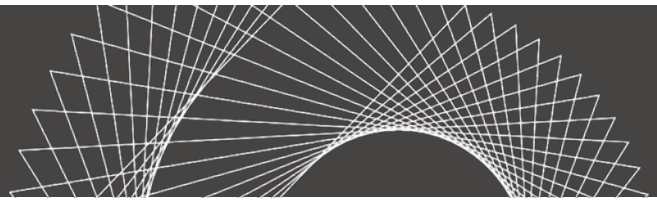
Export Controls and the Meaning of National Security



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Export Control Basics

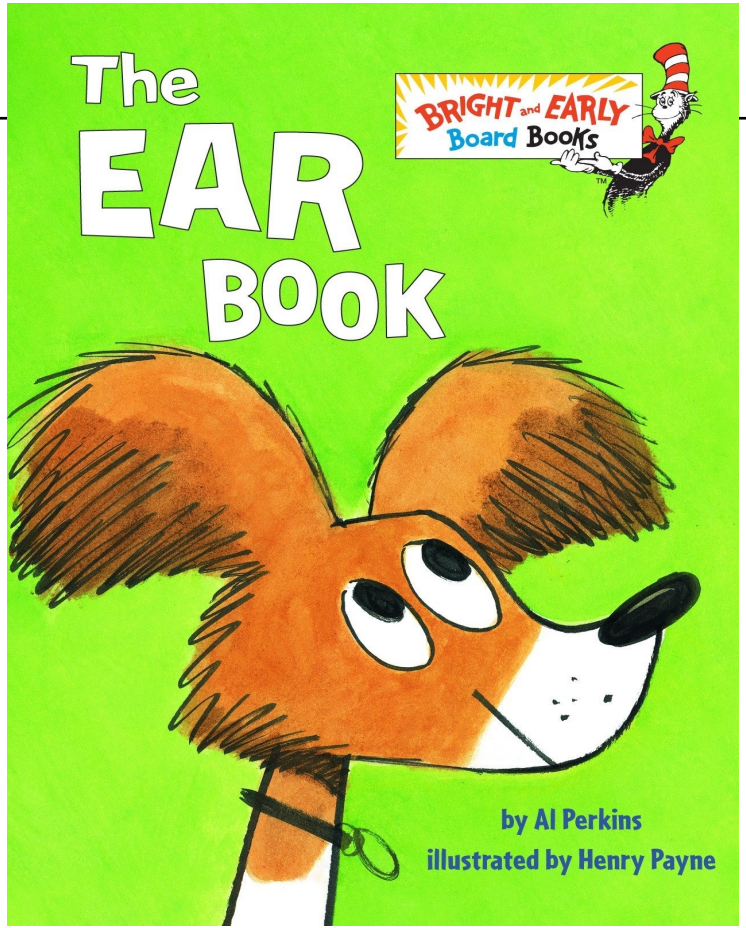
- Export controls are the rules that govern:
  - the export, reexport, and transfer
  - by U.S. and foreign persons
  - of commodities, technology, software, and services
  - to destinations, end uses, and end users
  - to accomplish various **national security** and foreign policy objectives.

All Export Controls on One Page

Actor / Act	**Physical Things** ("Goods," "Commodities," "Defense Articles")	**Information** ("Technology," "Technical Data")	**Software**	**Services** ("Defense services" or WMD-related "activities")
Destinations (Countries or regions, for listed items, or embargoed destinations for all else)				
End Uses (e.g., WMD end uses regardless of item's classification)				
End Users (e.g., SDNs or listed entities, regardless of item's classification)				

Actor: U.S. Person or Foreign Person (people and companies)

Act: Export, Reexport, or Transfer



See: www.bis.doc.gov

Topics Not Discussed Today

- The bookend to export control “keep away” strategies is the industrial policy “run faster” strategy, which has evolved considerably in recent years, and is separate from this discussion.
- Sanctions, which have blended with export controls in actions against Russia given limited allied export control authorities.
- Defense trade controls (e.g., the ITAR and FMS issues) have many different policy issues, and not at issue here.
- Import and domestic controls (e.g., NDAA 889 procurement controls and ICTS rule approach to protecting critical infrastructure).
- IP theft, immigration, visa issues, espionage, and cyber security.
- Foreign direct investment controls (CFIUS) and possible outbound investment controls.
- Tariffs, trade remedies (e.g., WTO), antidumping/countervailing duties.
- Diplomacy.

The Three Legs of the Export Control Stool

- **List-Based** controls over specific commodities, software, and technologies (e.g., "items" on the Commerce Control List)
- **End-Use** controls over specific activities not involving listed items or listed end users (e.g., prohibitions on US person support for the development of WMD)
- **End-User** controls over exports to specific entities of unlisted items for any end use (e.g., the Entity List, which is significantly evolved from its non-proliferation-focused origins)
- Congress recently gave BIS significant new authorities to impose U.S. person *end use* controls against "military, security, or intelligence" services – *even if no items subject to the EAR are involved.*
- See: https://www.akingump.com/a/web/fo8dd66FHjU3jXzWnZDNAc/4P3e26/international-trade-alert.pdf

Allies Do Not Use All the Legs….

- Allies align on list-based controls identified by the regimes. But for new Russia controls, US, however, has unilateral controls on a long list of items controlled for "Regional Stability," "Crime Control," and "Anti-Terrorism" reasons.
- Allies align on end use controls if for development or production of weapons of mass destruction. US has gone further and imposed them against military-intelligence end uses, military end uses, and end uses specific to advanced node semiconductors in China.
- US is largely alone in using end-user controls in export controls (e.g., the Entity List and military end users), but allies do impose sanctions against specific sectors and entities.
- End use and end user controls can be effective tools if policy issue to be addressed cannot be addressed through list-based controls, such as for human rights objectives.

The First Rule of Regulations Is ….

- ***Define the problem to be solved.***
  - See: https://www.uscc.gov/sites/default/files/2021-08/Kevin_Wolf_Testimony.pdf
- So, how a government defines "national security" and "foreign policy" will determine the scope of what should be controlled for export.
- The Cold War-era COCOM-based national security-focused policies pertaining to dual-use items included a **strategic** trade and containment policy directed at the Soviet Union and the Eastern Bloc (and a "Green Line" for China).
- The foreign policy objectives were similar, but also included support for sanctions programs and limited human rights objectives.
- Three of the four multilateral regimes were created near the end of the Cold War to address **non-proliferation** objectives pertaining to WMD.

The Second Rule of Regulation Is…

- Make it ***effective*** at achieving the goal and ***not counterproductive***.
- The general rule is the multilateral/plurilateral controls tend to be more effective at denying the items at issue to the parties at concern.
- History has shown that unilateral controls are *eventually* counterproductive and ineffective.
  - Although unilateral controls are sometimes effective in specific areas of dominance, and occasionally they are warranted, even if ineffective, to express a country's view (such as on human rights issues), this is still the lesson of history.

Post-Cold War-Era National Security Purpose

- Since the end of the Cold War, the primary national security objective of export controls has been to, in essence, regulate:
  - **weapons of mass destruction (WMD) (nuclear, chemical/biological, and missile-related items);**
  - **conventional military items (and items of importance to terrorists); and**
  - **bespoke and dual-use commodities, software, and technology that have some identifiable relationship to their development, production, or use.**
- The "strategic" trade controls focused on containing the Soviet Union and achieving objectives broader than non-proliferation objectives largely fell away. Indeed, a goal was to include Russia in the regimes.

The Four Regimes (and Their Strengths)

- The lists of such items that are the foundation of most post-Cold War export controls are determined by consensus in the four primary, voluntary multilateral regimes, which are:

  - the Nuclear Suppliers Group (NSG),
  - the Australia Group (AG) (for chemical and biological-related items),
  - the Missile Technology Control Regime (MTCR), and
  - the Wassenaar Arrangement (WA), which covers conventional arms and dual-use items to prevent "destablising accumulations" and their acquisition by terrorists.

    – See: https://www.akingump.com/a/web/da8PXpEZoaPekNsTPUmfmr/011422us-euttcwolfkilcreasehelderfinal.pdf

- Items identified by the regimes are more effectively controlled because most or all the producing nations regulate them. Each country, however, defines "national security" at its own "national discretion." There was no one common rule, but a common understanding.

Regimes (and Their Weaknesses)

- The lists of items identified by the regimes are country agnostic. The focus is on the inherent properties of particular items to develop, produce, or use WMD or conventional military items, or their bespoke or dual-use components. See: https://www.bis.doc.gov/index.php/documents/regulations-docs/2329-commerce-control-list-index-3/file
  - For most countries, if a commodity, software, or technology is on one of these lists, the export is controlled. If not, then it is not. If for a civil end use, the license is generally approved.
  - The "catch-all" end use controls are limited to those related to WMD development or production. Few countries have a "military end use" control like the United States.
  - There are no end user controls in the regime-focused systems similar to the US Entity List.
  - The regimes' mandates prohibit or, at least, do not authorize the use of export controls to achieve economic security objectives.

Wassenaar Criteria for Control

- "Dual-use goods and technologies to be controlled are those which are major or key elements for the indigenous development, production, use or enhancement of military capabilities. For selection purposes the dual-use items should also be evaluated against the following criteria:

  - Foreign availability outside Participating States.
  - The ability to control effectively the export of the goods.
  - The ability to make a clear and objective specification of the item . . . ."

- **"N.B. 1. General commercially applied materials or components should not be included."**
  - See https://www.wassenaar.org/app/uploads/2019/consolidated/Criteria_for_selection_du_sl_vsl.pdf

Reasons to Know the Regimes' Mandates

- Issues regarding export controls, such as whether the Japanese and the Dutch will agree to impose plurilateral semiconductor production equipment controls against China, are daily in the mass media.
  - "At last, the export control nerds get to sit at the lunch table with all the cool kids!"
- To understand the legal, policy, and cultural reasons why such deals are hard, one must understand the multilateral regime history and mandates. They largely govern the laws, policies, and cultures of today's allied export control systems.

Traditional Foreign Policy Purpose

- The foreign policy objectives of U.S. export controls have been primarily focused on regulating a relatively small number of basic items used in human rights abuses (such as instruments of torture) or that supported U.S. unilateral sanctions, such as those against Iran, Cuba, Syria, the Crimea region of Ukraine, and North Korea.

  - Such export controls are generally unilateral. There is not a multilateral regime to identify or coordinate export controls on items of human rights-related concerns. Biden Administration, however, is working issue with non-binding guidance through the Export Controls and Human Rights Initiative that is part of the Summit for Democracies.

  - Trump Administration gets credit for using Entity List more often specifically to address human rights issues, but only with respect to China. It also codified in the EAR long-standing policy to considering human rights issues in all license applications.

Post-Cold War Role of Economic Considerations

- Traditionally, economic considerations of lost sales were never studied or considered because one does not compromise national security or foreign policy objectives for profit.

- Also, the effectiveness of the multilateral system depended upon a common understanding among the allies that controls would be used to achieve non-proliferation objectives and not for domestic economic protectionist reasons.

- Any economic benefits for U.S. exporters would come from:

  - keeping the lists of controlled items current (so as not to over-control items that no longer meet the standards);
  - the efficient operation of the licensing system in the least regulatory burdensome way possible to achieve the national security and foreign policy objectives; and
  - having multilateral controls that also applied to competitors in allied countries.

Post-Cold War Mantra

- "Export controls do not pick economic winners or losers."
- Meaning: If something warranted controls for national security reasons, as basically defined by the non-proliferation-focused regime structure, then it warranted control. If not, then not, regardless of positive or negative impact on US companies.
- Export controls were never included in trade deals or discussions – or even considered a tool of trade policy (which is why BIS is separate from ITA and why State's ISN is separate from EB).
- Popular issue of the day: Should this mantra be changed? (Answer depends on how one defines "national security.")

“National Security” Thinking Evolves

- In the early 1990’s, when the current structure was created:
  - The processor in your cell phone was a strictly controlled supercomputer because of its ability to be used to design weapons.
  - The GPS capability in your phone was strictly controlled because it was what was used to direct missiles to targets.
  - The encryption capability in your phone was strictly controlled and only for use with law enforcement, military, and intelligence applications.
  - All commercial telecom exports of any sort to USSR and PRC were largely prohibited.

“Economic Security” Has No Set Meaning

- “Economic security is national security” is a commonly used, but vague and undefined phrase with many meanings that run along a spectrum (from less controlling to more):
  - Allow for as many exports as possible, unless items clearly bespoke or significant to specific WMD or military applications to countries of concern so that the export sales can fund the R&D of domestic manufacturers to use to out-innovate their foreign competition (Clinton- and Bush-era definitions)
  - Remove unnecessary controls and barriers on trade with close allies, which helps US and allied defense and industrial bases, and military interoperability among allies (Obama Export Control Reform definition)
  - Impose unilateral and plurilateral controls over “force multiplying” technologies that have broader “strategic” implications, such as “advanced compute” capabilities critical to AI applications (Biden/Sullivan Doctrine)

“Economic Security” Spectrum cont.

- Impose controls over chokepoints for commercial technology sectors PRC plans to artificially subsidize to achieve strategic economic dominance
- Use as a tool of trade protectionism to economically advantage US companies even if for otherwise uncontrolled items (Mercantilistic approach)
- Limit commercial development/production technology and know-how exports to force or benefit domestic manufacturing, i.e., to prevent off-shoring of jobs (Labor approach)
- Control chokepoint technology exports for the overseas production of items necessary for domestic critical infrastructure and supply chain security (post-COVID reaction to “dual-circulation” strategy)
- US is not alone in thinking about this question.

• (There are significant other trade and “economic security” issues not discussed here, such as outbound and inbound investment controls.)

The Issue with China and Export Controls

- How should dual-use export controls be used to regulate purely commercial commodities, software, and technologies that are not subject to any multilateral controls in order to respond to China's:
  - technology acquisition policies to advance its policies to strategically subsidize indigenous capabilities in critical economic sectors to the detriment of U.S. competitors, technology leadership, critical infrastructure, and supply chain security (Made in China 2025);
  - civil-military fusion policies to help modernize its military capabilities, particularly in areas of concern such as advanced computing applications needed to design advanced weapons; and
  - massive human rights abuses using such technologies?

China cont.

- Because the post-Cold War-era export control system focused on WMD and conventional military proliferation, it was not designed to address such China-specific issues and contemporary national security concerns.
- In other words, the “dual-use” system was premised on the regular ability to distinguish between clearly civil and clearly military applications for the same items. That is no longer often the case with respect to exports to China and other countries, per their state policies.
- Unlike when system was created in 1990’s, critical foundational technologies necessary to develop advanced weapons come more from the commercial sector than from defense contractors.

What is Not New re PRC and Export Controls

- For decades there have been complete U.S. embargoes on military- and space-related items destined to China – including zero *de minimis* rules for any U.S. content in foreign-made military or space items. So, not the issue.
- For years, the licensing policies on listed dual-use items have been quite strict given risk of PRC inward and outbound diversion.
- There are catch-all prohibitions on exports of otherwise generally uncontrolled items if for a military end use/user, or for use in producing or developing a missile, nuclear weapons, or chem/bio weapons.
- Significant enforcement authorities have been directed at illegal exports/transfers to, from, and within China.

The ECRA and FIRRMA Discussion

- In late 2017, Congress began considering expanded authorities for CFIUS to address, in the main, national security concerns with Chinese investment in the US and the transfer of emerging and foundational technology in connection with joint ventures.
- There was a significant bipartisan and public discussion about the national security implications pertaining to China-specific technology acquisition and use policies.
- Ultimately, Congress decided to let export controls continue to address issues pertaining to the outbound transfers of technology and for CFIUS to address inbound investment issues.
- In August 2018, Congress expanded authority of foreign direct investment controls (FIRRMA) and passed the Export Control Reform Act (ECRA) to create the authorities to address the issues.

Export Control Reform Act of 2018 (ECRA)

- ECRA requires BIS to lead an ongoing interagency effort to identify "emerging" and "foundational" technologies not now controlled by a regime but that are "essential to national security," but did not define terms.

- ECRA set clear standards for control and a requirement that the controls be made multilateral over time. (In particular, controls should not be imposed on technologies widely available outside the United States.)

- So, allows unilateralism for a few years, but requires that U.S. work to make them multilateral. (Identical to the 0y521 controls BIS created in 2012!)

- See: https://www.akingump.com/en/news-insights/the-export-control-reform-act-of-2018-and-possible-new-controls.html

What Does “National Security” Now Mean?

- The Trump administration took a series of unilateral actions and clearly imposed controls beyond the classical non-proliferation-focused bases for export controls. It, however, never articulated a common administration-wide description of what “national security” meant with respect to emerging and foundational technologies, or with respect to China or Russia. It also did not define what “emerging” and “foundational” technologies were.

- The Biden Administration did not really either during its first year -- until its response to Russia’s invasion of Ukraine and then, more specifically, in a September 2022 speech by NSA Sullivan.

Impact of Russia's Invasion on Export Controls

- For the first time since the Cold War, U.S. allies and partners collectively responded to a broad-based threat from an authoritarian major power by materially amending their export control laws and policies to achieve strategic objectives beyond those of the four primary export control regimes.

- Although the new controls are limited to Russia and Belarus, the mold was nonetheless broken for coordinated U.S. allied and partner use of export controls to achieve strategic and other policy objectives regarding specific countries, end uses, and end users of common concern beyond traditional nonproliferation objectives.

- Controls include those against purely commercial items (e.g., basic semiconductors and aircraft parts) to harm the parts of the economy necessary for the Russian military to function and evolve. See: https://committees.parliament.uk/writtenevidence/114084/pdf/

NSA Sullivan's Answer to the Question

- National Security Advisor Jake Sullivan answered the question clearly in September 2022. See: https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit/

- **"Computing-related technologies, biotech, and clean tech are truly 'force multipliers' through the tech ecosystem. And leadership in each of these is a national security imperative."**

- With respect to export controls, "we have to revisit the longstanding premise of maintaining 'relative' advantages over competitors in certain key technologies. We previously maintained a 'sliding scale' approach that said we need to stay only a couple of generations ahead. That is not the strategic environment we are in today. Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible."

New Scope of "National Security"

- Export controls have not been so publicly and clearly identified by a senior administration official as a "strategic" tool of national security since the end of the Cold War.

- The stated policy bases for the new controls reflect the administration's significant concerns about China's development and production of WMD and conventional military items, and the use of these technologies to enable human rights abuses.

- However, the new controls differ in scope from most previous export controls because they are unilateral (i.e., U.S. only), targeted at one country (China), and applied to essentially commercial items that are several stages earlier in the development and production supply chain than the types of items traditionally subject to export controls.

- See: https://www.politico.com/news/2022/12/26/china-trade-tech-00072232

October 7, 2022 Controls Against China

- Unilateral controls designed to limit the development and production in China of:
  - Advanced node semiconductors;
  - Semiconductor production equipment;
  - Advanced computing items; and
  - Supercomputers.
- Biden-Harris Administration determined that the existence of indigenous capabilities to develop and produce such items in China is a per se national security threat.

Impact and Difference

- Thus, the material difference in tone and scope of the new rule is that it, more so than any other post-Cold War export control rule, expansively considers "the impact of advanced computing integrated circuits, supercomputers, and semiconductor manufacturing equipment on **enabling** military modernization, including the development of WMD and human rights abuses" in one specific country, i.e., China.

- This policy and regulatory scope is why compliance with the rule will have a significant impact on otherwise commercial and academic activities.

BIS Statement of Policy Bases for New Controls

- BIS's policy response to concerns about such impacts is that the government of China "has mobilized vast resources to support its defense modernization, including the implementation of its military-civil fusion development strategy, in ways that are contrary to U.S. national security and foreign policy interests."
- BIS also stated in its preamble that the "PRC government expends extensive resources to eliminate barriers between China's civilian research and commercial sectors, and its military and defense industrial sectors. It also is developing and producing advanced integrated circuits (packaged or unpackaged) for use in weapons systems."

New Controls On US Person Activities

- There are now new controls on U.S. person activities related to the development or production of:
  - integrated circuits at semiconductor fabrication facilities in China that develop or produce identified advanced node semiconductors; or
  - semiconductor production equipment in China.

New Controls on Specific End Uses

- There are now new controls on specific activities involving end uses related to:
  - advanced node semiconductors,
  - production equipment for their production, or
  - supercomputers.
- End use controls are not based on lists of specific items or end users. It's how unlisted items are used that creates the control.

Historical Role of End Use Controls and Allies

- With the Enhanced Proliferation Control Initiative from the early 1990's, the US and its allies imposed controls on activities by their citizens that would support the development or production of WMD.

- These types of controls are the legal basis for the new China-specific end use controls. The US is "informing" US persons that their work in support of advanced node semiconductors and supercomputers could be for use in China to develop WMD.

- Thus, the allies have the same legal authorities to impose essentially the same controls – if they also make the policy decision that support for advanced computing and advanced semiconductors is per se a threat pertaining to the development in China if WMD. To date, no ally has made that determination.

  – It's a function of policy and policy will, not law.

New Controls on Specific Items

- There are new controls on specific types of:
  - advanced integrated circuits (primarily high-end GPUs),
  - commodities containing such integrated circuits,
  - semiconductor production equipment, and
  - related components, software, and technology.

Technology Node PRC Cut-Lines for Logic and Memory

- Logic integrated circuits using non-planar architecture or with a production technology node of 16/14 nm or smaller.
- NAND memory with 128 layers or more.
- DRAM with a technology node of 18 nm half pitch or smaller.
- No impacts on mature technology nodes, but these thresholds are unlikely to change as technology evolves.

GPUs (and Electronics Containing Them)

- New ECCN 3A090 controls integrated circuits that have or are programmable to have an aggregate bidirectional transfer rate over all inputs and outputs of 600 Gbyte/s or more to or from integrated circuits other than volatile memories, and also one or more of a specific tera operations per second (TOPS) threshold.
- 4A090 controls electronics containing them.

Semiconductor Production Equipment

- New ECCN 3B090 controls specific types of semiconductor production equipment specific to producing advanced node memory.
- New 744.23(a)(1)(v) imposes controls on the export of any commodity, software, or technology for development or production in China of almost any kind of semiconductor production equipment or mask.

New Controls on Non-US-Made Items

- There are now three new foreign direct product rules that subject non-U.S.-made items to EAR licensing requirements if they involve:
  - any of several dozen Chinese “Footnote 4” companies on the Entity List identified as supporting advanced computing applications in China,
  - supercomputer-related activities in China, or
  - AI applications in China.

The New China-Specific Rules

- Although they are really all about emerging and foundational technologies, BIS did not use the emerging and foundational technology authorities in ECRA to publish them. That would have required public notice and comment. BIS said the rules needed to be published unilaterally and urgently. They are also with respect to items that are widely available outside the United States.
- There are certain to be discussions of new controls pertaining to AI and quantum computing technologies.
- Entity List designations will continue apace, which requires constant compliance reviews – particularly with respect to the many different "footnote 4" entities against which extraterritorial foreign direct product rule applies.

Extraterritorial Application of US Controls

- ITAR and EAR always apply to US-origin items, wherever located.
- ITAR governs foreign-made defense articles produced or manufactured from ITAR-controlled technical data or defense services. Relatively simple extraterritorial rules.
- EAR controls foreign-made items with more than a de minimis amount of *controlled* content.
- EAR now has nine (9!) different "foreign direct product rules" (now in 734.9) that cause foreign-made items to be subject to the EAR under different circumstances.
  - Basically, items made directly from certain technology or software subject to EAR or produced by specific types of equipment made from technology can be subject to EAR controls outside the United States.
  - Very complicated compliance issues for non-US companies.

Deemed Exports

- The default rule in the EAR is that a license is required to release source code or technology to a foreign person in the United States if a license is required to export the same technology or source code to that person's country of most recent citizenship or nationality.
- The 2022 Russia- and China-specific export controls, however, explicitly excluded from their respective scopes the creation of any new deemed export controls. See EAR §§746.2(a)(2) and 742.6(a)(6)(ii). Thus, the focus of the new rules is on the development, production, and use of items of concern in or destined to Russia or China, and not on Russian or Chinese nationals in the United States.
- Whether this departure from traditional deemed export control rules will continue with new controls is unknown.

Detailed Descriptions of the New Rules

- See: https://www.akingump.com/en/news-insights/bis-imposes-new-controls-to-limit-the-development-and-production-of-advanced-computing-and-semiconductor-capabilities-in-china.html

- Podcast at: https://open.spotify.com/episode/1GPig8extLON1JW8M043vF

- Podcast at: https://tradetalkspodcast.com/podcast/170-national-security-semiconductors-and-the-us-move-to-cut-off-china/

“Plurilateral” Will be the Word of 2023

- When unilateralism is counterproductive and multilateralism is too slow, then the Goldilocks solution in addressing novel China- and other country-specific national security issues is to work with a smaller number of like-minded nations that are producers of the core Information Communication Technologies at issue.
- The first step is working with the key allies to get to a common understanding of the novel national security threats created with respect to purely commercial technology. (Remember, if modified for military, space, intelligence, or identifiable “dual-use” item, then largely already controlled.)
- Then, work with the allies to identify the key technologies at issue. (Focus on smaller group of ICT items first to show that the idea will work.)
- Then, work with the allies to get them to change their domestic laws to allow for end use, end user, and destination-specific controls related to items not on regime lists. https://www.cnas.org/publications/commentary/export-controls-will-become-more-effective-when-they-include-plurilateral-controls

“Plurilateral” cont.

- Then, work with the allies to align country-specific license policies for regime-listed items.
- Then, develop a no-undercut policy and share information about issues of concern.
- Then, work together to later get regimes to adopt the new controls.
- Create incentives to join, such as reduction in unnecessary controls by and among participating countries – potentially even changes to immigration, investment, procurement, and tariff rules to enhance “run faster” opportunities among participating allies.
- Harmonize and enhance joint enforcement efforts and coordination.
- Very hard, but the “least bad option” to purely unilateral controls (which works in short term but not long term) or sticking to traditional multilateral system (which works in long term but not short term).

Examples

- The response of 37 allied countries to impose controls against Russia and Belarus outside regime structure was an ad hoc "plurilateral" response. Policy objectives are clear and direct, which enables clear and direct collective action.
- The current discussions among the Dutch, the Japanese, and the US governments about whether to impose additional controls on semiconductor production equipment is a hot topic. Policy objectives are, however, not as clear and direct to the allies as an invasion of another country.
- There are certain to be other groupings of ad hoc arrangements discussed over 2023 in different areas, including to address human rights issues – US-EU TTC, G7, and the Quad.

Why Current Regime System Not Effective re PRC

- Need for consensus of regime members, many of which just see PRC as an economic opportunity.
- Regimes do not have the mandate to deal with country-specific issues or purely commercial technologies. Controls must be "destination agnostic."
- Regimes do not have mandate, with small exception, to address human rights issues.
- Regime members 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.
  - That is, even if an allied government wanted to block the export of an emerging or foundational technology to PRC that is not on a regime list, it would not have the legal authority to do so.

Unilateral Controls Not Effective in Long Run

- Can be very effective in the short run.
- But, history has shown that unilateral controls eventually end up harming the very industries to be protected – and are not effective over medium term. For example, U.S. unilateral worldwide controls on commercial satellites (after several years) seriously hurt U.S. satellite industry and helped Japanese and European competitors.
  - U.S. companies offshore their development and production.
  - Incentives created for non-U.S. companies to start manufacturing the same items.
  - Creates incentive for foreign buyers to design out U.S.-origin content.
  - Income for R&D goes to foreign competitors to help them out-compete US companies.
  - Shipments from allied countries go to the end user, end uses, and destinations of concern, so control not effective.
- https://www.cnas.org/publications/reports/rethinking-export-controls-unintended-consequences-and-the-new-technological-landscape

The Uncertainty and Complexity Factor

- The rules are extremely complex -- and also apply to companies and items outside the United States that are not normally subject to export controls.
- The rules are constantly evolving, and more change is inevitable, thus leaving buyers uncertain of what is next.
- The rules subject otherwise uncontrolled foreign-made items to control merely if they are made with US equipment or technology or software tools.
- The complexity and uncertainty have a market impact far beyond their precise legal scope. Buyers, wanting stability of supply, and reduction of regulatory burden and risk, will reduce exposure to US-branded or made items, even if not legally required.
- Benefits foreign competitors unless rules are imposed equally by allied countries.

Personal View: A New, 5th Regime Is Needed

- A new export regime is needed for two reasons.
- First, a new regime of like-minded techno-democracies is therefore needed to address traditional nonproliferation issues that the legacy regimes will not be able to because of Russia's disruptive membership.
- Second, the regimes' mandates do not permit actions to address other significant contemporary policy issues, such as those related to: (i) how to respond to the national security threat from China's objective of obtaining strategic economic dominance in key technology areas; (ii) allied supply chain resiliency objectives; (iii) the misuse of commercial technologies to abuse human rights; and (iv) China's and Russia's military-civil fusion policies.
- See: https://cset.georgetown.edu/wp-content/uploads/WorldECR-109-pp24-28-Article1-Wolf-Weinstein.pdf

Creating a New Regime Will be Hard

- Limited resources in allied countries to focus on something this novel and difficult.
- Not a clear vision yet as to technology scopes or countries.
- Concerns that efforts to create will facilitate (false) PRC talking points to non-aligned countries that it is an effort of techno-democracies to monopolize technology developments to their economic detriment.
- Could be seen as harming traditional non-proliferation efforts.
- No (perceived) incentives for other countries to join.
- Consensus on general principles doesn't last.
- Countries fear retaliation from PRC and don't like to "name and shame" specific countries.

So, Before a Regime, Allies Should Create Standards

- Allies should develop and announce standards identifying the authorities, resources, and mandates an allied country's export control agency should have to implement plurilateral controls (that could be basis for new regime) that are effective and not counter-productive.

- The development, announcement, and then implementation of such standards are necessary because the export control authorities and systems of the allied countries were largely created near the end of the Cold War to accomplish post-Cold War common security issues, which were largely focused on non-proliferation objectives.

- Although still quite effective in many ways, existing allied export control systems do not have all the authorities, resources, and mandates necessary to adequately address together contemporary common security and human rights issues.

Standard 1 – Main Idea

- **Standard 1:** Export control agencies should have sufficient legal authorities, resources, and mandates to effectively address and enforce through coordinated plurilateral action both:
  - (i) classical export control issues that cannot be addressed through the existing multilateral regime process; and
  - (ii) contemporary common security and human rights issues outside the scope of the regimes' mandates.

Standard 2 – Legal Authorities to be Nimble

- **Standard 2:** To implement Standard 1, export control agencies must take whatever actions necessary to ensure that they have clear and broad legal authorities to create and impose quickly plurilateral controls outside the multilateral regime process:

    i. over commodities, software, and technology not identified on any existing multilateral regime list;

    ii. against end uses and related activities by their citizens and companies, even if not directly related to the production or development of WMD;

    iii. against specific end users and entities;

    iv. that are country-specific; and

    v. that address strategic objectives of common security interest, not just objectives focused on inherent capabilities of specific items.

Standards 3, 4, and 5

- **Standard 3:** Export control agencies should have sufficient resources to effectively implement the policy objectives in Standard 1 and the controls in Standard 2.

- **Standard 4:** Export control licensing officials in standards participating countries will create systems to coordinate, to the extent possible, licensing policies for plurilateral controls.

- **Standard 5:** Export control enforcement officials in standards participating allied countries will create systems to coordinate, to the extent possible, the sharing of enforcement-related information.

Standards 6, 7, and 8

- **Standard 6:** Intra-governmental coordination between export control policy officials and export control enforcement officials should be seamless.

- **Standard 7:** Export control agencies will do all the work necessary to reduce unnecessary regulatory burdens on controlled trade by and among countries that adopt the same standards.

- **Standard 8:** Standards adherents will not use export controls to achieve purely trade protectionist or mercantilistic policy objectives.

Standards 9 and 10

- **Standard 9:** Export control agencies will work with all relevant subject matter experts in industry, government, and academia to ensure that any new controls are clearly written, technical accurate, and effective given the complexity of technology, supply chain, and foreign availability issues.

- **Standard 10:** Export control agencies will provide resources and incentives for companies to create and enhance their internal compliance programs, particularly those affected by the new controls.

Allies Need to be Prepared

- Authorities described in standards are needed whether the status quo remains in place with respect to China and other countries of concern or there needs to be a dramatic increase in controls to respond, for example, to hostile action against Taiwan or another country, or the provision of lethal support to Russia.
- Benefiting from lessons learned in the lead-up and implementation of the allied response to Russia's continuing invasion of Ukraine, the allied systems need to be ready and much nimbler.

What's Expected in 2023????

- Tweaking of China-specific semiconductor controls?
- New controls re exports and reexports to Iran of items used in UAVs?
- Focused (and extraterritorial) enforcement re Russia and PRC diversion? More coordination with DOJ, FBI, and DHS on enforcement focused on distributors?
- End-use and end-user controls specific to human rights issues?
- Significant policy debate about outbound investment controls, and degree to which should overlap with EAR's technology transfer controls? Will it be an EO with notification requirements only? New controls? Apply to biotech and clean energy, too?
- New end use and end user controls on quantum and AI-related applications?
- New controls on biotech or clean energy (fusion) technologies?

2023 Continued….

- Plurilateral controls with Japanese and Dutch on semiconductor production equipment?
- Will they later also include end use controls against China's advanced node semiconductor industry? (If not, the playing field for US companies will NOT be level.)
- Impact of CHIPS Act and IRA on willingness of allies to cooperate?
- Will October 7th-like rules be adopted for the PRC aerospace industry?
- Will the de minimis rules be adjusted to allow for more controls over foreign-made commercial items in key sectors?
- Will the many and very complex foreign direct product rules be simplified and harmonized (and thus apply to more foreign-made items)?

2023 Continued . . .

- Will AUKUS efforts result in significant simplification and harmonization to the defense trade and dual-use controls by and among the UK, Canada, Australia, and the US?

- In other words, will the export control ules that apply to Canada be applied equally to the UK and Australia?

Follow the OMB Regulatory Calendar

- The Commerce Department calendar for new rules under consideration is at www.reginfo.gov Topics from Fall 2022 for BIS under consideration are:
- Clarification of routed export transaction rules
- Revisions to License Exception AVS (for aviation)
- Changes to nuclear propulsion plant end-use restrictions
- Amendments regarding many 600 series military controls
- Updates to controls on commercial satellite and launch-related items
- Revisions to the various EAR country groups
- Consideration of controls on brain-computer interface items

OMB Regulatory Calendar cont.

- Modifications to License Exception APR
- Implementing regime controls agreed on in 2022
- Imposition of end-user and end-use controls to address human rights issues
- Clarification of License Exception STA
- Revisions to controls on cameras and related items
- Designation of additional military-intelligence end users