

# THE WILLIAMS FOUNDATION

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## US DEFENCE EXPORT POLICY

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## IMPLICATIONS FOR AUSTRALIA

There was general support from United States industry when President Obama announced the decision on 14Aug09 to undertake a comprehensive review of export controls. The President directed that the National Economic Council and the National Security Council launch a broad-based interagency process for reviewing the overall US export control system, including dual-use and defence trade processes. The Statement of the White House Press Secretary on the review notes that “the US has one of the most robust export control systems in the world. But, it is rooted in the Cold War era of over 50 years ago and must be updated to address the threats we face today and the changing economic and technological landscape”.

International sales of US military or dual-use systems, often euphemistically called military assistance programs, have for many years been used as an instrument of US foreign policy. Sale, or alternatively prevention of sale of US high-tech systems have been used to control the balance of power in regions, support friendly governments or enhance operational capability of states fighting organisations/states whose aims were considered to be anathema to the aims of the US. The US Commerce Department administers export control of high-tech goods that may also have a dual-use military application. The Defense Security Cooperation Agency (DSCA) administers Foreign Military Sales (FMS) for the Department of Defense. The DSCA web site states that all sales, FMS and Direct Commercial Sales (DCS), “are subject to the approval of the Department of State, the US Congress, and applicable US export laws and regulations”. These government regulations are known as the International Traffic in Arms Regulations (ITAR) and control the export and import of defence-related articles and services on the US Munitions List (USML). Australia has also enacted laws similar to those of the US for the control of defence and dual-use exports under the Customs Prohibited Exports Act and the Defence and Strategic Goods List.

Sale of F16 fighter aircraft to Pakistan is a classic case of changes in US foreign policy. In the early 1980's sale was approved of 111 F16 aircraft to Pakistan, an ally of the US against the Soviet invasion of Afghanistan. Even though the project had been funded and some aircraft delivered, delivery of the remaining order was embargoed by Congress, under the Presslar Amendment, when the US President could not certify that Pakistan did not possess an explosive nuclear device. The embargo on delivery of F16 aircraft to Pakistan was lifted in 2005 when the US needed support from Pakistan in the “War on Terror”.

Foreign customers are also subject to another idiosyncrasy of US export regulations; the requirement for a negotiated contract before the proposal can be reviewed by Congress. Thus the customer must negotiate with a US defence company in good faith for a product and a level of technology transfer without knowing what level of transfer will be approved. In the case of Wedgetail AEW&C aircraft for Australia, as reported in Flight International 17-23Apr01 Boeing was fined for making an offer to Australia before the level of technology transfer offered was approved. In most cases, the individual is also held accountable for ITAR transgressions.

The Global Financial Crisis combined with the effects of post 9/11 operations in the US and wars in Iraq and Afghanistan have stressed both the US economy and the Defense Budget. However, according to the Centre for Arms Control and Non-proliferation's report of 20Feb08 the US still accounts for almost 50% of world expenditure on defence. Additionally, the Pentagon's budget request for 2010 is for an increase in funding over the 2009 budget to meet perceived major threats since the end of the Cold War.

President Obama's review into the very complex approval system is not expected to be simple or rapid. The 1979 Export Administration Act expired in 2001 and since then Congress has been unable to agree on reforms to replace this highly technical legislation.

US policy and practice are important to Australia. Despite our good standing as friend and ally, the law is the law: valid and mutually beneficial capability developments based on equipment or technology exports are frequently derailed or delayed. Over recent years, senior defence officials have worked at ways to get through or around the ITAR minefield to facilitate transfers. Progress has been useful but limited. US and Australian officials then initiated a Concept for US/AS Interoperability which was the first top-down attempt to assess needs and priorities across the board, in part to spotlight and facilitate clogged transfers.

Secretary of State Rice also attempted to introduce legislation to facilitate industry cooperation between the US and UK and the US and Australia. Australia's standing as an ally might afford something of a strategic head start, but certainly not a free ride against Congressional protectionism. Proposed changes to legislation floundered under the Bush administration due to procrastination in various elements of the approval process; and this was for unclassified articles/services only! Since multi-national US companies are unlikely to be comfortable using two or three sets of export regulations with the increased possibility of ITAR based fines, the only real benefit for the UK or Australia under the proposed changes would appear to be in the area of combined R&D.

US defence companies have been given approval to offer F-16 and F/A-18 aircraft to India and F/A-18 aircraft to Brazil. Although initial announcements stated there would be 'unprecedented technology transfer', in the case of Brazil the US will not allow integration of weapons in Brazil. While these export approvals appear to be aimed at regional balance-of-power issues, there could be two major benefits for US foreign policy in a general relaxation of export controls. The US would have greater control of military operations by recipients since in most cases the US would control the level of training and logistic support for the systems. US industry would also have greater scope for competing against foreign manufacturers who have been only too keen to fill orders proscribed by the US and thus support their own local defence industry. European manufacturers have been particularly successful with helicopters and transport aircraft in South East Asia.

A relaxation in US export policy could also have implications for Australia's strategic and operational efforts to engage with important regional security partners in the Asia-Pacific. For example, Indonesia could be a more capable and reliable partner in humanitarian efforts in the region with full support for their C130 transport fleet.

However, export regimes that expired in 2001 have not yet been renewed; and laws facilitating industry cooperation between the US/UK and US/AS have stalled. So while the Administration may be willing to consider changes, Congress apparently is not. It appears that Congress is insisting on protecting everything on the USML instead of refining the List and protecting the things that really matter.

As stated by Bill Reinsch, president of the US National Foreign Trade Council "Export control reviews are frequently announced, occasionally begun, and never completed. The really good news will be when it is finished".