

The Evolution and Trend of US Export Control Laws and China's Response

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The U.S. export control legal system has gone through three periods. The introduction of the Export Control Reform Act of 2018 marks a new period for U.S. export control. Based on the changes in the controlled items and control lists of the U.S. Export Administration Regulations in recent years, this article analyzes the new trend of the current U.S. unilateral export control on China, which is based on lists, restricts high-tech industries, and emphasizes country and military use. At the same time, a brief analysis is made of the multilateral control trends in China, including the coordination of multilateral export control mechanisms, the blockade of high-tech fields, the construction of a global supply chain system, the strengthening of foreign investment security reviews, and the generalization of human rights and labor issues. China should improve relevant blocking legislation, deepen the construction of international industrial chains, strengthen independent research and development, and promote corporate compliance from both the government and corporate levels, and actively respond to the new trend of U.S. export control on China.

Keywords: US export control, entity list, multilateral export control, China

Overview of the U.S. Export Control Legal System

The Export Control System and Corresponding Departments

The current U.S. export control system is mainly divided into two parts: the first is the military items system, which is under the responsibility of the Directorate of Defense Trade Controls (DDTC) of the U.S. Department of States. The second is the dual-use items system, which is under the responsibility of the Bureau of Industry and Security (BIS) of the U.S. Department of Commerce. In addition, during the investigation process, other departments will also cooperate and participate depending on the type of the case, such as the U.S. Department of Homeland Security, the Department of Energy, etc. If the case involves criminal charges and lawsuits, the U.S. Department of Justice will take the lead after entering the judicial process. In summary, based on the end use and review procedures of export controlled items, the institutional allocation is characterized by a single department taking the lead and multiple departments coordinating and cooperating.

The Evolution History of the Export Control Laws

The establishment of the U.S. export control system was initially aimed at the military purposes of hostile countries during wartime, but as time passed and wartime needs weakened, its legislative purpose tended to

maintain economic dominance in peacetime and to seek a balance between maintaining national security and trade development. Overall, the evolution of the U.S. export control laws has gone through three main periods.

The first period is the EAA in the Cold War period. In February 1949, the U.S. introduced the Export Controls Act of 1949, which was the first export control law introduced by the U.S. in peacetime. Subsequently, the Export Administration Act of 1969 replaced the 1949 Act. The Export Administration Act of 1979 (EAA), comprehensively updated the 1969 Act, shifting from protecting basic national security technologies and promoting trade to imposing export controls for military purposes and foreign policy. It was amended in 1981, 1983, 1985, and 1988, and continued to be used throughout the Cold War. In the early period of the formulation of the Export Control Law, coupled with the impact of the war factor, the export control legal system changed frequently during this period, and tried to find long-term rules in the amendment.

The second period is the IEEPA and presidential order period. Since the EAA needs to be constantly updated and revised, in August 1994, Congress failed to reach a consensus on reforming the U.S. dual-use export control system to adapt to the post-Cold War era after the collapse of the Soviet Union, and the EAA became invalid. Until 2001, U.S. President Bush issued an executive order to grant the president the power to ensure the effectiveness of EAA through the International Emergency Economic Powers Act (IEEPA).¹ Since then, from 2002 to 2018, the U.S. President issued presidential executive orders pursuant to IEEPA each year to maintain the operation of the U.S. export control system. During this period, due to the end of the war and the stabilization of the new world order, there were few amendments to the content of the export control laws. However, due to the power struggle between the president and Congress in the U.S., the continuation of the effectiveness became the main issue of debate during this period.

The third period is the ECRA 2018 and EAR period. In 2010, U.S. President Obama proposed an export control reform initiative, proposing to focus the enforcement on critical technologies and remove controls on other non-core technologies. Although the ultimate goal of reform initiative was not achieved, on August 13, 2018, U.S. President Trump signed the ECRA 2018, which aims to strengthen the U.S. export controls to facilitate control over end-use, end-users, and related destinations in terms of critical technologies. Since then, the U.S. export controls have entered a new historical period, with specific implementation details becoming more complete and being adjusted in real time in line with the latest technological developments.

The Current Export Control Legal System

After the reform of export control system in 2018, the current legal system not only includes laws related to export control passed by Congress, but also includes bills implementing relevant regulations of international organizations such as the United Nations, prohibition and restrictive bills issued against certain countries or regions, and presidential resolutions signed by the U.S. President.

The EAR is the core legal basis for the U.S. to implement the export control system. The Legal Authority for the EAR document issued by the BIS in 2020 details the legal basis for the EAR. Its legal basis is mainly divided into three parts: the first part is the basic laws on export control, including IEEPA, ECRA, and EAA. The second part is the special laws related to export control, such as United Nations Participation Act of 1945, Nuclear

¹ Continuation of Export Control Regulations, as amended, Exec. Order No. 13222, as amended by Exec. Order No. 136372, 3 C.F.R., 2001 Comp., p. 783 (2001).

Non-proliferation Act of 1978, Trading with the Enemy Act, and USA Patriot Act of 2001. The third part contains executive orders and presidential resolutions on export control.

The U.S. export control legal system is characterized by a clear hierarchy, with laws and administrative regulations complementing and improving each other, and playing a guiding and regulating role in the regular implementation of export control. At the same time, new problems arising in practice are also fed back at any time and reflected in the revision of regulations. For example, in recent years, with the development of the semiconductor chip, artificial intelligence, and biomedicine industry, BIS has updated the scope of relevant controlled items and shortened the adjustment cycle to achieve the purpose of maintaining national security. The Department of Commerce has also jointly issued legal regulations with multiple departments such as the Department of the Treasury and the Department of Justice to truly realize coordination and cooperation among departments.

Trends in Export Control Items

Items subject to the EAR can be divided into two categories: the first is items not included in the Commerce Control List (CCL), collectively referred to as EAR99. EAR99 items, usually consisting of low-tech consumer goods, do not require a license in most cases, and only require a license when it involves restricted end users, end uses, or export destinations. Second, the items listed in the CCL. Each item is assigned a corresponding ECCN (Export Control Classification Number) code. The U.S. has adopted stricter export controls on items in the CCL. In many cases, a license must be applied to export, re-export, or transfer within the country. The CCL lists the ECCN of the controlled items and the control reasons corresponding to each controlled item. After clarifying the reasons for the control of the controlled items according to the CCL, it is necessary to use the Commerce Country Chart (CCC) to confirm whether the item needs to apply for an export license. This approach of formulating controls based on end-users and end-uses has also been referenced and adopted by many other countries when formulating export control laws.

Changes in the Commercial Control List

The revision and update of CCL are mainly divided into the following three situations:

First, update and implement the meeting resolutions of international multilateral export control organizations. Multilateral export control mechanisms are highly valued by the U.S. If the U.S. alone imposes strict export controls on items, end users are likely to obtain controlled items through third countries, thus rendering the U.S. unilateral export control ineffective in fact. Therefore, BIS amends the CCL and other corresponding sections of the EAR essentially annually, based on the most recent conference resolution of the Wassenaar Agreement, to implement the list arrangements of the Wassenaar Arrangement and to maintain the international unified standards for export control of dual-use items and technologies. In addition to the Wassenaar Arrangement on conventional arms control, the international multilateral export control mechanisms joined by the U.S. also include the Australia Group, the Nuclear Suppliers Group, and the Missile Technology Control Regime (MTCR) on biological and chemical weapons control. Compared with the unilateral implementation of export controls by the U.S., multilateral coordination mechanisms are more deterrent to controlled items and sanctioned targets. Currently, the U.S. has greater negotiating power and influence on multilateral mechanisms. For items that have been included in the control of multilateral mechanisms, the U.S. will modify the corresponding lists based on

them, but if it does not conform to its own interests, the U.S. chooses to instigate changes to the multilateral mechanisms first, and then incorporates them into its own lists. For items that have not yet been included in the control of multilateral mechanisms, the U.S. will steer the multilateral mechanisms to develop in a direction that is conducive to collaborative management and strengthening its own technological advantages.

Second, include emerging and foundational technologies in the control list. In the period of peaceful development, the definition of national security has gradually expanded from the traditional military field to the economic field. The leading advantage in economic fundamentals will be more conducive to taking the initiative in the current world landscape. Therefore, leadership in emerging and foundational technologies will inevitably become the first line of defense to consolidate economic advantages. In recent years, the U.S. has strengthened its control over the supply chain and technology security of the Information and Communications Technology (ICT) industry. The control of emerging and foundational technologies is also a significant part of ECRA 2018.

Third, manage revisions and update public comments. BIS is involved in the management of CCL lists and ECCN codes, and also conducts daily revisions as technology develops and control needs arise. For example, in recent years, BIS has strengthened controls on military electronic equipment, genetically modified organisms, facial recognition systems, fingerprint and voice recognition technology, nucleic acid assemblers, genetic elements, vaccines, automated geospatial image analysis software, toxic chemicals, marine toxins, microelectronics, and quantum computing.

In summary, the CCL list shows the following characteristics: First, it emphasizes multilateral coordination. The U.S. is increasingly inclined to strengthen the implementation effect of export controls through multilateral mechanisms at the international level and expand the influence of the U.S. export control policy on a global scale. Second, for high-tech industries, the U.S. will continue to strengthen export controls on emerging and foundational technologies in the future, and implement more precise control measures based on the authorization of ECRA to maintain the technological advantage of the U.S. worldwide. Third, it strengthens specific country control. The U.S. has strengthened the licensing review of countries that prohibit the sale of weapons through the CCL list combined with the CCC national control.

Commerce Country Chart Involving China

According to EAR Supplement No. 1 to Part 738, the reasons for control listed in the CCC include: chemical and biological weapons, nuclear non-proliferation, national security, missile technology, regional stability, firearms convention, crime control and anti-terrorism. It can be seen that the reasons for U.S. control against China are diverse and comprehensive, with the exception of firearms convention and anti-terrorism reasons, which are included in the list of reasons for control. In addition, on July 31, 2020 and December 23, 2020, BIS issued two Federal Register on Hong Kong-related issues.² In the July Federal Register, BIS suspended all license exceptions for Hong Kong, which were treated differently from China (PRC). In the December Federal Register, the Hong Kong Special Administrative Region of China (HKSAR) was removed from the EAR's list of destinations and consolidated under the PRC. BIS took this action in response to new security measures, 2020 Hong Kong national security law. In practice, many entities use Hong Kong's special licensing policies and

² 85 FR 45998, Revision to the Export Administration Regulations: Suspension of License Exceptions for Hong Kong, 07/31/2020; 85 FR 83765, Removal of Hong Kong as a Separate Destination under the Export Administration Regulations, 12/23/2020.

geographical conditions to circumvent BIS controls on import and export trade. In addition to considering national security and regional stability factors, the cancellation of Hong Kong's exceptional license also plays an important role in closing loopholes in the rules in practice.

Trends of Export Control Lists

According to the EAR, the export control lists under the jurisdiction of the BIS are mainly divided into the following four categories: Denied Persons List (DPL), Entity List (EL), Unverified List (UVL), and Military End User List (MEU). As of September 3, 2024, a total of 12 Chinese entities were listed on the Denied Individuals List, 770 on the Entity List, 108 on the Unverified List, and 70 on the Military End-User List.³

Weakening Impact on Denied Persons List

The Denied Persons List includes persons who are denied export privileges. The DPL system is the original blacklist system of the U.S. According to the provisions of the EAR, since the listed persons are American and foreign individuals or organizations that do not comply with the U.S. export control measures, the listed persons shall not participate in any transaction of goods, software, and technology subject to the EAR, exported from the U.S. or intended to be exported, and are prohibited from providing convenience or services for the listed entities to obtain items subject to the EAR, exported from the U.S. or intended to be exported. In recent years, BIS has rarely used the DPL list for China, and in more cases has included controlled individuals in the Entity List or imposed sanctions based on the SDN list of the U.S. Treasury Department.

Frequent Use of the Entity List

The Entity List is a list of foreign persons listed in EAR Supplement No. 4 to Part 744, including companies, research institutions, governments, private organizations, individuals, and other types of legal persons. Entities on the Entity List must obtain an export license from BIS to export, re-export, or transfer items controlled under the EAR, and license exceptions are not applicable; the review of license applications will be under the review policy indicated in the entity and other relevant provisions of the EAR. In current, the licensing system of the Entity List involving China usually adopts a strict licensing review policy of "presumption of denial", but in the case of Xinjiang-related issues, a case-by-case review policy is adopted for some ECCN coded items. Revisions to the Entity List are voted on by the End-User Review Committee (ERC), which is usually comprised of the Departments of Commerce, State, Defense, Energy, and Treasury, and is chaired by the Department of Commerce. Additions to the Entity List are made by majority vote, and deletions or modifications to the list are made by unanimous vote.

According to the explanation of BIS, Chinese entities are listed in the Entity List usually because they violate the national security and foreign policy interests or pose a potentially significant threat. In recent years, the Entity List has been used more frequently. At the same time, updates to the Entity List have been targeted at high-tech industries, using national security, foreign policy interests, or human rights and labor issues to regulate Chinese enterprises involved in "military-civilian integration" and "intelligent manufacturing".

³ <https://www.trade.gov/data-visualization/csl-search> (last visited Sept. 3, 2024).

Strengthening of the Unverified List

In 2002, the U.S. established the Unverified List. If BIS is unable to verify the legitimacy and reliability of the end-use and end-user of items controlled by the EAR, such as not allowing BIS to conduct on-site inspections of exported items, the end-user will be listed on the Unverified List. Since the start of the U.S.-China trade war in 2018, BIS has made several updates to the Unverified List involving China, including removing Chinese entities from the list. The reason for the removal is that BIS can verify the authenticity through end-use, such as these entities no longer doing business in controlled countries and no longer participating in the U.S. exports. Overall, it is easier to remove from the Unverified List than from the Entity List. In recent years, BIS has used the Unverified List more frequently. Through the Unverified List, BIS has skillfully shifted the burden of proof to the listed entities. Even if the entity can prove the authenticity of the end use through evidence later, the proof process consumes a lot of labor, financial resources, and time.

Establishment of the Military End User List

In 2020, the U.S. established a military end-user list, which is specifically designed for military end-users in countries that are competitors of the United States, such as Belarus, China, Russia, Venezuela, etc. The export restrictions and removal process are the same as those on the entity list. According to the EAR, military end users refer to national armed forces, or entities whose actions or functions are intended to support “military end uses”. The establishment of this list also indicates that BIS will further strengthen its controls in military-related areas and critical countries.

Collaboration of Multilateral Mechanisms

In recent years, the rapid development of high-tech industries in China such as electronic communications and artificial intelligence has threatened the competitive advantages of the U.S., the European Union, Japan, and other traditional western countries. Maintaining advantages in high-tech industries and leading positions in international competition is what these developed countries urgently need to achieve. In addition, the European Union, Japan, Australia, and other countries are highly dependent on the U.S. to maintain national security and related high-tech. As traditional allies of the U.S., although their interests are not completely consistent on export control issues related to China, due to their common interests and pressure from the U.S., these countries are more likely to reach a consensus and coordinate actions on China's export control issues.

Strengthening Multilateral Export Control Mechanisms

After the end of the Cold War, the U.S. and core EU member states joined international multilateral export control mechanisms such as the Wassenaar Arrangement and the Australia Group. The Wassenaar Arrangement is led by the U.S. and mainly controls exports of high technology, including dual-use items, technology lists, military lists. Each member state independently adjusts the scope of its export control items based on the list, and the member states will share relevant information on export controls to coordinate the export control systems among member states.

The U.S. seeks cooperation with its allies in the field of export control to achieve coordinated actions. The U.S. Foreign Investment Risk Review Modernization Act (FIRRMA) states that the U.S. president should cooperate with allies to strengthen the multilateral export control mechanism. The dual-items export control

regulation of the EU also stipulates that the EU should engage in dialogue and cooperation with third countries to exchange information and practices, thereby facilitating the harmonization of global multilateral control mechanisms. On September 29, 2021, the EU-US Trade and Technology Council held its first meeting and jointly issued the statement. According to the statement, the U.S. and the EU will strengthen cooperation on export controls and set up an export control group to establish a special forum for dialogue on export controls between the U.S. and the EU, so as to facilitate the exchange of information on the risks of sensitive technology export destinations, adjustments to the export control regulations, and best practices for implementing effective export control measures. In addition, the U.S. and the EU also advocate assisting with export control to third countries, and the scope of the export control cooperation mechanism will continue to expand. It could be seen that in the future, more U.S. allies and partners will join in the multilateral export control mechanisms, promoting coordination policies toward China.

Bans on High-Tech Fields

The export control focus areas of the U.S., the EU, and other countries are converging, concentrating on high technologies. ECRA 2018 has expanded the scope of export control and added export control on emerging and foundational technologies. The new revised "EU dual-use Regulation 2021/821" also expanded the scope of export controls in the EU, and further strengthened export controls on relevant technologies by defining four export practices: export, re-export, outsourced processing, and electronic transmission of software and technology. Japan has followed the pace of U.S. export controls and has revised its end-user list. The Chinese companies and research institutions included in the Japanese list are mainly engaged in high-tech fields, which overlap with Chinese entities on the U.S. Entity List. Australia announced a list of critical technologies in 2021, which includes eight categories and 63 technologies, including artificial intelligence, computers, communications technology, quantum technology, and biotechnology. This list will guide Australia to adjust its export control policies on critical technologies and foreign investment security review mechanisms. With the rapid scientific and technological development, countries that gain competitive advantages in cutting-edge technologies will occupy the high ground in international competition and enhance their global impact. Therefore, western countries and their allies will further strengthen cooperation in critical technology fields and implement a more comprehensive technological blockade against China.

Construction of Global Supply Chain

As the globalization of production division and cooperation deepens, the U.S., while strengthening collaboration with its allies on export controls, must also consider the interests of its industrial security and development, and accelerate the construction of supply chains for critical technologies and raw materials. The U.S. and the EU mentioned in the Pittsburgh statement that the U.S. and the EU will reduce trade barriers, deepen cooperation in 5G and 6G communications technology, artificial intelligence, etc., develop international standards for emerging and critical technologies, establish a supply chain for semiconductors, increase cooperation and investment in the whole process of research and development, design, and production, thereby reducing dependence on China and strengthening competitiveness in cutting-edge technologies. As important countries for semiconductor exports, Japan and South Korea are important partners for Europe and the U.S. to strengthen the semiconductor supply chain. The Action Plan for Critical Technologies released by Australia

mentioned that it will strengthen cooperation with allies in high technology fields such as artificial intelligence and communication technology.

It is thus evident that the U.S., in collaboration with its allies, has a clear tendency to establish a multilateral export control mechanism, to strengthen the comprehensive blockade of China's high-tech development through transatlantic cooperation and the Indo-Pacific cooperation strategy, and to build a global supply chain involving high-tech and critical raw materials that is independent of China. These actions strengthen the security and stability of the supply chain worldwide to implement more thorough export controls on China.

Strengthening the Foreign Investment Security Review Mechanism

Export control ensures a country's technological competitive advantage usually by restricting the export of various tangible or intangible critical technologies. However, in addition to trade, foreign investors can also obtain control over foreign companies through investment, mergers, and acquisitions, and have access to core information on technologies during management and operations. Therefore, investment is also a major channel for acquiring critical technologies. The foreign investment security review mechanism protects critical technologies from being acquired by restricting foreign capital. Therefore, the foreign investment security review mechanism and the export control mechanism protect national security in the two aspects. Although the two restrictions have different contents, the purpose is the same. These two mechanisms have achieved a strict blockade of critical technologies through information sharing, to safeguard the national technological advantages.

The U.S. advocates for its allies to establish a foreign investment security review mechanism as soon as possible, and seeks the cooperation of its allies to establish a cooperation mechanism. For example, Section 1713 of FIRRMA stipulates an information sharing program for international cooperation in foreign investment review, which will establish a formal procedure for exchanging information with allied governments. This program exchanges critical information related to the national security of the U.S. and its allies, including information on specific technologies and entities related to that specific technology, and holds regular meetings with allies to coordinate actions on foreign security reviews and technology controls. Besides, the investment review group could also work with the export control group to explore strategies to address risks associated with specific sensitive technologies.

In order to cooperate with the export control mechanism and strengthen the comprehensive blockade of China's critical technologies, based on the Biden administration's actions to deepen transatlantic cooperation and Indo-Pacific partnership strategy, it can be foreseen that the U.S. will establish an investment review cooperation mechanism with other allies in the future, to restrict overseas investments of Chinese companies and obstacle the access to critical technologies.

The Abuse of Labor Rights Issues

The U.S. and its allies all pursue the capitalist system, share similar values, and are consistent on human rights. There is disagreement on the socialist system with Chinese characteristics. The western countries have endeavored to promote Western-style liberal democracy, and for this reason it has attacked China on human rights issues in Xinjiang and Hong Kong several times. In recent years, the U.S. indicated that there are human rights violations such as forced labor in Xinjiang and has taken a series of measures to deal with this. In terms of export control, the human rights issues in Xinjiang have become an important reason for the U.S. BIS has

included in the scope of its export controls advanced network surveillance technologies related to human rights, such as face recognition systems, polygraphs, and voice print recognition systems. The EU's newly revised export control regulations also reflect the emphasis on value and ethical issues in the development of emerging technologies, such as the human rights issues in artificial intelligence technologies, etc. The inclusion of human rights-related network surveillance technologies in the scope of controlled items shows that the EU shares the same position as the U.S. on the issue of human rights in China.

The definition of "human rights" itself is controversial, and the U.S. and the EU have vague criteria for measuring human rights violations. Therefore, the reason for human rights is more likely to be abused and become an excuse to tighten export control policies. The ethical risks brought about by technology are something that all countries should take very seriously. However, to promote Western democratic values, put international public opinion pressure on China, and use human rights as an excuse to curb China's technological development, strengthening global cooperation on human rights might become the direction of the U.S. and its strategic allies towards China in the future policies.

China's Responses and Suggestions

By reviewing the changes and trends in the U.S. export control on China in recent years, it presents the characteristics of more cross-departmental joint reviews, tightening of control of emerging technologies, generalization of jurisdictional grounds, diversification of control means, and strengthening of international cooperation. In this regard, China can consider actively responding from both the government and enterprise levels, so as to safeguard national security interests and ensure the operation of its economy and industries.

Government Measures

First, improve relevant legislation and appropriately apply blocking measures. China should speed up the study of the relevant supporting regulations of the Export Control Law, improve and timely adjust the control catalog of dual-use items, strengthen the construction of the unreliable entity list, counter the unreasonable extraterritorial jurisdiction of the U.S., so as to establish a market environment that is conducive to Chinese companies to participate in fair competition. Second, make full use of diplomatic mechanisms and strengthen strategic negotiations with the U.S. China could use the trade deficit, bilateral dialogue, and cooperation mechanism, to negotiate with the U.S. through various diplomatic channels, enhance mutual trust and understanding, and actively promote the healthy development of bilateral trade. Third, expand opening up and deepen international industrial investment cooperation. Although the U.S. attempts to strengthen its technological ban against my country through multinational allies, China could seize the divergence of interests among countries under the multilateral mechanism, strengthen technical cooperation with Russia, Germany, and other countries, encourage enterprises to carry out cross-border technical cooperation, establish overseas R&D institutions, and create a global R&D innovation network. Fourth, optimize talent introduction policies and increase financial support for critical technologies. For example, China could provide generous scientific research funding support and advanced scientific research facilities for overseas high-tech talents, provide a good service and communication platform, establish incentive mechanisms for scientific research and innovation, cultivate a group of leading enterprises, and build a collaborative innovation system among enterprises, universities, and research institutions.

Enterprise Responses

First, strengthen export control compliance. Chinese companies should learn and fully understand the relevant U.S. export control regulations and conduct corresponding risk assessments based on their business conditions. Establish a corporate compliance system based on the eight elements of the Export Compliance Guidelines issued by the BIS. In regular management, companies should set up specialized compliance departments or hire relevant legal advisors, and approach internal management, such as providing training for employees, signing compliance commitments with employees, etc. Second, expand the supply chain sources of critical products. Relevant import and export companies can actively expand the sources of supply channels, promote the diversification of import components, optimize the supply chain structure of enterprises, reduce export control risks, and thus break through the technological blockade of the U.S. and its allies. Third, actively adopt multiple remedies. Once listed in the list, entities have the right to appeal to the U.S. End-User Review Committee to apply for removal from the list. In addition to administrative remedies, entities can also seek judicial remedies against illegal acts such as abuse of discretion by the U.S. Department of Commerce by civil lawsuits. If necessary, listed enterprises can also seek support from Chinese relevant government departments.

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