

## Chapter

# 2

# SECURITY COOPERATION LEGISLATION AND POLICY

## INTRODUCTION

The U.S. security assistance (SA) program, a major component of security cooperation (SC), has its foundation in public law, which provides both authorizations and appropriations. This chapter will examine and highlight some of the key provisions of these SA-related statutes.

Certain SA programs must be authorized and appropriated. Six such programs include the following:

- International Military Education and Training (IMET) Program
- Foreign Military Financing Programs (FMFPs)
- Economic Support Fund (ESF)
- Peacekeeping Operations (PKO)
- International Narcotics Control and Law Enforcement (INCLE)
- Nonproliferation, Anti-Terrorism, Demining, and Related Programs (NADR)

Foreign military sales (FMS), commercial exports or direct commercial sales (DCS), drawdowns, and leasing are also addressed in SA legislation, though not from a funding standpoint since U.S.-appropriated dollars are not normally required. Instead, these programs are addressed from a reporting, control, and oversight perspective.

### Authorization Acts

With respect to the current U.S. SA program, two basic laws are involved. They are as follows:

- Foreign Assistance Act (FAA), as amended [22 U.S.C., 2151, et. seq.]
- Arms Export Control Act (AECA), as amended [22 U.S.C., 2751, et. seq.]

Both the FAA and AECA follow a succession of earlier acts which served as the basis for many of the current provisions in the FAA and AECA.

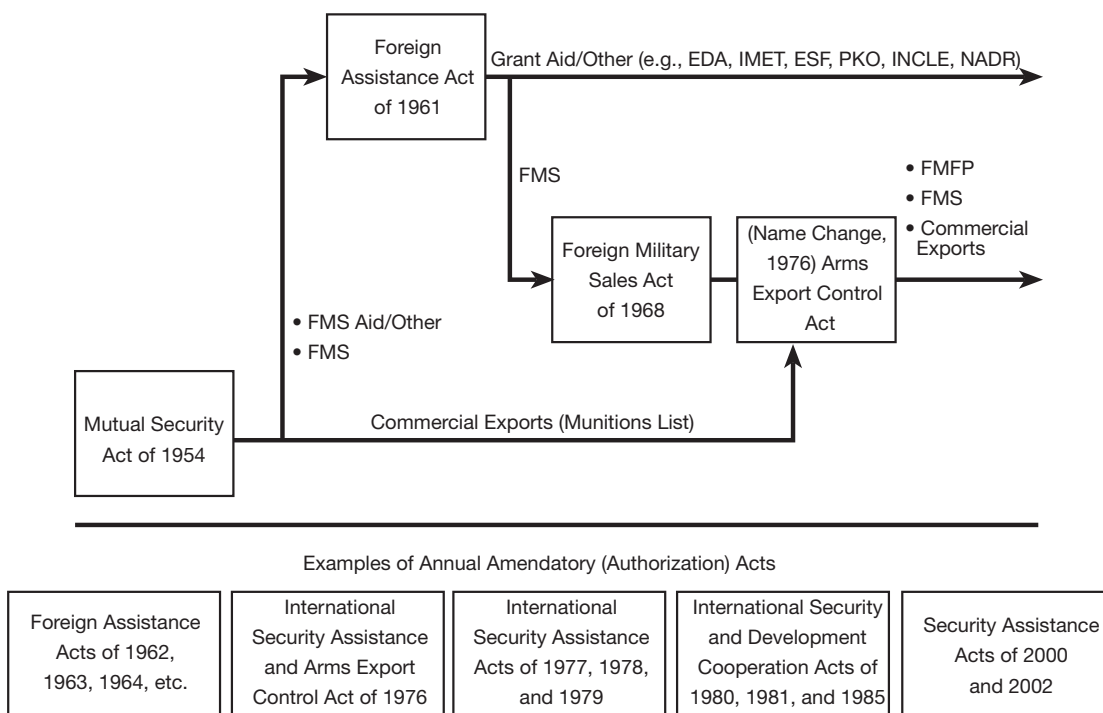
The FAA, originally enacted on 4 September 1961, contains many provisions that were formerly in the Mutual Security Act of 1954, as amended. Today, the FAA is the authorizing legislation for IMET, ESF, PKO, INCLE, NADR, overseas SA program management, grant transfer of excess defense articles (EDA), emergency drawdowns, and a wide variety of other foreign assistance programs. It should be noted that the FAA contains well over 700 sections; much of the act refers to programs outside the purview of SA, for example, the following are such programs:

- Development assistance
- Famine prevention
- International organizations

- Support for East European Democracy (SEED) Act of 1989
- Freedom for Russia and Emerging Eurasian Democracies and Open Markets (FREEDOM) Support Act

The AECA came into being under a different title, the Foreign Military Sales Act of 1968 (FMSA). Before 1968, the basic authority for FMS was the FAA. The FMSA served to incorporate the FMS program under a new and separate act. The International Security Assistance and Arms Export Control Act of 1976 changed the title of the FMSA to the current AECA. The 1976 Act also repealed Section 414 of the Mutual Security Act of 1954, which provided authority for commercial licensing through the International Traffic in Arms Regulations (ITAR). The commercial licensing DCS authority was placed in a new Section 38, AECA, “Control of Arms Exports and Imports,” which governs the licensing and sale of items through direct commercial channels. The AECA is the statutory basis for the conduct of FMS, funding for FMFP, and the control of commercial sales of defense articles and services. Figure 2-1 addresses the various acts discussed above in the context of their relationships to one another.

**Figure 2-1  
Major Security Assistance Authorization Acts Since 1954**



The FAA and the AECA may be amended by annual or biennial security assistance or foreign assistance authorization acts. However, Congress has used annual Department of Defense (DOD) and other Department of State (DOS) legislation, along with any stand-alone legislation, and various functional laws to amend the FAA or AECA. In the absence of an authorization act, the appropriations committee has included program authorization language in the affected annual appropriations act, in other acts or in stand-alone legislation to authorize additional SA programs.

The Senate Foreign Relations Committee (SFRC) and the House Foreign Affairs Committee (HFAC) are responsible for foreign assistance and SA program authorization legislation. The Senate Armed Services Committee (SASC) and the House Armed Services Committee (HASC) are responsible for defense programs authorization legislation, including DOD authorities related to SA and authorities

for the broadly defined SC programs. Both SA and SC authorized programs were addressed earlier in Chapter 1, “Introduction to Security Cooperation.”

The largest reorganization of Security Cooperation (SC) and its programs occurred with the National Defense Authorization Act (NDAA) for fiscal year (FY) 2017, P.L. 114-328, 23 December 2016 (herein referred to as NDAA FY 2017). NDAA FY 2017 reflected a tremendous effort to significantly reform, consolidate, and codify existing SC programs, along with other major changes to the conduct, oversight, and execution of security cooperation. In fact, NDAA FY 2017, P.L. 114-328 Section 1241 establishes a new Chapter 16 in Title 10 called “Security Cooperation.” This new chapter requires the Secretary of Defense to designate an individual and office at the Under Secretary of Defense-level or below with responsibility for oversight of strategic policy, guidance, and overall resource allocation for SC programs and activities of the DOD. Additionally, Chapter 16 includes sections encompassing the main aspects of previous SC programs that have been repealed, re-codified, and/or codified—and sometimes consolidated into a new program/section. About 21 existing SC programs are now consolidated into eight new programs (sections). These eight sections (along with others) are permanent U.S. law and no longer need periodic reauthorization. It is worth noting that Congress will sometimes use the Fiscal Year NDAA to update previous NDAAAs. They have used it to extend numerous programs that were temporary in nature, to expand programs, to provide more guidance to DOD on programs, to limit the scope of programs, and to reinforce the importance of previous legislation. Thus, it is very important to review the latest NDAA to make sure you fully understand the intent of Congress before using a security cooperation program.

### **Appropriations Acts**

SA appropriations are included in the annual Department of State/Foreign Operations, and Related Programs Appropriations Act (S/FOAA) for FY. As its title suggests, this act is the appropriation authority for several foreign relations programs, including many SA programs. This act is one of twelve appropriations acts required every FY. Should a new FY begin before an appropriation act has been approved, a Continuing Resolution Authority (CRA) is essential to keep the funded foreign assistance programs from coming to a standstill. The CRA is the authority to obligate funds against the FMFP, IMET, ESF, PKO, or other related SA appropriations for the new FY. CRAs are legislated by Congress in a joint resolution to make temporary appropriations prior to passage of the regular appropriations act, or in lieu of such an act. Normally, the CRA is for a designated period less than a FY and does not usually allow funding for the start of any new programs.

The House Appropriations Committee (HAC) and the Senate Appropriations Committee (SAC) are responsible for the timely legislation of all twelve annual bills. The 11 September 2001 terrorist attack and military operations in Afghanistan and Iraq, coupled with domestic and worldwide natural disasters requiring vast amounts of humanitarian and reconstruction assistance, further complicated the legislative appropriations process with the requirement for annual and emergency supplemental appropriations. These often included SA funding in addition to the standard appropriations.

### **Federal Statutes, Regulations, and Federal Register on the Internet**

The publication of U.S. law and regulations (as well as announcement of official determinations, certifications, or notifications) is readily available to the public using a variety of open U.S. Government (USG) websites.

### ***Slip Laws***

The first official publication of a law is often referred to as a “slip law” because of how it was once printed and bound for distribution. Currently, due to wide internet access and printing expenses, slip laws are rarely used. The best source for these now-electronic slip laws is Congress.gov, located at <http://congress.gov>. This site provides public access to the legislative process ranging from the first

introduction of a bill, to committee and conference reports, to passage by both houses, to enactment by the President, and, finally, to the assignment of a P.L. number by the archivist of the U.S. before paper printing by the U.S. Government printing office (GPO).

Public law numbers are assigned based on the convening Congress: e.g., P.L. 109-145 is the 145th law of the 109th Congress. An extension of this example is the 109th Congress having two sessions: the first being calendar year (CY) 2005 and the second being CY 2006. The session numbering and time period of the Congress coincide with the term of the just-elected House of Representatives. The enacted laws for the first session CY 2005 of the 109th Congress included P.L. 109-1 through P.L. 109-318. The second session CY 2006 laws of the 109th Congress included P.L. 109-319 through P.L. 109-482.

U.S. Federal statutes are published in three formats: slip laws, session laws, and codification. Recently enacted legislation is published individually as a slip law. Slip laws are compiled at the end of each Congressional session into the United States Statutes at Large and known as session laws. The final step is for session laws to be integrated into the pre-existing body of law, i.e. U.S. Code.

### ***United States Code***

The United States Code (U.S.C.) is the codification of the general and permanent laws of the U.S. by the Office of the Law Revision Counsel of the House of Representatives. The Office of the Law Revision Counsel divides the U.S.C. laws into 53 general subject areas. The U.S.C. is published every six years and is essentially restatements from the Statutes at Large. Maintaining an up-to-date paper copy of the lengthy U.S.C. is very costly and difficult to administer; however, the same data can be accessed online at <https://www.govinfo.gov/app/collection/uscode> or <http://uscode.house.gov/>. The general subject areas are referred to as “titles.” Most SA-codified laws can be viewed under Title 22, “Foreign Relations and Intercourse.” Certain SA-related and SC-codified laws can be viewed under Title 10, “Armed Forces.” These titles are often referred to when differentiating between authorities and appropriations for the DOS and its responsibility for foreign affairs and the DOD and its responsibility for national defense.

### ***Legislation on Foreign Relations Through (year)***

As a more timely reference, the SFRC and HFAC regularly publish a multi-volume set of documents to reflect new and amending legislation enacted from the previous calendar year (CY) to also include any related executive orders. Volume 1-A provides an up-to-date printing of the FAA and the AECA as well as any relevant still-in-effect portions of prior year appropriations and authorizations acts. As with the slip law, a printed copy of this publication is no longer available. The March 2010 edition, which covers legislation through 2008, can be viewed online: <https://foreignaffairs.house.gov/bills>. The section footnotes of this document provide the tools for determining the slip law and U.S.C. section cross-referencing relationship.

### ***Slip Law and U.S. Code Relationship***

Once the slip law is codified into the appropriate general subject title, it can be referred to as its original enactment title, P.L. number, original section numbers, and date of passage with any subsequent amendments. Or it can be referred to as its U.S.C. title number with U.S.C.-specific section numbers. An SA law example of this relationship is Section 21, Sales from Stocks, AECA, P.L. 90-629, 22 October 1968, as amended, is codified as 22 U.S.C. 2761 with the same section title.

A DOD security cooperation law example of this relationship is the initial funding, authority, later codification, and possible recodification of the Regional Combating Terrorism and Irregular Warfare Fellowship Program (CTIWFP). Funding for this program was first provided in 2002 by DOD appropriations and annually thereafter. Subsequent DOD authorizations also provided for this program

with Section 1221 of the NDAA for FY 2004, P.L.108-136, 24 November 2003, finally amending 10 U.S.C. with a new Section 2249c authorizing CTIWFP on a permanent basis. In FY 2017, as part of the reorganization of SC programs under that year's NDAA [P.L. 114-328] , many permanent programs were recoded and added to the new Chapter 16 of Title 10. CTIWFP was part of this reorganization and can now be found at 10 U.S.C. 345.

### ***Code of Federal Regulations***

The Code of Federal Regulations (CFR) is the codification of general and permanent rules published in the Federal Register (FR) by the executive branch and its agencies. Using the same U.S.C. organization-by-subject procedure, the CFR is arranged into fifty general subject areas. Using administrative law authority and procedures, the CFR generally has the same authority as the law authorizing the regulation. An SA example of this procedure is the ITAR, 22 CFR parts 120-130, which, by delegation of authority, is maintained by the Deputy Assistant Secretary of State for Defense Trade Controls. The authorizing authority for the ITAR is Section 38(a)(1), AECA [22 U.S.C. 2778]. The officially published ITAR can be viewed at the govinfo site, <https://www.govinfo.gov/app/collection/cfr/2021/title22/chapterI/subchapterM>, published on an annual basis or, in a more timely manner, at the Bureau of Political-Military Affairs, Directorate of Defense Trade Control (PM/DDTC) website, [https://www.pmdtc.state.gov/ddtc\\_public?id=ddtc\\_kb\\_article\\_page&sys\\_id=%2024d528fddbfc930044f9ff621f961987](https://www.pmdtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=%2024d528fddbfc930044f9ff621f961987). Both the Defense Security Cooperation Agency (DSCA) and Defense Security Cooperation University (DSCU) websites provide links to these sites.

Using administrative law procedures, any proposed changes to the CFR are generally available for public comment along with notice of final changes in the daily FR also maintained by GPO.

### ***Federal Register***

The Federal Register (FR) is a daily publication of rules, proposed rules, notices by federal agencies, executive orders, and other Presidential documents. The daily journal can be found online at [www.federalregister.gov](http://www.federalregister.gov) while printed copies can be obtained from the GPO. Both the printed document and the website have the announcements arranged on a daily basis for each agency (in alphabetical order) with a calendar year making a volume, e.g., CY 2007 is Volume 72. There are no entries or announcements on weekends or federal holidays. An SA example in the use of the FR can be found at <http://edocket.access.gpo.gov/2007/pdf/07-2637.pdf>. This is the 30 May 2007 public notice on the FR, Volume 72, number 103, by the DOD/DSCA of a proposed 36(b)(1) FMS sale to Iraq. Section 36(b)(1), AECA [22 U.S.C. 2776(b)(1)] requires advance notification to Congress. Section 155, P.L.104-164, 21 July 1996, amended the U.S.C. with a new Section 36(f), AECA [22 U.S.C. 2776(f)], requires the full unclassified text of any advance notification of a sale to Congress be published in the FR. DSCA provided a routine and prompt public announcement of this proposed 36(b)(1) FMS notification on 18 May 2007 on its website: <https://www.dsca.mil/major-arms-sales>.

### ***DSCU Web Page***

Selected SA publications listed below are available via the DSCU website: <https://www.dscu.edu/pages/resources/publications.aspx?id=0>.

- Green Book
- Bandarian SC Sample Case Documents
- Case Reconciliation and Closure Guide
- DLA Customer Assistance Handbook
- DOD Financial Management Regulation

- Foreign Purchaser Guide to Freight Forwarder Selection
- International Programs Security Handbook
- MILSTRIP and MAPAD Handbook for Security Cooperation
- SAMM DSCA 5101.38-M
- Security Cooperation Billing Handbook
- Transfer of Night Vision Devices (NVDs) Handbook, DOD
- Security Cooperation Programs Handbook

## **LEGISLATED MANAGEMENT OF SECURITY ASSISTANCE FUNDING**

### **Funding Obligations and Reprogramming**

Section 653(a), FAA, requires a Presidential notification, delegated to the Secretary of State, to Congress to allocate any funds appropriated by the annual S/FOAA. This funding allocation report must be made no later than thirty days after the enactment of a law appropriating funds to carry out any provision of the FAA or the AECA. The report will identify each foreign country and international organization to which the USG intends to provide any portion of the appropriated funds, and the amount of funds, by category of assistance, that the USG intends to provide. It should be noted that this report does not always become available within the thirty days of enactment. An example of this late reporting occurred in FY 2011 when the appropriation was enacted on 15 April 2011, but the report was not provided to Congress until 3 August 2011. The annual allocation reports after FY 2011 continued to be outside of the thirty-day window or not at all.

Section 634A(a), FAA, is the principal authority covering funding obligations and reprogramming actions. In general, special notification to Congress is required fifteen days in advance of any obligation of funds appropriated to carry out the purposes of the AECA or the FAA for any activities, programs, projects, types of material assistance, countries, or other operations that have not been justified to Congress or that are in excess of the amount justified to Congress. This notification must be provided to the Congressional foreign relations and appropriations committees.

Additionally, the notification must be made whenever a proposed reprogramming of funds exceeds \$1 million and the total amount proposed for obligation for a country under the AECA in a FY exceeds the amount specified for that country in the Section 653(a), FAA, report to Congress by more than \$5 million. Congressional notification of such proposed reprogramming must specify the nature and purpose of the proposed obligation and to the extent possible, the country for which such funds would otherwise have been obligated.

Further statutory provisions regarding funding commitments for FMFP, IMET, ESF, NADR, INCLE, and PKO are found in the annual S/FOAA. Under these provisions, special notification to the two appropriations committees is required fifteen days prior to the commitment of these SA funds when such funds are to be expended for the acquisition of specific types of defense articles that have not been previously justified to Congress or that exceed the quantities previously justified by 20 percent. This provision applies to the specified defense articles of major defense equipment (MDE) other than conventional ammunition, aircraft, ships, missiles, or combat vehicles [Section 7015, P.L. 115-141].

### **Availability of Funds**

IMET, FMFP, and ESF are the only SA programs identified specifically in law for which appropriated funds may be made available after the expiration of the FY for which they were appropriated. These funds shall remain available for an additional four years from the date when the availability of such

funds would otherwise have expired, if such funds are initially obligated before the expiration of their respective periods of availability.

The IMET program has two important exceptions. The first exception involves what is termed an IMET fifth quarter. This procedure permits uncommitted appropriated dollars to be committed no later than 30 September of a given fiscal year, but to be spent in the subsequent three-month period (i.e., the fifth quarter), through 31 December. The second exception began in FY 1999 when \$1 million of the total funding appropriated for IMET would remain available until expended. This figure was changed to \$3 million for each FY beginning with FY 2002. Starting in FY 2009, appropriations were increased to \$4 million. In FY 2018, \$11 million may remain available until the next FY [Title IV, P.L. 115-141 for FY2018]. This authority is to allow for the expenditure of all IMET funding without the loss of it at the end of the FY.

### **Non-Funded Security Assistance Programs**

The FMS and DCS components of SA are normally funded by direct cash outlays of the purchasing countries. These two programs can also be funded using appropriated FMFP funds or, in the case of Building Partner Capacity (BPC) programs, DOD SC funds. Consequently, FMS and DCS do not require Congressional budget authorizations or appropriations. Nevertheless, the financial activity generated by FMS cash purchases has a substantial impact on USG financial programs. Special accounting procedures have been instituted for the management of these funds. FMS cash activities are documented in the annual U.S. budget in terms of the FMS Trust Fund, which will be discussed in Chapter 12 of this text, “Financial Management.”

## **BASIC POLICIES**

The remainder of this chapter discusses a broad variety of statutory provisions that govern the management of SA and SC. Selected provisions from the FAA, the AECA, or other sources and are representative of the wide range of legislative rules, enable Congress to exercise regulatory and oversight responsibilities. For ease of reference, applicable legislative references are cited either at the conclusion of the discussion of specific provisions or at the beginning of the discussion of a set of related provisions.

### **Reaffirmation of United States Security Assistance Policy**

Section 501 of the Foreign Assistance Act (FAA) statement of policy outlines the goals of the legislation. In it, Congress reaffirms the policy of the United States to achieve international peace and security through the United Nations and to only use armed force for individual or collective defense. Military assistance to friendly countries to promote peace and security are guided by the principle of effective self-help and mutual aid while exerting maximum efforts for universal control of weapons of mass destruction and regulation and reduction of armaments [Section 501, FAA].

### **Ultimate Goal**

The Arms Export Control Act Section 1 outlines the ultimate goal of the U.S. continues to be a world that is free from the scourge of war and the danger and burdens of armaments, in which the use of force has been subordinate to the rule of law and international adjustments are achieved peacefully. U.S. policy remains to encourage regional arms control and disarmaments agreements, and to discourage arms races. U.S. policy is also to exert leadership in the world community to bring about arrangements for reducing the international trade in the implements of war [Section 1, AECA].

### **Purpose of Arms Sales**

Congress recognizes that the U.S. and other free and independent countries have valid defense requirements. Because of the growing cost and complexity of defense equipment, it is increasingly difficult and uneconomical for any country to fill all of its legitimate defense requirements from its

own design and production base. Therefore, it is the policy of the U.S. to facilitate the common defense by entering into international arrangements that further the cooperative exchange of data, research, development, production, procurement, and logistics support. To this end, the AECA authorizes sales by the USG to friendly countries in furtherance of the security objectives of the U.S. and in consonance with the principles of the UN Charter [Section 1, AECA].

Defense articles and services shall be furnished or sold solely for the following:

- Internal security
- Legitimate self-defense
- Preventing or hindering the proliferation of weapons of mass destruction and the means of delivering such weapons
- Permitting the recipient country to participate in regional or collective arrangements consistent with the Charter of the United Nations
- Supporting economic and social development activities by foreign military forces in less developed countries [Section 502, FAA, and Section 4, AECA]

### **Arms Sales and United States Foreign Policy**

It is the sense of the Congress that arms sales shall be approved only when they are consistent with U.S. foreign policy interests [Section 1, AECA].

- The FY 2018-2022 Joint Strategic Plan for the DOS and USAID include four overall strategic goals:
  1. Protect America’s Security at Home and Abroad
  2. Renew America’s Competitive Advantage for Sustained Economic Growth and Job Creation
  3. Promote American Leadership through Balanced Engagement
  4. Ensure Effectiveness and Accountability to the American Taxpayer
- The FY 2018-2022 Joint Strategic Plan for the DOS and USAID can be found online: <https://www.state.gov/wp-content/uploads/2018/12/Joint-Strategic-Plan-FY-2018-2022.pdf>

### **Effect on United States Readiness**

FMS sales that would have an adverse effect on U.S. combat readiness shall be kept to an absolute minimum. For such sales, the President would be required to provide a written explanation to the Speaker of the House and the Senate Armed Services and Foreign Relations committees [Section 21(1), AECA].

### **Conventional Arms Restraint**

Congress encourages the President to maintain adherence to a policy of restraint in conventional arms transfer and to continue discussions with other arms suppliers in order to restrain the flow of conventional arms to less developed countries. It is the sense of the Congress that the aggregate value of FMS in any FY shall not exceed current levels [Section 1, AECA]. This provision was added to the AECA in June 1976. Accordingly, the base year for “current levels” was FY 1975, which had a combined total of FMS and foreign military construction sales of [then-year] \$15.8 billion.



## **Security Assistance Surveys**

Security assistance surveys include any survey or study conducted in a foreign country by USG personnel for the purpose of assessing the needs of that country for SA. Defense requirement surveys, site surveys, general surveys or studies, and engineering assessment surveys all represent various types of SA surveys. It is the policy of the U.S. that the results of SA surveys do not imply a commitment by the U.S. to provide any military equipment to any foreign country. Recommendations in such surveys should be consistent with the arms export control policy provided in the AECA. As part of the quarterly report required by Section 36(a), AECA, the President shall include information on all such surveys authorized during the preceding calendar quarter [Section 26(b), AECA].

A similar but not a replacement program titled Expeditionary Requirements Generation Team (ERGT) was established by DSCA policy 11-18, 31 March 2011. ERGTs deploy to augment combatant command (CCMD) staffs and security cooperation organizations (SCO) with SC expertise in support of planning and execution of capability-building efforts. However, ERGTs primarily focus on assisting SCOs in helping international partners define partner needs and requirements [SMM, C2.4.2.3]. Initial teams were funded by DSCA, with subsequent teams to be funded by the applicable agencies.

## **Civilian Contract Personnel**

The President shall, to the maximum extent possible and consistent with the purposes of the AECA, use civilian contract personnel in any foreign country to perform defense services sold through FMS [Section 42(f), AECA].

## **Prohibition on Performance of Combatant Activities**

Personnel performing defense services sold through FMS may not perform any duties of a combatant nature. This prohibition includes any duties related to training and advising that may engage U.S. personnel in combat activities in connection with performance of those defense services. Within forty-eight hours of the existence of (or a change in the status of) significant hostilities or terrorist acts, which may endanger American lives or property involving a country in which U.S. personnel are performing defense services, the President shall submit a report in writing to Congress [Section 21(c), AECA].

## **Limitation on Assistance to Security Forces**

No assistance (includes both articles and training) authorized by the FAA or the AECA will be made available to any unit of the security forces of a country if the Secretary of State has credible information that such unit has committed a gross violation of human rights. Funding may be provided once the Secretary determines and reports to Congress that the affected country is taking effective measures to bring the responsible members of the security forces unit to justice [Section 620M, FAA]. This is commonly referred to as the Leahy Amendment with the process entitled Leahy Vetting. DOD funding for U.S. exercises or training with foreign security force or police units are likewise restricted. Section 1204, NDAA, FY 2015, P.L. 113-291, states and codifies the following: DOD training, equipment, or other assistance may not be provided to a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights [10 U.S.C., Section 362]. Proposed students and/or units are to be vetted using all available USG resources prior to any training or combined exercises.

## **Advisory and Training Assistance**

Advisory and training assistance conducted by military personnel assigned to overseas SA management duties shall be kept to an absolute minimum. Such advisory and training assistance shall be provided primarily by other U.S. military personnel not assigned under Section 515, FAA, and who are detailed for limited periods to perform special tasks [Section 515(b), FAA].

## **Prohibitions Regarding Police Training**

None of the funds appropriated under the authority of the FAA shall be used to provide training or advice or to provide financial support for police, prisons, or other law enforcement forces of any foreign government. This prohibition does not apply to assistance and training in maritime law enforcement and other maritime skills, nor shall it apply to a country with long-standing democratic tradition that does not have standing armed forces or any consistent pattern of gross violations of internationally recognized human rights [Section 660, FAA]. This prohibition is not provided for AECA-authorized programs; however, prior coordinated approval from the Department of State and DOD/DSCA is required [SAMM, C4.5.7.3].

## **Personnel End-Strengths**

Military and civilian personnel performing SA under the FAA or AECA must be within the personnel levels authorized for the DOD. No additional personnel are authorized for SA [22 U.S.C. 2751 note], and Section 605(a), P.L. 94-329].

## **Eligibility for Grant Aid**

No defense articles or defense services (including training) shall be furnished to any country on a grant basis unless it shall have agreed to the following:

- It will not, without the consent of the President, permit any use of such articles or services by anyone who is not an officer, employee, or agent of that country.
- It will not, without the consent of the President, transfer (to another country) such articles or services by gift, sale, or other method.
- It will not, without the consent of the President, use or permit the use of such articles or services for purposes other than those for which furnished.
- It will provide substantially the same degree of security protection afforded to such articles or services by the USG.
- It will permit continuous USG observation and review with regard to the use of such articles or services.
- It will return to the USG, for such use or disposition as the USG may determine, any articles or services no longer needed. [Section 505(a), FAA]

This is often referred to as the 505 Agreement. It is normally entered into via diplomatic channels prior to a grant transfer. The 505 Agreement procedures are also used for grant transfers authorized or funded by DOD security cooperation.

## **Eligibility for Sales**

Similar to the 505 agreement conditions for grant transfers, no defense article or service shall be sold by the USG to any country or international organization unless the following occurs:

- The President finds that it strengthens the security of the U.S. and promotes world peace.
- The country (or international organization) has agreed not to transfer title to, or possession of, any articles or services (including training) furnished to it by the U.S., unless the consent of the President has first been obtained.
- The country (or international organization) has agreed to not use or permit the use of such articles or related training or other defense service for purposes other than those for which

furnished, unless the consent of the President has first been obtained.

- The country (or international organization) has agreed to provide substantially the same degree of security protection afforded to such article or service by the USG.
- The country (or international organization) is otherwise eligible to purchase defense articles or services. [Section 3(a), AECA]

Beginning 29 November 1999, all sales and lease agreements entered into by the USG shall state that the U.S. retains the right to verify credible reports that such article has been used for a purpose not authorized under Section 4, AECA, or if such agreement provides that such article may only be used for purposes more limited than those authorized under Section 4, AECA, for a purpose not authorized under such agreement [Section 3(g), AECA].

### **Presidential Determination**

In order for SA to be provided to any country, it is required that such country first be deemed eligible to participate in U.S. SA programs. Such eligibility must be established by the President and is confirmed in a written Presidential Determination (PD). This requirement is outlined in Section 503 of the FAA and Section 3 of the AECA. Further, grant military assistance or a sales program for any country may be authorized when the President finds that furnishing defense articles and services to such a country will strengthen U.S. security and promote world peace. Consequently, annual budgetary planning and programming for SA is generally limited to those countries in which PDs have determined eligibility.

All such written determinations, which authorize the purchase of defense articles and services, are signed by the President and take the form of a memorandum for the Secretary of State. Each determination is normally published in the FR at the time of approval. A list of all determinations approved to date can be found in the annual Congressional Budget Justification (CBJ) for Foreign Operations, FY 20XX.

Such a determination is only a preliminary finding of eligibility and does not guarantee the approval of any specific requests for arms transfers or other assistance. A determination for a specific country needs to be made only once, and subsequent determinations for any country for which a determination was previously made are treated as amendments. Although budgetary planning considerations may include certain countries that are awaiting a favorable determination, no budgetary implementation for SA for such countries may occur until such determinations have been made.

### **Other Restrictions**

Except where the President (often delegated to the Secretary of State) finds national security or U.S. interests require otherwise, no assistance shall be provided to countries that do any of the following:

- Repeatedly provide support to international terrorists [Section 620(a), FAA]
- Are communist, including, but not limited to the following: Democratic People's Republic of Korea, People's Republic of China, Republic of Cuba, Socialist Republic of Vietnam, and Tibet [Section 620(f), FAA]
- Are indebted to any U.S. citizens, corporations, etc. for goods or services (where legal remedies are exhausted, the debt is not denied or contested, etc.) [Section 620(c), FAA. [Section 620(e), FAA]
- Are in default on any FAA-authorized loan to the USG in excess of six months [Section 620(q), FAA]

- Are engaged in illicit drug production or drug transiting and have failed to take adequate steps to include preventing such drugs from being produced or transported, sold to USG personnel or their dependents, or smuggled into the U.S. (50 percent of assistance is suspended) [Section 490(a), FAA]
- Are in default to the USG for a period of more than one calendar year on any foreign assistance or SA loan (e.g., a development assistance, FMFP, or ESF loan) [Section 7012, P.L. 115-141]. This prohibition is renewed in the annual S/FOAA, and is generally referred to as the Brooke-Alexander Amendment.
- Prohibits or otherwise restrict, directly or indirectly, the transport or delivery of U.S. humanitarian assistance [Section 620I, FAA]
- Grants sanctuary from prosecution to any individual or group that has committed an act of international terrorism or otherwise supports international terrorism [Section 7021(b), P.L. 115-141]
- Fails to comply, or make significant efforts for compliance, with minimum standards for combating the trafficking in persons (TIP) [Section 110, P.L. 106-386]
- Taxes U.S. goods and services being imported as U.S.-funded assistance [Section 7013, P.L. 115-141]
- Does not pay any accumulated automobile parking fines or property taxes in New York City or the District of Columbia [Section 7053, P.L. 115-141]
- Knowingly transfers Man-Portable Air Defense Systems (MANPADs) to a government or organization that supports terrorism [Section 12, P.L. 109-472]
- Recruits or uses child soldiers in the regular armed forces, paramilitaries, militias, or civil defense forces [Section 404(a), P.L. 110-457]

### **Additional Restrictions**

The following restrictions, unlike those noted above, do not provide specific statutory authority for a Presidential waiver. They require suspension/termination of assistance to any government:

- That is engaged in a consistent pattern of acts of intimidation or harassment directed against individuals in the U.S. [Section 6, AECA]
- That severs diplomatic relations with the U.S. or with which the U.S. severs such relations [Section 620(t), FAA]
- That delivers or receives nuclear enrichment or reprocessing equipment, material, or technology (and have not entered into an agreement with the International Atomic Energy Agency [IAEA] to place all such equipment under an IAEA safeguards system) or transfers a nuclear device to a non-nuclear-weapon state [Sections 101-103, AECA]. This is often referred to as the Symington-Glenn Amendment
- That prevents any U.S. person from participating in the provision of defense articles/services on the basis of race, religion, national origin, or sex [Section 505(g), FAA]. A similar provision prohibits military sales, sales credits, or guarantees [Section 5, AECA]
- Whose duly elected head of government is deposed by military coup d'état or decree in which the military plays a decisive role [Section 7008, P.L. 115-141]

### **Human Rights**

According to Section 502b of the FAA, a principle goal of U.S. foreign policy shall be to promote the increased observance of internationally recognized human rights by all countries. This policy goal is in accordance with both international obligations set forth in the UN Charter and with the constitutional heritage and tradition of the U.S. to promote and encourage increased respect for human rights and fundamental freedoms throughout the world regardless of race, sex, language or religion. In the absence of a Presidential certification to Congress, no SA may be provided to any country in which the government engages in a consistent pattern of gross violations of internationally recognized human rights [Section 502B, FAA].

The Secretary of State with the assistance of the Assistant Secretary of State for Democracy, Human Rights, and Labor and with the Ambassador at Large for International Religious Freedom shall also transmit to Congress a complete report of the practices regarding the observance and respect for internationally recognized human rights for each country proposed as a recipient of SA programs. This report is to be part of the presentational materials for SA programs proposed for each FY [Section 502B, FAA].

### **Security Cooperation Organizations Overseas**

The following is an overview of legislated authorities and limitations regarding the overseas security cooperation organization (SCO), e.g., Office of Defense Cooperation (ODC), U.S. Military Assistance Group (MAG), Office of Security Cooperation (OSC), etc. A more in-depth description of the duties of a SCO is provided by Chapter 4, “Security Cooperation Organizations Overseas,” and Chapter 17, “Resource Management for the Security Cooperation Organization.”

### ***Security Cooperation Organization Functions***

The President may establish and assign members of the U.S. armed forces to a SCO to perform one or more of the following seven functions:

1. Equipment and services case management
2. Training management
3. Program monitoring
4. Evaluation and planning of the host government’s military capabilities and requirements
5. Administrative support
6. Promoting rationalization, standardization, interoperability, and other defense cooperation measures
7. Liaison functions exclusive of advisory and training assistance [Section 515(a), FAA]

Advisory and training assistance conducted by SCO personnel shall be kept to an absolute minimum [Section 515(b), FAA]. Such assistance shall be by other personnel detailed for limited periods to perform specific tasks.

### ***Security Cooperation Organization Size***

The number of members of the armed forces assigned to a SCO in a foreign country may not exceed six unless specifically authorized by the Congress. The President may waive this limitation if he determines and reports to the congressional foreign relations committees, thirty days before the introduction of the additional military personnel, that U.S. national interests require more than six members of the armed forces be assigned to a particular country not designated in the statute to exceed six. Countries designated to have more than six U.S. military personnel are identified in Section 515(c)

(1), FAA.

The total number of U.S. military personnel assigned to a foreign country in a FY may not exceed the number justified to the Congress in the annual CBJ material, unless the congressional foreign relations committees are notified thirty days in advance.

### ***Sales Promotion by the Security Cooperation Organization***

The President shall continue to instruct U.S. diplomatic and military personnel in U.S. missions abroad that they should not encourage, promote, or influence the purchase by any foreign country of U.S.-made military equipment, unless they are specifically instructed to do so by an appropriate official of the executive branch [Section 515(f), FAA].

### ***Strategy to Capability Framework***

The National Security and National Defense Strategies emphasize the importance of strengthening alliances and attracting new partners to insure our national security and foreign policy objectives. Security cooperation has become a tool of first resort in executing this strategy. However, maximizing security cooperation as a tool to support this guidance has been difficult. The Department lacks a common, simple, and intuitive multi-year picture of desired outcomes and security cooperation activities that translates strategic guidance into international partner capability. In order to get everyone on the “same sheet of music,” DSCA developed the Strategy to Capability framework to standardize strategic planning and streamline how those activities are resourced and executed. To be clear, the Strategy to Capability framework is not guidance—security cooperation stakeholders receive guidance from a variety of other sources. Strategy to Capability is also not prioritization—there are other mechanisms for establishing Department priorities. Finally, Strategy to Capability is not a tasking—DSCA performs the majority of the work.

Strategy to Capability is an outcomes and capabilities-based methodology. It starts with the analysis of potential threats to the U.S., articulates partner security roles, and culminates in the development of partner capabilities that support both domestic and international partner interests. The framework simply ensures activities across all security cooperation programs—from Training and Equipping, to Institutional Capacity Building, to Exercises—align with desired capabilities and outcomes. It provides a collective, comprehensive planning framework for the Security Cooperation community. The framework allows the Security Cooperation community to follow a common approach to capability development that benefits all security cooperation stakeholders but offers sufficient flexibility to leverage elements of their existing planning frameworks. The result is a process that allows the Security Cooperation community to plan, resource, and implement activities that build international partner capabilities according to clear, measurable goals tied to strategic imperatives. For example, a DOD security cooperation goal may be to complicate the strategic calculus of a competitor—this is the threat. Thus, the DOD wants the partner Navy to conduct maritime patrols to demonstrate a capability that could be applied during a contingency—this is the partner role. The DOD may elect to invest in building partner maritime domain awareness capability—a support role—or Ministry of Defense capability to develop a Maritime strategy—a governance role—so that the partner Navy will conduct maritime patrols. As a result of the Maritime patrols, the threat is deterred or, failing that, less effective during a contingency, which benefits the United States and the international partner.

The Strategy to Capability framework includes four levels of independent analysis of different criteria drawn from desired strategic outcomes. Each level results in a product that synthesizes strategic outcomes with varying degrees of program activity to inform program planning, development, and execution. The Level 1 Strategic Framework document links strategic guidance to capabilities within a single country. It is a current-state, cross-Department view of the desired outcomes in terms of international partner roles and major security cooperation efforts with a single partner. The Level 2 Five-Year Plan is a matrix showcasing the entirety of the program activity and resourcing that will

be used to develop the capabilities associated with a desired role for a specific country. The Level 3 Systems Program Management Plan provides an in-depth review of case lifecycle milestones for specific systems or areas of support charted on the Five-Year Plan. DSCA creates this plan to identify cost schedule, and performance status at a granular level. The Level 3 System Program Management Plan is currently only created for capabilities that involve considerable acquisition of U.S. defense articles and services. The Level 4 Interagency Targeted Action Plan provides a detailed look at priority capabilities with priority partners that facilitate strategic competition. This plan includes interagency political, economic, and/or technical considerations and identifies risk for these activities to impact overall program objectives. It informs senior leaders where interagency action may be required to ensure programs stay on track. DSCA develops this document in conjunction with the interagency. A Level 4 Interagency Targeted Action Plan only needs to be created if it meets a series of qualifying factors involving priority weapon systems supporting priority capabilities with priority partners.

The Strategy to Capability is a framework that provides an opportunity to truly transform security cooperation planning, resourcing, execution, and evaluation for the better. Secondly, none of these documents is a panacea, and they will not overcome the need to communicate across the interagency to develop holistic, well-rounded plans. However, it does provide a simple, intuitive, common picture from which we can all collaborate. You can't get everyone on the same sheet of paper if there isn't a common sheet of paper. Finally, no single organization can transform security cooperation planning. It will take a whole-of-government approach that is already underway. It requires buy-in from across the community and will continue to adapt as we establish lessons learned and best practices. DSCA will work with the security cooperation community on translating the Level One Frameworks into Five-Year Plans consistent with evolving security cooperation planning guidance. DSCA also produced a short (10:07) Strategy to Capability video available at <https://www.milsuite.mil/video/watch/video/25213>.

### ***Chief of United States Diplomatic Mission***

The President shall prescribe appropriate procedures to assure coordination among representatives of the USG in each country, under the leadership of the Chief of the U.S. Diplomatic Mission (the U.S. Ambassador) [Section 622, FAA, and Section 2, AECA].

U.S. military personnel assigned to SA organizations shall serve under the direction and supervision of the Chief of the U.S. Diplomatic Mission in that country [Section 515(e), FAA].

## **MILITARY SALES**

In general, the AECA authorizes two ways a country or international organization can purchase U.S. defense articles, services, or training. The first method is FMS through a government-to-government contract or the FMS Letter of Offer and Acceptance (LOA) case. This FMS case can be filled by sale from U.S. stock or a USG purchase from industry or by providing credit to fill the requirement either by sale from stock or by purchase from industry. The FMS process, procedures, and policies will be addressed in Chapter 5, "Foreign Military Sales Process."

The second purchasing method is DCS, which allows the country or international organization to purchase directly from U.S. industry with an export license issued by the DOS. The DCS process and policies are addressed in Chapter 15, "A Comparison of Foreign Military Sales and Direct Commercial Sales."

### **Sales from Stock**

The country agrees to pay the USG for defense articles and defense services sold from DOD and U.S. Coast Guard stocks as follows:

- The actual (stock-list) value for defense articles not intended to be replaced at the time of agreement to sell

- The replacement cost for defense articles intended to be replaced, including contract or production costs less any depreciation in value
- The full cost to the USG for defense services; in the case of a country that is concurrently receiving IMET assistance, only those additional costs that are incurred by the USG in furnishing such assistance will be charged
- The sales price shall also include appropriate charges for the following:
  - ◊ Administrative services (surcharge)
  - ◊ A proportionate amount of any nonrecurring costs of research, development, and production of MDE (does not apply to FMS cases, which are wholly financed with U.S. provided grant funds)
  - ◊ The recovery of ordinary inventory losses associated with the sale from stock of defense articles that are being stored at the expense of the purchaser
  - ◊ Unless the President determines it to be in the national interest, payment shall be made in advance of delivery or performance [Section 21, AECA]

There are situations where certain costs may be waived or reduced. Many of these are addressed later in this chapter under the heading, “Additional Provisions Relating to North Atlantic Treaty Organization (NATO), NATO Members, Japan, Australia, Republic of Korea, New Zealand, Israel, and Other Eligible Countries.”

### **Procurement Sales**

The USG may procure defense articles and services for sale to an FMS purchaser if the purchaser provides the USG with a dependable undertaking to pay the full amount of such contract, which will insure the USG against any loss and make funds available in such amounts and at such times as may be required by the contract (and to cover any damages/termination costs). Such foreign purchaser payments shall be received in advance of the time any payments are due by the USG. Interest shall be charged on the net amount by which such foreign purchaser (country or international organization) is in arrears under all of its outstanding unliquidated dependable undertakings, considered collectively [Section 22, AECA].

### **Credit Sales**

The USG is authorized to finance procurements of defense articles, defense services, and design and construction services by friendly foreign countries and international organizations [Section 23, AECA]. This financial assistance is an FMFP grant or loan. Most FMFP has been grant assistance requiring no repayment.

Repayment of loans in U.S. dollars is required within twelve years, unless a longer period is authorized by statute [Section 23(b), AECA]. The FMFP loans authorized under Section 23, AECA, shall be provided at rates of interest that are not less than the current average market yield on outstanding marketable obligations of the U.S. of comparable maturities [Section 31(c), AECA].

### **Foreign Military Construction Sales**

The President may sell design and construction services using the FMS process to any eligible foreign country or international organization if such country or international organization agrees to pay, in U.S. dollars, the full cost to the USG of furnishing such services. Payment shall be made to the USG in advance of the performance of such services [Section 29, AECA].



## **Sales to United States Companies**

The President may sell defense articles, e.g., government-furnished equipment (GFE) or government-furnished material (GFM) to a U.S. company for incorporation into end items (and for concurrent or follow-on support) that are, in turn, to be sold commercially DCS to a foreign country or international organization under Section 38, AECA, and to sell defense services in support of such sales of defense articles. Such services may be performed only if the following is true:

- The end item to which the articles apply is procured for the armed forces of a foreign country or international organization.
- The articles would be supplied to the prime contractor as GFE or GFM if they were being procured for the use of the U.S. armed forces.
- The articles and services are available only from USG sources or are not available to the prime contractor directly from U.S. commercial sources at such times as may be required to meet the prime contractor's delivery schedule. [Section 30, AECA]

## **Direct Commercial Sales**

The President (delegated to the Secretary of State) is authorized to control the DCS of U.S. defense articles and services by U.S. industry [Section 38(a)(1), AECA]. Procedures for U.S. industry to obtain export licenses for DCS are codified by the DOS within the ITAR, 22 C.F.R. 120-130. Section 121.1, ITAR, is the U.S. Munitions List (USML), which defines, by category, what constitutes a defense article, service, and related technical data. This arms control authority by the President is similarly extended to include the import defense articles and services and has been delegated to the attorney-general. Chapter 7 of this text, "Technology Transfer, Export Controls, and International Programs Security," provides further discussion on the export licensing of DCS.

## **DRAWDOWN AUTHORITIES**

### **Special Emergency Drawdown Authority**

If the President determines and reports to Congress that an unforeseen military emergency exists that requires immediate military assistance to a foreign country or international organization and that such emergency requirement cannot be met under the AECA or any other authority, the President may direct the drawdown of defense articles, services, or training from the DOD of an aggregate value not to exceed \$100 million in any fiscal year [Section 506(a)(1), FAA].

A second special drawdown authority of \$200 million in defense articles, services, and training for each fiscal year has also been established [Section 506(a)(2), FAA]. The authorized purposes for the latter drawdown authority include counternarcotics, antiterrorism, nonproliferation, disaster relief, migration and refugee assistance, and support of Vietnam War era missing-in-action/prisoners-of-war (MIA/POW) location and repatriation efforts. Limitation imposed on this drawdown include not more than \$75 million may come from DOD resources, not more than \$75 million may be provided in support of counter-narcotics, and not more than \$15 million may be provided in support of Vietnam War era MIA/POW location and repatriation. While all Section 506 drawdown actions require notification to Congress, drawdowns in support of counternarcotics or antiterrorism assistance require at least fifteen days advance notification before taking place.

Section 576, P.L. 105-118, amended the FAA to provide the authority for the use of commercial transportation and related services acquired by contract for the drawdown if the contracted services cost less than the cost of using USG resources to complete the drawdown [Section 506(c), FAA]. The use of commercial rather than USG transportation assets to complete the drawdown is to be reported to Congress to include any cost savings realized [Section 506(b)(2), FAA].

Section 506(c), FAA, provides authority for appropriations to reimburse the DOD and the military departments (MILDEPs) for costs in providing emergency drawdown defense articles, services, and training; however, this authority is rarely provided. Likewise, because of the negative impact of this type of drawdown on the MILDEPs, it has become a tool of last resort and reluctantly directed.

### **Peacekeeping Emergencies**

The drawdown of commodities and services is authorized from the inventory and resources of any agency of the USG of an aggregate value not to exceed \$25 million in any FY to meet an unforeseen emergency requirement for peacekeeping operations. The authority for reimbursement is rarely provided [Section 552(c)(2), FAA].

### **War Crimes Tribunals Drawdown**

The annual appropriations act authorizes the drawdown of up to \$30 million in commodities and services to support the United Nations War Crimes Tribunal, established with regard to the former Yugoslavia for the just resolution of charges of genocide or other violations of international humanitarian law. After completing a congressional notification, similar UN Security Council-established or authorized tribunals or commissions are also eligible for this drawdown authority [Section 7047, P.L. 115-141].

### **Drawdown Policy and Procedures**

The following general guidelines and policies have evolved for execution of drawdowns:

- Equipment to be provided must be physically on-hand (excess or non-excess).
- No new contracting is authorized to support drawdowns (may use commercial contracts for transportation services only if scope of existing contracts encompass drawdown requirement).
- Services must reimburse the Defense Logistics Agency (DLA) for any working capital fund material or services provided in support of drawdowns.
- Service tasked with providing specific equipment will fund transportation to final destination.
- Airlift and sealift can only be provided using military air or sealift (MILAIR/MILSEA) or appropriate time-charter contracts if the scope of existing contracts cover the proposed use.
- Where possible, complete support packages are normally provided for any major end items.

In general, equipment and spare parts now being provided under drawdown are increasingly coming from units, prepositioned equipment storage, or operational logistics stocks. Residual equipment that is excess and can be released without adverse operational impact is increasingly in very poor condition requiring significant repair or refurbishment. Where such repair can be legally performed under drawdown authority, it only adds to the DOD operational and maintenance (O&M) funding impact on the services in supporting the drawdown effort.

Drawdowns do not provide additional budget authority to the DOD. The military services (MILSVCs) are required to use currently allocated O&M funds to provide training services, packing, crating, and handling (PC&H) services, transportation services, repair/refurbishment services, and the provision of spare parts or support services from the working capital fund-operated DLA activities.

## **SPECIAL PRESIDENTIAL WAIVER AUTHORITY**

In accordance with Section 614, FAA, the President may authorize the furnishing of limited assistance and sales, without regard to any other laws, when determined and reported to Congress that to do so is important to U.S. national security interests. In addition, the President may make

sales, extend credit, and issue guarantees under the AECA without regard to any other laws when determined and reported to Congress that to do so is vital to U.S. national security interests. The following limitations apply in a given FY:

- The use of up to \$250 million of funds made available under the FAA (grants) or the AECA (grants or loans), or \$100 million of foreign currencies accruing under the FAA or any other law. However, not more than \$50 million of the \$250 million limitation may be allocated to any one country, unless such country is a victim of active aggression
- Not more than \$750 million in sales under the AECA
- Not more than \$500 million of the aggregate limitation of \$1 billion (i.e., \$250 million assistance and \$750 million sales) may be allocated to any one country

## CONGRESSIONAL REVIEW OF PROPOSED TRANSFERS

### Foreign Military Sales

The President (delegated to the Secretary of Defense) shall submit a numbered certification (with justification, impact, etc.) to the Congress before issuing a foreign military sale (FMS) letter of offer and acceptance (LOA) to sell defense articles or services for \$50 million or more, or any design and construction services for \$200 million or more, or major defense equipment (MDE) for \$14 million or more. The higher dollar thresholds for notification for NATO countries, Japan, Australia, Republic of Korea, Israel, and New Zealand are \$100 million, \$300 million, and \$25 million respectively. Approval for FMS must be provided by the DOS to the DOD prior to any Congressional notification. Once a potential FMS is approved by the DOS, the Defense Security Cooperation Agency (DSCA) provides the official notification to Congress. The DSCA FMS notifications are generally announced and published almost immediately on the DSCA website and later in the Federal Register.

MDE includes any item of significant military equipment (SME) on the USML having a nonrecurring research and development cost of more than \$50 million or a total production cost of more than \$200 million. SME is defined in Section 47(9), AECA, as a defense article identified on the USML for which special export controls are warranted because of the capacity of such articles for substantial military utility or capability. The USML is required by Section 38, AECA, and is maintained by the DOS within Section 121.1 of the ITAR, which can be viewed at [https://www.pmdtc.state.gov/?id=ddtc\\_kb\\_article\\_page&sys\\_id=24d528fddbfc930044f9ff621f961987](https://www.pmdtc.state.gov/?id=ddtc_kb_article_page&sys_id=24d528fddbfc930044f9ff621f961987).

The LOA shall not be issued if Congress, within thirty calendar days after receiving such certification, adopts a joint resolution stating it objects to the proposed sale. However, such action by Congress does not apply if the President states in his certification that an emergency exists that requires such sale in the national security interests of the U.S. [Section 36(b)(1), AECA].

An exception to the above thirty-day procedure exists for NATO, and NATO member countries, Australia, Japan, Republic of Korea, Israel, and New Zealand. NATO and NATO member countries have a formal statutory notification period of fifteen days.

### Direct Commercial Sales

Thirty days before the issuance of any export license for MDE in excess of \$14 million or other defense articles or services in excess of \$50 million, the President (delegated to the Secretary of State) shall submit a numbered certification to the Congress. Although DCS is managed day-to-day by PM/DDTC, the Assistant Secretary of State for Legislative Affairs provides the congressional notifications required for DCS. These notifications are to be published in the Federal Register. Dollar thresholds for notification for NATO countries, Japan, Australia, Republic of Korea, Israel, and New Zealand are \$25 million and \$100 million, respectively. Unless the certification states that an emergency exists,

an export license for the items shall not be issued within a thirty calendar day Congressional review period. Further, such license shall not be issued if the Congress, within such thirty-day period, adopts a joint resolution objecting to the export. The congressional review period for NATO, NATO members, Australia, Japan, Republic of Korea, Israel, and New Zealand is fifteen days as in the FMS process [Section 36(c), AECA].

The licensing of any USML category I small arms (weapons of .50 caliber or less ) valued at \$1 million or more for any country must be also be notified to Congress and is subject to the fifteen- or thirty-day joint resolution objection process [Section 36(c), AECA]. It should be noted that this small threshold for arms notification does not apply to the FMS process.

Normally, it is the country's decision to purchase FMS or DCS. However, the President (delegated to the Secretary of Defense) may require that any defense article or service be sold under FMS in lieu of commercial export (DCS) channels [SAMM, C4.3.5]. The President may also require that persons engaged in commercial negotiation for the export of defense articles and services keep the President fully and currently informed of the progress and future prospects of such negotiations [Section 38(a)(3), AECA].

### **Third-Party Transfers**

The recipient country, as a condition of sale, must agree not to transfer title or possession of defense articles or services (including training) to another country, unless the consent of the President has first been obtained. This authority to transfer is normally provided in writing from the DOS.

Furthermore, the Congress has a thirty calendar day review period (fifteen days for NATO, NATO members, Japan, Australia, Republic of Korea, Israel, and New Zealand) for proposed third-party transfers of defense articles or services valued (in terms of its original acquisition cost) at \$14 million or more for MDE or \$50 million or more for other defense articles, services, or training. The dollar thresholds for notification for NATO countries, Japan, Australia, Republic of Korea, Israel, and New Zealand are \$25 million and \$100 million respectively. Congress can adopt a joint resolution of disapproval of the proposed transfer during the fifteen- or thirty-day review period. [Section 3(d), AECA]

The following are exceptions to this congressional review process for third-party transfers:

- The President states in the certification submitted that an emergency exists, which requires that consent to the proposed transfer becomes effective immediately
- Transfers of maintenance, repairs, or overhaul defense services or repair parts if such transfers will not result in any increase in military capabilities
- Temporary transfers of defense articles for the sole purpose of receiving maintenance, repair, or overhaul
- Cooperative cross-servicing arrangements or lead-nation procurement among NATO members. Note, however, that Section 36(b) notifications must identify the transferees on whose behalf the lead-nation procurement is proposed

### **Leases of Defense Articles**

The President may lease defense articles in the stocks of the DOD to an eligible foreign country or international organization if the following occurs:

- He determines there are compelling foreign policy and national security reasons for providing such articles on a lease basis rather than on a sales basis under the AECA.
- He determines that the articles are not for the time needed for public use.
- The country or international organization has agreed to pay, in U.S. dollars, all costs

incurred by the USG in leasing such articles, including reimbursement for depreciation of such articles while leased, and the replacement cost if the articles are lost or destroyed while leased. [Sections 61-64, AECA]

The above cost reimbursement requirements do not apply to leases entered into for purposes of cooperative research or development, military exercises, communications, or electronics interface projects.

With a Presidential national security interest determination, the requirement for reimbursement of depreciation of any leased article that has passed three-quarters of its normal service life can also be waived. This waiver authority cannot be delegated below the Secretary of Defense and is to be used sparingly [Section 61(a), AECA].

Replacement cost of any leased item lost or destroyed would be either of the following:

- The replacement cost of the item if the USG intends to replace the item
- The actual value (less any depreciation in the value) if the USG does not intend to replace the item [Section 61(a)(4), AECA]

Each lease agreement shall be for a fixed duration, not to exceed five years, and shall provide that, at any time during the duration of the lease, the President may terminate the lease and require the immediate return of the leased articles. The maximum five-year period for a lease would begin at the time of delivery to the country if the item being leased requires an extended modification or overhaul period exceeding six months before delivery. An extension of a lease is permitted but must be reported to Congress as described below.

Defense articles in the stocks of the DOD may be leased or loaned to a foreign country or international organization under the authority of Chapter 6, AECA, or Part II, Chapter 2, FAA. Excess defense property may not be leased to a foreign country or international organization under the authority of 10 U.S.C. 2667.

According to 22 U.S.C. 2796b, Congress must be given a thirty day advance notification for any lease for a period of one year or longer. Like FMS, the Presidential decision authority to lease has been delegated to the DOS, with subsequent congressional notifications provided by DSCA. Further, if the lease is for one year or longer, and is valued at \$14 million or more for MDE or \$50 million or more for other defense articles, Congress may adopt a joint resolution during the thirty-day notification/review period prohibiting the proposed lease. The notification thresholds for NATO countries, Japan, Australia, Republic of Korea, Israel, and New Zealand are higher: \$25 million for MDE and \$100 million for other defense articles.

The congressional advance notification period for leases to NATO, NATO members, Japan, Australia, Republic of Korea, Israel, and New Zealand is fifteen days. Both the fifteen- and thirty-day periods can be waived by the President in the event of an emergency.

### **Congressional Joint Resolutions**

As just described, the AECA contains provisions for the congressional rejection of proposals for FMS and DCS, third-country transfers, and leases of U.S. defense articles. The mechanism for such congressional action is a joint resolution. While a joint resolution can be a statement of approval or disapproval, in this context, it will most likely be a statement of disapproval of a proposed sale, transfer, or lease, which is passed by simple majority votes in both the Senate and the House of Representatives. For the resolution to become a law or statute, the President must approve and sign. If the President is unlikely to approve and sign, it may be returned to Congress to override the presidential veto. Unless Congress is able to override the President's veto by obtaining a two-thirds majority vote in each house

in support of the original resolution of rejection, the sale, transfer, or lease will be permitted. Should Congress, however, muster sufficient votes to override the President's veto, the proposed sale, transfer, or lease would not be authorized.

### **Other Reports to Congress**

There are numerous other reports provided to Congress concerning SA programs. The following list includes some of these reports. A comprehensive listing of SA reports submitted to Congress by DOD elements can be found in DSCA 5105.38-M, SAMM, appendix 5, "Congressional Reports and DSCA Reports Control System."

### **Quarterly Reports to Congress**

- A listing of all unaccepted or not canceled LOAs by country or international organization for MDE valued at \$1 million or more [Section 36(a)(1), AECA]
- A listing of all LOAs accepted together with a total value of sales to each country or international organization during the fiscal year [Section 36(a)(2), AECA]
- The cumulative dollar value of sales credit agreements during the fiscal year [Section 36(a)(3), AECA]
- A listing of all commercial export licenses issued during the fiscal year for MDE valued at \$1 million or more to also include USML category I small arms [Section 36(a)(4), AECA]
- A listing of all SA surveys authorized during the preceding quarter; Congress shall be authorized access to such survey reports upon request [Section 26, AECA]

### **Annual Reports to Congress**

#### ***Arms Sales Proposal***

No later than 1 February of each year, the President shall transmit to Congress the annual "Arms Sales Proposal" covering all sales, including FMS and DCS, of major weapons or weapons-related defense equipment for \$7 million or more or of any other weapons or weapons-related defense equipment for \$25 million or more, which are considered eligible for approval during the current calendar year. This report, commonly referred to as the Javits Report after Senator Jacob Javits (D-NY), is generally classified and required by Section 25(a) of the AECA. By policy, no sales or licensing notifications will take place until the Javits Report is received by and briefed to Congress, which must be in session to receive the report.

#### ***End-Use Monitoring***

A report to Congress regarding the implementation of end-use monitoring (EUM), to include costs and numbers of personnel associated with the program, shall be included with the annual Congressional Budget Justification for Foreign Operations, FY 20XX, submitted not later than 1 February to Congress [Section 634, FAA].

#### ***Anticipated Excess Defense Articles***

No later than 1 February, the President shall transmit to Congress an annual report listing weapons systems that are SME, and numbers thereof, that are believed likely to become available for transfer as EDA during the next twelve months [Section 25(a)(13), AECA]. This report is submitted concurrent with the Javits Report.

## ***Agent Fees***

The Secretary of State shall require reporting on political contributions, gifts, commissions, and fees paid, offered, or agreed to be paid in connection with FMS or DCS; such information shall be made available to Congress upon request [Section 39, AECA].

## ***Foreign Military Training Report***

Prior to 31 January of each year, a joint Secretary of State and Secretary of Defense report is to be submitted to Congress that includes all training provided to foreign military personnel by the Department of Defense and Department of State during the previous fiscal year and proposed training for the current fiscal year. This report is to include a foreign policy justification and purpose plus the number of foreign personnel trained, their units and location for each training activity. In addition, for each country, it is to include an aggregate number of students and costs. With respect to U.S. personnel, the operational benefits to the U.S. and U.S. military units involved in each training activity. This reporting requirement does not apply to any NATO countries, Australia, Japan or New Zealand unless specifically requested by one of the appropriate congressional committees and will be notified in writing ninety calendar days in advance for a specific country [Section 656, FAA].

## ***Anti-Boycott Determination***

The Anti-Economic Discrimination Act of 1994 [Section 564, P.L. 103-236] states that, effective 30 April 1995, the sale or lease of any defense article or service is prohibited to any country or international organization that maintains a policy or practice of, “sending letters to U.S. firms requesting compliance with, or soliciting information regarding compliance with, the the Arab League primary or secondary boycott of Israel.”

The President can annually waive this transfer prohibition for one year on the basis of national interest and promotion of U.S. objectives to eliminate the Arab boycott, or on the basis of national security interest. On 24 April 1997, the President delegated the annual report and waiver authority to the Secretary of State.

## **ADDITIONAL PROVISIONS RELATING TO NATO, NATO MEMBERS, JAPAN, AUSTRALIA, NEW ZEALAND, REPUBLIC OF KOREA, ISRAEL, AND OTHER ELIGIBLE COUNTRIES**

### **Reduction or Waiver of Nonrecurring Cost Charges**

The President may reduce or waive nonrecurring cost (NRC) charges required by Section 21(e)(1)(B), AECA, (e.g., a proportionate amount of any NRC of research, development, and production of MDE) for particular sales that, if made, would significantly advance USG interests in NATO standardization; standardization with Japan, Australia, or New Zealand in furtherance of the mutual defense treaties between the U.S. and those countries; or foreign procurement in the U.S. under coproduction arrangements [Section 21(e)(2)(A), AECA].

NRC for research and development (R&D) may also be waived for an FMS sale to any eligible country if the following applies:

- Applying the cost would result in the loss of a sale
- The waived costs would be substantially offset in lower realized unit cost to the USG through increased production resulting from the FMS [Section 21(e)(2)(B), AECA]

Further, the President may waive the charges for administrative services under Section 21(e)(1)(A), AECA, in connection with any sale to the NATO Support and Procurement Organization and its executive agencies in support of a weapon system partnership agreement or NATO/SHAPE project [Section 21(e)(3), AECA].

## **Cooperative Furnishing of Training**

The President may enter into NATO standardization agreements and may enter into similar agreements with Japan, Australia, New Zealand, and major non-NATO allies for the cooperative furnishing of training on a bilateral or multilateral basis, if such agreement is based on reciprocity. Such agreements shall include reimbursement for all direct costs but may exclude reimbursement for indirect costs, administrative surcharges, and costs of billeting of trainees [Section 21(g), AECA].

## **Major Non-North Atlantic Treaty Organization Allies**

For many years, 10 U.S.C. 2350a(i)(3) identified Australia, Egypt, Israel, Japan, and Republic of Korea as major non-NATO allies (MNNA) as a DOD authority for cooperative R&D. In 1996, P.L. 104-164 amended the FAA to add New Zealand and, perhaps, more importantly, provided the President with authority to designate a country as a MNNA for the purposes of the FAA and the AECA, or terminate such a designation, with a thirty-day advance notification to Congress [Section 517, FAA]. Subsequently, Argentina, Jordan, Bahrain, Kuwait, Morocco, Pakistan, Philippines, Thailand, and Afghanistan have been added using the notification procedure. The country of Taiwan is also to be treated as though it is a MNNA [Section 1206, P.L. 107-228]. The statutory benefits in the FAA and the AECA of being designated a MNNA include eligibility for the following:

- Priority delivery of EDA to NATO countries on the southern and southeastern flank, to major non-NATO allies on NATO's southern and southeastern flanks, and the Philippines [Section 516 (c)(2), FAA]
- Stockpiling of U.S. defense articles [Section 514 (c)(2), FAA]
- Purchase of depleted uranium anti-tank rounds [Section 620GJ, FAA]
- With a reciprocity agreement, be exempted of indirect costs, administrative charges, and billeting costs for training [Section 21(g), AECA]
- Use of any allocated FMFP funding for commercial leasing of defense articles not including MDE (other than helicopters and aircraft having possible civilian application) [Section 7068, P.L. 113-235]

## **Incremental Tuition Pricing for International Military Education and Training—Designated Countries**

The President is authorized to charge only those additional costs incurred by the USG in furnishing training assistance to countries concurrently receiving IMET. While section 546(a), FAA, prohibits the high-income countries of Austria, Finland, Republic of Korea, Singapore, and Spain from receiving IMET assistance, they remain eligible for FMS-incremental tuition prices [Section 21(a)(1)(C), AECA].

Israel, though not an IMET recipient, is authorized the IMET tuition price for training when using FMFP [Section 541(b), FAA].

## **Contract Administration Services and Catalog Data and Services**

The President is authorized to provide (without charge) quality assurance, inspection, contract administration services (CAS), and contract audit defense services in connection with procurements by, or on behalf of, a NATO member or the NATO infrastructure program, if such government provides such services in accordance with an agreement on a reciprocal basis (without charge) to the USG. A similar provision applies with respect to cataloging data and cataloging services [Section 21(h), AECA]. Effective 14 November 2005, these authorities were extended to Australia, Japan, Republic of Korea, New Zealand, and Israel [Section 534(l)(1), P.L. 109-102].



## **Section 27, Arms Export Control Act, Cooperative Projects**

Under a cooperative project pursuant to Section 27, AECA, the President may enter into a written agreement with NATO, NATO members, and other eligible countries for a jointly managed program of cooperative research, development, test, and evaluation (RDT&E) and joint production, including follow-on support or concurrent production. Congress must receive a certification not less than thirty days prior to USG signature of a proposed cooperative project agreement [Section 27, AECA]. For additional information on international armaments cooperation, see Chapter 13 of this text, “Systems Acquisition and International Armaments Cooperation.”

### **SPECIAL DEFENSE ACQUISITION FUND**

The Special Defense Acquisition Fund (SDAF) was authorized by Section 108(a), International Security and Development Cooperation Act of 1981, P.L. 97-113, 29 December 1981, to provide the DOD the authority to procure and stock defense articles and services in anticipation of future foreign government military requirements. By permitting such advance procurements, the SDAF enabled the DOD to reduce customer waiting times for selected items, improve its response time, emergency foreign requirements, and reduce the need for meeting normal FMS requirements through drawdowns or diversions of defense equipment from U.S. stocks or new production.

The SDAF was established as a revolving fund which was initially capitalized through three sources:

1. Collections from FMS sales of DOD stocks not intended to be replaced
2. Asset use collections and contractor payments for the use of U.S.-owned facilities equipment
3. Recouped non-recurring research, development, and production charges from both FMS and DCS

By 1987, the SDAF reached its maximum authorized capitalization level of \$1.07 billion [10 U.S.C. 114(c)], which represented a total of the value of articles on hand and on order as well as all unobligated funds. Although appropriated funds were authorized, no appropriations were necessary, as the fund was maintained on a self-supporting basis, with Congress annually providing an obligational authority (OA) for SDAF expenditures. DSCA served as the overall DOD manager of the SDAF, while the MILDEPs retained custody of those articles awaiting sale.

The SDAF provided a very viable method for effecting advance procurements to reduce customer waiting time as well as a source of urgently needed articles. Operation Desert Storm forces were able to use over \$130 million of articles from the SDAF stocks, to include AIM-9, STINGER, and TOW missiles, plus various types of vehicles, ammunition, night vision devices, and communications equipment.

Although the SDAF was widely viewed as an important SA program, a major DOD budget tightening effort in 1991 led to the decision in March 1993 to close down the program. For FY 1994, no new budget authority was sought for the SDAF, although Congress agreed to extend \$160 million in OA into FY 1994 from the \$225 million FY 1993 budget authority. For FY 1995, \$140 million in OA was carried over from FY 1994, plus an added OA of \$20 million extending through FY 1998 for the purpose of closing the SDAF. Section 536, P.L. 105-118, extended the OA to FY 2000. Collections in FY 1994 and thereafter from SDAF sales in excess of the OA provided in prior year appropriations acts must be deposited in the miscellaneous receipts account of the U.S. Treasury. With SDAF drawing to a close, Section 145, P.L. 104-164, repealed a variety of recurring status reports required by Congress under Sections 51 and 53, AECA. See DSCA 5105.38-M, SAMM, C11.9, for further information.

At the Administration’s repeated request during the years after 9/11, SDAF was reactivated in FY 2012 authorizing the use of \$100 million existing FMS administrative funding to recapitalize

the existing AECA SDAF authority. Section 1202, P.L. 114-328 increased SDAF to \$2.5 million and Section 7035(b)(5), P.L. 116-94 extended its authority until 30 September 2022. At least 20 percent of these funds are to be used to procure precision-guided munitions [Section 1203, P.L. 115-91].

## **EXCESS DEFENSE ARTICLES**

The term Excess Defense Articles (EDA) is applied collectively to U.S. defense articles that are no longer needed by the U.S. armed forces. Such defense articles may be made available for sale under the FMS program [Section 21, AECA] or as grant (no cost) transfers to eligible foreign countries under the provisions of Section 516, FAA, which are described below.

The following formal definition of EDA is provided in Section 644(g), FAA and establishes the guidelines for determining which defense articles may be treated as excess equipment:

EDA means the quantity of defense articles (other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors) owned by the USG, and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all DOD Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations under this Act.

The NDAA for FY 1993 amended 10 U.S.C. by adding a new Section 2552 that restricts the sale or transfer of excess construction or fire equipment. Such transfers or military sales in the future may only occur if either of the following conditions apply:

- No department or agency of the USG (excluding the DOD), and no state, and no other person or entity eligible to receive excess or surplus property submits a request for such equipment to the DLA Disposition Services (formerly known as the Defense Reutilization and Marketing Service [DRMS]) during the period for which such a request may be accepted by this agency.
- The President determines that such a transfer is necessary in order to respond to an emergency for which the equipment is especially suited. [Section 4304(a), P.L. 102-484]

For the purpose of this new provision, the term “construction” or “fire equipment” includes the following:

Tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, pumpers, fuel and water tankers, crash trucks, utility vans, rescue trucks, ambulances, hook and ladder units, compressors, and miscellaneous fire fighting equipment [Section 4304(c), P.L. 102-484]

The intent of this change is to permit other federal agencies and states the opportunity to request and receive such items before they are made available for sale or grant transfer to foreign countries or international organizations. Although this provision applies to construction equipment as well as fire equipment, the earlier exclusion of construction equipment from the definition of excess defense equipment essentially limits the defense authorization act’s restrictions to fire equipment.

As defense articles become excess, they are screened to determine whether they may be sold to eligible countries through FMS procedures or transferred as grant-provided items under the various provisions of the FAA, as discussed below. The ultimate responsibility for determining if an item should be identified as excess rests with the MILDEP having control over the item. MILDEP recommendations for the allocation of EDA to specific countries are reviewed and staffed by an EDA coordinating

committee, chaired by DSCA, and comprised of representatives from the DOS, OSD, Joint Staff, commerce department, and MILDEPs. Once a decision is made to furnish EDA to a particular country, DSCA prepares any required congressional notification.

### **Sales of Excess Defense Articles**

EDA sold through FMS procedures are priced on the basis of their condition as described in DOD 7000.14-R, Financial Management Regulation (FMR), Volume 15. Prices range from a high of 50 percent of the original acquisition value for new equipment, to a low of 5 percent for equipment in need of repairs. Before allowing the FMS sale of EDA, the President shall determine that the sale will not have an adverse impact on the U.S. technology and industrial base and, particularly, will not reduce the opportunities of the U.S. technology and industrial base to sell new or used equipment to the recipient country [Section 21(k), AECA]. Certain stipulations may also be put in place before excess defense articles are transferred by sale. For example, NDAA FY 2018 dictated that excess high mobility multipurpose wheeled vehicles must receive the same new, modernized powertrain and a modernized, armored or armor-capable compartment restored to like-new condition prior to transfer by sale or grant [Section 1276, P.L. 115-91]. Charges must be levied on such sales as well as on grant transfers (with certain exceptions) for the costs of Packing, Crating, Handling and Transportation (PCH&T). Charges for any requested spares support, training, repair work, or upgrades will also be levied.

### **Grant Transfer of Excess Defense Articles**

P.L. 104-164, 21 July 96, simplified the then existing cumbersome grant EDA program by combining the five different EDA authorities into one. The new authority, a revised Section 516, FAA, authorizes the President to transfer EDA on a grant basis to countries for which receipt of such articles was justified pursuant to the annual Congressional Budget Justification for Foreign Operations, FY 20XX, for counternarcotics programs submitted under Section 634, FAA, or for which receipt of such articles was separately justified to Congress, for the FY in which the transfer is authorized. Beginning with FY 2008, the eligible countries are annually identified to Congress within a limited distribution letter provided by DSCA after coordination with State Department Bureau of Political-Military Affairs, Office of Regional Security and Arms Transfers (PM/RSAT). It must be noted that because a country might be eligible for EDA does not mean any EDA is available for transfer or that any available EDA can be transferred.

Grant EDA transfer limitations include the following:

- Item must be drawn from existing DOD stocks.
- No DOD procurement funds are to be used during the transfer.
- Transfer has no adverse impact on U.S. military readiness.
- Transfer is preferable to a transfer on a sales basis, after taking into account the potential proceeds from, and likelihood of, such sales and comparative foreign policy benefits that may accrue to the U.S. as the result of a transfer on either a grant or sales basis.
- Transfer has no adverse impact on U.S. technology and industrial base, and particularly, will not reduce the opportunity for the sale of a new or used article.
- Transfer is consistent U.S. policy for the eastern Mediterranean (Turkey, Greece, and Cyprus) established under Section 620C, FAA. [Section 516(b), FAA]

DOD funds may not be used for PCH&T during a grant EDA transfer, except when the following is true:

- Transfer is determined to be in the national interest of the U.S.

- Recipient is a developing country receiving less than \$10 million in IMET and FMFP during the FY of the transfer
- Total transfer does not exceed 50,000 pounds
- Transfer is accomplished on a space-available basis [Section 516(e)(2), FAA]

Congressional notification of thirty days prior to the transfer of EDA, whether by sale or grant, is required if the item is categorized as SME or valued (original acquisition cost) at \$7 million or more [Section 516(f)(1), FAA]. Additionally, beginning in FY 2015, Section 516(g)(1) of the FAA was amended so no more than \$500 million (current value) in defense articles may be transferred in one FY as grant EDA, P.L. 113-276, 18 December 2014. Any authorization for the grant EDA transfer of naval vessels generally exempts the value of the transfer from this annual ceiling.

### **Grant Excess Defense Articles for NATO, Major Non-NATO Allies, and Others**

A priority in delivery of grant EDA will be given to NATO member countries on the southern and southeastern flank (Portugal, Greece, and Turkey) and to major non-NATO allies (Israel, Egypt, and Jordan) on the southern and southeastern flanks of NATO [Section 516(c)(2), FAA]. The Philippines was legislatively included in this priority group [Section 1234, P.L. 107-228].

After priority in delivery of grant EDA to NATO countries and major non-NATO allies on the southern and southeastern flanks, priority in delivery of grant EDA will be afforded next to countries eligible for assistance authorized by the NATO Participation Act (NPA) of 1994 [Section 609, P.L. 104-208]. Initially, the latter group of eligible countries included Poland, Hungary, the Czech Republic, and Slovenia [Section 606, P.L. 104-208]. In July 1997, an invitation for NATO membership was extended to Poland, Hungary, and the Czech Republic. FY 1999 legislation added Romania, Estonia, Latvia, Lithuania, and Bulgaria to the NPA eligible country list [Section 2703, P.L. 105-277]. Section 4 of the Gerald B.H. Solomon Freedom Consolidation Act of 2002, P.L. 107-187, 10 June 2002, designated Slovakia as eligible to receive assistance under the NPA. This same act also endorsed the admission of the seven countries into the NATO Alliance. An invitation was extended in November 2002 to these same countries for entry into NATO in May 2004. The Senate promptly ratified the April 2003 Presidential proposal for these countries.

The NATO Freedom Consolidation Act of 2007, P.L. 110-17, 9 April 2007, Section 4(b)(1), added the non-NATO countries of Albania, Croatia, Georgia, Macedonia [Former Yugoslav Republic of Macedonia (FYROM)], and the Ukraine to the NPA EDA priority delivery list. This same legislation stated the sense of Congress that these countries be admitted to NATO as they become willing and able with a clear national intent to meet the responsibilities of membership.

### **War Reserve Stockpiles for Allies**

Section 514(b) of the FAA sets an annual ceiling on the value of additions to stockpiles of U.S. defense articles located abroad that may be set aside, earmarked, reserved, or otherwise intended for use as war reserve stocks for allied or other foreign countries (other than those for NATO purposes or in the implementation of agreements with Israel). From 1979 until 1988, the Republic of Korea was the only country outside of NATO where such war reserves stockpiles for allies (WRSA) were authorized to be maintained. For FY 1988, Congress approved an administration request to establish a new stockpile in Thailand, and \$10 million in defense articles was authorized to be transferred for this purpose. Congress authorized \$100 million in defense articles to establish a stockpile in Israel in FY 1990. For FY 1991, Congress authorized \$378 million in stockpile additions to establish stockpiles in the major non-NATO allies' countries, of which not less than \$300 million was designated for stockpiles in Israel, with the remainder divided between the Republic of Korea (\$68 million) and Thailand (\$10 million). For FY 1993, Congress authorized a total of \$389 million worth of U.S. defense equipment to be transferred to the WRSA in FY 1993; not less than \$200 million was designated for stockpiles in

Israel, and up to \$189 million was available for stockpiles in the Republic of Korea [Section 569, P.L. 102-391].

Beginning in FY 1996, the President can also designate any country for such stockpiling [Section 514(c)(2), FAA] with a fifteen-day notification to Congress. However, the value of the stocks to be set aside each year for any country (other than NATO or Israel) must be approved by annual SA authorizing legislation [Section 514(b)(1), FAA].

It should be understood that no new procurements are involved in establishing and maintaining these stockpiles. Rather, the defense articles used to establish a stockpile and the annual authorized additions represent defense articles that are already within the stocks of the U.S. Armed Forces. The stockpile authorizing legislation simply identifies a level of value for which a stockpile may be established or increased. Moreover, the defense articles in these stockpiles remain U.S. military service-owned and controlled stocks. As the term “war reserve” implies, these stocks are intended for emergency use only. Any future transfer of title/control of any of these stocks to an allied or friendly country would require full reimbursement by the purchaser under FMS procedures, or from military assistance funds made available for that purpose under SA legislation prevailing at the time the transfer was made. An example of the requirements to transfer WRSA material is illustrated in Section 509(a) (1) of the Foreign Relations Authorization Act, FY 1994 and FY 1995. [P.L. 103-236] The Secretary of Defense, in coordination with the Secretary of State, was permitted to transfer obsolete or surplus items in the DOD inventory to the Republic of Korea, which are in the WRSA for the Republic of Korea in return for concessions by the Republic of Korea. The authority expired on 29 April 1996 and required congressional notification thirty days prior to the transfer, identifying the items transferred and the concessions to be given.

## **COUNTRY-SPECIFIC LEGISLATION**

The statutory provisions which set forth such a prohibition regularly include the required conditions under which a specific ban may be removed. The statutory language usually calls for a determination by the President, and a Presidential report to Congress, that the subject country has taken appropriate action (as required by Congress) to resolve the issue, which led to the original prohibition (e.g., improved its human rights practices, eliminated corruption involving the management of U.S. grant funds, crack down on illicit drug trafficking, etc.).

## **WEAPONS-SPECIFIC LEGISLATION**

A related regulatory provision involves what may be termed weapons-specific legislation. Such statutory provisions serve to restrict the sale of specific types of weapons to particular countries.

### **Depleted Uranium Anti-Tank Shells**

The first such weapons-specific provision was introduced in FY 1987 when Congress placed a ban on the sale of depleted uranium (DU) anti-tank shells to any country other than NATO member countries and the major non-NATO allies. This prohibition has been renewed annually through FY 1995 by Congress. However, in FY 1992, Taiwan was added to the list of exempted countries. FY 1996 legislation did not renew DU round restriction. However, P.L. 104-164 amended the FAA to reflect the DU round sales restriction and permanently exempting the NATO countries, MNNAs, Taiwan, and any country the President determines that such a sale is in the U.S. national security to do so [Section 620J, FAA].

### **STINGER Missiles**

A second weapons-specific statute was introduced in FY 1988 when Congress prohibited the U.S. from selling or otherwise making available STINGER man-portable air defense missiles to any country in the Persian Gulf region, other than Bahrain. This provision had also been renewed annually

by Congress through FY 1999 [Section 530, P.L. 106-113]. However, effective with enactment on 6 October 2000, Section 705, P.L. 106-280, provides an exception to the prohibition. A one-for-one transfer of STINGERS is authorized to any Persian Gulf country if the missile to be replaced is nearing the scheduled expiration of its shelf life. In addition, none of the funds authorized through various SC programs (i.e., Counter-ISIS Train and Equip Fund and Assistance and Sustainment to the Military and National Security Forces of Ukraine) may be used to procure or transfer man-portable air defense systems [Section 9012, 9015, P.L. 115-141].

### **Missile Technology Control Regime**

Another type of armaments regulation was introduced in the NDAA, FY 1991, P.L. 101-510, Section 1703, which added to Chapter 7 of the AECA, entitled, “Control of Missiles and Missile Equipment or Technology.” This legislation reflects the provisions of a 16 April 1987 international statement, referred to as the Missile Technology Control Regime (MTCR), in which seven countries—United States, United Kingdom, Germany, France, Italy, Canada, and Japan—agreed to restrict the international transfer of sensitive missile equipment and technology. The MTCR has since grown to include a membership of 35 countries that have all agreed to limit the export of missiles and related technology that could be used to deliver weapons of mass destruction. Under the provisions of Chapter 7, sanctions may be applied against persons, defined to include individuals, corporations, and countries, regardless of membership in MTCR, which unlawfully transfer such equipment or technology. The sanctions range from the denial of USG contracts relating to missile equipment or technology, the denial of all USG contracts, and the denial of all U.S. export licenses and agreements involving items on the USML. Countries in violation of the MTCR, regardless of being a signatory, may be prohibited from receiving foreign assistance or denied from buying further arms from the U.S. A waiver of these sanctions may be granted if the President determines and notifies Congress that such a waiver is either of the following:

- Essential to the national security of the U.S.
- The offender is a sole source supplier of the product or service, and the product or service is not available from any alternative reliable producer, and the need for the product or service cannot be met in a timely manner by improved manufacturing processes or technological developments [Sections 73(e) and (g), AECA]

### **Chemical and Biological Weapons**

A similar regulatory program involving the transfer of chemical and biological (C/B) weapons was introduced in 1991 with the passage of the Foreign Relations Authorization Act for FYs 1992 and 1993. This legislation added Chapter 8 to the AECA, entitled, “Chemical or Biological Weapons Proliferation,” and mandates a variety of sanctions that the U.S. may take against persons, companies, and countries that unlawfully aid in the transfer of the illegal use of C/B weapons. The sanctions range from the denial of USG procurement contracts for a company that knowingly and materially contributed to the unlawful transfer of C/B weapons/technology to the termination of all U.S. foreign assistance to a government that has used such weapons. A Presidential waiver of such sanctions is authorized when such a waiver is either essential to U.S. national security interests or there has been a fundamental change in the leadership and policies of the foreign government [Section 505(b), P.L. 102-138].

### **Anti-Personnel Land Mines**

In a unique action, the NDAA, FY 1993 established a one-year moratorium on the transfer of anti-personnel land mines [Section 1365, P.L. 102-484]. This legislation was proposed to serve as an interim step in obtaining an international agreement for prohibiting the sale, transfer, or export of these weapons and limiting their use, production, possession, and deployment. This legislation specifically prohibits sales, the financing of sales, commercial exports, the issuing of licenses for the export of such

land mines, or the furnishing of any foreign assistance related to the transfer of such land mines during the period 23 October 1992 through 22 October 1993 [Section 1365(c), P.L. 102-484].

Subsequent annual legislation extended the moratorium to 23 October 2014 [Section 634(j), P.L. 110-161], and provided the permanent authority for the grant transfer of demining equipment available from the USAID or DOS [Section 7054(a), P.L.112-74]. The command-detonated claymore mine has been legislatively defined as not an anti-personnel land mine [Section 580(b)(2), P.L. 104-107]. Of interest are some of the statistics cited in the statute regarding anti-personnel land mines: over forty-four countries are known to manufacture these weapons, and, during the ten years from 1983 through 1992, the DOD approved the sale of 108,852 anti-personnel land mines and the DOS approved ten licenses for the commercial export of such land mines valued at a total of \$980,000 [Section 1423(a)4, P.L. 103-160]. This unilateral U.S. moratorium is seen by Congress to serve as a model for adoption by other countries. Diplomatic efforts are well underway, both through the UN and other multilateral means, to achieve an international use or transfer ban similar to the C/B weapons prohibition.

### **Cluster Munitions**

Beginning in FY 2008, the transfer of cluster munitions or its technology shall not take place unless the sub-munitions, after arming, do not result in more than one percent unexploded ordnance across the range of intended operational environments. The transfer agreement must also specify that the munitions will only be used against clearly defined military targets and will not be used where civilians are known to be present or in areas normally inhabited by civilians [Section 646(b), P.L. 110-161].

### **SUMMARY**

Security assistance, like other USG programs, is governed by U.S. statute. The primary or basic laws are the FAA and the AECA. Funds are appropriated for SA in the annual S/FOAA, FY 20XX, and can be limited in its allocation until specified U.S. national interests are met. While certain SA sales programs (such as foreign military cash sales and commercial sales) do not involve funding authorizations or appropriations, the Congress still has an interest in these programs. It has legislated certain control and reporting measures over the years into the law affecting these as well as programs requiring appropriations. Given the wide variety and complex details of these country-specific and weapons specific provisions, please consult the legislation directly or various legislative sources cited below for additional information.

## REFERENCES

- The Congressional Appropriations Process: An Introduction*. Washington, D.C.: U.S. Government Printing Office, 97–684, updated 8 September 2006.
- The Congressional Budget Process—An Explanation*. Committee on the Budget, U.S. Senate. Washington, D.C.: U.S. Government Printing Office, December 1996.
- Foreign Aid: An Introduction to U.S. Programs and Policy*. Washington, D.C.: Congressional Research Service, 7–5700, 9 April 2009.
- State, Foreign Operations Appropriations: *A Guide to Component Accounts*. Washington, D.C.: Congressional Research Service, 7–5700, 30 March 2009.
- U.S. Congress. Act for International Development, The Foreign Assistance Act (FAA), as amended, <https://www.govinfo.gov>.
- U.S. Congress. International Security Assistance and Arms Export Control Act (AECA), as amended, <https://www.govinfo.gov>.
- U.S. Congress. National Defense Authorization Act (NDAA), <https://www.congress.gov/>.
- U.S. Office of the Federal Register. “National Security Presidential Memorandum on United States Conventional Arms Transfer Policy.” DCPD Number: DCPD201800254, April 19, 2018. <https://www.govinfo.gov/>
- U.S. Department of State. *Congressional Budget Justification for Foreign Operations, FY 20XX*. Washington, D.C., (issued annually).



**Attachment 2-1**  
**U.S. Conventional Arms Transfer Policy (CATP)**

PRESIDENTIAL MEMORANDA

**National Security Presidential Memorandum Regarding U.S.  
Conventional Arms Transfer Policy**

Issued on: April 19, 2018

MEMORANDUM FOR THE VICE PRESIDENT

THE SECRETARY OF STATE

THE SECRETARY OF THE TREASURY

THE SECRETARY OF DEFENSE

THE ATTORNEY GENERAL

THE SECRETARY OF COMMERCE

THE SECRETARY OF ENERGY

THE SECRETARY OF HOMELAND SECURITY

THE ASSISTANT TO THE PRESIDENT AND CHIEF OF STAFF

THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

THE REPRESENTATIVE OF THE UNITED STATES OF AMERICA TO THE UNITED  
NATIONS

THE DIRECTOR OF NATIONAL INTELLIGENCE

THE DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY

THE ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS

THE ASSISTANT TO THE PRESIDENT AND COUNSEL TO THE PRESIDENT

THE ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY AND DIRECTOR OF  
THE NATIONAL ECONOMIC COUNCIL

THE ASSISTANT TO THE PRESIDENT FOR HOMELAND SECURITY AND  
COUNTERTERRORISM

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**U.S. Conventional Arms Transfer Policy (CATP)**

THE ASSISTANT TO THE PRESIDENT FOR TRADE AND INDUSTRIAL POLICY AND  
DIRECTOR OF THE OFFICE OF TRADE AND MANUFACTURING POLICY

THE ASSISTANT TO THE PRESIDENT FOR SCIENCE AND TECHNOLOGY AND  
DIRECTOR OF THE OFFICE OF SCIENCE AND TECHNOLOGY POLICY

THE DIRECTOR OF NATIONAL DRUG CONTROL POLICY

THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

THE ADMINISTRATOR OF THE NATIONAL AERONAUTICS AND SPACE  
ADMINISTRATION

THE DIRECTOR OF THE NATIONAL SECURITY AGENCY

THE DIRECTOR OF THE DEFENSE INTELLIGENCE AGENCY

THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION

SUBJECT: United States Conventional Arms Transfer Policy

Section 1. Purpose. The security of the United States and the defense of our interests require a strong military, capable allies and partners, and a dynamic defense industrial base, which currently employs more than 1.7 million people. Strategic conventional arms transfers lie at the intersection of these interests and play a critical role in achieving our national, economic security, and foreign policy objectives.

This policy will be implemented consistent with requirements of the Arms Export Control Act of 1976, as amended (22 U.S.C. 2751 et seq.).

By better aligning our policy regarding conventional arms transfers with our national and economic security interests, the approach outlined in this memorandum will serve several functions. It will help us maintain a technological edge over potential adversaries; strengthen partnerships that preserve and extend our global influence; bolster our economy; spur research and development; enhance the ability of the defense industrial base to create jobs; increase our competitiveness in key markets; protect our ability to constrain global trade in arms that is destabilizing or that threatens our military, allies, or partners; and better equip our allies and partners to contribute to shared security objectives and to enhance global deterrence. These

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security objectives include countering terrorism, countering narcotics, promoting regional stability, and improving maritime and border security.

When a proposed transfer is in the national security interest, which includes our economic security, and in our foreign policy interest, the executive branch will advocate strongly on behalf of United States companies. The executive branch will also streamline procedures, clarify regulations, increase contracting predictability and flexibility, and maximize the ability of the United States industry to grow and support allies and partners.

Sec. 2. Policy. With respect to arms transfers, it shall be the policy of the executive branch to:

(a) bolster the security of the United States and our allies and partners, including by defending against external coercion, countering terrorism, and providing capabilities in support of shared security objectives;

(b) maintain technological advantages of the United States military, including by ensuring that there are appropriate protections on the transfer of United States military technologies;

(c) increase trade opportunities for United States companies, including by supporting United States industry with appropriate advocacy and trade promotion activities and by simplifying the United States regulatory environment;

(d) strengthen the manufacturing and defense industrial base and lower unit costs for the United States and our allies and partners, including by improving financing options and increasing contract flexibility;

(e) facilitate ally and partner efforts, through United States sales and security cooperation efforts, to reduce the risk of national or coalition operations causing civilian harm;

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(f) strengthen relationships and enhance military interoperability where doing so serves national security and foreign policy interests of the United States;

(g) prevent proliferation by:

(i) exercising restraint in transfers that may be destabilizing, be dangerous to international peace and security, involve materials that may be used as delivery systems for weapons of mass destruction, or result in potential adversaries obtaining capabilities that could threaten the superiority of the United States military or our allies and partners;

(ii) continuing United States participation in and support for multilateral arrangements that contribute to the objectives and interests outlined in this memorandum, including the United Nations Register of Conventional Arms, the United Nations Standardized Instrument for Reporting Military Expenditures, regional initiatives that enhance transparency in conventional arms transactions, the Missile Technology Control Regime (MTCR), and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies;

(iii) continuing to use multilateral arrangements to promote shared national policies of restraint against the acquisition of armaments and sensitive dual-use goods and technologies for military end uses by states whose behavior is cause for serious concern; and

(iv) working bilaterally and multilaterally to assist other state suppliers of conventional arms in developing effective export control mechanisms in support of responsible export policies that align with those of the United States; and

(h) continue to meet the requirements of all applicable statutes, including the Arms Export Control Act, the Foreign Assistance Act, the International Emergency Economic Powers Act, and the annual National Defense Authorization Acts. Arms transfer decisions will be consistent with the requirements of all applicable export control regulations and international commitments and obligations of the United States. These laws and regulations will apply, as appropriate, regardless of whether transfers are accomplished through direct commercial sales, government-to-government transfers, United States assistance programs, approvals for the retransfer of arms, changes of end use, or upgrades.

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Sec. 3. Arms Transfer Decisions. In making arms transfer decisions, the executive branch shall account for the following considerations:

(a) The National Security of the United States.

(i) The appropriateness of the transfer in responding to United States security interests.

(ii) The degree to which the transfer contributes to ally and partner burden-sharing and interoperability in support of strategic, foreign policy, and defense interests of the United States.

(iii) The transfer's consistency with United States interests in regional stability, especially when considering transfers that involve power projection, anti-access or area denial capability, or the introduction of a capability that may increase regional tensions or contribute to an arms race.

(iv) The transfer's effect on the technological advantage of the United States, including the recipient's ability to protect sensitive technology; the risk of compromise to United States systems and operational capabilities; and the recipient's ability to prevent the diversion of sensitive technology to unauthorized end users.

(v) The recipient's nonproliferation and counterproliferation record.

(vi) The transfer's contribution to efforts to counter terrorism, narcotics trafficking, transnational organized crime, or similar threats to national security.

(b) The Economic Security of the United States and Innovation.

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(ii) Whether the United States has actual knowledge at the time of authorization that the transferred arms will be used to commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949; serious violations of Common Article 3 of the Geneva Conventions of 1949; attacks intentionally directed against civilian objects or civilians who are legally protected from attack; or other war crimes as defined in section 2441 of title 18, United States Code. If the United States has such knowledge, the transfer shall not be authorized.

(e) Nonproliferation.

The risk that the transfer could undermine the integrity of international nonproliferation agreements and arrangements that prevent proliferators, programs, and entities of concern from acquiring missile technologies or other technologies that could substantially advance their ability to deliver weapons of mass destruction, or otherwise lead to a transfer to potential adversaries of a capability that could threaten the superiority of the United States military or our allies and partners.

Sec. 4. Implementation. (a) Within 60 days of the date of this memorandum, the Secretary of State, in coordination with the Secretaries of Defense, Commerce, and Energy, shall submit to the President, through the Assistant to the President for National Security Affairs (APNSA), a proposed action plan to implement the policy set forth in sections 2 and 3 of this memorandum.

(b) The proposed action plan shall include actions that the United States Government should take in the short term and long term to improve its ability to identify, communicate, pursue, and support arms transfers in the manner most beneficial to the national security interests of the United States, including economic security, the broader economy, and United States foreign policy interests. The proposed action plan should account for the competitive environment in which the United States must operate and the need to protect and expand our technological advantages and our defense industrial base. The proposed action plan should include an outline of the financial and personnel resources necessary to implement the roadmap with minimal increase in the total of otherwise budgeted funds, with offsets identified if necessary.

(c) Within 60 days of the date of this memorandum, the Secretary of State, in coordination with the Secretaries of Defense, Commerce, and Energy, shall submit to the President, through the

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APNSA, a proposed initiative to align our unmanned aerial systems (UAS) export policy more closely with our national and economic security interests. The initiative should address the status of, and recommend next steps for, MTCR adoption of revised controls for MTCR Category I UAS, consistent with the UAS export policy.

Sec. 5. Earlier Presidential Actions. This memorandum supersedes and replaces Presidential Policy Directive-27 of January 15, 2014 (United States Conventional Arms Transfer Policy).

Sec. 6. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP