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JUDICIAL REVIEW OF EXPORT CONTROL DETERMINATIONS

Dean A. Pinkert
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I. INTRODUCTION

This commentary includes: (1) a summary of the export control laws and regulations administered by the Bureau of Export Administration¹ and the U.S. Department of Commerce; (2) an outline of the review procedures available at the agency level; (3) a discussion of the principles that govern judicial review pursuant to the Export Administration Act ("EAA")² of civil enforcement and administrative export control determinations; and (4) an analysis of reform proposals. Because reauthorization and reform of the EAA are perennial subjects of activity on Capitol Hill, it is timely to consider whether the scheme of judicial review might be altered to better complement review procedures available at the agency level.

II. AN OVERVIEW OF THE REGULATORY SCHEME

The Export Administration Regulations, promulgated under the authority of the EAA, generally are focused on the control of exports of "dual-use" commodities (commodities that have military and commercial applications).³ The Bureau of Export Administration is charged with administering these regulations.⁴

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1. See The Export Administration Act of 1979, *as amended*, 50 U.S.C. app. §§ 2401-2420 (1988). The EAA expired in 1994. On November 13, 2000, however, the President signed into law H.R. 5239, extending the EAA from August 20, 1994 to August 20, 2001.

2. Export Administration Act, 50 U.S.C. app. §§ 2401-2420 (1988).

3. U.S. DEPARTMENT OF COMMERCE, BUREAU OF EXPORT ADMINISTRATION, EXPORT ADMINISTRATION REGULATIONS §§ 730.1-730.3, 730.6 (2000).

4. See Export Administration Act, 50 U.S.C. app. § 2403.

The precursor to the EAA was the 1949 Export Control Act.⁵ That statute was as much focused on economic security as national security. Nevertheless, soon after the passage of this legislation, the NATO allies established the Coordinating Committee ("CoCom").⁶ CoCom was designed to prevent resources intended for the reconstruction of Europe from being diverted to the Soviet Bloc.⁷ In 1994, as a result of the successful conclusion of the Cold War, CoCom was ended. A greatly relaxed post-Cold War international export control regime, the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, came into existence in 1996.⁸

The basic structure of the Export Administration Regulations was established under CoCom. Activities subject to the regulations include: (1) exports; (2) re-exports to third countries; (3) the involvement of U.S. persons in supplying foreign-origin items or in otherwise supporting a transaction with knowledge of a proliferation link; and (4) release of technology or software to a foreign national.⁹ The regulations do not cover exports under the exclusive jurisdiction of another federal agency or exports of "publicly available" software and technology.¹⁰

Unless a specific license exception applies, a company desiring to engage in an activity subject to the regulations involving a controlled commodity—or otherwise requiring a license—must file a license application with the Bureau of Export Administration.¹¹ Such applications are reviewed by, at a minimum, the Departments of Commerce, State, Defense, and Energy, and the Arms Control and Disarmament Agency.¹² The Commerce Department also has the option of asking other agencies to review specific license applications. Similarly, the Defense Department can refer license requests to the National

5. See Cecil Hunt, *Department of Commerce Export Controls*, in *COPING WITH U.S. EXPORT CONTROLS* 37, 43-46 (Evan R. Berlack & Cecil Hunt eds., Practicing Law Institute 1998).

6. See *id.* at 43.

7. See *id.* at 43-44.

8. See Export Administration Regulations § 743 (2000).

9. See *id.* § 730.5.

10. *Id.* § 730.8.

11. See *id.* § 736.

12. See *id.* § 750.3.

Security Agency, the Defense Intelligence Agency, or others in the intelligence community.¹³

The regulations also discuss two ways in which companies may obtain export control information from the Bureau of Export Administration. One way is by submitting a "classification request."¹⁴ On the basis of data submitted regarding the item to be classified, the Bureau of Export Administration will advise the exporter (1) whether the item is on the control list, and, if so, (2) the appropriate Export Control Classification Number.¹⁵ Companies also may request an "advisory opinion" based on information about the item to be exported, the proposed destination, and the proposed end-use and end-user.¹⁶ The Bureau of Export Administration will respond with non-binding advice on whether a license is required and, if so, whether it is likely to be granted.

Violations of the Export Administration Regulations are subject to severe criminal and civil sanctions. On the civil side, Bureau of Export Administration counsel may file charges with an administrative law judge (ALJ) seeking civil fines or administrative sanctions.¹⁷ Administrative sanctions include "denial orders."¹⁸ These orders bar exports by the sanctioned person—and related parties—as well as the supply to such persons of items that have been exported from the United States.

III. AGENCY LEVEL REVIEW OF CIVIL ENFORCEMENT UNDER THE EAA

The exporter is entitled to notice of the charges against him and an opportunity to be heard by the ALJ. The ALJ must then determine whether the evidence supports the charges. The ALJ's determination is reviewable in the first instance by the Under Secretary of Commerce for Export Administration.¹⁹ The scope of the Under Secretary's review of ALJ de-

13. See *Export Controls: Issues Related to Commercial Communications Satellites: Testimony Before the United States Senate Select Comm. on Intelligence*, 105th Cong. 3 (1998) (statement of Katherine V. Schinasi, Associate Director, United States General Accounting Office).

14. 15 C.F.R. § 748.3(b) (2000).

15. See *id.*

16. *Id.* § 748.3(c).

17. See Export Administration Regulations § 764 (2000).

18. *Id.*

19. See 15 C.F.R. § 766.22 (2000).

terminations has been clarified by two decisions of the D.C. Circuit.

*Iran Air v. Kugelman*²⁰ provides an overview of the agency-level review mechanisms available to parties charged with civil violations.²¹ In 1990, the Bureau of Export Administration sought to impose civil penalties on Iran Air for unauthorized re-exportation to Iran of certain dual-use products. Iran Air requested a hearing before an ALJ pursuant to § 2412(c)(1) of the EAA.²² After receiving evidence and argument from the parties to the dispute, the ALJ ruled that the EAA authorizes sanctions only for knowing violations of the Export Administration Regulations.²³ As the U.S. Government had not proven that Iran Air had knowledge of its alleged civil offenses, the ALJ dismissed the charges. The Under Secretary reversed the ALJ on this point, finding that knowledge is not a required element of a civil enforcement action, and remanded for appropriate reconsideration.²⁴ On remand, the ALJ refused to follow the agency's reading of the law and dismissed the charges again. The Under Secretary vacated the ALJ's second decision and remanded for redetermination.²⁵ The ALJ issued a third order rejecting the agency's construction of the statute.²⁶ The Under Secretary once again vacated the ALJ's decision and issued a final order imposing penalties and suspending Iran Air's export privileges.²⁷

Iran Air appealed the decision to the D.C. Circuit, arguing that the Under Secretary acted beyond her authority by overturning the determination of the ALJ.²⁸ The D.C. Circuit upheld the Under Secretary's authority to overturn an ALJ's determination on a matter of law, finding this authority to be necessary to facilitate the implementation of uniform agency policies with respect to the EAA. The court further found "permissible" the Under Secretary's view that knowledge is not a

20. 996 F.2d 1253 (D.C. Cir. 1993).

21. *See id.* at 1255.

22. Export Administration Act, 50 U.S.C. app. § 2412(c)(1) (1988).

23. *See Iran Air*, 996 F.2d at 1255.

24. *See id.*

25. *See id.*

26. *See id.* at 1257.

27. *See id.*

28. *See id.* at 1256.

required element of proof in a civil violation case under the EAA.²⁹

The court distinguished *Iran Air* from an earlier landmark determination that limited the prerogatives of the Under Secretary.³⁰ In *Dart v. United States*,³¹ the Court held: (1) sections 13(a) and 13(c) of the EAA do not provide an exemption from judicial review for decisions of the Under Secretary that fail to "affirm, modify, or vacate" determinations of the ALJ; and (2) the Under Secretary is required to defer to certain determinations of the ALJ.³² *Iran Air* made it clear that such deference is required only with respect to the ALJ's factual determinations.

IV. JUDICIAL REVIEW OF BUREAU OF EXPORT ADMINISTRATION DETERMINATIONS

The general rule under the EAA is that Department of Commerce export control determinations are not subject to judicial review.³³ The following matters, however, represent exceptions to the general rule:

1. the imposition of civil penalties and denial of export privileges;³⁴
2. collection of civil penalties;³⁵ and
3. suits by parties to compel the Department of Commerce to act on a license application.³⁶

Cases in the first category are heard in the Court of Appeals for the D.C. Circuit. EAA § 2412(c)(1), however, provides that the review is limited to the determinations necessary to establish liability.³⁷ Cases in the second and third categories are heard, in the first instance, in federal district court.

29. *Iran Air*, 996 F.2d at 1256.

30. *See id.* at 1253.

31. 848 F.2d 217, 231 (D.C. Cir. 1993).

32. *Id.* at 231.

33. *See* Export Administration Act, 50 U.S.C. app. § 2401 (1988).

34. *Id.* § 2412(c)(3), (d)(3).

35. *Id.* § 2410(f).

36. *Id.* § 2409(j)(2). Prior to filing suit to compel the Department of Commerce to act on a license application, parties must first petition the Secretary of Commerce.

37. *Id.* § 2412(c)(1).

The *Moller-Butcher* case illustrates the interplay between limitations on judicial review of civil enforcement determinations and the distinct roles of the ALJ and the Under Secretary under the EAA. In 1984, Moller-Butcher and a company he controlled were charged with multiple violations of the EAA.³⁸ In 1986, the ALJ imposed sanctions, denying Moller-Butcher export privileges for twenty years.³⁹ The Secretary of Commerce affirmed the ALJ's decision.⁴⁰ In 1990, Moller-Butcher filed a motion with the ALJ seeking to reduce the sanctions. The ALJ granted Moller-Butcher's motion. The Under Secretary issued an order denying the motion for modification, finding that the ALJ's determination merely was advisory.⁴¹ Moller-Butcher appealed the Under Secretary's order to the D.C. Circuit.⁴²

The court held that the EAA clearly limits the court's review authority to "questions concerning the liability which occasioned the sanction at issue, not the sanction itself."⁴³ Because *Moller-Butcher's* challenge did not address liability for the imposed sanction, the court was without jurisdiction to review the Under Secretary's order. In addition, the court noted that it may review claims that the Under Secretary exceeded her authority in disposing of a determination by the ALJ.⁴⁴ In this case, however, the Under Secretary properly "vacated" the action of the ALJ and thus acted within the scope of her authority.⁴⁵

One of the unusual features of the judicial review scheme is that determinations to impose civil penalties are subject to litigation on two tracks. First, the determination to impose a civil penalty may be litigated up through the ALJ, the Under Secretary, and the D.C. Court of Appeals.⁴⁶ Second, if the penalty is imposed but not paid, the Department of Commerce

38. See *Moller-Butcher v. U.S. Dep't. of Commerce*, 12 F.3d 249, 252 (D.C. Cir. 1994).

39. See *id.* at 250.

40. See *id.*

41. See *id.*

42. See *id.*

43. *Id.* at 252.

44. See *Moller-Butcher*, 12 F.3d at 252.

45. *Id.*

46. See Export Administration Act, 50 U.S.C. app. § 2412(c)(1), (c)(3) (1988).

must file an action to collect the unpaid amount and must prove its case *de novo* before a federal district court.⁴⁷

Two important categories of determinations are not subject to judicial review under the EAA: classification decisions and license denials.⁴⁸ In both cases, however, administrative review procedures are available to aggrieved parties.⁴⁹ These procedures leave final decision-making authority in the hands of the Under Secretary for Export Administration.

V. PROPOSALS FOR REFORM

Proposals for reauthorization of the EAA frequently are accompanied by proposals for reform of review procedures. General objectives of reform include increasing agency accountability and eliminating duplicative procedures.

In 1994, the Customs and International Trade Bar Association ("CITBA") recommended that the Court of International Trade ("CIT") be given jurisdiction in lawsuits seeking judicial review under the EAA.⁵⁰ According to CITBA, "it would be logical to give the CIT jurisdiction in these cases because these lawsuits challenge government actions affecting international trade in goods."⁵¹ Two additional considerations support CITBA's proposal. First, under the current scheme, only a handful of appeals have been taken to the D.C. Circuit. Exporters might be more inclined to bring appeals to a court of specialized international trade jurisdiction. Second, the CIT has substantial relevant experience. The CIT already considers appeals "on the record" from international trade determinations, in particular, cases involving allegations of unfair trade practices by foreign governments and companies.⁵² Such cases frequently have a foreign policy aspect and require the protection of sensitive information. Moreover, the CIT reviews classification decisions of the U.S. Customs Service.

47. *See id.* § 2412(f).

48. *See id.* § 2412(e).

49. *See* 15 C.F.R. § 756.2 (2000).

50. *See* Customs and International Trade Bar Association, Recommended Expansions in the Jurisdiction of the U.S. Court of International Trade (1994) (unpublished recommendations to the U.S. Court of International Trade) (on file with author).

51. *Id.* at 5.

52. *Id.*

If the CITBA proposal is adopted, and more export control cases are litigated, a concern arises about the resolution of civil enforcement disputes in a timely manner. One way to streamline procedures would be to take away the responsibility of the Under Secretary for Export Administration to review legal determinations of the ALJ. Another would be to eliminate duplicative litigation of civil penalty determinations. In fact, in the 106th Congress, the Clinton Administration supported legislation that would have reauthorized the EAA and reformed it along these lines.⁵³ Under the draft legislation, enforcement proceedings under the EAA would be subject to "one-track" judicial review under the Administrative Procedures Act.⁵⁴ In addition, review by the Under Secretary no longer would be required. Although the exporter would maintain the right to appeal the ALJ's determinations to the Under Secretary, the decision of the ALJ would become the decision of the Commerce Department, if the exporter chooses not to appeal. The 106th Congress did not enact any reforms of the EAA.⁵⁵

Another reform proposal is for judicial review of classification determinations.⁵⁶ The claimed benefits of the proposal are improved accuracy and greater public confidence in these determinations. The potential negative consequences include delay, uncertainty, and the inability to respond flexibly to an ever-evolving national security policy environment.

A less radical way to address concerns about classification determinations might be to permit an ALJ to review such determinations under an "arbitrary and capricious" standard of review. The ALJ's decision would be final and non-appealable. This approach would both introduce a greater degree of accountability into classification decision-making and avoid the pitfalls of a cumbersome review process.

53. See F. Amanda DeBusk, *Role of Judicial Review in Administrative Enforcement Cases*, 26 BROOK. J. INT'L L. 853 (2001).

54. 5 U.S.C. §§ 701, 706 (1994).

55. See *supra* note 1.

56. See Larry Christensen, Address at the Eleventh Annual Judicial Conference of the U.S. Court of International Trade (Dec. 7, 1999) (on file with author). See also DeBusk, *supra* note 53.

VI. CONCLUSION

It can be expected that Congress will continue to deliberate over reauthorization and reform of the EAA. Any reform of review mechanisms for classification and/or civil enforcement determinations should balance the twin objectives of increasing the accessibility of judicial review and ensuring that review procedures—both administrative and judicial—do not become so cumbersome as to impede significantly the achievement of legitimate national security and foreign policy objectives.

