

Trade sanctions and export controls: A multi-jurisdictional analysis for the energy sector

Paul D. Burns*, Brian Cacic, Nicholas F. Coward, Ross Denton, Edrick Guo, Eugene Lim, Sylwia A. Lis, Sunny Mann

1. Introduction

Supplying goods, technology or services for use in oil and gas projects often raises significant compliance challenges under export control, trade sanctions and antiboycott laws of the supplying jurisdiction. Such laws may restrict the export of goods or technology to specified countries, prohibit trade and financial transactions with specified parties, or impose licensing or other government approval requirements, including conditions on the use of government-issued licenses, before the transaction may proceed. Increasingly, goods or services destined for a single project may be sourced by suppliers from multiple sources around the world, often triggering export control and related compliance issues under the laws of multiple jurisdictions.

Historically, compliance with US export control and related laws has been viewed as the most challenging (relative to similar laws of other jurisdictions) by US and non-US companies alike due to the breadth of these laws, their extraterritorial application and aggressive US government enforcement. While US export control and related laws continue to be the most restrictive in many respects and distinctly extraterritorial in their reach, other jurisdictions have in recent years strengthened their export controls and committed significant resources to the enforcement of those controls. Consequently, suppliers of goods, technology or services for the energy sector need to be aware of potential compliance issues not only under the laws of their home jurisdictions but also those of other jurisdictions that participate in the supply chain.

As a result of aggressive enforcement of export control and related requirements by many jurisdictions that are common suppliers of goods, technology or services for use in oil and gas projects, compliance failures may result in significant monetary and other penalties. Moreover, because the policies underlying export controls are grounded, at least in part, in antiterrorism and nonproliferation efforts, violations of these controls may result in significant reputational harm to the entity found in violation of its compliance obligations.

* Paul D Burns is a Partner of Baker & McKenzie LLP, Toronto, Canada; Brian Cacic is an Associate of Baker & McKenzie LLP, Toronto, Canada; Nicholas F Coward is a Partner of Baker & McKenzie LLP, Washington, DC; Ross Denton is a Partner of Baker & McKenzie LLP, London, England; Edrick Guo is an Associate of Baker & McKenzie, Hong Kong; Eugene Lim is a Partner of Baker & McKenzie, Hong Kong; Sylwia A Lis is an Associate of Baker & McKenzie LLP, Washington, DC; Sunny Mann is an Associate of Baker & McKenzie LLP, London, England.

This article provides an overview of regulatory frameworks and compliance requirements governing exports and related transactions falling within one or more of the following jurisdictions that are common suppliers of goods, technology or services for use in oil and gas projects: the United States, Canada, the European Union (in particular, the United Kingdom), China and Hong Kong, and Singapore (the ‘Supplier Jurisdictions’). To illustrate the application of these rules, the following countries have been selected as the recipient countries of such goods, technology or services: Saudi Arabia, Kuwait, Qatar, Bahrain, the United Arab Emirates, Iraq, Iran, Yemen, Cuba and Oman (the ‘Investment Countries’).

Parts 2–7 of the article provide overviews of the export control, trade sanctions and related laws and compliance requirements of the Supplier Jurisdictions, which would apply to transactions involving the Investment Countries. Part 8 sets forth a hypothetical scenario involving proposed exports to one or more of the Investment Countries and illustrates the application of the export control and related laws of one or more of the Supplier Jurisdictions.¹

2. US controls

Overview

US controls on export and related transactions are governed by multiple, sometimes overlapping, statutes and regulations, and are administered and enforced by multiple agencies. Finding one’s way through this complex maze of controls can be challenging. Not infrequently, even determining which US agency has jurisdiction over a particular transaction is difficult. Indeed, export transactions relating to oil and gas projects involving the Investment Countries often trigger the jurisdiction of multiple US agencies.

US law regulates exports from the United States and certain reexports from third countries of commodities, software, technology and services, and bars transactions and trade with certain countries, entities and individuals subject to US trade sanctions. These controls can be broadly described as:

Trade Sanctions: Restrictions on transactions by ‘US Persons’ involving, directly or indirectly, sanctioned countries and persons, including US Person facilitation of transactions by non-US Persons involving sanctioned countries/persons and US Person evasion of the sanctions; and

Export/Reexport Controls: Restrictions on exports from the United States and certain reexports² from other countries by any person, including non-US Persons, of controlled goods, software and technology subject to US jurisdiction (Items subject to US jurisdiction).

Most export/reexport transactions fall within the jurisdiction of one of the following agencies: The Treasury Department’s Office of Foreign Assets Control (OFAC), which

¹ This article is intended to provide a general overview of significant aspects of export control and related laws of the Supplier Jurisdictions. It does not cover all issues nor is it meant to serve as a substitute for advice on the applicability of the laws to a given set of facts or circumstances.

² In general, the reexport controls apply to reexports from outside the United States of US-origin items and certain foreign-made Items incorporating controlled US-origin content.

administers US trade sanctions;³ the Commerce Department's Bureau of Industry and Security (BIS), which administers the Export Administration Regulations (EAR);⁴ and the State Department's Directorate of Defense Trade Controls (DDTC), which administers the International Traffic in Arms Regulations (ITAR).⁵

Many companies within the energy sector find themselves running afoul of US trade sanctions and export/reexport controls by assuming that their non-US operations are outside the reach of those controls. Yet, the US trade sanctions and export/reexport controls are distinctly extraterritorial. Consequently, transactions conducted by non-US companies outside the United States may trigger these controls if they involve US Persons or Items subject to US jurisdiction. A general overview of some of the key US controls and compliance considerations relevant to exports/reexports involving US Persons and/or Items subject to US jurisdiction is provided below.

Trade sanctions and investment countries

US trade sanctions restrict trade, investment and financial transactions with sanctioned countries, entities and individuals involving US Persons or Items subject to US jurisdiction. These trade sanctions are implemented primarily through the regulations administered by OFAC,⁶ as well as the EAR administered by BIS.⁷

For these purposes, 'US Person' is defined to cover US companies and their non-US branches, all persons physically within the United States, and US citizens and permanent resident aliens, wherever located or employed.⁸ Under US trade sanctions, other than Cuba, the term 'US Person' does not cover separately incorporated non-US subsidiaries of US companies. However, US citizens and permanent resident aliens employed by or seconded to such non-US subsidiaries are always fully subject to sanctions. Importantly, the Cuba sanctions apply directly not only to US Persons but also to any non-US parties owned or controlled by US Persons (which includes, eg, foreign subsidiaries of US companies). Such parties are collectively referred to for purposes of the Cuba sanctions as 'persons subject to the jurisdiction of the United States'.⁹

The United States currently maintains comprehensive trade sanctions against Cuba, Iran and Sudan, and more limited sanctions against Burma (Myanmar), North Korea and Syria. In addition, the EAR impose a comprehensive licensing requirement for exports/reexports to Syria and North Korea of Items subject to US jurisdiction, irrespective of whether a US Person is involved. Further, non-country specific, list-based, sanc-

³ US trade sanctions are implemented by OFAC regulations, 31 CFR pt 500 *et seq.* Most current US trade sanctions have been imposed by the President pursuant to the International Emergency Economic Powers Act (IEEPA), 50 USC § 1701–6. Earlier trade sanctions are based primarily on the Trading with the Enemy Act, 50 USC app §§ 1–44.

⁴ 15 CFR pts 730–74. The EAR are issued under the authority of the Export Administration Act, 50 USC app §§ 2401–20 (EAA). The EAA has been in lapse since 20 August 2001 but a presidential order has extended the EAR under the IEEPA.

⁵ 21 CFR pts 120–30. The ITAR implement the Arms Export Control Act, 22 USC §§ 2778–994.

⁶ 31 CFR pt 500 *et seq.*

⁷ 15 CFR pts 730–74.

⁸ See, eg, 31 CFR § 560.314.

⁹ 31 CFR § 515.329.

tions are imposed against certain terrorists, narcotics traffickers, proliferators of weapons of mass destruction and other parties.¹⁰

These US Person-based controls often pose significant challenges to non-US companies with links to US-based entities or those having officers, managers or other employees who are US Persons. This is because under the trade sanctions, US Persons are prohibited not only from directly engaging in transactions with the sanctioned countries or persons but also from indirectly participating in, approving or otherwise facilitating such transactions.

Even if a sanctioned country transaction does not involve a US Person, the prohibitions under US trade sanctions may be triggered if it involves Items subject to US jurisdiction. For these purposes, 'Items subject to US jurisdiction' generally covers US-origin goods, software and technology (together 'Items'), foreign-made Items with controlled US content exceeding certain *de minimis* levels, and, in limited circumstances, certain foreign direct products of US technology or software controlled for national security reasons.

Except for Cuba and Iran, none of the Investment Countries are currently subject to US trade sanctions. Consequently, an export/reexport destined to an Investment Country other than Cuba or Iran is governed by the EAR or the ITAR, to the extent it involves Items subject to US jurisdiction (see below). Because of the breadth of US trade sanctions against Cuba and Iran, no US Person may engage, directly or indirectly, in virtually any Cuba- or Iran-related transaction.

Cuba

The Cuban Assets Control Regulations (CACR)¹¹ impose sanctions on Cuba that generally prohibit all transactions by 'persons subject to the jurisdiction of the United States' involving Cuba, the Government of Cuba (and any parties known to be owned or controlled by or acting for the Government of Cuba), Cuban nationals and Specially Designated Nationals (SDNs) of Cuba.¹² As noted above, 'persons subject to the jurisdiction of the United States' under the CACR include owned or controlled foreign subsidiaries of US companies. Thus, for example, a transaction of a UK subsidiary of a US company that involves Cuba would trigger prohibitions under the CACR.

Prohibited transactions under the CACR include exports, imports, financing, sales, purchases, investments and the provision of services to, or for the benefit of, Cuba or Cuban nationals (other than those resident in the United States), as well as dealings in Cuban-origin items. Persons subject to the jurisdiction of the United States are prohibited not only from direct dealings with Cuba, but also from facilitating or participating in any way in a transaction by other persons involving Cuba and that would otherwise be

¹⁰ The parties sanctioned under OFAC sanctions programs are designated under the Specially Designated Nationals and Blocked Persons List, which is available at <<http://www.treas.gov/offices/enforcement/ofac/sdn/index.shtml>>.

¹¹ 31 CFR pt 515.

¹² SDNs of Cuba are entities or individuals, wherever located, who are designated by OFAC as being owned or controlled by, or who act on behalf of, the Government of Cuba. See also n 10 and accompanying text.

prohibited if engaged in directly by persons subject to the jurisdiction of the United States. Persons subject to the jurisdiction of the United States also may not take actions intended to evade or which have the effect of evading, US sanctions. Further, persons subject to the jurisdiction of the United States are generally prohibited from undertaking any transactions relating to travel to Cuba unless authorized under a specific license issued by OFAC or under certain general licenses set forth in the CACR.

In addition, all property and interests in property (including contracts) of the Government of Cuba or any Cuban national is considered 'blocked' or frozen if they come within the possession or control of persons subject to the jurisdiction of the United States or are located in the United States. Persons subject to the jurisdiction of the United States are prohibited from engaging in any transactions involving such blocked property, including transferring, paying, exporting, withdrawing or otherwise dealing in such blocked property.

Persons *not* subject to the jurisdiction of the United States are generally only restricted to the extent they wish to export/reexport Items subject to US jurisdiction to Cuba.¹³ Such activities implicate only the export/reexport controls and are exclusively governed by the EAR. Under the EAR, the export or reexport (whether directly or indirectly) of nearly all Items subject to US jurisdiction to Cuba is restricted, including any wholly US-origin Items or foreign-made Items with more than 10 per cent US-origin content by value.

Iran

Under the Iranian Transactions Regulations (ITR),¹⁴ US Persons are prohibited from engaging in virtually all transactions involving Iran and the Government of Iran (including any parties known to be owned or controlled by or acting for the Government of Iran). Prohibited transactions under the ITR include sales, exports and reexports, imports, financing, new investments and the provision of services involving Iran or the Government of Iran, as well as dealing in Iranian-origin goods and services.

In addition to direct dealings with Iran, US Persons are also prohibited from facilitating or participating in any way in a transaction by non-US Persons involving Iran that would otherwise be prohibited as to US Persons. US Persons also may not take actions intended to evade or which have the effect of evading US sanctions. For example, a transaction by a UK subsidiary of a US company that involves Iran would trigger prohibitions under the ITR if any aspect of the transaction required an approval from the US parent or involvement of any US Person employee of the UK company.

¹³ In addition, under the Cuban Liberty and Democratic Solidarity Act of 1996, commonly referred to as the 'Helms-Burton Act', foreign companies may be subject to a suit by a US national in a US federal court and/or their officers, directors and principal shareholders (and their spouses, minor children or agents) denied entry into the United States if they have commercial dealings involving property in Cuba (eg, through use, lease, etc) that was confiscated by the Government of Cuba on or after 1 January 1959, the claim to which is owned by a US national and for which no compensation has been paid.

¹⁴ 31 CFR pt 560.

Non-US Persons are generally only restricted under the ITR to the extent they wish to export/reexport Items subject to US jurisdiction to Iran.¹⁵ Specifically, non-US Persons may not export/reexport ‘controlled’ US-origin Items to Iran. Assuming no US Person involvement, non-US Persons may, however, export/reexport non-‘controlled’ (so-called EAR99) US-origin or US-content Items to Iran, provided the US Items/US-content have first ‘come to rest’ in general inventory outside the United States – ie, they were not ordered from the United States specifically to fill an order for Iran and were not otherwise ‘earmarked’ or acquired and stocked specifically or predominantly for Iran.¹⁶

Controls on exports and reexports of commodities, software and technology

Determining whether a particular transaction is regulated under the EAR or the ITAR is a threshold issue in determining the applicable US controls. The ITAR regulate the export/reexport of Items and related services listed on the US Munitions List (USML).¹⁷ If the Item is controlled under the ITAR, a DDTC authorization will almost always be required prior to the export/reexport, regardless of the destination.

Most commercial exports/reexports are governed by the EAR. The EAR regulates so-called ‘dual-use’ Items – ie, Items that have both civilian and military applications but have not been specifically designed or modified for a military application. Unlike the ITAR, the EAR impose varying controls that depend on the classification of the Item, the destination, the identity of parties involved and the proposed end-use.

Item-based controls

Except for exports/reexports involving sanctioned countries (currently Cuba, Iran, Sudan, Syria and North Korea), export/reexport restrictions under the EAR are most often triggered based on the item classification. The EAR include the Commerce Control List (CCL), which consists of detailed entries describing the Items and the reason for control.¹⁸ Whether the export/reexport triggers CCL-based licensing requirements depends on the reason for control and the destination. For example, certain neutron generators used in oil and gas well logging are controlled on the CCL under Export Control Classification Number (ECCN) 3A231. Items classified under ECCN 3A231 are controlled for

¹⁵ In addition, two US statutes target certain specified non-US Person Iran-related activities. The Iran Sanctions Act of 1996 provides that retaliatory sanctions may be imposed on any party investing over \$20 million in a given year in Iran’s energy sector or on any person that helps Iran develop weapons of mass destruction or other military capabilities. The Iran, North Korea and Syria Nonproliferation Act requires the President to make reports to Congress regarding any foreign person (including foreign governments) that transfers to, or acquires from, one of these countries certain goods, services or technology identified in certain international arms control arrangements or that have the potential to contribute to a weapons of mass destruction program. If the President identifies a person who has engaged in such a transfer, the President must impose sanctions on that person (or explain to Congress why such sanctions have not been imposed).

¹⁶ Non-US Persons should not order Items from the United States intended specifically for Iran. There have been a number of enforcement actions characterizing such orders as ‘causing’ an unlawful export from the United States to Iran.

¹⁷ 21 CFR pt 121.

¹⁸ 15 CFR pt 774, available at <http://www.access.gpo.gov/bis/ear/ear_data.html#ccl>.

nonproliferation reasons and require a BIS license prior to an export/reexport to any of the Investment Countries.

The Item-based controls under the EAR, as well as those under the ITAR, apply to exports and reexports of technology or technical data. These controls apply not only to exports/reexports to foreign countries but also to transfers or releases of technology or technical data to foreign nationals in the United States. These rules are often referred to as 'deemed' export controls, pursuant to which a transfer or release of technology or technical data subject to the EAR or the ITAR to a foreign national in the United States is deemed to be an export to the foreign national's home country.

Items not specifically designated on the CCL are classified as EAR99. Absent end-user or end-use concerns, EAR99 items may be exported/reexported to any destination except to a handful of sanctioned countries.

End-user-based controls

Even if the transaction does not trigger a CCL-based license requirement, a license may be required because of the identity of the end-user. The US government maintains a number of lists designating certain individuals and entities as denied, debarred or otherwise restricted parties with whom US entities and individuals may not do business or who may be prohibited from receiving certain Items subject to US jurisdiction, regardless of whether a US entity or individual is involved.¹⁹ Consequently, it is critical from a legal compliance standpoint that export/reexport transactions involving US Persons or Items subject to US jurisdiction be screened against the relevant US government restricted parties lists.

End-use-based controls

Finally, exports/reexports involving Items subject to US jurisdiction may require a license based on the intended end-use. Specifically, EAR Part 744 prohibits certain exports/reexports of Items subject to US jurisdiction when the exporter or reexporter knows or has reason to know that the Item will be used in proliferation activities. The particular proliferation activities include those related to nuclear, chemical or biological weapons or to certain missile technologies.

Penalties

Violations of US trade restrictions and export/reexport controls are subject to civil and criminal penalties. Penalties under the EAR and most trade sanctions programs are up to \$250,000 per violation or twice the amount of the transaction for civil violations, and for criminal violations up to \$1 million for both companies and individuals and/or 20 years imprisonment for individuals.

¹⁹ The key US government restricted parties lists may be found at <<http://www.bis.doc.gov/complianceandenforcement/liststocheck.htm>>.

In addition, violators of the EAR may also be subject to a denial of export privileges. The effect of most denial orders is extensive in that they generally prohibit the denied person itself from exporting and reexporting any Item subject to US jurisdiction and all other persons from engaging with the denied person in any transaction that is subject to the EAR.

Antiboycott controls

Companies doing business in the Investment Countries should be cognizant of applicable US antiboycott laws. These laws prohibit or penalize US companies, including (in some instances) their foreign subsidiaries, from participating in or cooperating with foreign boycotts that have not been sanctioned by the United States. They consist of two independent regulatory regimes, which are administered separately by the Commerce and Treasury Departments,²⁰ and which in some instances are inconsistent in their jurisdictional reach and in what constitutes a prohibited or penalized action.²¹

Both sets of rules impose reporting requirements. The violations of the Commerce rules are subject to civil and criminal penalties available under the EAR (see above). The Treasury rules provide for the loss of certain tax benefits (eg, the foreign tax credit) as a result of an agreement to participate in or cooperate with an unsanctioned foreign boycott.

Although US antiboycott laws address any unsanctioned foreign boycott, their primary focus is the Arab League boycott of Israel. Thus for compliance purposes transactions with Arab countries should receive the greatest emphasis. The following Investment Countries are currently considered 'boycotting countries' by the Treasury Department: Kuwait, Qatar, Saudi Arabia, UAE and Yemen.²² Under the Treasury rules, companies with operations in these countries must file IRS Form 5713 with their annual tax returns, on which any boycott requests must be reported.

3. EU controls

Overview

Within the European Union (EU), export controls on sensitive dual-use items are set forth in EU legislation that applies across all 27 EU Member States. The current legislation is Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (EU Regulation), which came into force in August 2009. The administration (including licensing) and enforcement of the EU rules are left to each of the individual Member States pursuant to their national laws. In the UK, this is done primarily pursuant to the Export

²⁰ Commerce antiboycott rules are set forth in the EAR, 15 CFR pt 760. Treasury antiboycott rules are set forth in s 999 of the Internal Revenue Code and corresponding guidelines.

²¹ For example, receipt of a request to provide a negative certificate of origin of the goods (eg, a certification stating that the goods to be supplied are not produced in Israel) would not be reportable under the Treasury antiboycott rules and compliance with such a request would not be penalized under those rules. In contrast, receipt of the same request would be reportable under the Commerce antiboycott rules and compliance with such a request would be prohibited under those rules.

²² The current list also includes Lebanon, Libya and Syria. Iraq is not on the list but its status remains under review. See 74 Fed Reg 58074 (10 November 2009).

Control Order 2008 ('ECO', brought into force under the Export Control Act 2002).²³ The Member States can supplement the dual-use controls set forth in the EU Regulation, which the UK has done through additional products controls. Military export controls are left to each individual Member State under its national controls. Again, in the UK, these are primarily contained in the ECO.

With respect to the authorities, licensing is undertaken in the UK by the Export Control Organization (which sits within the Department for Business, Innovation and Skills, 'BIS'). Enforcement in the UK is undertaken by Her Majesty's Revenue and Customs (HMRC).

Trade sanction rules are set forth in individual pieces of EU legislation that target dealings with specific countries and groups. Again, the administration and enforcement of these rules are left to individual Member States under national law. In the UK, in relation to sanctions measures, licensing is undertaken by BIS for trade-related sanctions (with enforcement left to HMRC), while Her Majesty's Treasury acts as the licensing and enforcement authority for financial sanctions (eg, freezes on the funds of designated persons).

Trade sanctions and investment countries

The EU follows a so-called 'smart sanctions' policy, whereby sanctions are targeted at the particular individuals and entities with which the EU has concerns. Thus, in contrast to the United States, there is currently no comprehensive embargo that prohibits all trade with any country. EU sanctions measures impose obligations on *inter alia* (i) any person within the EU; (ii) any person that is a national of an EU Member State, even if located outside of the EU; (iii) any legal person incorporated in the EU; (iv) any legal person incorporated outside of the EU, but only in respect of business conducted in whole or in part in the EU; and (v) any acts undertaken on the territory of the EU, in its airspace or on board any vessel or aircraft under the jurisdiction of an EU Member State.

Of main interest to businesses in the energy sector are (i) restrictions on dealings with specific persons and (ii) prohibitions on supplying certain items into certain countries. Such rules can have a significant impact on the energy sector given the fact that these targeted sanctions are in place against a number of countries in Africa, the Middle East and Asia where sizeable energy reserves are located.

Financial sanctions

In relation to the person-based controls, there is a prohibition on making available, directly or indirectly, any funds or economic resources to, or for the benefit of, any designated person. The terms 'funds' and 'economic resources' are very broadly defined and there is no *de minimis* threshold. Clearly, businesses should be screening counterparties (including, but not limited to, customers, distributors, agents, suppliers, joint venture partners and banks) to ensure that they are not falling foul of the person-based controls.

²³ There are also other pieces of UK legislation intended to deal with specific products (eg, Radioactive Sources (Control) Order 2006 'RSCO', for radioactive sources).

Depending on the circumstances, there is also a risk of a violation where funds or economic resources are made available to an entity whose shareholder or director is designated.

The list of designated parties is compiled by the EU (based on any UN designations and additional EU unilateral designations).²⁴ Member States can supplement these lists based on any domestic concerns; indeed, the UK has done this.²⁵ There are also prohibitions on investing in certain targeted entities and/or targeted sectors in certain countries.

Trade sanctions

There are also product or trade-related sanctions for certain countries that go beyond the standard export control regime that applies to exports to all countries (as described in Section Exports of commodities, software and technology). In particular, there is a prohibition on supplying, directly or indirectly, military items to, or for use in, countries subject to arms embargoes.²⁶ This is relevant to the energy sector given the explosives, charges, fuses and detonators that are employed in the industry. Similar items can also be controlled by certain internal repression control lists that apply with respect to certain countries.

Other specific country regimes prohibit the supply of additional items to specific countries depending on the policy objective (eg, items that could assist nuclear proliferation in Iran or North Korea). With respect to Iran, Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (EU Iran Regulation) prohibits the supply of listed items to Iran or for use in Iran, while a prior licensing requirement is imposed on a number of other items. This controls direct and indirect supplies of the items to Iran; and where they are supplied to any person outside of Iran where such person is in turn controlled, directly or indirectly, by the Iranian State, an Iranian parent company or a resident in Iran. The product control lists go well beyond the standard dual-use control lists (discussed further in Section Exports of commodities, software and technology). Companies operating in the energy sphere have been surprised to find relatively standard products controlled by the Iran sanctions (including, eg, certain types of seals, gaskets, pipes and pumps). There are also controls on the interaction between EU financial institutions and Iranian financial institutions. A number of key Iranian banks are designated parties under the person-based controls. This has had a significant impact on the ability of companies doing business in Iran to get paid.

²⁴ The current regimes targeted by the EU under the person-based controls are the following: Belarus, Burma, Democratic Republic of Congo, Eritrea, Guinea, Iran, Iraq, Ivory Coast, Lebanon, Liberia, North Korea, Sudan, Syria, Former Republic of Yugoslavia, Zimbabwe, Al-Qaida and Taliban, Terrorist Groups and persons indicted by the International Criminal Tribunal for Yugoslavia.

²⁵ The consolidated list of persons targeted under the UN, EU and UK designations is available at the website of Her Majesty's Treasury at <<http://www.hm-treasury.gov.uk/d/sanctionsconlist.htm>>.

²⁶ Currently, the following countries are subject to a military embargo: Armenia, Azerbaijan, Burma, Democratic Republic of Congo, Eritrea, Guinea, Iran, Iraq, Ivory Coast, Lebanon, Liberia, North Korea, Sierra Leone, Somalia, Sudan, Uzbekistan and Zimbabwe.

Blocking sanctions

Reacting against attempts by the US to impose extraterritorial obligations against non-US Persons, the EU introduced blocking sanctions under EU Regulation 2271/96 prohibiting compliance with the extraterritorial effects of US sanctions against Cuba and Iran. In relation to Iran, the EU prohibits compliance with the Iran Sanctions Act of 1996 (ISA), which prohibits certain investments in Iran's petroleum sector by both US and non-US Persons. At the time of writing, there are a number of legislative proposals before the US Congress seeking to broaden the ISA that would enable sanctions to be imposed against persons supporting Iran's ability to refine petroleum. Compliance with such legislation (if it does come into force) may raise issues pursuant to the EU blocking measures. In relation to Cuba, the EU prohibits compliance with the Helms-Burton Act and the CACR. There is also an obligation on businesses under EU Regulation 2271/96 to inform the Commission if the foregoing US sanctions against Iran and Cuba directly or indirectly affect their economic and/or financial interests. The conflicting requirements of US sanctions and the EU blocking sanctions raise complex compliance issues for EU-based businesses. Given that breaches of the EU blocking rules can constitute a criminal offense in a number of EU Member States, issues have to be carefully handled on a case-by-case basis.

Exports of commodities, software and technology

Determining whether a company's products are caught by product control lists is a complex and technical task. The task is further complicated in the EU by the fact that exporters have to consult numerous pieces of legislation and lists that have been introduced at a pan-EU level and also at the national level by individual EU Member States.

Item-based controls

EC dual-use controls

Annex I of the EU Regulation sets forth the list of controlled dual-use items (goods, software and technology). Annex I is closely based on the international export regimes (Wassenaar Arrangement, Nuclear Suppliers Group, Australia Group and Missile Technology Control Regime). The classification/rating entries in Annex I closely mirror the US CCL, although there are differences (in particular, the latter has a greater number of unilateral entries going beyond the EU's list). There are numerous items controlled in Annex I that are of relevance to the energy sector and it is critical for companies to review the list and to stay up-to-date with it.²⁷ For example, the following items are controlled in Annex I and would require a license for export from the UK (or any other EU jurisdiction) to the Investment Countries: devices designed to initiate charges (under 1A007), charges, detonating cord and severing tools (under 1A008) and neutron generators (under 3A231). Further, software with encryption capability, which is widely used in the energy sector, can be controlled under 5D002.

²⁷ The latest version of Annex I is available at the BIS website <<http://www.berr.gov.uk/files/file52654.pdf>>.

No item on Annex I may be exported outside of the customs territory of the EU without an appropriate license or authorization.²⁸ From an energy sector perspective, it is critical for companies to understand that the continental shelf of EU Member States (eg, the UK Continental Shelf in the North Sea) is considered as being outside of the customs territory of the EU. Accordingly, export licenses must be sought prior to exporting Annex I items to platforms and rigs on the UK Continental Shelf from the UK mainland. Annex IV is a more sensitive subset of Annex I. A license is even required to transfer Annex IV items from one EU Member State to another. In contrast to the United States, the EU does not impose any reexport or deemed export controls. However, some national licensing authorities may seek to impose obligations on end-users and consignees not to reexport items that they have received under an export license from that authority.

UK dual-use and military controls

EU Member States can supplement the EU dual-use controls; for example, the UK has introduced an additional dual-use product list. The RSCO also lists certain radioactive sources employed by the energy sector in drilling activities. Such items cannot be exported without a license outside of the UK (including to other EU Member States and the UK Continental Shelf).

Military item controls are set forth in national Member State legislation. In the UK, the military list is set out in Schedule 2 of the ECO. Controlled military items of relevance to the energy sector include explosives, charges, fuses, detonators, gyros and military grade aviation fuel. Such items cannot be exported without a license to destinations outside of the UK (including to the UK Continental Shelf or to other EU Member States). The UK also imposes a licensing requirement on trade (trafficking and brokering) activities that result in the movement of controlled UK military list items from one third country to another third country (including between other EU Member States). This catches supplying or delivering, agreeing to supply or deliver or doing any act calculated to promote the supply or delivery of such items from one third country to another. Depending on the item and the destinations involved, this can catch not only trafficking and brokering activities undertaken in the UK, but also by UK persons outside of the UK.

End-use-based controls

Pursuant to end-use controls in the EU Regulation, a licensing requirement can be imposed on any item that is not controlled by Annex I depending upon its end-use. An exporter is required to apply for a license where it knows or has been informed by its national licensing authority that an item is or may be intended for a weapons of mass destruction (WMD) end-use (broadly speaking, any use in connection with a chemical, biological or nuclear weapon or related missile delivery system). EU Member States are

²⁸ In relation to the EU dual-use regime, export licenses must be applied for by the 'exporter' (essentially, the entity that has the contract with the non-EU consignee and has the power to send the item out of the customs territory of the EU). The exporter must apply for the license from the authority in the Member State in which the exporter is established (not the authority of the country from which the good is being dispatched to outside of the EU).

permitted, under their national laws, to impose this requirement where the exporter has grounds for suspecting such an end-use. The UK has introduced this control. Similarly, an exporter is required to apply for a license where it knows or has been informed by its national authority that an item is or may be intended for a military end-use in a country subject to an arms embargo imposed by the UN, the EU or the Organization for Security and Cooperation in Europe.

The EU Regulation²⁹ recently introduced new trafficking and brokering controls whereby a license is required for involvement in the movement of items between two non-EU countries where the item is or may be intended for a WMD end-use. EU Member States can, under their national laws, extend this licensing requirement to also apply to a military end-use.

Penalties

Enforcement of the EU trade restrictions is left to Member State authorities under national laws. In the UK, depending upon the precise nature of the violation, maximum penalties are imprisonment for up to 10 years and/or an unlimited fine. Enforcement has been on the rise in the UK, with a number of recent criminal prosecutions against both corporations and individuals. Some individuals are currently serving lengthy prison sentences and are subject to director disqualification orders.

4. Canadian controls

Overview

Canadian export controls and trade sanctions are in many ways similar to those found in the United States and the United Kingdom. However, Canada, for domestic policy reasons, has also enacted its own trade regulations and sanctions, which may add additional complexities that exporters must navigate.

Two federal organizations are primarily responsible for the oversight and administration of Canada's export controls regime: the Department of Foreign Affairs and International Trade³⁰ (DFAIT) and the Canada Border Services Agency³¹ (CBSA). Among other things, DFAIT is responsible for the administration of Canada's export control and trade sanctions legislation, such as the Export and Import Permits Act³² (the 'EIPA'), the United Nations Act³³ (the 'UN Act') and the Special Economic Measures Act³⁴ (the 'SEMA'). In addition, through its Export and Import Controls Bureau, DFAIT issues Export Permits to persons wishing to export controlled goods from Canada. One of the CBSA's primary responsibilities is to manage the import and export of goods into and from Canada at Canada's various ports of entry. The CBSA administers more than 90 acts, regulations and international agreements and assists DFAIT in administering the EIPA by ensuring

²⁹ Council Regulation (EC) No 428/2009, Art 5.

³⁰ Department of Foreign Affairs and International Trade <<http://www.international.gc.ca>>.

³¹ CBSA <<http://www.cbsa.gc.ca>>.

³² Export and Import Permits Act, RSC, 1985, c E-19.

³³ United Nations Act, RSC, 1985, c U-2.

³⁴ Special Economic Measures Act, SC, 1992, c 17.

that persons exporting controlled tangible goods from Canada have obtained the requisite Export Permits.

The EIPA regulates and controls the export and transfer of certain goods and technology from Canada to any destination, as well as the export and transfer of all goods and technology to certain countries. In general, the EIPA controls the export and transfer of goods and technology from Canada by way of regulation through two primary lists, which are the Export Control List³⁵ (ECL) and the Area Control List³⁶ (ACL).

The ECL is a listing of specific goods and technology that may not be exported or transferred from Canada without the exporter first obtaining an Export Permit. The goods and technology appearing on the ECL fall within seven groups. Each group is based on various international treaties and agreements to which Canada is a signatory. Group 5 includes items controlled for Canadian domestic policy reasons. The ECL must be read in conjunction with *A Guide to Canada's Export Controls, 2007*³⁷ (the 'Guide'), which is published by DFAIT, as the ECL specifically refers to certain items listed in the Guide.

The ACL is a listing of countries to which the Government of Canada controls the export or transfer of all goods and technology. No goods may be exported from Canada to any country on the ACL without first obtaining an Export Permit. As of 1 January 2010, Myanmar (Burma) and Belarus are the only two countries on the ACL.

Finally, Canada's Controlled Goods Program (CGP), administered by the Controlled Goods Directorate,³⁸ regulates the access, possession and transfer in Canada of certain controlled goods and/or controlled technology (Controlled Goods), as defined under the Defence Production Act.³⁹ In very general terms, Controlled Goods are defined to include military, strategic and missile technology goods.

Subject to certain limited exemptions, registration under the CGP is mandatory for anyone dealing with Controlled Goods in Canada. Registration under the CGP is required before examining, possessing or transferring Controlled Goods. Controlled Goods may only be transferred to a person in Canada, if that person is also registered under the CGP. In addition, to export a Controlled Good from Canada, registration with the CGP is a prerequisite in order to obtain an Export Permit from DFAIT.

Trade sanctions and investment countries

Pursuant to the UN Act, Canada enacts regulations in order to implement sanctions and embargoes authorized by the United Nations Security Council. Consequently, the export of specified goods and services to countries subject to the sanctions of the United Nations Security Council may be restricted or controlled pursuant to UN Act regulations.

Pursuant to SEMA, Canada enacts regulations that restrict investment in and dealings with certain states and/or certain 'designated persons' in order to implement the decisions or resolutions of international organizations of which Canada is a member, or

³⁵ Export Control List, SOR/89-202.

³⁶ Area Control List, SOR/81-543.

³⁷ *A Guide to Canada's Export Controls, 2007*, Department of Foreign Affairs and International Trade.

³⁸ The Controlled Goods Directorate (Public Works and Government Services Canada) <<http://ssi-iss.tpsgc-pwgsc.gc.ca/dmccgd/>>.

³⁹ Defence Production Act, RSC, 1985, c D-1.

where a grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis. Canada has currently enacted regulations under SEMA against Myanmar (Burma)⁴⁰ and Zimbabwe.⁴¹

In 1992, Canada issued the Foreign Extraterritorial Measures (United States) Order, 1992⁴² (the 'FEMA Order') under the provisions of the Foreign Extraterritorial Measures Act⁴³ (FEMA). Pursuant to the FEMA Order, every Canadian corporation and every director and officer of a Canadian corporation, who receives any communication relating to an 'extraterritorial measure of the United States' (essentially, the US embargo against Cuba) in respect of any trade or commerce between Canada and Cuba from a person who is in a position to direct or influence the policies of the Canadian corporation, is required to notify the Attorney General of Canada of such communication. The FEMA Order further prohibits a Canadian corporation, including its directors, officers, managers or employees in a position of authority from complying with the US embargo against Cuba, or any notifiable communications relating thereto, whether by overt act or omission. This legislation has a similar purpose to the EU blocking sanctions described above.

With respect to the Investment Countries, Canada currently has enacted trade sanctions, by way of regulation made under the UN Act, against only Iran.⁴⁴ This regulation enacts into Canadian law the United Nations Security Council resolutions 1737 (2006), 1747 (2007) and 1803 (2008), which were adopted in response to the risks posed by Iran's pursuit of certain nuclear technologies and related activities. Like the UK, the Canadian trade sanctions imposed on Iran prohibit the supply of listed items to Iran or for use in Iran, as well as impose controls against certain entities and persons believed to be involved with Iran's nuclear activities.

Exports of commodities, software and technology

Determining whether the exports of commodities, software and technology require Canadian Export Permits involves a consideration of not only the specific item being exported, but also a consideration of who the ultimate consignee will be and the consignee's end-use of the item being exported.

Item-based controls

As noted above, the ECL provides seven groups of specific goods and technology that may not be exported or transferred from Canada without the exporter first obtaining an Export Permit. These groups are: Group 1 (Dual-Use List), Group 2 (Munitions List), Group 3 (Nuclear Nonproliferation List), Group 4 (Nuclear-Related Dual-Use List), Group 5 (Miscellaneous Goods and Technology), Group 6 (Missile Technology Control Regime List) and Group 7 (Chemical and Biological Weapons Nonproliferation List).

⁴⁰ Special Economic Measures (Burma) Regulations, *SOR/2007-285*.

⁴¹ Special Economic Measures (Zimbabwe) Regulations, *SOR/2008-248*.

⁴² Foreign Extraterritorial Measures (United States) Order, 1992, *SOR/92-584*.

⁴³ Foreign Extraterritorial Measures Act, RSC, 1985, c F-29.

⁴⁴ Regulations Implementing the United Nations Resolutions on Iran, *SOR/2007-44*.

Certain forms of technology, which is defined under the EIPA as including ‘technical data, technical assistance and information necessary for the development, production or use of an article included in an Export Control List’,⁴⁵ are controlled for transfer from Canada. ‘Transfer’ means, in relation to technology, to dispose of it or disclose its content in any manner from a place in Canada to a place outside Canada.⁴⁶ Therefore, the export of technology from Canada electronically is potentially subject to Canada’s export control laws. However, unlike the United States, Canada does not have a ‘deemed export’ rule and therefore under the EIPA, an Export Permit is not required when controlled technology is shown to or verbally communicated to a foreign national who is within Canada at the time of the communication.

All US-origin goods are controlled to prevent the use of Canada as a route by which US embargoes could be circumvented. Item 5400 controls the export of all US-origin goods from Canada unless an Export Permit is obtained. If US-origin goods or technology are further processed or manufactured outside the United States so as to result in a substantial change in value, form or use of the goods and technology, or in the production of new goods or technology, the goods or technology will not be controlled under Item 5400. The test for Item 5400 amounts to one of substantial transformation. Canadian exporters of US-origin goods may be able to rely on General Export Permit No 12⁴⁷ (GEP 12) to export US-origin goods that are not listed elsewhere on the ECL; however, GEP 12 will not apply, and a specific Export Permit must be obtained, if such US-origin goods are shipped to Cuba, North Korea, Iran or Syria, or to countries listed on the ACL, or are goods that are otherwise listed on the ECL.

Persons in the energy sector exporting goods and technology from Canada should carefully review the ECL, and in particular Groups 1 and 5, as there are many items that could potentially apply. For example, Item 1–3.A.1.e applies to certain high energy density batteries for use in harsh environments. These batteries can be used in certain measuring equipment that are used in field activities. An Export Permit from DFAIT would be required to export such batteries from Canada to the Investment Countries.

End-user-based controls

Pursuant to regulations under the *Criminal Code*⁴⁸ and the UN Act, Canada prohibits transactions with certain individuals and entities who are considered to be involved in or associated with terrorist activity, and make it an offense for anyone in Canada, or any Canadian outside Canada, to provide or collect funds if the person knows that the funds would be used by such individuals or entities.⁴⁹ These regulations also make it an offense for anyone in Canada, or any Canadian outside Canada, to deal in any way

⁴⁵ See n 32 at s 2(1).

⁴⁶ Ibid.

⁴⁷ General Export Permit No 12 – United States Origin Goods, *SOR/97-107*.

⁴⁸ Criminal Code, RSC, 1985, c C-46.

⁴⁹ Regulations Establishing a List of Entities, *SOR/2002-284*; Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism, *SOR/2001-360*; United Nations Al-Qaida and Taliban Regulations, *SOR/99-444*.

with property if the person knows it is owned or controlled by such an individual or entity.

Further, Canada has enacted regulations implementing several other United Nations Security Council Resolutions. These regulations are in addition to those established pursuant to SEMA, which Canada has enacted as a matter of domestic trade policy. Together, this set of regulations prohibit persons in Canada and Canadians outside Canada from engaging in various prescribed activities or financial relationships with certain individuals or entities in the following countries: Burma,⁵⁰ Cote d'Ivoire,⁵¹ Democratic People's Republic of Korea,⁵² Democratic Republic of the Congo,⁵³ Iran,⁵⁴ Iraq,⁵⁵ Lebanon,⁵⁶ Liberia,⁵⁷ Sierra Leone,⁵⁸ Somalia,⁵⁹ Sudan⁶⁰ and Zimbabwe.⁶¹

The consolidated lists of names developed by DFAIT which reflect the sanctioned individuals and entities noted above are updated regularly and are available from the website of the Office of the Superintendent of Financial Institutions Canada,⁶² as well as DFAIT's website.

End-use based controls

DFAIT encourages exporters to make all reasonable enquiries of the end-use of goods or technology exported from Canada. For example, exporters should understand the capabilities and potential end-uses of the products being sold for export, as well as have some knowledge of their customers and the nature of their businesses. DFAIT usually requires exporters to provide an end-use statement from the consignee stating what the goods will be used for and that they will not be used for certain prohibited activities.

ECL Item 5505, entitled 'Goods and Technology for Certain Uses (Catch All)', is a 'catch-all' control item that applies to all goods not listed elsewhere on the ECL which may be intended for, or of which there are reasonable grounds to suspect the goods are intended for, use in the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or missiles capable of delivering such weapons. Item 5505 will only apply to countries that are not members of at least two nonproliferation export control groups.

⁵⁰ See n 40.

⁵¹ United Nations Côte d'Ivoire Regulations, SOR/2005-127.

⁵² Regulations Implementing the United Nations Resolutions on the Democratic People's Republic of Korea (DPRK) SOR/2006-287.

⁵³ United Nations Democratic Republic of the Congo Regulations, SOR/2004-222.

⁵⁴ See n 44.

⁵⁵ United Nations Iraq Regulations, SOR/2004-221.

⁵⁶ Regulations Implementing the United Nations Resolution on Lebanon, SOR/2007-204.

⁵⁷ Regulations Implementing the United Nations Resolutions on Liberia, SOR/2001-261.

⁵⁸ United Nations Sierra Leone Regulations, SOR/98-400.

⁵⁹ Regulations Implementing the United Nations Resolutions on Somalia, SOR/2009-92.

⁶⁰ United Nations Sudan Regulations, SOR/2004-197.

⁶¹ See n 41.

⁶² Office of the Superintendent of Financial Institutions Canada <<http://www.osfi-bsif.gc.ca>>.

Penalties

Contravention of any of Canada's export control laws may result in penalties and/or imprisonment for corporations and individuals found guilty of the contravention. Depending on the nature of the violation and the specific legislation in question, monetary penalties can range from \$25,000 up to \$2,000,000, while criminal penalties could result in imprisonment for periods of up to 10 years. It is important to note, however, that under the EIPA, monetary penalties for an indictable offense are at the discretion of the court.

5. China controls

Overview

In China, the export of goods and technologies is governed under: (a) Dual-Use Items and Technologies Regime; (b) Commercial Encryption Regime; and (c) Prohibited and Restricted Technology Export Regime. The dual-use items and technologies regime is administered by the Ministry of Commerce. The commercial encryption regime is administered by the State Encryption Management Bureau. Finally, the technology export regime is administered by the Ministry of Commerce and the Ministry of Science and Technology.

Trade sanctions and investment countries

Pursuant to United Nations Resolutions, China currently enforces arms embargoes against Somalia, Sierra Leone, Al-Qaida and the Taliban and associated individuals and entities, Iraq, Liberia, The Democratic Republic of the Congo, Sudan and The Democratic People's Republic of Korea.

Exports of commodities, software and technology

Item-based controls play the most important role with respect to exports from China. The nature of the goods will determine which export control regime is applicable. Exporters should always check the most up-to-date list of items under these various regulatory regimes. Such lists are published on the websites of the relevant governing PRC authorities.

Item-based controls

Dual-use items and technologies regime

The main regulations which control the export of dual-use products and technologies are the Measures for the Administration of Import and Export Licensing for Dual-Use Goods and Technologies, effective from 1 January 2006 (the 'Dual-Use Items Regulations'). Annexed to the Dual-Use Items Regulations is the Catalog for the Administration of Import and Export Licenses for Dual-Use Items and Technology (the 'Dual-Use Items Catalog'), which lists items and technologies that are subject to export controls. The list covers items and technologies which are controlled by various PRC regulations governing nuclear exports, nuclear dual-use goods and related technologies, missiles and missile-related items and technologies, biological agents and related equipment and technologies,

controlled chemicals, precursors and chemicals used in the production of narcotic drugs and psychotropic substances, and certain chemicals and related equipment and technologies.

The Dual-Use Items Catalog lists the chemical, biochemical, missile-related items and nuclear and nuclear dual-use items which are subject to export controls. The Dual-Use Items Catalog also contains a brief section on computer technology. Any entity or individual who exports dual-use items and technologies to any destination without appropriate approvals could be liable for administrative and criminal penalties. An example for the energy sector would be the use of gyros for drilling activities. As they are a type of dual-use item under the Dual-Use Items Catalog, it is unlawful to export gyros without an export license to any destination.

Technology export regime

The export of technology is also governed by the regulatory system set out in the Regulations of the People's Republic of China for Administration of the Import and Export of Technology (the 'Technology Regulations'), effective from 1 January 2002. Article 2 of the Technology Regulations defines the export of technology as the transfer of technology by means of trade, investment or economic technology cooperation between China and parties overseas. This includes the assignment of patents, the application for assignment of patents, patent licenses, the transfer of technical secrets and other forms of technology transfer such as technical services.

In addition, the Measures of the People's Republic of China for the Administration of Technologies Prohibited or Restricted from Export, effective from 1 January 2002 (the 'Technologies Export Measures'), was issued to provide for the administration of technology exports. The Catalog of Technologies which are Prohibited or Restricted from being exported from China, effective from 1 January 2002 (the 'Technologies Export Catalog'), was also issued to determine the scope of technologies that are subject to these export restrictions and prohibitions.

The Technologies Export Catalog sets out 117 different categories of technologies that are restricted from being exported (including computer technologies and communication technologies) and 33 categories of technologies that are prohibited from being exported (these include technologies relating to encryption and computer network security), involving 34 industries.

Petroleum and natural gas development engineering technologies is one category restricted from export under the Technologies Export Catalog. These include technologies for non-seismic oil and gas surveying, for oil and gas well drilling processes, for manufacturing oil drilling and production equipment, and for the gathering and transportation of petroleum and natural gas.

Commercial encryption regime

China is not a member of the Wassenaar Arrangement and does not control commercial encryption products and technologies based on their encryption strength alone. Instead,

it controls commercial encryption products and technologies in general. The Regulations for the Administration of Commercial Encryption (the 'Commercial Encryption Regulations') issued on 7 October 1999 sets out the regulatory framework for export of commercial encryption products and technologies in China. Article 2 of the Commercial Encryption Regulations defines 'commercial encryption' as encryption technology and encryption products used to protect by encryption or to carry out security certification for information that does not involve State secrets.

Pursuant to Article 13 of the Commercial Encryption Regulations, the export of commercial encryption products is subject to the approval of the State Encryption Management Bureau (SEMB). In its Issues Relevant to the Management of Commercial Encryption, the SEMB clarifies that the Commercial Encryption Regulations only regulates specialized hardware and software that contain encryption and decryption operations as their core function. The precise nature of each product will determine whether it is caught under the 'core function' test.

The 2009 Chinese tariff classifications, effective from 1 January 2009, introduce tariff lines for certain encryption products. Importers and exporters of these encryption products are required to use the prescribed tariff numbers in their Customs declaration forms and need to submit SEMB licenses to Customs when importing and exporting.

As of 1 January 2010, SEMB Import Permits will be required by Customs in order to import nine types of encryption products that have tariff numbers listed in the Catalog for the Administration of Import of Encryption Products and Equipment Containing Encryption Technology (First Batch) (Catalog). In addition, there is a general catch-all provision set out in Notice No 18 jointly issued by SEMB and the General Administration of Customs and effective from 1 January 2010, whereby even if a product is not listed in the Catalog, if the importer knows or ought to know that the imported products contain encryption technology, the importer should also apply for an Import Permit and submit this to Customs when importing such goods.

End-user-based controls

As part of the process to apply for a Dual-Use Export License, an End-Use and End-User Certificate issued by the foreign consignee is required as a supporting document. The identity of the end-use will have an effect on the application, but all other factors will be considered as a whole.

End-use-based controls

Article 8 of the Dual-Use Item Regulations contains a catch-all provision that strictly prohibits the export of all products and technologies, where the exporting entity or individual knows or ought to have known that the exported products will be used to produce weapons of mass destruction or systems capable of achieving such purposes.

Penalties

Violations of the trade sanctions regulations in China can result in imprisonment for at least 7 years and/or an unlimited fine. Criminal and/or administrative penalties may be imposed for breaches of China's export controls. Smuggled goods and illegal gains may be confiscated. Fines and fixed-term imprisonments may also be imposed. Contravention of the Commercial Encryption Regime may result in the encryption products being confiscated.

6. Hong Kong controls

Overview

The Hong Kong export control regime is separate from the PRC export control regime.

The export from Hong Kong of strategic commodities is regulated by the Import and Export Ordinance (the 'Ordinance') and the Import and Export (Strategic Commodities) Regulations (the 'Regulations') enacted under the Ordinance. The Trade and Industry Department (TID) is responsible for administering the Regulations while the Customs and Excise Department is responsible for enforcement activities (including audits, inspection and raids).

Under the Regulations, a person is required to obtain a license prior to the export of each strategic commodity item. The lists of controlled strategic commodities are set out in the four Schedules to the Regulations. In addition, the Schedules list items that are subject to licensing control for transit.

Trade sanctions and investment countries

Pursuant to United Nations Sanction Ordinance, Hong Kong currently enforces arms embargoes against Somalia, Sierra Leone, Al-Qaida and the Taliban and associated individuals and entities, Iraq, Liberia, The Democratic Republic of the Congo, Sudan and The Democratic People's Republic of Korea.

Exports of commodities, software and technology

The TID maintains control on import and export of strategic commodities including munitions items, chemical and biological weapons and their precursors, nuclear materials and equipment and dual-use goods that are capable to be developed into weapons of mass destruction. In addition, the Department imposes end-use control on products that are used in connection with the development of weapons of mass destruction. These controls are to prevent Hong Kong from being used as a conduit for the proliferation of weapons of mass destruction and to guarantee its access to high technology products.

Item-based controls

Schedule 1⁶³ of the Regulations comprises two lists: the Munitions List and the Dual-Use Goods List. The Munitions List covers firearms, ammunition, explosives, bombs and rockets, tanks and toxicological agents, etc, and equipment and technology for the pro-

⁶³ Available online at <<http://www.hkliv.org/hk/legis/en/reg/60G/sch1.html>>.

duction of these weapons, etc. The Dual-Use Goods list covers a wide variety of industrial dual-use goods under ten categories: Nuclear Materials, Facilities and Equipment (Category 0); Materials, Chemicals, Micro-organisms and Toxins (Category 1); Materials Processing (Category 2); Electronics (Category 3); Computers (Category 4); Telecommunications and Information Security (Category 5); Sensors and Lasers (Category 6); Navigation and Avionics (Category 7); Marine (Category 8); and Propulsion Systems, Space Vehicles and Related Equipment (Category 9).

Schedule 2⁶⁴ extends controls to certain munitions, nuclear materials, facilities and equipment, encryption equipment, items of nuclear concern and articles for use relating to nuclear, chemical and biological weapons which are in transit or in air transshipment cargo.

There is an approval-in-principle arrangement (the 'Arrangement') for approved bulk users of strategic commodities licenses who import/export goods classified under Categories 3 and 5 of Schedule 1 to the Regulations. The Arrangement simplifies the licensing procedures and expedites processing time for frequent and qualified users of TID's licensing services. A company must be a frequent user of the TID's strategic commodities licensing service and have a good compliance record to qualify for the Arrangement. The Arrangement generally applies to companies who frequently export to the same consignee.

As an example, explosive devices specially designed for military use fall under Schedule 1 of the Regulations. An exporter selling them to the energy sector will need a license to do so. It is not possible for the exporter in this case to apply for a bulk license.

End-user-based controls

There are no additional end-user controls pursuant to Hong Kong export controls. The TID may require end-user information for some sensitive cases.

End-use-based controls

Schedule 3⁶⁵ of the Regulations sets out the items subject to end-use control. These items include any equipment (including clothing), computer software or material, capable of being used in the development, production, handling or storage of any nuclear weapon or any missile capable of delivering any nuclear, chemical or biological weapon. The items listed in Schedule 3 will be subject to export licensing control if the exporter knows or there are reasonable grounds for him to believe that they will be used, or suspect that they might be used in activities (specified in Schedule 4) relating to chemical, biological or nuclear weapons.

⁶⁴ Available online at <<http://www.hkllii.org/hk/legis/en/reg/60G/sch2.html>>.

⁶⁵ Available online at <<http://www.hkllii.org/hk/legis/en/reg/60G/sch3.html>>.

Penalties

Violations of the trade sanctions regulations in Hong Kong can result in imprisonment not exceeding 7 years and/or an unlimited fine.

If the strategic commodities listed in Schedule 1 are imported or exported without a valid license, the person commits an offense and is liable on summary conviction to a fine of HK\$500,000 and to imprisonment for 2 years. A person is liable on indictable conviction to an unlimited fine and to imprisonment for 7 years. Similar penalties apply in respect of Schedules 3 and 4. However in respect of Schedule 4, it is a defense for the person charged to prove that he made all reasonable enquiries as to the intended use of the goods and was satisfied himself that it would not be used in an activity specified in Schedule 4.

7. Singapore controls

Overview

Similar to Hong Kong, the export of goods and technologies from Singapore is governed by the Regulation of Imports and Exports Act (RIEA) and the Strategic Goods Control Act (SGCA). Singapore Customs is responsible for processing applications for permits in relation to import/export of strategic goods.

Trade sanctions and investment countries

The Regulation of Imports and Exports Regulations (RIER) (made pursuant to RIEA) provides for prohibitions on imports and/or exports of certain items to various countries or territories. These can be found in the Schedules of the RIER. The list contains arms embargoes against Sierra Leone, Iraq, Iran, Liberia, the Democratic People's Republic of Korea, Sudan, Liberia, Rwanda and Côte d'Ivoire.

Exports of commodities, software and technology

Since 1 January 2003, Singapore has deployed a strategic goods control system, which is aimed at the regulation of trade in or transfer of strategic goods and related technology to curb the proliferation of WMD.

Item-based controls

The SGCA and the Strategic Goods (Control) Regulations (SGCR) form the basis for administering the trade in strategic goods and related technology in Singapore. The SGCA requires the relevant permits be obtained under the Strategic Trade Scheme for the physical and electronic export/reexport, transshipment, bringing in transit and brokering of strategic goods and related technology, as well as goods and technology capable of being used for weapons capable of causing mass destruction and missiles capable of delivering such weapons.

The goods that are subject to control are listed in the Schedule of the Strategic Goods (Control) Order 2009 (the 'Strategic Goods Control List' or 'SGCL'). The SGCL divides the strategic goods that are controlled into two broad categories: military goods and

Dual-Use Goods, and sets out each controlled item and its technical specifications as well as any exceptions that may apply.

Traders must apply for a permit before they are allowed to carry out the following types of transactions relating to strategic goods or technology in the SGCL and items under the ‘catch-all’ provision (see below): (i) export; (ii) reexport; (iii) transshipment; (iv) bringing in transit; (v) intangible transfer of technology (ITT) (any electronic transmission of controlled strategic goods technology carried out in Singapore by electronic means, or making the controlled strategic goods technology available in Singapore on a computer, so that it becomes accessible to a person in a foreign country); and (vi) brokering. The party exporting the goods must, therefore, obtain a permit, regardless of whether or not it is the owner of the goods.

Depending on the nature of the goods, it is possible to obtain a ‘bulk’ permit. There are two different types. One type covers shipments of either a specific product to multiple end-users or shipments of multiple products to a single end-user. Another type covers shipments of multiple products to multiple end-users. Both types of permits are valid for 3 years.

End-user-based controls

As part of the process to apply for a permit under the Strategic Trade Scheme under the SGCA, an End-User Certificate or statement issued by the foreign consignee is required as a supporting document. The decision of whether to issue a permit will be based on an overall evaluation, rather than the identity of the end-user solely.

End-use-based controls

Other goods and technology which are not listed in the SGCL but are intended or likely to be used for WMD purposes or a ‘relevant activity’ are also controlled under the SGCA. This is internationally known as a ‘catch-all’ control.

The ‘catch-all’ provision captures goods and technology that fall outside the scope of the SGCL. It poses an additional hurdle for compliance purposes since in practice it requires any indication of such prohibited activities to be recognized and carefully evaluated.

Penalties

Violations of the trade sanctions regulations in Singapore can result in imprisonment not exceeding 5 years and/or a fine not exceeding S\$100,000.

Under the SGCA, any person who exports and transmits any strategic goods or strategic goods technology without a permit shall be guilty of an offense and shall be liable on the first conviction to a fine not exceeding S\$100,000 or three times the value of the goods or technology in respect of which the offence was committed, whichever is the greater, or to imprisonment for a term not exceeding 2 years or both. On the second or subsequent conviction, a person may be subject to a fine not exceeding S\$200,000 or four times the value of the goods or technology in respect of which the offense was committed, which-

ever is the greater, or to imprisonment for a term not exceeding 3 years or to both. The RIER imposes the same nature and quantum of penalties on any person who is guilty of an offense as those liable under the SGCA.

8. Case study

The following case study illustrates the application of certain of the export controls and trade sanctions under the laws of the United States, the UK, the EU, Canada, and China, with their complex and sometimes contradictory compliance obligations.

NRG US Inc (NRG US) is a US incorporated entity that supplies equipment for oil and gas drilling activities. NRG US has subsidiaries in over 30 countries, including the UK, Canada and China. NRG UK Ltd (NRG UK), incorporated in the UK, has been asked to provide a number of products to customers in Saudi Arabia (Ar-Oil), Iran (Ir-Gas) and Cuba (Cub-Oil).

These products include:

- (i) *A variety of seals (some of which are made of PTFE). These seals were manufactured in the United States, but have been sitting in general inventory in the UK for 6 months;*
- (ii) *Certain gyros that, although initially designed over 20 years ago for military use, are now primarily employed by the energy sector for drilling activities. While NRG UK has a number of these gyros available for supply out of the UK, it believes that it may be prohibited from supplying such items given that they have some US content in them. NRG UK could also turn to its affiliate in China, CHI-NRG Corp (CHI-NRG), which has similar gyros, but free of any US content; and*
- (iii) *Software products to help store data following analysis of the output of the drilling activities. Given the commercially sensitive nature of such research analysis, the software has strong cryptographic capability in it. NRG UK would arrange for this software to be supplied directly by the research and development center within the Canadian affiliate, CAN-NRG Inc (CAN-NRG). The software product was developed wholly in Canada but it incorporates a third-party US-origin encryption module.*

Under internal corporate delegations of authority, NRG UK is required to seek approval from NRG US before entering into certain categories of contracts worth in excess of GBP 500,000 (which is the case with respect to the proposed sales to Ar-Oil, Ir-Gas and Cub-Oil).

Based on its preliminary due diligence, NRG UK has confirmed that the proposed transactions would not involve any persons designated on any restricted parties lists maintained by the United States, the EU and UK or Canada. NRG UK has also satisfied itself that the proposed transactions would not involve sensitive activities that would trigger concerns under end-use-based controls of these jurisdictions.

Compliance considerations under US trade sanctions and export controls

The proposed exports by NRG UK, CAN-NRG and CHI-NRG to Saudi Arabia, Cuba and Iran raise a number of compliance issues under US reexport controls and, with respect to Cuba- and Iran-destined exports, under US trade sanctions.

Because the seals are of US origin, they would be Items subject to US jurisdiction. Consequently, NRG-UK would need to ensure that the reexport of the seals from the UK to Saudi Arabia complies with applicable US controls. Assuming the seals are commercial off-the-shelf products that have not been designed or modified for a military application or otherwise designated on the USML, NRG UK's reexport of the seals to Ar-Oil in Saudi Arabia would be subject to reexport controls under the EAR. Absent end-user or end-use concerns, the key compliance question would be whether the seals trigger licensing requirements for Saudi Arabia based on their classification under the EAR. In this respect, NRG UK would need to determine whether the seals are subject to CCL-based controls or are classified as EAR99. If EAR99, NRG UK may reexport the seals to its customer in Saudi Arabia without a US government license. If, on the other hand, the seals are designated on the CCL, a reexport license from BIS may be required, depending on the reason for the CCL-based control.

The export of gyros incorporating US-origin content that have been designed for military use from the UK to Saudi Arabia would need to be considered under the ITAR controls. If the US-origin content itself would be controlled on the USML, the proposed export would trigger license requirements under the ITAR. Unlike the EAR, the ITAR do not have *de minimis* rules that might release from US controls foreign-made Items incorporating limited US-origin content that meet the applicable *de minimis* test. Consequently, assuming the US-origin content is controlled under the ITAR, NRG UK would need to obtain a license from DDTC prior to the export of the gyros to Saudi Arabia.⁶⁶

CAN-NRG, in addition to considering Canadian controls applicable to software exports, would need to consider compliance with US reexport controls under the EAR applicable to Items using cryptographic functionalities prior to the export from Canada to Saudi Arabia of the Canadian-made software incorporating a US-origin encryption module. The EAR's controls on commercial encryption Items are complex and impose compliance requirements that, in many respects, are unique. The controls applicable to encryption Items to non-sanctioned countries depend primarily on the nature of the encryption functionalities.⁶⁷ Canadian-made software incorporating a US-origin encryption module may be eligible for export from Canada to Saudi Arabia without a prior authorization from BIS or, in some instances, may be excluded from the EAR's controls if it meets the applicable *de minimis* test.⁶⁸ The applicable rules under the EAR would

⁶⁶ Other compliance issues could be presented if the gyros incorporated US-origin content controlled under the EAR.

⁶⁷ Some Items using certain limited encryption functionalities and certain other specified categories of encryption Items do not require authorization prior to the export/reexport. Many other encryption Items are eligible for the export/reexport to non-sanctioned countries under License Exception ENC (Encryption), following the required one-time review by BIS. Certain categories of encryption Items are subject to licensing requirements when destined to government end-users in certain countries. See 15 CFR pt 774, Category 5 (pt 2); § 740.17; § 742.15.

⁶⁸ See, eg, 15 CFR § 740.17(b)(4)(ii); § 734.4(b).

need to be analyzed carefully to determine whether CAN-NRG could export this software to Saudi Arabia without prior authorization from BIS.

The proposed exports by NRG UK, CAN-NRG and CHI-NRG to Cuba would be prohibited under US trade sanctions. This is because as foreign subsidiaries of a US company, all three entities are persons subject to the jurisdiction of the United States under the CACR. Consequently, none could engage, directly or indirectly, in any of the proposed exports destined to Cuba (regardless of whether the goods to be supplied are Items subject to US jurisdiction) without running afoul of US trade sanctions.

The proposed exports to Iran would trigger controls under US trade sanctions because these transactions would involve both Items subject to US jurisdiction and US Persons if the transaction required a US parent approval. As a threshold matter, if the proposed sales to Iran fall under the category of contracts that require the US parent approval pursuant to the internal corporate delegations of authority, the US parent would be prohibited from granting such approval or otherwise facilitating its foreign subsidiaries' proposed sales to Iran. Furthermore, for the US parent to ignore the delegation of authority process in order to allow the transactions to proceed may be viewed as prohibited facilitation of non-US Person transactions involving Iran or evasion of the applicable prohibitions under the ITR. Changing the delegations of authority to permit Iran-related transactions to proceed would also be prohibited if such a change would require the approval or other involvement of the US parent.

Even if the proposed sales to Iran do not require the US parent approval and no US Persons are otherwise involved, NRG UK and CAN-NRG would need to consider whether the proposed exports/reexports of Items subject to US jurisdiction would trigger prohibitions under the US trade sanctions applicable to Iran. If the US-origin seals are designated on the CCL, NRG-UK's reexport of those seals to Iran would be prohibited under the ITR, and OFAC would not grant licenses authorizing reexport of any CCL-controlled Item to Iran. If, on the other hand, the seals are classified as EAR99, NRG UK would not on the facts presented be prohibited from reexporting the seals to Iran, provided NRG UK satisfies itself that the seals have indeed 'come to rest' in its general inventory in the UK prior to the reexport to Iran (ie, they have not been ordered from the United States specifically or predominantly to fill orders from Iran). Assuming the gyros with US-origin content are subject to the ITAR, NRG UK's shipment of such gyros to Iran would be prohibited under the ITAR, and DDTC would not grant licenses authorizing any export/reexport to Iran.

CAN-NRG would need to determine whether its export of the software incorporating a US encryption module to Iran would trigger prohibitions under the applicable US controls. Unless the applicable *de minimis* tests under both the EAR and the ITR are satisfied, CAN-NRG would be prohibited from exporting this software to Iran.

Finally, both NRG UK and CAN-NRG need to be mindful of potential compliance issues under US antiboycott laws in connection with the proposed sales. Transactions of foreign subsidiaries of US companies involving Items subject to US jurisdiction generally would be subject to the US Commerce Department's antiboycott rules. Even if no Items subject to US jurisdiction are involved, transactions of foreign subsidiaries of

US companies would generally fall within the Treasury Department's jurisdiction under its antiboycott rules.

The key for complying with US antiboycott laws is to realize that even in the absence of an explicit agreement to cooperate with an unsanctioned boycott, companies will be deemed to have cooperated if boycott-related language appears in documents. Therefore, all documents related to doing business with Saudi Arabia and Iran would need to be scrutinized for boycott-related language, which generally must be removed or taken exception to, and reported to either the Treasury Department or the Commerce Department, or both. In the context of the boycott of Israel, boycott-related language generally would include references to 'Israel', 'blacklist' or 'boycott'. However, both the Commerce and the Treasury antiboycott rules also prohibit or penalize agreements to comply with requests that on their face may not appear to be boycott-related.

Compliance considerations under EU/UK export controls

The PTFE seals do not appear on Annex I to the EU Regulation. Accordingly, on the basis that there is no WMD or military end-use concern, the seals can be supplied to Ar-Oil in Saudi Arabia and Cub-Oil in Cuba without a license. However, PTFE seals do appear on Annex II to the EU Iran Regulation, which means that NRG UK must seek a prior authorization before, directly or indirectly, selling, supplying, transferring or exporting the seals to Iran or for use in Iran. Similarly, a prior authorization would be required with respect to the provision of any related financing, financial assistance or technical assistance related to the supply of the seals to Ir-Gas. An authorization would also be required if NRG UK were to broker the sale, supply, transfer or export of such items by a different third party to Ir-Gas.

With respect to the gyros, given that they were specially designed for military use, they would be controlled on the UK Military List. NRG UK would need to apply for an export license to supply the gyros out of the UK to Ar-Oil in Saudi Arabia and Cub-Oil in Cuba. However, given that Iran is subject to a UN and EU arms embargo, no export license would be granted for the supply of the gyros out of the UK to Iran. Similarly, pursuant to the ECO, given that Iran is an embargoed country, NRG UK would be prohibited to engage in any act calculated to promote the supply or delivery of gyros to Iran. Thus, NRG UK is prohibited from referring the order for the supply of gyros to Ir-Gas to its affiliate, CHI-NRG, or otherwise facilitating in any manner the supply of such items to Iran.

As the subsidiary of a US company, NRG UK is prohibited under US trade sanctions against Cuba from doing or facilitating any business with Cuba. However, pursuant to the EU Blocking Regulation 2271/96, NRG UK is also prohibited from complying with the extraterritorial effects of certain US trade sanctions against Cuba – specifically the Helms-Burton Act and the CACR. Further, NRG UK is required to report to the European Commission on the effects of such sanctions on its activities. However, if NRG UK decided not to proceed with the Cub-Oil transaction based on reasons that are independent from the extraterritorial application of the above-mentioned US laws (eg, having to comply with US laws not referenced in the EU Blocking Regulation 2271/96, such as the

EAR or ITAR, or due to commercial or reputational reasons), there would be good grounds for arguing that the obligations under the EU Blocking Regulation 2271/96 would not arise.

Compliance considerations under Canadian export controls

Canadian export controls potentially apply to the software containing cryptography being exported from CAN-NRG to Saudi Arabia, Cuba and Iran. The ECL seeks to control only 'strong' cryptography used for certain purposes.⁶⁹ For example, symmetric algorithms with key lengths below 56-bits are not controlled. Similarly, cryptography strictly used for password authentication is exempt from control. In this case, strong cryptography is being used to encrypt data from being viewed by uninvited third parties. Such use of cryptography generally is controlled; however, additional information regarding the cryptographic algorithm(s) being employed and the corresponding key-length(s) is required to determine an exact classification under the ECL. In addition, one also must ascertain whether CAN-NRG is exporting any source code from Canada, as source code is considered controlled 'technology' under the ECL and must be considered separately from the machine executable code (a.k.a. object code) of the software.

Assuming that the software contains controlled cryptography, CAN-NRG will be required to apply for and obtain from DFAIT Export Permits for the transfers of the software to Saudi Arabia, Cuba and Iran. In addition, when applying for Export Permits, CAN-NRG will require a signed end-use statement from the customers in Saudi Arabia, Cuba and Iran, providing a brief description of how the software will be used and acknowledging that they will not use the software for military purposes, nuclear or missile proliferation activity, or for any purpose associated with the design, development or production of chemical, biological or nuclear weapons, or their delivery systems, nor resell or export to any entity involved in such activity. With respect to the US content of the software, Item 5400 of the ECL likely would not apply as, arguably, the software has undergone further processing and development in Canada so as to result in a substantial change in value, form or use of the software over and above the US content that was initially present in the software source code.

Finally with respect to the direct shipments of the software from Canada to Cuba, if CAN-NRG received a communication from NRG US instructing it not to sell and ship the software to Cub-Oil in Cuba, CAN-NRG and every director and officer who received the communication would be required to notify the Attorney General of Canada of the receipt of the communication pursuant to the FEMA Order. In addition, CAN-NRG, its directors, officers, managers and employees in a position of authority would be prohibited from complying with the notifiable communication, as well as the US embargo against Cuba with respect to the sale to Cub-Oil. If, however, CAN-NRG does not receive such a communication from NRG US and decides not to complete its transaction with Cub-Oil for *bona fide* commercial reasons (eg, there is evidence that Cub-Oil could

⁶⁹ See Group 1, Category 5 – part 2 of the ECL. Cryptographic algorithms controlled for export under the ECL include symmetric algorithms whose key lengths are greater than 56-bits, and asymmetric algorithms where the security of the algorithm is based on one or more enumerated computations (eg, factorization of integers in excess of 512-bits (eg, RSA)).

not pay for the software), and not as a result of the US embargo against Cuba, then arguably the decision not to proceed with the transaction should not raise any issues with respect to the FEMA Order. It should be noted that the FEMA Order provides that the prohibition on complying with notifiable communications and the US embargo against Cuba applies in respect of any act or omission constituting compliance with the communication or the embargo, whether or not compliance with the communication or the embargo is the only purpose of the act or omission.

Compliance considerations under China export controls

China has implemented UN resolutions 1737, 1747 and 1803, which impose on Iran a proliferation-sensitive nuclear and ballistic missile programs-related embargo. Therefore, if it is likely that the gyros (given their original military purpose even if they are now primarily used by the energy sector) supplied by CHI-NRG Corp could contribute to Iran's enrichment-related, reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems, CHI-NRG Corp would violate the trade sanctions by supplying the gyros to Ir-Gas.

Part VI of the Dual-Use Items Catalog lists gyros as a missile-related item subject to export controls. If not prohibited under the trade sanctions, CHI-NRG should apply to the Quota and License Administrative Bureau of Ministry of Commerce for an export license for dual-use items and technologies to export the gyros to Iran. Similarly, with respect to the proposed exports of the gyros to Saudi Arabia and Cuba, CHI-NRG Corp would need to apply and receive an export license for dual-use items and technologies to export the gyros out of China.

9. Conclusion

Supplying goods, technology and services for use in oil and gas projects often triggers complex export control and related compliance issues under the laws of supplying jurisdictions. In today's tough enforcement climate, companies found in violation of these laws may face significant penalties in multiple jurisdictions and suffer reputational harm. Ensuring compliance with these complex controls, particularly in transactions that trigger compliance responsibilities under more than one jurisdiction, can be challenging. Consequently, energy and service companies need to implement proper internal controls and risk assessment programs to ensure compliance with these multi-jurisdictional laws and regulations. Failure to do so could result in severe monetary penalties, imprisonment, and reputational harm.