enter into "executory" contracts for the sale of these products, provided the contract meets certain criteria and performance is expressly contingent on OFAC approval.[79] After a seller has concluded an executory contract, it must obtain a specific license

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73. *See* U.S. Dep't of Commerce, Bureau of Export Admin., *Commerce Department Will Remove 51 Indian Entities from Sanctions List* (last modified Dec. 16, 1999) <http://www.bxa.doc.gov/press/99/51Entities-2beRemoved.html>.

74. *Id.*

75. Statement by the Press Secretary, *Humanitarian Exemptions from Sanctions* (last modified Apr. 28, 1999) <http://www.pup.whitehouse.gov/uri-res/IZR?urn:pdi://oma.eop.gov.us/1999/4/29/3.text.1>.

76. 31 C.F.R. pts. 538, 550, and 560 (as amended), 64 Fed. Reg. 41,784, 41,787, 41,789, and 41,792 (1999).

77. *See* 31 C.F.R. §§ 538.523(a)(1), 550.569(a)(1), and 560.530(a)(1), 64 Fed. Reg. 41,784 (1999).

78. *See* 31 C.F.R. §§ 538.523(a)(2), 550.569(a)(2), and 560.530(a)(2), 64 Fed. Reg. 41,784, 41,787, 41,789, and 41,792 (1999).

79. *See* 31 C.F.R. §§ 538.523(a)-(b), 550.569(a)-(b), and 560.530(a)-(b), 64 Fed. Reg. 41,784, 41,787, 41,789, 41,791 and 792 (1999).

from OFAC authorizing contract performance.[80] OFAC apparently will not entertain license requests until a prospective seller has an executory contract in hand.

Trade in certain bulk agricultural commodities, by contrast, may be eligible for blanket licenses that are not tied to a particular transaction. Sellers of enumerated bulk commodities can secure blanket licenses authorizing them to issue price quotations and to enter into and perform contracts for the sale of the commodity under a single license of a specified duration.[81] An executory contract is not a prerequisite to obtaining a bulk sales license; indeed, the AgMed Amendments do not permit sellers to conclude executory contracts for bulk commodity sales.[82] In addition, U.S. brokers are authorized under a general license to broker the sale and export of bulk agricultural commodities by authorized U.S. sellers.[83]

The parameters of the new licensing policy have yet to be fully defined or explored. Even so, the AgMed Amendments do not suggest that licenses will be granted for any investment activities in a sanctioned country, or for other transactions that go beyond the arm's-length sale of products. In this sense, sales to a distributor or a manufacturer in one of the sanctioned countries could raise other issues, if the U.S. seller is seeking to provide other ancillary services or support to the buyer. Payment restrictions also apply to licensed transactions; unless otherwise specifically licensed by OFAC, payment for approved shipments must be made by cash in advance, sales on open account, or financing through a third-country bank.[84] Finally, U.S. companies generally are not authorized to sell products to the governments of these sanctioned countries, although sales to identified government procurement bodies are within the general licenses.[85]

OFAC's AgMed Amendments are consistent with policies adopted in 1999 with respect to three other sanctioned countries: Cuba, Serbia, and Taliban-controlled regions of Afghanistan. The favorable licensing policies for exports of agricultural products, medicines, and medical devices to these other countries are discussed above in section II.A.

Though limited in scope, this new licensing policy departs from the long-standing rule barring all commercial trade with embargoed countries. While exceptions for humanitarian gifts and donations have been features of numerous U.S. sanctions programs for some time,[86] U.S. companies are now able (subject to OFAC approval) to sell authorized products to these countries for a profit. This shift in policy has been driven, in part, by proposed legislation that would exempt agricultural products from and mandate certain other reforms to U.S. sanctions programs. The Clinton administration has indicated that future sanctions programs should adhere to this policy.

80. *See* 31 C.F.R. §§ 538.523(d), 550.569(d), and 560.530(d), 64 Fed. Reg. 41,784, 41,787, 41,790, and 41792 (1999).

81. *See* 31 C.F.R. §§ 538.524, 550.570, and 560.531, 64 Fed. Reg. 41,784, 41,787, 41,790, and 41,792 (1999).

82. *See* 31 C.F.R. §§ 538.524(a), 550.570(a), and 560.531(a), 64 Fed. Reg. 41,784, 41,787, 41,790, and 41,792 (1999).

83. *See* 31 C.F.R. §§ 538.526, 550.572, and 560.533, 64 Fed. Reg. 41,784, 41,788, 41,790—41,791, and 41,793 (1999).

84. *See* 31 C.F.R. §§ 538.525, 550.571, and 560.532, 64 Fed. Reg. 41,784, 41,788, 41,790, and 41,793 (1999); *see also id.*, 64 Fed Reg. 58,789, 58,790, 58,791 (1999) (amending provisions relating to financing of medical and agricultural sales).

85. *See* 31 C.F.R. §§ 538.523(a), 550.569(a), and 560.530(a), 64 Fed. Reg. 41,784, 41,787, 41,789, and 41,792 (1999).

86. *See e.g.*, 31 C.F.R. § 515.206(b) (exemption for donations of food to nongovernmental organizations or individuals in Cuba); *id.* § 560.210(b) (exemption for humanitarian donations to Iran) (1999).

B. Sanctions Reform Legislation

Both the White House and Congress have continued to consider ways to scale back unilateral sanctions, even though such programs seem to be proliferating. Sanctions reform discussions began in earnest in 1997, with proposed 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 to date, both houses of Congress devoted considerable energy in 1999 to legislation that, if enacted, would exempt agricultural products from sanctions rules. Indeed, even though these initiatives did not yield any statutory changes, they almost certainly served as a catalyst for administrative reforms, including the AgMed Amendment, described above.

On January 19, 1999, Senate Agriculture Committee Chairman Dick Lugar (R-Ind.) introduced a bill that would provide a blanket "carve-out" for agricultural products from unilateral sanctions, subject to possible presidential override in particular cases.[87] Shortly thereafter, Senator Chuck Hagel (R-Neb.), Chairman of the Senate Foreign Relations Committee Subcommittee on International Economic Policy, Export, and Trade Promotion, introduced similar legislation.[88] Later in the year, the sanctions carve-out for food and medicine almost became law as an amendment to the agriculture appropriations bill for fiscal year 2000. Although the Senate passed the amendment by a seventy-to-twenty-eight margin, members of the House objected to the provision during conference on the grounds that they opposed loosening sanctions on Cuba.[89]

C. Iran and Libya Sanctions Act

1. *ILSA Sanctions Not Imposed*

Although certain foreign investment transactions in Iran raised the prospect that sanctions might be imposed under the Iran and Libya Sanctions Act of 1996 (ILSA),[90] there was no government action under ILSA in 1999. Designed to pressure U.S. trading partners to restrict their business activities involving Iran and Libya, this highly controversial law requires the President to impose sanctions against any person—including any foreign individual or company—that, among other things, engages in certain levels of investment in the Iranian or Libyan petroleum sectors.[91]

To date, due mainly to intense pressure from the European Union, President Clinton has declined to impose any sanctions under ILSA.[92] Three widely reported transactions during 1999, however, prompted State Department review under the ILSA and raised the

87. *See generally* United Stated Trade Act of 1999, S. 101, 106th Cong. (1999).

88. This bill, Food and Medicine Sanctions Relief Act of 1999, S. 327, 106th Cong. (1999), was identical to an amendment to the Agriculture Appropriations bill introduced in July 1998 by Senators Hagel and Dodd (D-Conn.), a measure that was approved by the Senate but dropped during budget negotiations.

89. *See* Jennifer Coderre, *Conference Report Boosts Farm Aid to $8.7 Billion; Sanctions Language Removed*, 16 Int'l Trade Rep. (BNA) 1649 (1999).

90. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1999).

91. *Id.* § 5(b)(2), 110 Stat. 1543.

92. In 1998, President Clinton issued a controversial waiver of ILSA sanctions against the Total S.A., Gazprom, and Petronas $2 billion joint venture to develop the South Pars oil field in Iran. *See* Secretary Madeline K. Albright, *Iran and Libya Sanctions Act (ILSA): Decision in the South Pars Case* (visited June 11, 2000) <http://secretary.state.gov/www/statements/1998/980518.html>.

specter of ILSA sanctions being triggered. First, in March 1999, France's Elf Aquitaine, Italy's ENI, and the National Iranian Oil Company entered into an agreement to develop the Doroud field in Iran—a deal valued at approximately $1 billion.[93] In April 1999, Elf Aquitaine and Canada's Bow Valley Energy Ltd. reportedly entered into an agreement worth some $300 million with the National Iranian Oil Company to develop an Iranian offshore oil field.[94] Third and most recently, Shell Exploration B.V. signed an agreement with the National Iranian Oil Company on November 14, 1999, to develop two other Iranian offshore fields.[95] This deal is valued at approximately $800 million.[96]

Despite State Department expressions of concern over these investments, none has yet been determined to warrant ILSA sanctions. Thus, at least in 1999, the Clinton administration was able to avoid the Hobson's choice of either imposing sanctions and facing potential European Union action in the World Trade Organization or issuing another waiver and provoking congressional ire.

2. *Suspension of U.N. Sanctions against Libya*

The recent suspension of the U.N. sanctions against Libya, discussed above in section II.A.2.a, also has implications under certain provisions of ILSA. In addition to mandating sanctions in cases of significant foreign investment in Libya's petroleum sector, ILSA sanctions are also triggered if the president determines that a foreign person or firm has knowingly exported, transferred, or otherwise provided to Libya any goods, services, technology, or other items covered by paragraphs 4(b) or 5 of U.N. Security Council Resolution 748, or paragraphs 5 or 6 of Resolution 883, if the items contribute materially and significantly to Libya's development of its petroleum resources, military capabilities, or aviation.[97]

In light of the recent suspension of the U.N. sanctions upon which this prong of the ILSA is predicated, the question arises whether this ILSA provision is moot. As a matter of U.S. law, transactions that are inconsistent with Security Council Resolutions 748 and 883 could trigger ILSA sanctions, particularly given that the U.N. sanctions are merely suspended rather than permanently withdrawn. It remains to be seen, however, whether U.S. policy on this matter may be modified to reflect the suspension or future permanent withdrawal of the U.N. sanctions.

D. Massachusetts' Burma Law Dealt Another Blow

The fate of sanctions measures imposed in recent years by states and municipalities remained in constitutional limbo in 1999. In April 1998, the National Foreign Trade Council (NFTC)[98] filed a lawsuit[99] challenging the constitutionality of a Massachusetts law prohib-

93. *See* Gary G. Yerkey, *U.S. 'Concerned' Over European Deal to Develop Energy Resources in Iran*, 16 Int'l Trade Rep. (BNA) 378 (1999).

94. *See* Gary G. Yerkey, *U.S. Sanctions Against Libya Will Remain in Effect Despite Break in Lockerbie Case*, 16 Int'l Trade Rep. (BNA) 600 (1999).

95. *See Shell to Invest in Iranian Oil, Risking U.S. Penalty*, N.Y. Times, Nov. 15, 1999, at C10; David Knott, *Iran Deal for Shell*, Oil & Gas J., Nov. 22, 1999, at 33.

96. *See id.*

97. *See* Pub. L. No. 104-172, 110 Stat. 1542.

98. NFTC is a broadly based trade association that 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.

99. *See* Complaint for Declaratory, Injunctive and Other Relief (visited June 11, 2000) <http://usaengage.org/background/lawsuit/complain.html>; *see also* Michael S. Lelyveld, *Industry Group Takes Massachusetts to*

iting the state government from purchasing goods or services from any company doing business with the Government of Burma.[100] In November 1998, Judge Tauro of the District Court in Massachusetts ruled that the Massachusetts law was unconstitutional because it "impinges on the federal government's authority to regulate foreign affairs."[101] That decision, which was appealed by the Commonwealth of Massachusetts, persuaded the European Union to suspend its complaint against the Massachusetts law before the World Trade Organization, pending the outcome of the appeal.

On June 22, 1999, the Court of Appeals for the First Circuit upheld the district court's ruling. In a unanimous decision, the First Circuit held that the state's "Burma Law" improperly intrudes on the federal government's exclusive authority to conduct foreign relations, violates the Foreign Commerce Clause, and is preempted by federal sanctions against Burma.[102]

In September, Massachusetts petitioned the U.S. Supreme Court to hear an appeal of this controversial case.[103] On November 29, the Supreme Court agreed to hear the case; oral arguments will take place March 22, 2000. The Supreme Court's review, which has drawn dozens of amicus briefs, could lead to a decision that significantly hampers the ability of states, cities, and localities to defend existing foreign sanctions measures or to impose new restrictions in the future.

E. Narcotics Kingpin Act

On December 3, 1999, President Clinton signed into law the Foreign Narcotics Kingpin Designation Act (Narcotics Kingpin Act or the Act) as part of the Intelligence Authorization Act for Fiscal Year 2000.[104] Building on earlier efforts to apply sanctions under the International Emergency Economic Powers Act (IEEPA),[105] the stated purpose of the Narcotics Kingpin Act is "to provide authority for the identification of, and application of sanctions on a worldwide basis to, significant foreign narcotics traffickers, their organizations, and the foreign persons who provide support to those significant foreign narcotics traffickers and their organizations, whose activities threaten the national security, foreign policy, and economy of the United States."[106]

Court over Myanmar Sanctions, J. Com., May 1, 1998, at 3A. Burma has been renamed Myanmar by the current regime, but many observers continue to use the former name.

100. Mass. Gen. Laws, ch. 7, § 22G-22M (1999). 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).

101. 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).

102. *See* National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999).

103. *Id.*, *cert. granted*, 120 S. Ct. 525 (1999), *aff'd*, Crosby v. National Foreign Trade Council, 2000 WL 775550 (2000).

104. Foreign Narcotics Kingpin Designation Act, Pub. L. No. 106-120, 113 Stat. 1606, 1625 (codified as amended at 21 U.S.C. §§ 1901-08 (1999) [hereinafter Narcotics Kingpin Act].

105. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-07 (1999). Under the IEEPA, the President of the United States is empowered to impose economic sanctions upon a finding of an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." *Id.* § 1701(a). President Reagan declared such an emergency with respect to Libya by Executive Orders 12,543 and 12,544 dated January 7 and 8, 1986, respectively.

106. Narcotics Kingpin Act § 803, 113 Stat. at 1626.

To this end, the Act directs the president, based on information received from relevant executive branch agencies, to submit annual reports to Congress beginning June 1, 2000, identifying those foreign persons deemed "appropriate for sanctions" (i.e., "significant foreign narcotics traffickers") under this law and stating the president's intent to impose sanctions on such persons.[107] A more detailed classified report must be submitted by July 1 each year.[108] The president is also empowered to designate persons not listed in the annual reports as significant foreign narcotics traffickers at any time but must file a supplemental report with Congress.[109]

In addition to those persons designated as significant foreign narcotics traffickers under section 804(b) or (h)(1), the Secretary of the Treasury (i.e., OFAC) may, in consultation with other relevant agencies, designate the following as sanctioned persons: any foreign person (entity or individual) "materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of a . . . [designated] significant foreign narcotics trafficker";[110] any foreign person "owned, controlled, or directed by, or acting for or on behalf of a significant foreign narcotics trafficker";[111] or any foreign person "playing a significant role in international narcotics trafficking."[112]

Significantly, the Narcotics Kingpin Act codifies a blocking order, limiting the president's choice of sanction measures to impose.[113] Once the president designates a person as a significant foreign narcotics trafficker or OFAC designates a foreign person in accordance with section 805(a), all property and property interests owned or controlled by such person(s) that come within the possession or control of a U.S. person are blocked.[114] As is common in other U.S. blocking orders, U.S. persons (wherever located) and any persons within the United States (regardless of nationality) are prohibited from dealing in the blocked property or engaging in any transactions to evade or avoid the blocking order.[115] Attempts and conspiracies to violate the blocking order are also prohibited.[116]

Although the Narcotics Kingpin Act curtails executive discretion in choosing which sanctions measures to impose upon a designated person, the president may waive application of any authorized sanction in cases where U.S. national security would be significantly harmed.[117] A presidential waiver, however, requires congressional notification within twenty-one days of its issuance.[118]

Violations of the Narcotics Kingpin Act (including regulations or licenses issued thereunder) are punishable by stiff criminal and civil penalties. On the criminal side, individuals convicted of *willful* violations of the Act face up to ten years imprisonment and/or fines in accordance with the general fine provision of title 18 of the U.S. Code.[119] Entities face up

107. *Id.* § 803(b)(1)-(12), 113 Stat. at 1627.
108. *See id.* § 804(d), 113 Stat. at 1627.
109. *See id.* § 804(h)(1), 113 Stat. at 1628.
110. *Id.* § 805(b)(2), 113 Stat. at 1629.
111. *Id.* § 805(b)(3), 113 Stat. at 1629.
112. *Id.* § 805(b)(4), 113 Stat. at 1630.
113. *See id.* § 805(a), 113 Stat. at 1629.
114. *See id.* § 805(b), 113 Stat. at 1629.
115. *See id.* § 805(c), 113 Stat. at 1630.
116. *See id.* § 805(c)(2), 113 Stat. at 1630.
117. *See id.* § 804(g)(1), 113 Stat. at 1628.
118. *See id.* § 804(g)(2), 113 Stat. at 1628.
119. *See id.* § 804(a)(2), 113 Stat. at 1631.

to a $10,000,000 fine for similar violations.[120] More onerous, and perhaps reaching new heights of severity even for U.S. sanctions laws, any officer, director, or agent of any entity who *knowingly* participates in violations of the Narcotics Kingpin Act is subject to thirty years imprisonment, up to a $5,000,000 fine, or both.[121] In addition to the criminal penalties, the Secretary of the Treasury may assess a civil penalty up to $1,000,000 on any person who violates any regulation, rule, order, or license issued pursuant to the Act.[122] Imposition of this civil penalty is subject to limited judicial review.[123]

F. Foreign Assets Control Commission

A provision of the Narcotics Kingpin Act calls for the establishment of a Judicial Review Commission on Foreign Assets Control (Commission).[124] The five-member Commission is charged with two duties: reviewing the "current judicial, regulatory, and administrative authorities relating to the blocking of assets of foreign persons by the United States Government";[125] and conducting a "detailed examination and evaluation of the remedies available to United States persons affected by the blocking of assets of foreign persons by the United States Government."[126] To perform these duties, the Commission is, among other things, empowered to hold hearings and obtain relevant information from any U.S. Government agency.[127]

By December 3, 2000, the Commission must submit a report to Congress detailing its activities and presenting any findings, conclusions, or recommendations based on the review.[128] The Commission is of limited duration and is due to terminate sixty days after the aforementioned report is submitted to Congress.[129] The five Commission members are to be appointed by members of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.[130]

IV. Export Policy Developments

High-profile accounts of possible transfers of sensitive technology to China have revived a long-running debate about the direction and efficacy of U.S. export controls. Fanned by allegations of systematic espionage by the Chinese government and lax U.S. government security and export control policies, a House of Representatives select committee, chaired by Representative Christopher Cox (R-Calif.), issued an 871-page report in early 1999 that was highly critical of existing U.S. export control policies and called for more vigorous enforcement of export control laws. For much of 1999, the "Cox Committee Report" shaped the debate on the law and policy of export controls.

120. *See id.*
121. *See id.* § 807(a)(2), 113 Stat. at 1632.
122. *See id.* § 807(b), 113 Stat. at 1632.
123. *See id.* § 807(c), 113 Stat. at 1632.
124. *Id.* § 810(a), 113 Stat. at 1633.
125. *Id.* § 810(c)(1), 113 Stat. at 1632 1633.
126. *Id.* § 810(c)(2), 113 Stat. at 1633.
127. *See id.* § 810(d), 113 Stat. at 1633.
128. *See id.* § 810(g)(1), 113 Stat. at 1635.
129. *See id.* § 810(h), 113 Stat. at 1635.
130. *See id.* § 810(b), 113 Stat. at 1633.

A. Communications Satellites

Exports of goods, services, and technology from the United States fall under one of two separate and independent export control regimes. First, the EARs, which are administered by the Department of Commerce's Bureau of Export Administration, apply to exports of most commercial (or dual-use) goods and technology. Historically, virtually all commercial items (with the recent exceptions of encryption and civilian satellites) have been subject to EAR rather than ITAR control. Second, the State Department's ITAR regulate exports of "defense articles" and related technical and defense services. In general, ITAR controls apply to exports of items that are specifically designed or modified for military use or to certain other items that are deemed to present particular national security risks.

In October 1998, in response to growing concern about the spread of sensitive technology and allegations of illegal transfers to the People's Republic of China, Congress re-shifted control over the licensing of commercial satellites from the Commerce Department to the State Department.[131] The effective date of the jurisdiction transfer was March 15, 1999, although the agencies' implementing regulations did not appear in the *Federal Register* until several days after that date.[132] Under the new rules, all satellites and "related items" are now subject to ITAR export control under Category XV of the U.S. Munitions List.

The scope of the transfer of jurisdiction, however, is not clear on the face of the legislation. It incorporates by reference a February 1998 letter from the State Department to Senator Helms, Chairman of the Senate Committee on Foreign Relations. That letter referred to various items that had been transferred from ITAR to EAR jurisdiction in October of 1996. It did not refer to other satellite-related items that had been transferred previously or that had always been subject to EAR control. In this sense, the jurisdiction transfer appears to apply only to those items that had been under State Department jurisdiction prior to October of 1996. Nonetheless, the State Department's Office of Defense Trade Controls (ODTC) is reportedly interpreting the jurisdiction transfer more broadly than that, rejecting the Commerce Department's position that certain "space-qualified" items (which have been under EAR jurisdiction for more than fifteen years) remain subject to EAR control. This interagency dispute regarding the scope of the jurisdiction transfer, which has generated considerable confusion and uncertainty in the exporting community, is currently being mediated by the White House National Security Council.

B. Canadian ITAR Preference Narrowed

In April 1999, the State Department's ODTC amended the ITAR to narrow the scope of the long-standing "Canadian exemption," which permitted the export of most ITAR-controlled articles, technical data, and services to Canadian end-users without obtaining an ITAR license.[133] The new regulations require U.S. exporters of ITAR-controlled items and services to obtain prior licensing approval from ODTC for a broader range of exports to

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131. *See* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261 § 1513(a), 112 Stat. 1920, 2174 (1998).

132. The State Department's Office of Defense Trade Controls published amendments to the ITAR on March 22. *See* 64 Fed. Reg. 13,679, amending 22 C.F.R. pts. 121 and 124 (1999). The Commerce Department's Bureau of Export Administration's accompanying amendments to the EARs were published on March 18. *See* 64 Fed. Reg. 13,338, amending 15 C.F.R. pts. 734, 740, 742, 752, 772, and 774 (1999).

133. *See* Amendments to International Traffic in Arms Regulations, 64 Fed. Reg. 17,531 (1999).

Canada, including exports of articles, technical data, and services described in Category XV of the Munitions List. Even where the exemption is still available, the amended regulations impose new documentation requirements as a condition for using the exemption.

The perceived expansion of the ITAR Canadian exemption generated considerable criticism from the Canadian government as well as from affected exporters. In October, the State Department announced that the two governments had "reached substantial agreement in principle to implement steps" that would allow the two countries to maintain both a "strong North American perimeter for defense export controls" and the "unique, integrated North American defense industrial base."[134] Under the terms of the "agreement in principle," the Canadian government would strengthen its own defense export controls by subjecting to control all items on the U.S. Munitions List. For its part, the U.S. government would fully restore—and perhaps even expand—the ITAR Canadian exemption. At the time of this writing, no concrete steps towards regulatory implementation of this approach had been adopted.

C. Continuing Statutory Vacuum

Ever since the lapse of the Export Administration Act (EAA) in 1994, the Commerce Department's EARs have been extended on a temporary, ad hoc basis under separate statutory authority, the International Emergency Economic Powers Act (IEEPA).[135] By failing to enact new legislation, the Commerce Department and some members of Congress have argued, Congress has missed an opportunity to design a framework that addresses the realities of the post-Cold War world. A new EAA could, the argument goes, serve as a framework that articulates a new consensus about what items should be controlled for export, why they should be controlled, and how to control them. Most important from the Commerce Department's perspective, a new statute could provide a long-overdue basis for establishing new penalty levels, improving licensing procedures, and building in mechanisms for resolving interagency disputes over licensing decisions. Although 1999 saw several valiant efforts to implement a new and updated version of the EAA, those efforts were ultimately unsuccessful.[136]

D. Court Decision Strikes Blow to Encryption Rules

In a highly-publicized decision issued on May 6, 1999, the U.S. Court of Appeals for the Ninth Circuit ruled that U.S. export controls on encryption source code are an unconstitutional prior restraint on free speech.[137] By a two-to-one majority, the court found that computer source code is akin to language or "speech" that is subject to protection under the First Amendment of the U.S. Constitution. Export rules that regulate encryption source code, the court held, are an invalid prior restraint on speech or publication under the First Amendment. Ultimately, the legal issues in this case could reach the Supreme Court.

134. *Canada: Joint Statement on Defense Export Controls and North American Defense Industrial Base* (last modified Oct. 12, 1999) <http://secretary.state.gov./www/briefings/statements/1999/ps991012b.html>.

135. 50 U.S.C. §§ 1701-07.

136. Proposed EAA renewal legislation, sponsored by Senator Enzi (R-Wy.), Chair of the Senate's Subcommittee on International Trade and Finance of the Senate Banking Committee, failed to get through the Senate.

137. Bernstein v. U.S. Dept. of Justice, 176 F.2d 1132 (9th Cir. 1999) (opinion withdrawn).

Notwithstanding the breadth of the Ninth Circuit's ruling, it is important to recognize that it did not eliminate U.S. encryption export regulations. On the contrary, those rules have remained in effect, and the government has stated that it will continue to enforce them. Equally important, the Justice Department sought a rehearing of the appeal en banc in the Ninth Circuit, and it obtained an injunction suspending the Ninth Circuit's ruling.[138] In the meantime, all current controls on encryption technology (including source code), software, and hardware have continued to apply.

By the close of 1999, however, the fate of the *Bernstein* appeal was uncertain, in light of new encryption export policies announced by the Commerce Department, as discussed below in section E. Among other things, the new rules will apparently ease controls in a manner that might arguably moot Mr. Bernstein's case. (Indeed, it is possible that government concerns about the *Bernstein* precedent were a motivating factor behind the decision to loosen the encryption rules in a manner that effectively mooted the case.) Still, the *Bernstein* case might be used to challenge other aspects of export control laws, particularly controls on technology transfers. If extended to their logical extremes, the principles articulated in the Ninth Circuit's decision could lead to findings that controls on technology transfers, particularly domestic transfers under the "deemed export" rule, are unconstitutional prior restraints on speech or invalid for other reasons.

E. Changes in Encryption Export Rules

In September 1999, the Clinton administration announced another dramatic change in a series of sweeping decontrols with respect to exports of encryption hardware, software, and technology. While the new policies do not eliminate all controls on encryption exports, they will allow U.S. companies to export products with very powerful encryption to customers in all but the embargoed countries. The new rules, to be implemented in the form of regulations in early 2000, will permit such exports once the particular product to be shipped has received a one-time technical review by the U.S. government.

The new rules continue the shift away from transaction-specific licensing requirements, and grant favorable export treatment based on a single product-specific ruling. This expands upon on the current "License Exception ENC" concept, which has to date been limited to products with a 56-bit key-length or sales of stronger products to approved sectors. The new framework will eliminate these limitations and make approved products of any encryption strength eligible for export, with only limited restrictions and post-shipment reporting.

Under the new rules, any cryptographic hardware or software that has received a Commerce Department technical review will be exportable to individuals, commercial firms, and other non-government end-users. Exports to government entities can also become eligible for export if they are approved separately under a special "retail" license exception. Commerce Department officials have indicated that previously issued export licenses and License Exception ENC classifications will, in most cases, satisfy the one-time technical review requirement. A separate review process will be required, however, for any new products or to qualify for the special "retail" exception.

Notwithstanding the breadth of these decontrols, however, encryption export rules are still extremely complex, government review of products prior to export is required in most

138. Bernstein v. U.S. Dept. of Justice, 192 F.3d 1308 (1999).

cases, and many export transactions are subject to new reporting requirements. First, eligibility for favorable export treatment will, as noted above, be contingent on applying for and obtaining a written technical classification from the Commerce Department. Moreover, the expanded license exception will not extend to cryptographic technology, technical assistance, source code, API's, or sales of non-"retail" products to government end-users. These types of transactions will continue to require traditional export licenses or encryption licensing arrangements. In addition, the new encryption rules will impose post-shipment reporting requirements for most exports of products with a key length greater than 64 bits. Ironically, certain currently approved transactions that now are not subject to any reporting requirement will become subject to reporting under the new rule.

The new encryption export rules reflect increasing pressure from the business community to liberalize U.S. controls, which for the most part have been unilateral in nature. At the same time, the continuation—and even expansion—of product reviews and reporting requirements confirm that the U.S. government continues to view export controls as an essential tool for addressing national security and law enforcement concerns relating to the spread of strong encryption technology. While further liberalizations are inevitable, some degree of export regulation remains a fact of life for U.S. encryption exporters.

F. SED Rules Amended

After months of internal and external debate, the Commerce Department issued proposed regulations in October that "clarify the responsibilities of parties to an export transaction."[139] The proposed rules, which have not been without criticism, reflect the Commerce Department's and Customs Service's desire to use the Shipper's Export Declaration (SED)[140] as a vehicle for clearly determining export licensing—and, hence, compliance—responsibilities among the parties to an export transaction. Among other things, the proposed rules provide that when the foreign principal party expressly assumes responsibility in writing for determining license requirements and obtaining necessary authorization, that party must have a U.S. agent (with a legal presence) in the United States who becomes the "exporter" for export control purposes. If adopted in its proposed form, the proposed rules would also require exporters who ship under export licenses to formally communicate license conditions to all parties bound by the conditions and, when required by the license, to obtain written acknowledgment of the conditions.

G. CWC Implementation

In the final days of the 1998 legislative session, Congress passed the Chemical Weapons Convention Implementation Act of 1998 (CWC).[141] 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 compli-

139. 64 Fed. Reg. 53,854, proposed rule amending 15 C.F.R. pts. 732, 740, 743, 748, 750, 752, 758, 762, and 772 (1999); *see* 64 Fed. Reg. 53,861 (1999) (supplementary notice of proposed rulemaking).

140. The SED is a Census Bureau document that must be submitted to the Customs Service when items are exported from the United States.

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

ance. 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. In 1999, both the Commerce Department and the State Department issued regulations designed to implement the statute and U.S. obligations under the CWC.

In May, the Commerce Department amended the EARs to require prior notifications and annual reports of exports of certain toxic chemicals and precursors, to add licensing requirements to exports of certain chemicals and related technology not previously controlled, and to expand licensing requirements for certain already-controlled chemicals.[142] In July, both the Commerce Department and the State Department issued proposed rules to further implement the CWC.[143] Following an extended notice and comment period, BXA issued interim rules, and the State Department issued final regulations on December 30, 1999.[144] The Commerce Department regulations impose far-reaching reporting and inspection requirements and controls on imports for industries that use certain precursor chemicals that can be used in chemical weapons. The State Department's rules establish guidelines for collecting samples during inspections mandated by the CWC and imposing additional record keeping requirements and penalties for noncompliance.

V. Conclusion

For decades, U.S. export controls and trade sanctions have experienced periodic "mood swings," sometimes leading to shifts between policy extremes. After several recent years of escalation, however, one could sum up 1999 as a year of modest retrenchment. This is not to say that either Congress or the Executive branch has lost its appetite for imposing new and expanding sanctions programs, or that export controls are becoming an "endangered species." Quite the contrary, economic sanctions continue to serve as the tool of choice for advancing an ever-widening range of policy objectives, including the fight against international terrorism and drug trafficking. At the same time, calls for aggressive enforcement of export control laws, and increased penalties for violations, have rarely been louder.

Still, we witnessed in 1999 a "paring down" of several long-standing legal regimes, which just recently few would have predicted. In the sanctions area, both the Clinton administration and Congress took significant steps to ease controls on exports of agricultural and medical products to embargoed countries. Export controls on a broad universe of encryption products and technology were virtually eliminated, subject only to cumbersome, but surmountable, government reviews and reporting requirements. And U.S. courts reached landmark decisions in two far-reaching cases that could further limit the use of sanctions and export controls in the future. While it is still premature to view these developments as a "sea of change," the waters appear to be warming for further liberalizations as we enter the twenty-first century.

142. *See* 64 Fed. Reg. 27,138, proposed rule amending 15 C.F.R. pts. 734, 736, 738, 740, 742, 745, 748, 758, 772, and 774 (1999).

143. 64 Fed. Reg. 39,194 (1999) proposed rule amending 15 C.F.R. pts. 710-721; notice of proposed rulemaking 64 Fed. Reg. 39244, creating 22 C.F.R. pt. 103 (1999).

144. 64 Fed. Reg. 73,744 (1999); 64 Fed. Reg. 73,811 (1999).