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Running on Empty: U.S. Economic Sanctions and Export Controls in 1997

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I. Introduction And Summary

The year 1997 was a period of retrenchment in U.S. economic sanctions and export controls. From the outset, policymakers and the private sector had little hope that any significant structural reform of U.S. export controls might be achieved. Little effort was invested in proposals for liberalization of the Export Administration Act or other U.S. export control laws. Instead, U.S. officials and the American business community concentrated on issues connected with U.S. unilateral and extraterritorial sanctions measures.

A. ECONOMIC SANCTIONS

In the sanctions area, foreign policy and national security considerations reemerged to some extent in a non-election year as a tempering counterweight to extraterritorial initiatives. Although significant new sanctions programs were established against Burma (Myanmar)[1] and Sudan, these new measures were consistent with the more traditional approach to sanctions programs that prevailed prior to the enactment in 1996 of the Helms-Burton law against Cuba and the Iran and Libya Sanctions Act (ILSA).[2]

The new U.S. sanctions against Burma and Sudan added to the frustrations of the American business community over U.S. sanctions policy. The imposition of both of these sanctions programs provoked bitter criticism and condemnation by the various business coalitions organized over the past two years to combat the proliferation of U.S. unilateral sanctions laws.[3]

When considered in their political context, however, the specific features of these new sanctions regimes evidence a calculated retreat by the executive branch from the extraterritorial tactics embodied in the Helms-Burton and ILSA sanctions of 1996 against Cuba, Iran and Libya. Indeed, the sanctions against Burma and Sudan are much more limited in scope than other sanctions proposals put forward in Congress that were not acted upon in 1997. Thus, the sanctions against Burma and Sudan are indicative of a concerted effort to slow the momentum in Congress of other increasingly isolationist extraterritorial initiatives. In contrast with the more aggressive sanctions laws enacted in 1996, inherent limitations on the jurisdictional and substantive reach of both the Burma and Sudan sanctions leave room for greater flexibility to accommodate U.S. diplomatic, foreign and economic policy considerations in related enforcement decisions. Thus, the tone and substance of these new sanctions is more in keeping with basic precepts of U.S. sanctions policy that prevailed prior to 1996.

Faced with the threat of a legal challenge by the European Union (EU) in the World Trade Organization (WTO) to the Helms-Burton and ILSA sanctions laws of 1996, the Clinton Administration avoided taking punitive action against foreign companies under either law in 1997. The Administration was harshly criticized by advocates of a tougher approach to these unilateral measures for its unenthusiastic approach to related enforcement concerns.

Congressional concerns with the Administration's approach to these issues were especially acute when news broke in the fall of a joint venture between the French company, Total S.A., Gazprom of Russia and the Malaysian company Petronas valued at over $2 billion for development of the South Pars gas field in Iran. While members of Congress called for the Clinton Administration to take swift action against the deal, foreign officials warned that a punitive U.S. response would have grave consequences. It quickly became evident that the South Pars deal posed a critical test for the unilateral and extraterritorial U.S. sanctions measures enacted in 1996.

Although it was evident from the outset that the venture was inconsistent with fundamental ILSA prohibitions, the Administration took a protracted approach to its investigation in order to seek concessions from the governments of France, Russia and Malaysia that might provide a basis for a waiver of punitive sanctions. These efforts extended the formal investigation over an indefinite time period, and consequently, the review process was not concluded by the end of the year. Congressional critics, however, were losing patience with the Administration's approach by year's end.

Administration officials recognized that a decision not to impose punitive measures against the South Pars venture could result in Congressional action on other sanctions initiatives raising serious concerns for U.S. international interests. Such proposed measures included proposals to expand the scope of activities barred by ILSA, to curtail executive branch discretion in sanctions enforcement, and other initiatives that could undermine U.S. diplomatic efforts to promote multilateral support for U.S. sanctions policies and approaches to rogue regimes. The possibility of such new initiatives remained at the end of the year. Thus, the critical test of U.S.

sanctions policy associated with the South Pars venture was unresolved in 1997, and it was unclear when and how the matter would eventually be resolved.

Finally, it is worth noting that the Administration shied away in 1997 from the broader inherent challenge to federal authority over international affairs posed by the proliferation of state and local sanctions laws. These laws present an area of growing concern to U.S. and foreign business interests and raise significant supremacy and other constitutional questions that have not yet been addressed by the federal courts or lawmakers in Washington. At the end of the year, the U.S. business community and certain private sector coalitions were evaluating and apparently preparing to initiate a legal challenge to such laws in the months ahead.

B. EXPORT CONTROLS

As in other recent years, 1997 saw little movement toward export control liberalization through either structural or regulatory reform. The underlying export control statutes were unaltered and no significant categorical commodity jurisdiction transfers of emerging commercial technologies occurred. Moreover, some of the more modest export control reforms achieved in recent years were scaled back. For example, a new law was enacted in 1997 that rolls back the previous liberalization of export restrictions on high performance supercomputers. By the end of the year, preparations also were nearly complete to implement new restrictions on certain categories of U.S. goods under the new multilateral proliferation controls established by the COCOM successor regime, the Wassenaar Arrangement.

In the context of this scaling back of previous reforms, it appeared that many American companies came to view the status quo in U.S. export controls, even if problematic, as preferable to the uncertain outcome of a renewed legislative debate on these issues. Attention to more immediate problems created by the proliferation of U.S. unilateral sanctions also diverted private sector resources previously dedicated to the promotion of export control reform. Thus, no significant new ground was broken in efforts to promote export control liberalization in 1997, and the agencies that administer the U.S. export control laws focused their energies largely on enforcement matters.

II. Unilateral Sanctions

Although there were numerous unilateral sanctions initiatives in the U.S. Congress in 1997, only two new sanctions programs were established. These are the U.S. sanctions against Burma and Sudan. Both of these regimes were imposed by presidential executive order. However, despite these actions, the Clinton Administration resisted new Congressional initiatives to expand U.S. sanctions as a means to address concerns regarding international terrorism and religious persecution abroad more firmly than in previous years. A variety of sanctions proposals were put forward in Congress in 1997 which, if enacted, could have compelled the executive branch to take punitive action against China, Russia and other countries in which the United States has complex and substantial economic and strategic interests. Thus, the new U.S. sanctions against Burma and Sudan can be seen as a pragmatic compromise on sanctions policy designed to preempt those more onerous initiatives. It is clear that the Administration's resolve on these issues was strongly influenced by related concerns and criticisms raised by the U.S. business community and key foreign allies.

Similar concerns also motivated the Administration to navigate a skillful course through the diplomatic minefield set by the extraterritorial sanctions initiatives of 1996 against Cuba, Iran and Libya. Despite the heated objections of Congressional critics, no significant punitive actions against foreign investments were taken under either the Helms-Burton law against Cuba or the ILSA law against Iran and Libya. The Administration’s restrained approach was dictated by lingering sensitivity to the negative reactions to both laws of private sector interests and overseas allies, and a practical recognition that such inaction was politically feasible in a nonelection year. However, the fundamental conflicts with the European Union and other U.S. allies that arose in 1996 over the Helms-Burton and ILSA laws were still unresolved at the end of the year. Basic questions of international law, and corresponding objections from close foreign allies against U.S. unilateral and extraterritorial sanctions policies, can be expected to continue to undermine U.S. multilateral trade and foreign policy initiatives in 1998.

A. BURMA

The new U.S. sanctions against Burma, established by executive order in May, 1997, were apparently intended by the Clinton Administration as a demonstration of its commitment to human rights issues and a response to related Congressional criticisms. By the close of 1996, Congress had enacted legislation condemning the military government of Burma for its record of human rights abuses and suppression of democracy.[4] The legislation assigned President Clinton discretionary authority to impose sanctions against the country if its record on these issues did not improve.[5] Although the Administration was critical of that initiative in 1996, in the spring of 1997 it reversed its position. Notwithstanding protests from the U.S. business community, on May 22, 1997, President Clinton issued an executive order imposing limited sanctions against Burma under the new law and powers established by the International Economic Emergency Powers Act (IEEPA).[6] The U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) is now charged with preparing implementing regulations for the Executive Order. At the end of 1997, these regulations had not been issued and it was unclear when they might be released.

1. *Basic Prohibitions*

The Executive Order against Burma establishes three basic prohibitions. First, it bars any "new investment" in the country initiated by U.S. persons after May 20, 1997. The Order indicates that such prohibited investments include contracts and other activities for the economic development of resources in the country.[7] Second, the Order prohibits "approval or other facilitation" by a U.S. person of transactions by a foreign party that would be prohibited if engaged in by a U.S. person.[8] Third, the Executive Order prohibits any transaction by a U.S. person that "evades or avoids" the two primary prohibitions indicated above.[9]

2. *Effect on Trade in Goods, Technology, and Services*

Although the Executive Order does not provide a clear definition of the term "new investment," it expressly exempts transactions involving trade in goods, technology, or services from the scope of its restrictions.[10] The Order also does not bar U.S. persons from entering into, performing, or financing contracts for the sale or purchase of goods, services, or technology in Burma unless such activities would support economic development of the country's resources.[11] Thus, the sanctions do not bar exports or reexports to Burma of U.S.-origin goods.

3. *Limitations on Extraterritorial Application*

By comparison with the more sweeping sanctions measures of 1996 against Cuba, Iran, and Libya, the Executive Order against Burma has only limited extraterritorial implications. Although it bars U.S. persons from "approving" or "facilitating" activities associated with Burma outside the United States, the Order's operative definition of "U.S. person" establishes an effective in personam limitation on its jurisdictional reach.[12] The Order only applies to U.S. citizens, permanent resident aliens, entities organized under U.S. law (including foreign branches), and persons present in the United States. Foreign subsidiaries and foreign joint ventures of U.S. companies are not subject to the Burma sanctions.[13]

B. SUDAN

The new U.S. sanctions imposed against Sudan in November 1997 were apparently issued as part of a strategy to preempt other sanctions initiatives in Congress that might have had a more damaging impact on other foreign policy and national security priorities of the Clinton

Administration. In particular, the Administration was concerned that certain antiterrorism initiatives against Sudan and Syria would further undermine the faltering Middle East peace process.[14] Administration officials also were concerned that broad religious persecution sanctions proposals in Congress targeting Sudan, China, and other countries might mandate action that could disrupt a more subtle approach to countries in which the United States has larger economic and strategic interests.[15] Accordingly, Sudan's sponsorship of international terrorism, commission of human rights abuses, and suppression of religious freedoms were specifically cited as grounds for the embargo in the President's Order.[16]

1. *Principal Prohibitions*

The Executive Order against Sudan establishes a comprehensive embargo much broader than the new sanctions against Burma. The Sudan sanctions also go well beyond pre-existing export control restrictions established by the country's designation under the Export Administration Act as a state sponsor of international terrorism.[17]

First, the Executive Order establishes a freeze on all Sudanese assets located in the United States or held by U.S. persons.[18] Second, it imposes a general ban on trade with Sudan, including a ban on imports of Sudanese goods or services to the United States, a ban on exports or reexports of U.S.-origin goods, technology or services to Sudan, and a ban on transactions by U.S. persons for the transportation of goods to, through, or from Sudan.[19] Third, the order prohibits U.S. persons from engaging in any transaction to evade or avoid the U.S. embargo or to facilitate exports to or from Sudan of goods, technology, or services of any kind, regardless of origin.[20] Finally, the Order prohibits U.S. persons from performing any contract in support of industrial, commercial, public utility, or other government projects in Sudan, including contracts for the financing of Sudan-related activities.[21] The Order specifies that this final prohibition bars U.S. persons from providing credits or loans of any kind to the government of Sudan.[22]

2. *Exceptions*

Like other comprehensive U.S. sanctions regimes, the Executive Order against Sudan includes a number of general exceptions that allow limited kinds of activities by U.S. persons. For example, the Order includes a general exception for exports and reexports of humanitarian relief items, such as food, clothing, and medicine.[23] It also allows transactions associated with journalistic or diplomatic activities, and other activities authorized by agencies of the U.S. government or the United Nations.[24] The Order further permits imports to the United States of Sudanese "informational materials."[25] The Order also provides an initial thirty-day grace period for the completion of obligations and commitments under pre-existing contracts.[26] This grace period expired on December 4, 1997. Finally, the President's report to Congress in conjunction with implementation of the Executive Order against Sudan states that licensing will be considered on a case-by-case basis for proposed imports to the United States of "certain products unavailable from other sources, such as Gum Arabic."[27] However, the actual Executive Order against Sudan does not include such express provisions. Thus, decisions on related cases are left to the discretion of OFAC. According to OFAC officials, no application for such a license had been approved by the close of 1997.

3. *Limitations on Extraterritoriality*

Like the new sanctions against Burma, the Executive Order against Sudan establishes certain jurisdictional limitations on its extraterritorial effects. Most important, it establishes *in personam* limitations by defining "U.S. persons" subject to the embargo to include only U.S.

citizens and companies organized under U.S. law, permanent resident aliens, and foreign persons located in the United States.[28] Thus, by omission, the definition exempts foreign subsidiaries and foreign joint ventures of U.S. companies from the sanctions on a jurisdictional basis.[29] Although these limitations provide little comfort to affected U.S. companies, they do help to minimize the potential opportunities for conflicts and confrontations with other countries over U.S. policy toward Sudan. Accordingly, these provisions have helped dampen foreign reaction to the U.S. embargo against Sudan.

4. *Areas of Ambiguity*

Because implementing regulations had not yet been issued by OFAC when 1997 came to a close, it was unclear how OFAC might apply the Sudan sanctions in several areas of potential concern for U.S. and foreign companies. In particular, the Order leaves open a variety of questions regarding how it may be applied with respect to reexports of U.S.-origin goods, services, and technology. For example, the 1995 Executive Order against Iran, which forms the basis for the current OFAC sanctions program against that country, differentiates between reexports of items controlled and uncontrolled for export to Iran under the Export Administration Regulations prior to the embargo. Thus, certain provisions in the Executive Order against Iran exempt reexports by non-U.S. persons of items that were not subject to restrictive U.S. export controls prior to issuance of the 1995 Order. Although similar language was not included in the Executive Order against Sudan, the possibility that such a policy might be recognized had not been ruled out by the end of the year.[30] Until implementing regulations are issued, however, foreign persons not otherwise subject to the Sudan sanctions are expected to act on the assumption that no such exception exists under the Sudan program and that specific licensing authorization from OFAC is required in such cases.

In response to requests for guidance on application of the Sudan Order, OFAC officials have indicated that OFAC does not intend to assert U.S. jurisdiction over reexports by foreign persons of foreign-made goods containing de-minimis levels of U.S.-origin parts or components amounting to 10 percent or less of the foreign product's value. This is consistent with OFAC's general approach under other sanctions programs. OFAC officials have cautioned, however, that they interpret the Sudan Order to strictly prohibit any U.S. export that would facilitate the manufacture of foreign-made goods with de-minimis U.S. content if the U.S. exporter knows or has reason to know that the foreign goods are ultimately destined for Sudan. In the absence of published guidance or case-specific advice from OFAC concerning this jurisdictional limitation, foreign companies have no reliable basis on which to determine how these principles might be applied by U.S. officials or eventually incorporated into final implementing regulations.

Until implementing regulations are published, OFAC can be expected to take a very broad approach to its legal mandate against Sudan. Consequently, any activities by U.S. or foreign entities connected with Sudan involving U.S. persons or U.S.-origin goods should be approached with great care. OFAC officials have indicated that many important policy issues must be resolved before they will make more specific guidance available. At the end of the year, it was still unclear when the interagency process to address these policy concerns would conclude or when implementing regulations for the Executive Order against Sudan would be issued.

C. SANCTIONS ENFORCEMENT

The reluctance of the Clinton Administration to enforce the Helms-Burton and ILSA sanctions laws in 1997 is an even clearer indication of the Administration's turn away from the compliant approach it took to Congressional sanctions initiatives in 1996. In the long run, it is the non-events of U.S. sanctions enforcement under these laws that are likely to be remembered as the most significant markers of U.S. sanctions practice in 1997.

1. *Helms-Burton and ILSA Enforcement*

To the dismay of the original Congressional sponsors of the Helms-Burton legislation, President Clinton continued to waive the most controversial private right of action provisions in Title III of the Helms-Burton law over the course of the year. With regard to ILSA enforcement, although several foreign ventures for oil and gas development involving Iran were investigated, Administration officials avoided any determination that punitive action was warranted under the law in 1997.

It is no coincidence that the lack of enforcement of the Helms-Burton and ILSA laws in 1997 coincided with difficult consultations with key U.S. allies on related extraterritoriality concerns and European threats of legal action against these laws in the WTO. The Administration was successful in its efforts to stave off a WTO challenge by the European Union for the duration of 1997. As indicated above, the Administration sought to use actions against Burma and Sudan to placate Congressional critics and preempt other Congressional sanctions initiatives in the face of the potential EU challenge. Moreover, its resolve was stiffened by the chorus of protests over U.S. unilateral sanctions measures from other countries and the American business community.

2. *ILSA Investigation of the South Pars Venture in Iran*

The most critical test of U.S. extraterritorial sanctions policy to emerge in 1997 was the more than $2 billion international joint venture involving Total S.A. of France, Gazprom of Russia and Petronas of Malaysia for development of the South Pars gas field in Iran. When news of the venture first broke in late September, it was widely seen in the United States as a clear violation of ILSA. Senator Alfonse D'Amato (R-NY) and other champions of the ILSA measures demanded that the Administration act forcefully against the deal. By the end of the year, however, the Clinton Administration had not formally concluded or announced the results of its investigation.

At the close of 1997, it was evident that Administration officials involved in the investigation generally agreed that the South Pars venture violated ILSA's core prohibitions. They were concerned that action against the deal would worsen tensions in U.S. relations with France, Russia, the EU, and other countries and thus jeopardize U.S. efforts to promote multilateral support for the larger U.S. sanctions agenda, including U.S. efforts to secure support for a tough stand against Iraq. At the same time, it was evident that these officials viewed with concern threats by key members of Congress to enact new sanctions laws if action was not taken against the deal. Accordingly, senior U.S. officials pursued consultations with French, Russian, and Malaysian officials in an effort to secure concessions necessary to justify the waiver of punitive measures under the law.[31]

By the end of the year, the Clinton Administration was running out of time to achieve a workable outcome. Frictions with U.S. allies over the South Pars issue had become an unwelcome distraction from Administration efforts to address more immediate concerns connected with Iraq in the Persian Gulf. At the same time, it appeared that the use of a waiver to resolve the case could provoke further sanctions initiatives in Congress that would also have a damaging impact on U.S. international interests. Thus, although White House officials managed to avoid a decision on how to respond to the deal and postponed coming to terms with the related foreign policy dilemmas posed by ILSA's extraterritorial provisions in 1997, by the end of the year the Administration appeared to be retreating into a corner. Administration officials recognized that they would face increasing pressure to stake out a clearer position on these issues and that a decision was likely to be forced in the months ahead. Still, the Administration's strategy appeared to be to postpone a decision on punitive measures through further consultations and a continued effort to secure sufficient grounds to justify a waiver. It was unclear, however, whether this would be politically feasible in Washington in a Congressional election year in 1998.

3. *Congressional Influence on Sanctions Enforcement*

As indicated above, the Administration's lack of enforcement action under ILSA in general, and with respect to the South Pars deal in particular, was subject to sharp criticism by members of Congress in 1997. In Senate Banking Committee hearings on the South Pars venture in October, key sponsors of ILSA, including the Committee Chairman Senator D'Amato, threatened to introduce new legislation to expand the scope of activities banned by the law and to impose greater restrictions on the Administration's scope of discretion in related enforcement matters. In that context, Senator D'Amato specifically suggested that new measures might be proposed to expand ILSA to prohibit U.S. companies from engaging in capital markets transactions with foreign companies engaging in unrelated business activities in Iran, even if there was no U.S. linkage with those activities. Moreover, it appeared that other sanctions initiatives might gain momentum in a backlash against the Administration approach to sanctions policy.

At the end of the year, the Administration's concerns focused in particular on a proposed bill to establish new missile proliferation sanctions directed against Russian ties with Iran. As discussed in greater detail below, the bill was incorporated as an amendment to pending legislation for Congressional ratification of the Chemical Weapons Convention.[32] Concerns with such Congressional initiatives also became increasingly entangled with discussion of the Administration's handling of the ILSA investigation of the South Pars deal. With the approach of Congressional elections and a strong challenge expected for Senator D'Amato's position in the Senate, it was expected that these issues would continue to influence the Administration's approach to sanctions enforcement in 1998.

III. Export Control Developments

As in other recent years, perhaps the most significant aspect of 1997 in the area of U.S. export controls was the absence of any significant advancement toward a fundamental reform of the underlying U.S. export control statutes. Almost nine years after the fall of the Berlin wall and long after the collapse of the Soviet Union and other Communist regimes in Eastern Europe, the U.S. export control laws are still grounded in policy precepts formed in the Cold War era. Although U.S. policymakers are pressing the emerging democracies of the, former Soviet republics and Central and Eastern Europe to establish export control regimes focused on nonproliferation and antiterrorism concerns, the fundamental framework of U.S. export controls has changed very little since the days of the Cold War. U.S. policymakers appear generally to recognize that new strategic and economic realities prevail in the world today, that the current structure of U.S. export controls is outdated, and that the established U.S. export control laws often work against U.S. companies in many ways. However, prospects for reform of the U.S. export control laws were no brighter at the end of the year than when it began.

More than eight years after the Export Administration Act of 1979 (EAA) lapsed in 1990, Congress and the executive branch were no closer to agreement on how the law should be restructured than when it originally expired. Neither the executive branch nor Congress invested much effort in promoting export control reform in 1997. Mindful of failed initiatives of the past and preoccupied with efforts to combat the proliferation of U.S. unilateral sanctions programs, the American business community also did not make much effort to promote reform in this area. Consequently, the EAA was simply extended in its existing form by executive order as in other recent years.[33]

In 1997, important long-term liberalization initiatives, including those to relax export restrictions on encryption products, again were stalled by partisan differences and substantive disagreements in Washington. In some cases, previous liberalizations of U.S. export controls were rolled back. Thus, late in 1997 a law was enacted that established new reporting and regulatory restrictions under the Export Administration Regulations (EAR) on certain types of high-performance supercomputers that were previously released from restrictive treatment. Separately, by the end of the year the executive branch had nearly completed preparation of new measures to implement U.S. proliferation control obligations under the multilateral Wassenaar Arrangement. The U.S. implementation regulations for the Wassenaar Arrangement will establish new export restrictions on a variety of products by early 1998. In the absence of significant export control reform initiatives, U.S. officials also focused more on enforcement efforts, including initiatives to apply previously obscure export control provisions such as the EAR Deemed Exports Rule.

A. DEEMED EXPORTS

In 1997, U.S. companies scrambled to comply with the previously obscure "deemed exports" provisions of the EAR as the Commerce Department took a more active interest in this issue. These provisions principally affect the employment of foreign nationals by U.S. companies in high-technology sectors. In recent years, there has been a growing shortage in the United States of persons with necessary skills and training in the computer, semiconductor, telecommunications and other applied high-technology industries. Consequently, U.S. companies increasingly have sought to hire foreign engineers and technicians with the high levels of education and training needed to fill key positions in their operations.

This trend has caught the attention of Commerce Department officials and caused them to take a more active approach to enforcement of deemed export restrictions. Not surprisingly, the Commerce Department's enforcement efforts in this area have been unwelcome by U.S. companies that are trying to focus their resources on efforts to maintain a competitive position in the international market place.

1. *The EAR Deemed Exports Rule*

The EAR provisions that make up the Deemed Exports Rule generally require employers to treat the employment of a foreign national as an export of U.S. technology.[34] The Rule requires export licensing based on a nonresident foreign employee's country of citizenship in cases where a position of employment would give them access to controlled technical data or software.[35] Thus, affected companies wishing to hire or assign a foreign employee to work in a

U.S. facility must first obtain an export license authorizing such transfers from the Commerce Department. Without an export license, the Deemed Exports Rule provides for the employment of a foreign national to be treated as a violation of the EAR.

The Deemed Exports Rule originated in the early 1990s in a series of informal Commerce Department interpretations of then-current EAR provisions governing exports of technical data. Until 1994, the Commerce Department treated the release of technical data to foreign nationals as a licensable export only in cases where a reexport of controlled data by the employee was either intended or foreseeable. Although the Deemed Exports Rule was formally added to the EAR in 1994, the Commerce Department only recently adopted an activist approach to its enforcement.

The Commerce Department indicated that it intended to take a more active approach to enforcement of the Rule by the end of 1996. This prompted a rush by U.S. companies to file related export license applications with the Department in the first few months of 1997. The rush to file caused a substantial backlog of applications and caused lengthy delays in the licensing review process that provoked an outcry by affected companies. The delays were then compounded when Department of Defense officials involved in the interagency review process reacted with concern and apparently slowed the review process further by applying closer scrutiny to these applications.

2. *Executive Branch Review of Deemed Exports Policy*

In response to private sector concerns, in June 1997 the Commerce Department initiated an extraordinary cabinet-level review of the Deemed Exports Rule by the rarely convened Export Administration Review Board (EARB).[36] This review resulted in the release of guidelines for license applications under the Deemed Exports Rule, entitled "Standard License Conditions for

Foreign Nationals." The guidance was directed primarily at issues connected with the semiconductor and computer sectors. Companies in other sectors were advised, in cases of uncertainty, to default to the assumption that export licensing is required for prospective hiring of nonresident foreign nationals. Thus, such companies must either apply for an export license or request specific guidance from the Commerce Department on a case-by-case basis when they believe that the Deemed Exports Rule might apply.

The limited guidance provided by the Commerce Department in 1997 leaves many questions unanswered regarding how the Deemed Exports Rule applies in different situations. Moreover, critics have raised a variety of questions about its validity, including First Amendment concerns. As this suggests, the Deemed Exports Rule remained a subject of controversy at the end of the year.

3. *Application of the Rule in Practice*

Notwithstanding areas of ambiguity in the Deemed Exports Rule, its licensing requirements apply in relatively few situations. First, as indicated above, licensing is only required in cases involving potential technology transfers that would be subject to EAR licensing requirements for a direct export or reexport to a foreign national's country of citizenship. In practice, these concerns arise most often in connection with sensitive industries, such as the computer, semiconductor and telecommunications sectors, based on U.S. national security-related considerations. For less sensitive sectors, licensing requirements generally exist only in cases that involve a citizen of one of the few countries subject to a comprehensive U.S. embargo or other severe country-based U.S. export control restrictions.

Given the Commerce Department approach to deemed exports issues in 1997, it is clear that these issues now must be carefully considered by U.S. companies in sensitive sectors that wish to hire foreign nationals. The new approach of the Commerce Department to these issues makes it incumbent upon U.S. companies to pay greater attention to such potential licensing concerns and to develop appropriate nondisclosure agreements and other internal compliance safeguards to respond.

B. ROLLBACK OF SUPERCOMPUTER CONTROLS

1. *The Dellums Amendment*

In a reversal of prior measures that lifted EAR restrictions on computer products operating at up to 7,000 million theoretical operations per second (MTOPS) by 1993, in November 1997 a law was enacted that establishes new restrictions on exports of these products. The new restrictions on supercomputer exports were put forward in Congress as an amendment to the 1997 Defense Appropriations Act sponsored by Rep. Ronald Dellums (D-CA). The measure was approved in Congress over the strenuous objections of Commerce Department officials charged with export administration and enforcement. The amendment was enacted when the Act was signed into law by the President. Nonetheless, executive branch officials attribute partial blame for the new restrictions to the lack of private sector intervention in the legislative process.

2. *Implementation and Substantive Requirements*

The specificity of the Dellums amendment leaves little room for the exercise of discretion by Commerce Department officials responsible for drafting corresponding implementing regulations. The legislation requires U.S. supercomputer exporters to provide the Commerce

Department with prior notice of any intended sale of high performance computers of over 2,000 MTOPS to end-users in the "tier three countries" which include Russia, China, and a number of other significant potential markets.[37] The Act provides for this notification to trigger an interagency review involving the Departments of State and Defense and other interested agencies. These agencies have ten days to decide whether to require an export license for the transaction in question, or whether the exporter can simply treat the matter like other uncontrolled exports of the products at issue.

3. *Private Sector Concerns*

Since the law was enacted, it has been roundly criticized by private industry groups and Commerce Department officials alike. Many questions have been raised about the workability of its requirements and the ability of the federal agencies concerned to adhere to the ten day timeline provided for interagency review. The completion of an interagency review of such export control issues within ten days would be unprecedented. Consequently, private sector observers doubt that this timeline will be observed in practice.

The new law has troubling implications for U.S. supercomputer producers. U.S. companies have only recently succeeded in successfully challenging the prior dominance by their Japanese competitors of the narrow international market for these products. Accordingly, there are concerns that these new U.S. export control restrictions might reverse the recent trend of American success. Although Commerce Department officials have indicated that they may seek a Congressional repeal of these provisions in 1998, it is unclear what chance of success, if any, such an effort would have.

C. PROLIFERATION CONTROLS

There was some progress in 1997 in efforts to harmonize the U.S. approach to nonproliferation export controls with that of its foreign allies. However, these developments also brought some reversals to earlier reforms of U.S. export controls affecting certain industries.

1. *Chemical Weapons Convention*

Although the United States signed the Chemical Weapons Convention (CWC) on January 13, 1993, the U.S. Senate did not give its advice and consent to ratification until April 24, 1997.[38] Even then, the Senate's approval was qualified by a variety of conditions, including provisions to restrict U.S. financing and sharing of intelligence information to further multilateral enforcement mechanisms under the CWC.

The U.S. House of Representatives failed to approve parallel implementing legislation by the end of 1997. This was largely because the House measure for implementation of the CWC was incorporated into a larger bill, strongly opposed by the Clinton Administration, that called for the imposition of new U.S. extraterritorial sanctions against Iran. The House bill, The Iran Missile Proliferation Sanctions Act of 1997, developed largely as a reaction against the Administration's approach to sanctions enforcement and was particularly directed at Russian and other foreign companies engaging in certain kinds of business with Iran.[39] Although action on a parallel proposal in the Senate was not taken by the end of the year, the initiative remained on the legislative agenda of the Senate for 1998.

As this suggests, by the close of 1997, action on the CWC had become entangled in the larger debate in Washington on U.S. sanctions policy. Further action in Congress on the CWC may well hinge on the extent to which members find acceptable the Clinton Administration's approach to enforcement of the ILSA law against Iran and enforcement of other sanctions programs in 1998.

2. *Wassenaar Implementation*

At the close of 1997, some two years after the conclusion of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Goods and Technologies,[40] the United States was the only member of the dozen countries involved in development of this multilateral export control regime that had not yet taken formal action to implement its terms. However, the Department of Commerce was nearly ready to issue interim implementing regulations, including a list of affected products, by the end of the year.[41]

The U.S. approach to implementation of the Wassenaar Arrangement calls for the State Department to assume control under the International Traffic in Arms Regulations over a variety of products with potential military applications.[42] These products will include certain categories of machine tools previously subject to Commerce Department control under the EAR. The new regulations also are expected to eliminate some licensing exceptions previously available for items subject to U.S. missile technology controls. Thus, a variety of dual-use products formerly regulated by the Commerce Department under the EAR will be subjected to more severe U.S. export licensing restrictions pursuant to the Wassenaar regime under State Department oversight. The implementing regulations will be divided into three different restriction categories of affected items, indicated by separate product lists. These will include: (1) a basic list; (2) a sensitive list; and, (3) a very sensitive list. Commerce Department officials suggest that these lists of dual-use items will harmonize the Commerce Control List of the EAR with the export control regimes of other Wassenaar members. U.S. officials have also suggested that this should help facilitate business dealings by U.S. exporters with other participating countries. It remains to be seen over time whether this will be the case following implementation of the new regulatory regime.

IV. Conclusions

At the close of 1997, it appeared that a measure of equilibrium had been reestablished in the general approach of executive branch officials to economic sanctions and export control issues. Compared with the dramatic expansion of U.S. extraterritorial sanctions measures in 1996, 1997 was a year of relative calm. However, problems related to enforcement of the extraterritorial sanctions enacted in 1996 against Cuba, Iran and Libya presented Administration officials with critical dilemmas that remained unresolved at the end of the year. Moreover, the scaling back of prior liberalizations of export control restrictions on leading sectors of U.S. industry generated new frustrations for the American business community.

In 1997, the currents of public policy debate on sanctions and export control issues in the United States remained at odds with private sector interests. The continued clamor in Congress for a more strident extraterritorial assertion of U.S. policy in these areas also conflicted with diplomatic efforts to promote U.S. foreign policy and national security interests on a multilateral basis. As a consequence, U.S. strategic initiatives to isolate rogue nations, such as Iraq and Iran, lost ground on the international stage over the course of the year.

Looking to the future, the events of 1997 provide little reason for optimism to private sector interests adversely affected by this conflict. With sanctions and export control issues increasingly entangled in the bitter partisan divide in Washington, it appears unlikely that the heated debate on fundamental questions of U.S. sanctions and export control policy will be resolved any time soon.

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[1] The U.S. Government does not recognize actions taken by the military government of the country to change the country's name from Burma to Myanmar. Consistent with current U.S. policy the country is referred to as Burma throughout this article.

[2] These are the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub. L. No. 104-114, 110 Stat. 785 (1996), and the Iran and Libya Sanctions Act of 1996 (ILSA), Pub. L. No. 104-172, 110 Stat. 1541(1996). *See, e.g.*, Wynn H. Segall, *Export Controls and Economic Sanctions*, 31 INT'L. LAW. 393 (1997).

[3] These include initiatives by various U.S. business coalitions, such as U.S.A. Engage and The National Association of Manufacturers, and various U.S. trade associations.

[4] These measures were included in Title V, section 101(c) of the omnibus appropriations bill for 1997. *See* Foreign Operations, Export Financing, and Related Programs Act § 570, Pub. L. 104-208, 110 Stat. 3009(1996).

[5] *Id.*

[6] *See* Exec. Order No. 13,047, 62 Fed. Reg. 28,301(1997), *reprinted* in 50 U.S.C.A. §§ 1701-1706 (West Supp. 1998).

[7] *Id.* §§ 1,3(a).

[8] *Id.* § 2(a).

[9] *Id.* § 2(b)

[10] *See id.* § 3.

[11] *See id.*

[12] *Id.* § 4(c).

[13] *See id.*

[14] Antiterrorism initiatives against Syria and Sudan were incorporated into both the proposed House and Senate State Department reauthorization and foreign operations appropriations bills in 1997. *See* H.R. 1757, 105th Cong. (1997); S. 903, 105th Cong. (1997); H.R. 2159, 105th Cong. (1997); S. 955, 105th Cong. (1997).

[15] The primary religious persecution initiatives were companion House and Senate bills that cited religious persecution concerns in Sudan, China, Tibet, Vietnam and certain other countries. H.R. 1685, 105th Cong. (1997); S. 772, 105th Cong. (1997).

[16] *See* Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (1997). This Order was also based on the President's authority under IEEPA. *See* 50 U.S.C.A. § 1701 (West Supp. 1998).

[17] Significant preexisting export restrictions also applied to Sudan under the Export Administration Regulations (EAR) based on this designation. *See* 15 C.F.R. § 742.10 (1997). Moreover, Sudan was already subject to an arms embargo under the International Traffic in Arms Regulations (ITAR) prior to the new Executive Order. *See* 22 C.F.R. § 126.1(a) (1997).

[18] Exec. Order No. 13,067, *supra* note 16, § 1.

[19] *See id.* § 2(a),(b),(f).

[20] *See id.* § 2(c),(g).

[21] *See id.* § 2(d).

[22] *See id.* § 2(e).

[23] *See id.* § 2(b).

[24] *See id.* § 3(a)(b).

[25] *Id.* § 2(a). The Order does not include an express parallel exception to specifically authorize exports or reexports of U.S.-origin informational materials to Sudan.

[26] *Id.* § 7(a). This grace period expired on December 4, 1997.

[27] Report to Congress pursuant to the International Economic Emergency Powers Act § 204(b), 50 U.S.C.A. § 1703(b) (West Supp. 1998).

[28] Exec. Order No. 13,067, *supra* note 16, § 3(c).

[29] However, the terms of the Order effectively bar U.S. persons and companies from directing or facilitating activities associated with Sudan by such foreign affiliates.

[30] *See* Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995).

[31] ILSA establishes two potential bases for a presidential waiver of sanctions. Both of these require certain statements and certifications regarding actions or assurances provided by countries associated with actionable investments under the law. *See* The Iran and Libya Sanctions Act of 1996 (ILSA), *supra* note 2, §§ 4(c), 9(c).

[32] This initiative is further discussed below.

[33] *See* 62 Fed. Reg. 43,629 (1997).

[34] *See* 15 C.F.R. § 734.2(b) (1997).

[35] The Deemed Export Rule does not apply to permanent resident aliens or foreign persons admitted to the United States as political refugees, regardless of their country of nationality.

[36] This is the highest level of interagency review available for such export control concerns before the President, and this was the first time in seven years that the EARB was convened. Its members include the Secretaries of State, Defense, Energy and Justice, and the Director of the Arms Control and Disarmament Agency.

[37] H.R. 1119, Pub.L. No. 105-85,111 stat. 1629(1997).

[38] *See* 143 Cong. Rec. 53651-57 (daily ed. Apr. 24, 1997). The Senate subsequently approved implementing legislation for the CWC later in the year. *See* Chemical Weapons Convention Implementation Act of 1997, S. 610, 105th Cong. (1997). In accordance with Article XXI, the Convention entered into force on April 29, 1997.

[39] *See* H.R. 2709, 105th Cong. (1997). The House measure also incorporated all of the conditions on approval specified in the Senate Bill.

[40] The Wassenaar Arrangement, which was concluded in December, 1995, replaces the former COCOM regime, generally requires bi-annual reporting by the United States and other member countries on exports made without licensing to specific countries of concern, particularly in the Middle East and Southeast Asia. Its adherents principally include NATO members and the Australia Group countries.

[41] These regulations were issued shortly after the new year. *See* Revisions to the Commerce Control List and Reporting Under the Wassenaar Arrangement, 63 Fed. Reg. 2,452 (1998) (interim rule).

[42] The ITAR are codified at 22 C.F.R. §§ 120.1-29(1997).