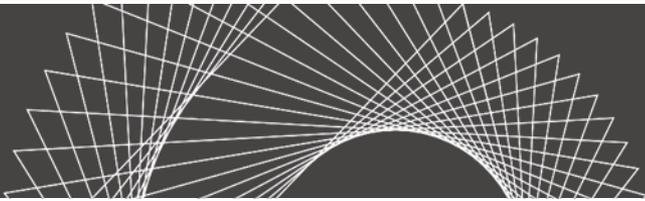


Status and Content of EAR Developments

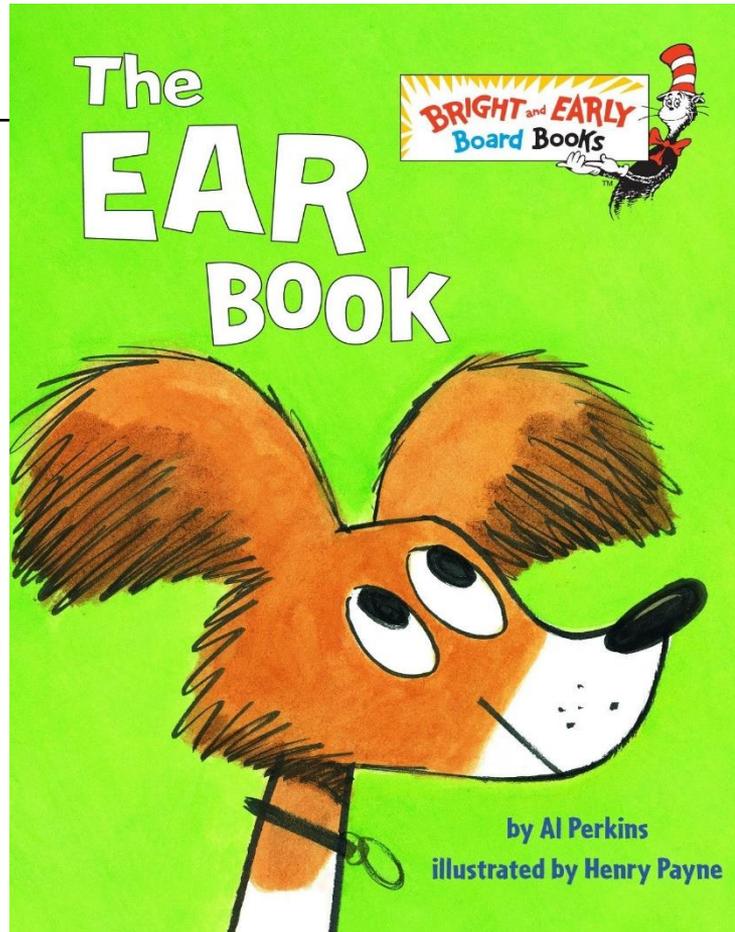


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National Security Purpose of Export Controls

- Since the end of the Cold War, the primary national security objective of export controls has been relatively straight-forward, which is (in essence) to regulate:
 - weapons of mass destruction;
 - conventional military items; and
 - commodities, software, and technology that had some identifiable relationship to their development, production, or use.
- The U.S. meets each year with its allies in the four multilateral export control regimes to agree on updates to the lists of such items.

Domestic Implementation

- Each member then implements the regime’s edits in their domestic export control rules the following year.
 - But for the unilateral controls (e.g., AT-only controls), the Commerce Control List is literally just a collection of all agreements with the regimes (which is why it is hard to understand sometimes).
- Each country make its own decision about whether a license should be granted to authorize exports of such items based on its assessment of whether there is a risk of diversion to a destination, end use, or end user of concern – but based on the traditional definition of “national security.”

Foreign Policy Purposes

- 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 or that supported U.S. unilateral sanctions, such as those against Iran, Cuba, Syria, the Crimea region of Ukraine, and North Korea.
- Such controls are generally unilateral.

Historical Role of Economic Considerations

- 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.

What is not New with Respect to China

- 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.
- Also, for years, the licensing policies on regime-listed dual-use items have been quite strict given risk of inward and outbound diversion. So, not the issue either.
- Significant enforcement authorities have been directed at illegal exports to and from China, so not really the issue either (although always room for more resources).

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 (MIC 2025);
 - civil-military fusion policies to help modernize its military capabilities; and
 - massive human rights abuses using such technologies?
- Because the Cold War-era export control system focused on WMD and conventional military proliferation, it was not designed to address such China-specific concerns.

What does “national security” now mean?

- Basic rule of regulation – to know the solution one must clearly define the problem to be solved.
- So, what does “national security” mean with respect to export controls on commercial items that do not have a clear relationship to WMDs or conventional military items?
- How far do we go into purely economic great power competitive issues when defining “national security” more broadly?
- Where is the line because domestic protectionism and economic security / national security?
- This is the decision for the Biden Administration to make.

Policy Concerns re PRC and Semiconductors

- PRC will subsidize its semiconductor industry to gain worldwide dominance. Puts US industry at disadvantage to vital product, which creates national security threat.
 - Potential disruption of supply chain.
 - Tampering for the sake of cyber intrusions and exfiltration.
- Enhanced indigenous design and production capabilities in semiconductors critical to military modernization, which is a national security threat. Advanced node IC's are critical to other technologies of concern, such as AI.
 - Focus is thus on tools, equipment, software, and technologies that would give PRC parity what advanced node capabilities in all aspects of semiconductors and related items.
 - Will a SMIC-like rule be applied to all of PRC?
- There are many Huawei issues, but primary one relates to 5G. If Huawei has 5G dominance, then allows for fast exfiltration of hacking when directed to do so.

BTW – A Reminder

- Export controls are not the solution to all non-kinetic problems. Must also consider:
 - Sanctions (can focus on individual companies using US dollar transactions as jurisdictional hook)
 - Import and domestic controls (e.g., NDAA 889 procurement controls and ICTS rule approach to protecting critical infrastructure)
 - IP theft prosecution
 - Industrial Policy -- domestic support for STEM, R&D, and industry generally
 - Foreign direct investment controls (CFIUS)
 - Tariffs
 - Diplomacy

Ways to Address with Export Controls

- Unilateral vs. Multilateral
- The story of U.S. dual-use export controls these last four years has been the expanded use of unilateral, extraterritorial list-based, end-use, and end-user controls largely to address Chinese government policies contrary to U.S. national security and foreign policy interests.
- There is little disagreement in U.S. political and policymaking circles that export controls and other tools must be used to respond to the China-specific national security threats, although there is no agreement on where the right line is.
- There is also little disagreement that the traditional multilateral export control system is not an effective or quick tool to address them.

Why Regime System Not Effective re PRC

- Need for consensus of regime members, many of which just see China 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 member states generally do not have the flexibility in their legal systems to adopt non-regime-based technology controls or end-use or end-user controls, except with respect to those related to weapons of mass destruction.

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 controls on commercial satellites 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.

Approach in Recent Years

- Given limitations of multilateral system and unilateral approach:
 - Obama Administration freed up USG burden for less sensitive exports to allies to focus more time on sensitive issues re PRC, such as U.S. content into military- or space-related items. Also, aggressive user of Entity List tool re PRC (and Russia) but with specific objectives in mind.
 - Trump Administration adopted and expand a series of unilateral, extraterritorial export controls, such as a novel Huawei-specific Entity List control, novel SMIC Entity List control, and expanded definition and scope of “military end user” controls.
 - Congress in 2018 expanded authority of foreign direct investment controls (CFIUS) and passed the Export Control Reform Act (ECRA).

Current Unilateral Controls

- Exports of otherwise uncontrolled, basic US (but not foreign) semiconductors and many other items to “military end user” or for a “military end use.”
 - Terms are defined broadly to capture otherwise commercial entities if even a small amount of work in support of military.
- Regular Entity List Action – Exports from US prohibited. Only foreign-made items with sensitive content controlled.
- Huawei Entity List Action – Applies to all US items – and foreign-made items if produced with use of US tools or software, even if otherwise uncontrolled.
 - Calls by some to apply this rule -- the “foreign-produced direct product rule” – more broadly

Export Control Reform Act of 2018 (ECRA)

- ECRA requires BIS to identify “emerging” and “foundational” technologies not now controlled by a regime but that are “essential to national security” (however defined)
- This effort was specifically in response to Chinese commercial technology acquisition efforts, but set clear standards for control and a requirement that the controls be made multilateral over time.
- So, allows unilateralism for a few years, but requires that U.S. work to make them multilateral.
- Trump Administration made all its emerging technology controls multilateral, but never started on the foundational technology controls.
- Used Entity List aggressively to respond to human rights violations in China.

Emerging and Foundational Process in ECRA

- In deciding whether a new technology should be added to unilateral controls, Administration must take into account the:
 - development of the technologies outside the United States;
 - effect export controls imposed pursuant to this section may have on the development of such technologies in the United States; and
 - effectiveness of export controls imposed pursuant to this section on limiting the proliferation of emerging or foundational technologies to non-U.S. countries.
- Basically, this ECRA provision states that comparable technologies that are widely available outside the United States are not good candidates for unilateral control because the control would be less effective and create an unlevel playing field for the affected U.S. industry.

“Plurilateral” Will be the Word, I Suspect

- When unilateralism is counterproductive and multilateralism is too slow, then the Goldilocks solution in addressing novel China-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 by China with respect to purely commercial technology.
- 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.

“Plurilateral” cont.

- Then, work with the allies to align China-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.
- Then, work together to get regimes to allow human rights concerns to be a standard for control.
- Then, work together on common “run faster” strategies of economic support for allied development and production efforts.
- Repeat.
- Very hard, but the “least bad option” to purely unilateral controls or sticking to traditional multilateral system.

Biden Administration Approach and Questions

- For now, Biden Administration is aggressively maintaining all policies in place at the end of the Trump Administration, such as:
 - Extraterritorial Huawei entity list policy focused on 5G items;
 - Novel SMIC catch-and-release Entity List license policy focused on advanced feature sizes; and
 - Expanded military end use/user rules and new military-intelligence end use/end use rules.
- Broad review of U.S.-China policies underway. I do not know the outcome.
- Will take the threats and concerns very seriously, but the process will be more orderly and predictable – and based on a plan with standards. And a focus on effectiveness.