



India, US and The Entity List

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Summary

The US government has had a system to control exports through much of their history. In modern times, this aspect of export controls took a new meaning and role with the onset of the cold war in the late 40s. The US relied principally on two legislative acts to enforce such export controls: The Export Administration Act (EAA) of 1979 for the control of exports of dual-use goods and technologies, and the Arms Export Control Act (AECA) for the export of defence articles and defence services.

Control of US Exports

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The Export Administration Regulation (EAR), administered by the Bureau of Industry and Security (BIS) of the US Department of Commerce, implements the provisions of the EAA. BIS also maintains a list, as required under the EAA, consisting of the goods and technologies subject to export controls under EAA. This list is known as the Commodity Control List (CCL).

The International Traffic in Arms Regulations (ITAR), administered by the Department of State, implements the provisions of the AECA. The Office of Defence Trade Controls in the Department of State maintains a list of items designated by the President as defence articles and services for the purposes of the implementation of the AECA. This list is commonly referred to as the United States Munitions List (USML).

The EAA expired in August 1994. Since then the control of exports of dual-use items has been carried out through a combination of emergency statutory authority the International Emergency Economic Powers Act (IEEPA), executive orders and regulations.

An Export Control Classification Number (ECCN) each number being a set of digits and a letter identifies items listed in the CCL. The reasons for control of these items identified by a digit are the following:

- 0: National Security reasons (including Dual Use and International Munitions List) and items on the NSG Dual Use Annex and Trigger List;
- 1: Missile Technology reasons;
- 2: Nuclear Nonproliferation reasons;
- 3: Chemical and Biological Weapons reasons; and
- 9: Anti-terrorism, Crime Control, Regional Stability, Short Supply, UN sanctions etc.

The following is a list of all possible Reasons for Control:

- | | |
|--------------------------------------|-----------------------|
| i. AT Anti-Terrorism | Control Reason No.: 9 |
| ii. CB Chemical & Biological Weapons | Control Reason No.: 3 |

iii.	CC Crime Control	Control Reason No.: 9
iv.	CW Chemical Weapons Convention	Control Reason No.: 3
v.	EI Encryption Items	Control Reason No.: 9
vi.	FC Firearms Convention	Control Reason No.: 9
vii.	MT Missile Technology	Control Reason No.: 1
viii.	NS National Security	Control Reason No.: 0
ix.	NP Nuclear Nonproliferation	Control Reason No.: 2
x.	RS Regional Stability	Control Reason No.: 9
xi.	SS Short Supply	Control Reason No.: 9
xii.	UN United Nations Embargo	Control Reason No.: 9
xiii.	SI Significant Items	Control Reason No.: 9
xiv.	SL Surreptitious Listening	Control Reason No.: 9
xv.	XP Computers	

Of these the following are controlled multilaterally under the four export control regimes: Reason CB and CW under Australia Group (AG); MT under Missile Technology Control regime (MTCR); NP under the Nuclear Suppliers group (NSG) and NS under the Wassanaar Agreement (WA). Together these four lists contain all items considered of to be of some significance to a WMD program in a country. Items not controlled for reasons of these regimes are not controlled by any other country and hence, in principle, are available to any country, and in particular to India, without any license requirements.

Of the control reasons the following require licenses for export to India, from US, whether or not the destination is on the Entity List: ii, iii, iv, v, vii, viii, ix, x and xv. Control reasons xi, xiii, and xiv apply to all countries. The only control reasons that do not apply for destinations in India, not on the Entity List are i, vi and xii.

Since reasons for control are not mutually exclusive, items may be controlled for more than one reason i.e. for example for both national security reasons as well as nuclear nonproliferation reasons.

The number of items in the CCL and the reasons for their control vary over time depending on reviews carried out by the BIS in consultation with other agencies of the government. Currently there are about 507 numbered items in the CCL. Of these 374 are controlled for one or more of the reasons for control 0-3 listed above. The remaining 133 items are

unilaterally controlled items numbered as #9 listed above.

Of these 37 are controlled for CB, CC and RS reasons and hence applicable to all destinations in India. 10 entries are controlled for SL and SS reasons and hence again applicable to all Indian destinations. *Hence the number of CCL entries not controlled for destinations in India, not under the Entity List, are 86 of which 83 are controlled solely for AT reason and the other three for AT reason in combination with UN and FC.*

The reach of the EAR is broad. Except for a few limited items, listed separately below, these include:

- 1 All items in the United States, including in the US Foreign Trade Zones or moving in transit through the United States from one country to another;
- 2 All US origin items wherever located;
- 3 US origin parts, components, materials or other commodities incorporated abroad into foreign made products, US origin software, and US origin technology commingled with foreign technology in quantities exceeding *de minimis* levels; and
- 4 Certain foreign-made direct products of US origin, technology or software.

The exceptions are:

- 1) Items that are exclusively controlled for export by other agencies of the US Government such as:
 - a) Department of State for items in the USML;
 - b) Office of Foreign Assets Control (OFAC) of the Department of Treasury which implements broad controls and embargo transactions with certain foreign countries;
 - c) US Nuclear Regulatory Commission which controls export and re-export of commodities related to nuclear reactor vessels;
 - d) Department of Energy for the export and re-export of technology related to production of special nuclear materials;
 - e) Patent and Trademarks Office for export of technologies; in the form of patent application, amendment, modification or supplement, that are subject to the EAR; and
- 2) Certain publicly available technology or software that is already published, results of fundamental research, educational materials and phonographs, printed books, newspapers, periodicals etc.

Items subject to EAR but not listed under a separate ECCN in the CCL are given the classification EAR99. Such items, even though subject to export controls, do not in practice

require licenses unless specially notified. These are usually common low technology items that do not warrant any special control efforts.

The CCL, in addition to listing of items, also includes for each item, along with its ECCN, the reasons for its control and the license requirements and exceptions. It is the responsibility of each exporter to verify whether or not an export requires a license and act accordingly. The EAR is a voluminous document, which sets out in detail the procedures to be followed by an exporter in executing an export order.

The ITAR is similar to the EAR but with its application restricted to items on the USML. Otherwise the procedures and practices in exporting an item are more or less identical.

Entity List

The Export Administration Regulations (EAR) contain a list of names of certain foreign persons including businesses, research institutions, government and private organizations, individuals, and other types of legal persons that are subject to specific license requirements for the export, reexport and/or transfer (in-country) of specified items. These persons comprise the Entity List.

BIS first published the Entity List in February 1997 as part of its efforts to inform the public of entities who have engaged in activities that could result in an increased risk of the diversion of exported, reexported and transferred (in-country) items to weapons of mass destruction (WMD) programs. Since its initial publication, grounds for inclusion on the Entity List have expanded to activities sanctioned by the State Department and activities contrary to U.S. national security and/or foreign policy interests.

The Entity List specifies the license requirements that it imposes on each listed person. Those license requirements are independent of, and in addition to, license requirements imposed elsewhere in the EAR.

Currently the no. of countries from where entities have been listed in the Entity list is 24 (including Hong Kong) and the no. entities listed approximately 250, and if the subordinate entities are counted it may run to about 300.

From India four major entities are listed: Bharat Dynamics Ltd, Defence Research and Development Establishment (DRDO), Department of Atomic Energy and Indian Space Research Organisation (ISRO). Taken individually the list has twelve (12) subordinate entities plus all unsafeguarded nuclear facilities. No industrial enterprise is listed from India other than Bharat Dynamics Ltd- which is engaged in the production of missiles in India. All the listed entities are in the public institutions. No entity from the private sector is included in the Indian entity list.

In mid-2010 the BIS implemented some changes in the Entity List from the 2009 Annual review of the Entity List. The review was in respect of 11 of the 24 countries on the Entity

List. A review of the list in respect of seven other countries-including India- is expected soon.

Removal of the Indian entities on the Entity List from the list has been one of the long standing requests of India which has been reiterated regularly at the annual HTCG (High Technology Cooperation Group) meetings, the most recent being earlier this year in Washington D.C.

However, the US government has been so far reluctant to consider the Indian requests on the ground;

- i) It is the US Policy not to support (a) nuclear activities not subject to International Atomic Energy Agency (IAEA) safeguards; and (b) MTCR category 1 programs (300km range/500 kg payload) in non-MTCR member countries;
- ii) All the Indian entities listed in the Entity List are engaged in one of these two activities;
- iii) Facilities put under IAEA safeguards can be removed from the Entity List;
- iv) Facilities that demonstrate they are not involved in programs for missiles or space launch vehicles with ranges of over 300 kilometers could be considered for removal from the Entity List; and
- v) In addition to demonstrating that facilities are not involved in such programs, facilities would also have to meet a number of other conditions such as comprehensive internal control programs and commitment to end-use checks, to be considered for removal from the Entity List.

Can the Indian entities be removed from the Entity List without damaging the US policies in respect of not supporting unsafeguarded nuclear activities or MTCR Category 1 programs? Yes, it can be done, with very little or no fear of US supplied items being diverted to such programs in India. In addition such an action will have far reaching positive effects on future Indo-US relations.

US-India high technology transfers.

After the 1974 nuclear test by India, US began to restrict high technology transfers to India. As a result of this and other actions by the US government, by late 70s, there was a huge backlog of applications for export of high technology items to India especially in respect of computers. The two governments began negotiations to resolve the matter and in 1984 a Memorandum of Understanding (MOU) was signed by the two governments formalizing procedures of high technology exports to India. After the 1998 nuclear tests once again restrictions were placed on high technology exports to India and the Indian entities on the Entity list expanded to over 200 destinations in India.

After the removal of nuclear test related sanctions and visit of President Clinton, relation between the two countries improved substantially resulting in the Next Steps in Strategic Partnership (NSSP) and subsequently resulted in the India-US nuclear deal, HTCG etc.

An analysis BIS license data in respect of export of dual-use high technology items to India clearly establishes the inclusion of destinations in India in the Entity List not only does not contribute much to the advancement of US policies, it has contributes substantially to the slowing down of the ongoing dialogue between the two countries on matters of strategic partnership quite contrary to the BIS judgment in its annual reports that “nor will any adverse reaction (to the Entity List) by other countries be counterproductive to U.S. foreign policy interests.” It has certainly been counterproductive in respect of Indo-US relations.

Why?

As mentioned earlier, the items which require licenses for export to India, not applicable for destinations not on the Entity List, are those unilaterally controlled for onlt AT reasons along with EAR99 items. EAR99 items are those not specifically included in the CCL and are common place items which are universally available from multiple sources globally and which are of low technology. Further in case of Indian destinations on the Entity List, there is a *presumption of approval for EAR99 items*.

Unfortunately, however, because of the Entity List and the reluctance/ ignorance of US exporters quite often even for many items that do not require any license apply for a license which are eventually Returned Without Action (RWA) by BIS indicating that No License is required (NLR). Nevertheless the process of examining and scrutinizing these applications takes time and often the potential India importer cancels the order and these applications too are RWA indicating “Applicant Request”. Table 1 below gives BIS data in respect of exports of controlled items to India.

TABLE

		RWA		Denials	No	Approvals
		Total	NLR			
2007	All	120	96	10	666	356.480
	EAR99	77	76	3	37	
	Unilateral	18	16	3		
	0-3	25	4	4		
2008	All	286	209	35	820	297.442
	EAR99	173	163	7	33	
	Unilateral	41	35	13	43	
	0-3	72	11	15	744	

RWA and denials for CY and Approvals for FY

In both 2007 and 2008, there were, in addition to NLR, many RWA because of applicant request, presumably because of the delay in the processing of the licenses. This is corroborated by the fact that the Industry has often complained that it has either completely ignored US suppliers because of presumed license difficulties or cancelled their order after placing it because of license delays. In fact there is ample circumstantial evidence to indicate that the Indian industry over years has begun to boycott US suppliers if they can find suppliers from other countries.

The above data substantiate the industry complaints. The vast majority of RWA are for NLR. Yet US industry continues to apply for licenses for items not requiring licenses because of the presence of Indian destinations in the Entity List. This is ironic considering that the number of denials of licenses for the Indian industry, especially the private sector, is often at most only one or two.

What would happen if the named Indian destinations were to be removed from the Entity List. It would make these destinations eligible for items not controlled for India. As detailed earlier, the number of items for which no license is required for export to India, is 86 of which 83 are solely for AT reasons and the remaining three for reasons which do not apply to India. Would or could any of these contribute to any WMD program in India. The number of items controlled for AT reasons either alone or in combination with other control reasons such as NS, MT, NP, CB and CW number more than 300. Therefore items controlled for AT reasons which may also contribute to WMD programs would probably number around 200. It is, therefore, very unlikely that any of the unilaterally controlled items solely for AT reasons will have any significance for WMD purposes.

There is another factor to be taken into account while judging the efficacy of the Entity List in respect of India. As mentioned earlier India and the US had concluded a MOU in 1984 for high technology transfers. The Indian government had, in addition, given two side letters- one MT Side Letter and the other a Nuclear Side letter to the US government. The Mt side letter assured the US government that no exported items will be used in the manufacture of nuclear weapon carriers or the conversion of non nuclear weapon carriers into nuclear weapon carriers. These included space launch vehicles as well.

The Nuclear Side letter assured the USG that the exported item will be used by or on behalf of any entity engaged in research, design, development or manufacture of nuclear explosives; when such activity involves at any time unsafeguarded nuclear material of facilities.

The 1984 MOU also had a mechanism for resolving US queries over alleged diversion of exported items to non-stated purposes. In the more than 25 years following the 1984 MOU the US never had any occasion to invoke this mechanism. Further more recently India had signed an End-Use-Monitoring (EUM) agreement with the US to assure the US that no exported items will be diverted or used in any non-stated activity. All these should

assure the US that the absence of Indian destinations in the Entity List will not in any manner whatsoever weaken the US policy of not supporting (a) nuclear activities not subject to International Atomic Energy Agency (IAEA) safeguards; and (b) MTCR category 1 programs (300km range/500 kg payload) in non-MTCR member countries; Further if considered necessary, the BIS can always require that exporters can export to the destinations currently in the Entity List, without a specific licenses, all items to India not requiring licenses with only the proviso that a post-shipment advice of such exports be intimated to the BIS. That should give sufficient confidence to the BIS that it can monitor that the US foreign policy objectives of not supporting WMD related programs are fully followed.

Therefore, in short, the US can remove all India destinations with the exception of unsafeguarded nuclear facilities from the Entity List without suffering any adverse consequence for its foreign policy goals. On the other hand the simple act of removing the Indian destinations from the Entity List will have far reaching positive impact on the ongoing India-US strategic relationship.