Developments in Unilateral U.S. Dual-Use Export Controls

And How They Could Be a Guide for Plurilateral Controls to Address Contemporary Country-Specific Concerns of Common Interest

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The story of U.S. dual-use export controls is the expanded use of unilateral, extraterritorial list-based, end-use, and end-user controls largely to address Chinese government policies contrary to U.S. national security and foreign policy interests.

INHALT

There is little disagreement in U.S. political and policymaking circles that export controls and other tools must be used to respond to such threats, particularly China's military-civil fusion policies and its human rights abuses. There is also little disagreement that the traditional multilateral export control system is not an effective or quick tool to address them. Although the multilateral system works fairly well to address common concerns regarding the proliferation of weapons of mass destruction and conventional military items, it is not well adapted to addressing contemporary issues involving a range of commercial information and communications technologies for several reasons. Given the need for consensus among member states with a wide range of capabilities in such technologies and the fast pace of the technologies' evolution, the regimes are not able to keep the lists of controls over such items current. The regimes do not have the mandate to address country-specific or, with a limited exception, human rights-related abuses with respect to the use of specific technologies. Finally, the regime member states generally do not have the flexibility in their legal systems to adopt non-regime-based technology controls or end-use or end-user controls, except with respect to those related to weapons of mass destruction.

This combination of factors led the Trump Administration to adopt and expand a series of unilateral, extraterritorial export controls to respond to specific issues involving China and other countries of concern, summaries of which are in Section I. A full description of each control would require separate and lengthy papers. The summaries are nonetheless useful in generally understanding the policy concerns motivating the actions and also the new compliance obligations U.S. and non-U.S. companies now have as a result. Section II describes the relatively new U.S. statutory requirement to identify and control "emerging" and "foundational" technologies essential to U.S. national security that are not now controlled by a multilateral regime. U.S. law has always authorized the identification and control of such technologies. Indeed, the Commerce Department's Bureau of Industry and Security (BIS) was created decades ago to lead the interagency process to do so. The difference now is that Congress specifically required BIS to lead such efforts and created standards for the imposition of unilateral controls largely to address Chinese technology acquisition efforts of concern. To the surprise of many, the Trump Administration, however, followed a traditional multilateral approach with respect to identifying and controlling emerging technologies.

If I were at Export Control Day as I was ten years ago, I would again speak about how the United States, Germany, and their other allies could work together to address common, contemporary policy issues through their export control systems. This time, however, I would first ask about whether the allies agreed that unilateral changes such as those described below were warranted. If not, I would ask why. Is the concern a matter of substance or semantics? Is the view that country-specific and human rights issues are better addressed by sanctions against transactions and activities as opposed to controls on commodities, software, and technologies? If so, I would refer to the topics in Section III and ask whether they would be willing to discuss changes to their domestic export control systems so that the next versions of such controls could be plurilateral. In my view, making such changes together would (i) enhance the controls' effectiveness in addressing contemporary country-specific military-civil fusion policies and human rights abuses of common concern; (ii) reduce unnecessary trade and diplomatic friction among the allies; and (iii) reflect the reality that the purpose and role of export controls needs to grow beyond the proliferation-focused issues that motivated the creation of the multilateral system near the end of the Cold War.

Summary of Significant Unilateral, Extraterritorial Controls in the Export Administration Regulations (EAR)

Additions to the Entity List

The Trump Administration continued the Obama Administration's aggressive

use of the Entity List tool. It added 279 parties to the list in 2020. There are now more than 1,500 parties on the list. 29 % are in China or Hong Kong. 20 % are in Russia. 9 % are in the UAE. The standard for being added to the list is a U.S. Government determination that a non-U.S. party has engaged in acts contrary to U.S. national security or foreign policy interests. This is a highly discretionary standard. Traditionally, it has been (and continues to be) used to list entities engaged in acts related to weapons of mass destruction, terrorism, diversions contrary to U.S. export control or sanctions regulations, or the use of U.S.-origin items to conduct military research in Russia, China, and other countries of concern. To the Trump Administration's credit, the tool was used to add dozens of Chinese government and commercial entities involved in China's campaign of repression, mass arbitrary detention, forced labor, and high-technology surveillance of Uyghurs and other ethnic minorities in Xinjiang. It also added to the list entities involved in military construction activities in the South China Sea. One action was focused on a Chinese entity engaged in intellectual property theft where there was a national security issue involved.

The Entity List-related license obligations apply to any commodity, software, or technology ("item") "subject to the EAR." Except for Huawei-related transactions, this is a jurisdictional term that applies, in essence, to all (i) U.S.-origin items, wherever located in the world; (ii) items in or transiting through the United States, even if non-U.S.-origin; (iii) non-U.S.-origin items that contain more than a de minimis amount of controlled U.S.-origin content; and (iv) non-U.S.-origin items that are the direct product of technology or software identified on the Wassenaar Arrangement control list.

These controls are unilateral in that they are specific to particular end users and primarily apply to commercial items not identified on any of the multilateral regime lists of dual-use items. Until August 2020, the license obligation applied to exports, reexports, or transfers by persons in or out of the United States "to" a listed entity. Now, the license obligation applies to all exports, reexports, and transfers of "items subject to the EAR" when a listed entity is a party to the transaction, such as a purchaser, intermediate consignee, ultimate consignee, or end user. This change and the significant number of entities on the list warrant revisions to U.S. and non-U.S. company screening programs to ensure compliance.

Huawei and the Foreign-Produced Direct Product Rule

The Chinese telecommunications company Huawei and many of its affiliates were added to the Entity List in March 2019. The number of listed affiliates grew over the course 2019 and 2020 to include more than 150 companies. As described in recent Commerce Department publications, the purpose of the listing is to limit the Huawei companies' access to telecommunications and related items so that they are unable to dominate global 5G development, which would allow the Chinese government to engage in industrial espionage and other cyber-related crimes around the world more easily. Not only is the policy justification for the listing unique, the size and jurisdictional reach of the Huawei-related listings are unique.

First, according to recent media reports, the Trump Administration approved tens of billions of dollars' worth of licenses authorizing exports to Huawei in 2020, denied similarly large amounts in other applications, and did not resolve tens of billions of dollars' worth in yet other applications. These amounts are several orders of magnitude larger than the impact of any previous Entity List or other export control action. Second, the Huawei-related Entity List rules have a novel extraterritorial jurisdictional scope that does not apply to shipments of non-U.S.-origin items from outside the United States to any other listed entity or destination. Specifically, since August 17, 2020, a non-U.S.-made item to be shipped from outside the United States to any party is "subject to the EAR" (and requires a license) if:

- it is the direct product of technology or software subject to the EAR and described in specific Export Control Classification Numbers (ECCNs) in Categories 3, 4, or 5 of the EAR's Commerce Control List (paragraph (a)); or produced by an item, such as a tool, that is the direct product of U.S.-origin technology or software described in the same ECCNs (paragraph (b)); and
- the exporter, reexporter, or transferor of the non-U.S.-produced item has "knowledge" that either (i) the item will be incorporated into, or used to produce or develop, a commodity produced, purchased, or ordered by a Huawei company (paragraph (1)); or (ii) a Huawei company is a party to any transaction involving the non-U.S.-produced item (paragraph (2)).

By definition, the rule subjects to U.S. export control license requirements non-U.S.-made items that have never before been subject to export controls. The rule is also extraordinarily complicated, which is magnified by the complexity the relevant global supply chains. Thus, U.S. and non-U.S. companies that engage in transactions involving a Huawei company, directly or indirectly, need to analyze carefully their shipments of non-U.S.-made items to ensure compliance.

Military End-Use and End-User Controls

The EAR prohibit the unlicensed export, reexport, and transfer of specific types of otherwise generally uncontrolled items subject to the jurisdiction of the EAR (e.g., U.S.-origin aircraft parts and basic semiconductor production equipment parts) to China, Russia, or Venezuela if (i) there is "knowledge" that the item is for a "military end use" or "military end user;" or (ii) BIS has identified the recipient as a "military end user." One can have such "knowledge" either as a result of being individually informed by BIS that there is an unacceptable risk of the item being diverted to "military end use" or "military end user" or, without such a notification, having awareness of a "high probability" that the covered item is for a "military end use" or "military end user."

Effective June 29, 2020, BIS expanded the definition of "military end use" so that that it means: (i) the "incorporation into" a military item; or (ii) "any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, 'development,' or 'production,'" of military items. A "military end user" is (i) the national armed services as well as the national guard and national police, government intelligence, or reconnaissance organizations; or (ii) "any person or entity whose actions or functions are intended to support 'military end uses.'" Thus, even if an export of a covered item is purely for civil end

uses and the recipient is otherwise engaged in civil activities, the entity is still a "military end user" if any other part of its business supports "military end uses," as now defined.

On December 23, 2020, BIS published in a new EAR supplement a list of entities it had determined were "military end users." The "first tranche" of military end users consists of 57 entities in China and 45 in Russia. BIS's creation of a specific list of military end users does not remove the obligation to determine whether one has knowledge that an unlisted end user in China, Russia, or Venezuela is a military end user when companies are exporting items subject to the military end use/user rule. Again, companies involved in trade with these countries need to update their internal control systems to ensure compliance with the EAR because the rules apply to items that are not subject to export controls of any other country.

Military-Intelligence End Use and End User Rule

On January 15, 2021, BIS published an interim final rule imposing controls on specific activities by U.S. persons in connection with "military-intelligence end uses" and "military-intelligence end users." The rule is set to become effective on March 16, 2021. These end use controls will be in addition to the existing EAR controls on U.S. person activities involving weapons of mass destruction, which the new rule will also expand when it takes effect. Specifically, U.S. persons may not "support" a "military-intelligence end use" or a "military-intelligence end user" in China or one of the other listed countries without a license. In addition, no U.S. or non-U.S. person may export, reexport, or transfer any item "subject to the EAR" if there is "knowledge" that the item is intended for a "military-intelligence end use" or a "military-intelligence end user" in China or one of the other listed countries.

Emerging and Foundational Technologies

Largely in response to concerns about efforts by companies in China and other countries to acquire uncontrolled emerging and foundational technologies, the U.S. Congress passed in 2018 the Export Control Reform Act (ECRA) and the Foreign Investment Risk Review and Modernization Act (FIRRMA). The rules regarding investment in the United States and export controls are now connected and overlapping. In sum, FIRRMA expanded the U.S. Government's authority over inbound investment to address concerns, inter alia, regarding transfers of potentially sensitive uncontrolled technologies to foreign persons. The EAR focus on outbound activities (and releases to non-U.S. persons in the United States of controlled technology) to address technology transfer concerns regarding identified commodities, software, and technologies. Emerging and foundational technologies added to the EAR's list of controlled items – the Commerce Control List – will simultaneously expand the U.S. Government's jurisdiction over foreign investments in the U.S. involving such technologies.

Understanding that the bar for the imposition of unilateral controls should be high, Congress set out in ECRA clear statutory standards governing the effort to identify and unilaterally control emerging and foundational technologies. Specifically, the new law requires the U.S. Government to conduct an interagency effort that reaches out to all available sources of information to identify emerging and foundational technologies that "are essential to the national security of the United States" and that are not now subject to a multilateral control. Once such technologies are identified, the statute requires BIS to get industry input on the controls in response to a proposed rule. (ECRA gives the U.S. Government vast discretion to work with allies to control through multilateral action commodities, software, and technology for a wide range of national security and foreign policy reasons, as defined by the administration.)

In deciding whether to identify such a technology as "emerging" or "foundational" and impose unilateral controls on its export, reexport, and transfer, the new law requires the U.S. Government to take in to account the (i) the development of the technologies outside the United States; (ii) the effect export controls imposed pursuant to this section may have on the development of such technologies in the United States; and (iii) the effectiveness of export controls imposed pursuant to this section on limiting the proliferation of emerging or foundational technologies to non-U.S. countries. Basically, this ECRA provision states that comparable technologies that are widely available outside the United States are not good candidates for unilateral control because the control would be less effective and create an unlevel playing field for the affected U.S. industry.

After the law came into effect, there was a widely held view that the Trump Administration would impose broad, sweeping unilateral controls over whole categories of technologies such as those involving artificial intelligence, semiconductors, advanced computing, quantum computers, additive manufacturing, robotics, and advanced surveillance technologies. With one limited exception, the Trump Administration did not impose unilateral controls over emerging technologies. To the contrary, it followed the standards in ECRA and worked with the regime allies to amend the regime control lists to add 37 types of narrowly scoped emerging technologies such as those pertaining to single-use biological cultivation chambers, certain microwave transistors, continuity of operation software, post-quantum cryptographic algorithms, underwater transducers, hybrid additive manufacturing tools, and computational lithography software.

In August 2020, BIS published a notice asking the public for comments on how to define "foundational" technologies and which technologies should be controlled as such. It is unknown how the Biden Administration will respond to the comments, but the legal standard for which ones should be identified and controlled unilaterally is the same as for "emerging" technologies.

Topics to Discuss Among the Allies

As described in the introduction, the existing export control regime system was set up near the end of the Cold War to address common concerns regarding the proliferation of weapons of mass destruction and conventional military items. It does not address country-specific concerns, primarily those pertaining to human rights abuses and China's military-civil fusion policies, i.e., the state policies designed to deeply integrate China's civilian and defense economies in order help modernize its military. To address such issues, a small group of like-minded allies

Impressum

AW-Prax – Außenwirtschaftliche Praxis
Zeitschrift für Außenwirtschaft in Recht und Praxis – herausgegeben in Verbindung mit dem Europäischen Forum für Außenwirtschaft, Verbrauchsteuern und Zoll e.V. (EFA)

Redaktion im Verlag
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Verantwortlich für den Inhalt
Uwe Mähren, Köln

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Erscheinungsweise
monatlich; jeweils zum 15. des Monats

Bezugspreise/Bestellungen/Kündigungen
Einzelheft Inland € 26,90/Einzelheft Ausland € 28,00 inkl. MwSt. inkl. Versandkosten (Inland 1,30 € pro Ausgabe/Ausland 4,30 € pro Ausgabe). Der Jahresabopreis Print Inland beträgt € 303,80/Print Ausland € 338,60 inkl. Versandkosten (Inland 1,30 € pro Ausgabe/Ausland 4,30 € pro Ausgabe). Die Zeitschrift ist auch als Online-Ausgabe inkl. Archiv für € 327,00 erhältlich. Bestellungen über jede Buchhandlung oder beim Verlag. Der Bezugszeitraum beträgt jeweils 12 Monate. Kündigungen müssen schriftlich erfolgen und spätestens am 15. des Vormonats, in dem das Abonnement endet, beim Verlag eingegangen sein.

Verlag: Reguvis Fachmedien GmbH
Postfach 10 29 52, 50469 Köln
Geschäftsführung: Jörg Mertens

Reguvis

www.reguvis.de

Abo-Service
Gerburg Brandt/Isa Güleryüz
Telefon: 02 21/9 76 68-173 und 357
Telefax: 02 21/9 76 68-232
E-Mail: aussenwirtschaft@reguvis.de

Vertrieb in Österreich
Kitzler Verlag GmbH
1010 Wien, Uraniastraße 4
Telefon: 00 43/(0)1/7 13 53 34-0
Telefax: 00 43/(0)1/7 13 53 34-85
E-Mail: office@kitzler-verlag.at

Aboverwaltung für Österreich
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Telefon: 00 43/(0)1/7 13 53 34-14
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E-Mail: sabrina.wosmek@kitzler-verlag.at

Anzeigenleitung
Hans Stender, Anschrift wie Verlag,
Telefon: 02 21/9 76 68-343
Telefax: 02 21/9 76 68-288,
E-Mail: hans.stender@reguvis.de
Mediadaten: www.reguvis.de > Infothek > Mediadaten

Anzeigenpreise
Es gilt die Anzeigenpreisliste Nr. 24 vom 1.1.2021
Vergünstigte Preise für Stellengesuche

Herstellung
Günter Fabritius, Telefon: 02 21/9 76 68-182

Satz
Satzbetrieb Schäper GmbH, Bonn

Druck
Appel & Klinger Druck und Medien GmbH, Schneckenlohe

ISSN 0947-3017

that are producer nations of the key technologies at issue could take steps along the lines of the following:

- Meet informally to discuss and get agreement on the common concerns to be addressed regarding now uncontrolled technologies, particularly those relevant to China's and other countries' military-civil fusion policies and human rights abuses.
- Agree to promote a plurilateral approach to taking list-based, end-user-based, and end-use-based export control actions that are outside the scope of the current regimes rather than taking unilateral and expansively extraterritorial steps, which are less effective and more controversial, unless clearly necessary.
- Discuss how such plurilateral export control steps could be integrated into broader strategies for dealing with the identified threats to be addressed, rather than adopted in isolation. This should include a discussion of incentives for cooperation, such as being able to receive more favorable export control licensing treatment, intelligence sharing, and the ability to participate in jointly funded R&D efforts. The discussion should also include ideas for how to control indigenous development and production capabilities of the technologies of common national security and foreign policy concern without letting the effort devolve (or be seen as devolving) into economic protectionist objectives.
- Discuss specific technologies of concern well in advance of regime meetings and work to get informal agreements among the participants to vote to control such technologies formally in the regimes during their regularly scheduled process. The smaller group of countries could also agree to ask the regimes to agree to make changes on a rolling basis to speed up the process rather than waiting for the annual plenary meetings to do so.
- Discuss how the members could address common export control licensing policies to enhance their effectiveness, rather than considering licensing policy purely as a matter of national discretion. This could include a "no undercut" rule as appropriate. The members should also discuss the information-sharing process and policy lessons learned from when COCOM had such an arrangement.
- Generally speaking, the technologies at issue are the types of items normally controlled by Categories 3, 4, and 5 of the Wassenaar dual-use list. These include the oft-discussed "emerging" technologies that are disruptive to traditional export control considerations, primarily those pertaining to artificial intelligence, quantum computing, and additive manufacturing. Most stages of the semiconductor development and production processes are clearly within the scope of the technologies at issue. Thus, the meetings should include or be informed by technical and subject matter experts in such areas from government, academia, and industry.
- Finally, for any such plurilateral effort to work, the participants would need to agree to promptly take the actions necessary to ensure that their domestic laws give their export control agencies more discretionary authority (i) to control non-regime-controlled items; and (ii) to impose end-use and end-user controls. This, I agree, will be an extraordinarily difficult goal to accomplish, but it will be critical to the success of any future plurilateral efforts.

Conclusion

Thank you for asking me to participate in Export Control Day 2021. I look forward to reading the other papers and meeting again one day in person. Also, to be clear, the views in this document are my personal views for the sake of framing a discussion of a current export control issue. I am not writing for or on behalf of anyone else. I am also not opposing or supporting with this paper any particular change in U.S. law.