

SECURITY COOPERATION LEGISLATION AND POLICY

INTRODUCTION

The U.S. security assistance (SA) program, which is a key facet of security cooperation (SC), has its foundation in public law which provides SA authorizations and appropriations. The purpose of this chapter is to 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:

- International Military Education and Training (IMET) program
- Foreign Military Financing Program (FMFP)
- 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 involved. 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:

- *Foreign Assistance Act of 1961* (FAA), as amended
- *Arms Export Control Act* (AECA), as amended

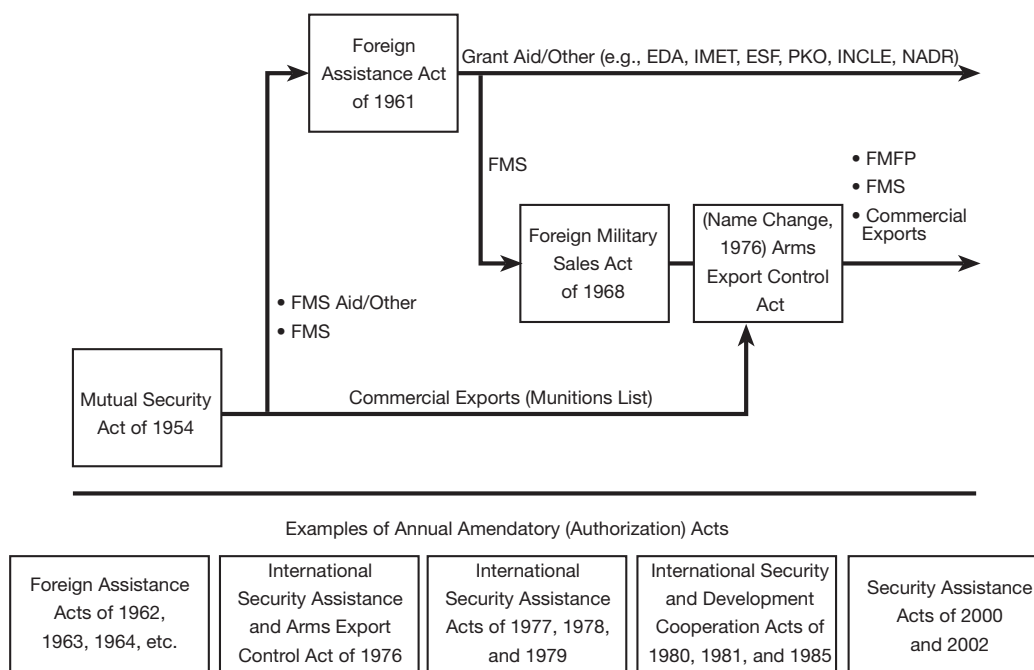
Both the FAA and AECA follow a succession of earlier acts which served as the basis for many of the current provisions in the FAA and AECA.

The FAA, originally enacted on 4 September 1961, contains many provisions which were formerly in the *Mutual Security Act of 1954*, as amended.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 (EDAs), 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:

- 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. This 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, recently Congress has used annual Department of Defense (DOD) and Department of State (DOS) legislation along with any stand-alone legislation such as P.L.104-164, 21 July 1996, and various functional laws such as the *International Narcotics Control Act* (INCA) or the *Afghanistan Freedom Support Act* (AFSA) of 2002 to amend the FAA or AECA. Congress was temporarily successful in the authorization process by legislating the *Security Assistance Act of 2000*, Public Law (P.L.) 106-280, 6 October 2000, and the *Security Assistance Act of 2002*, P.L.107-228, 30 September 2002, for fiscal years (FYs) 2000 through 2003. No SA authorizations were specifically enacted for FYs 2004 through 2009. In the absence of an authorization act, the appropriations committee has included program authorization language to the affected annual appropriations act.

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 which has included DOD authorities related to SA and authorities for the broadly defined security cooperation programs. Both SA and security

cooperation authorized programs were addressed in earlier Chapter 1, “Introduction to Security Cooperation.”

Appropriations Acts

Security assistance appropriations are included in the annual *Department of State/Foreign Operations, Export Financing, and Related Programs Appropriations Act (S/FOAA) for (Fiscal Year)*. 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, 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 under a CRA granted by Congress in a joint resolution making 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 such a CRA does not usually allow funding for the start of any new programs.

The FY 2009 appropriations process saw a different but not unprecedented use of a CRA. The *Consolidated Security, Disaster, and Continuing Appropriations, 2009*, P.L.110-329, 30 September 2008, included the FY 2009 appropriations for the DOD and Homeland Security and the Veteran’s Administration, plus a continuing resolution for the remaining nine required FY 2009 appropriations lasting until 6 March 2009. One more continuing resolution was required until the *Omnibus Appropriations Act, 2009*, P.L.000111-8, 11 March 2009, was enacted. Division H of P.L.111-8 was the *Department of State, Foreign Operations, and Related Programs Appropriations Act (S/FOAA), 2009*, necessary for funding FY 2009 SA. Similarly, Division F of P.L.111-117 was the S/FOAA for 2010. This same consolidated appropriation provided for five other required FY 2010 appropriations as Divisions A through E.

The House Appropriations Committee (HAC) and the Senate Appropriations Committee (SAC) are the committees responsible for the timely legislating of all twelve annual bills. The 11 September 2001 terrorist attack at the end of FY 2001 and military operations in Afghanistan and Iraq, coupled with domestic and world-wide natural disasters requiring vast amounts 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) web sites.

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. Because of wide internet access and the printing expense, slip laws are rarely used today. The best source for these now electronic slip laws is the Library of Congress (LOC) “Thomas” web site at <http://thomas.loc.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. within the office of the *Federal Register* (FR) 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 had 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.

All laws, including the annual appropriations and authorization acts, are initially slip laws that are compiled for each session of Congress into bound volumes, in order of enactment, referred as “statutes at large”. Every six years, the statutes at large are incorporated into the U. S. Code (USC) in a process referred to as codification. However, a supplement is published during each interim year until the next comprehensive USC volume publication.

United States Code

The *United States Code* (USC) 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 USC laws into fifty general subject areas and publishes them. Maintaining an up-to-date paper copy of the lengthy USC is very costly and difficult to administer; however, the same data can be accessed within the GPO database at <http://www.gpoaccess.gov/uscode/index.html>. The general subject areas are referred to as “titles”. Most SA laws can be viewed under Title 22, “Foreign Relations and Intercourse.” Certain SA related and security cooperation law 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 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 January 2006 edition can be viewed on the internet at http://www.dscamilitary.com/programs/LPA/2006/faq_aeca.pdf. The section footnotes of this document provide the tools for determining the slip law and USC section cross-referencing relationship. Both the Defense Security Cooperation Agency (DSCA) and Defense Institute of Security Assistance Management (DISAM) web pages provide links to this useful document.

Slip Law and United States 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 USC title number with USC-specific section numbers.

An SA law example of this relationship is Section 21, “Sales from Stocks, of the AECA, P.L.90-629, 22 October 1968,” as amended, is codified as 22 USC Section 2761 with the same section title.

A security cooperation law example of this relationship is the initial funding, authority, and later codification of the Combating Terrorism Fellowship Program (CTFP). 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 *National Defense Authorization Act for Fiscal Year 2004*, P.L.108-136, 24 November 2003, finally amending 10 USC with a new Section 2249c authorizing CTFP on a permanent basis.

Code of Federal Regulations

The *Code of Federal Regulations* (CFR) is the codification of general and permanent rules published in the *Federal Regulation* (FR) by the executive branch and its agencies. Using the same USC 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 (PM/DDTC). The authorizing authority for the ITAR is Section 38(a)(1), AECA [22 USC 2778]. The officially published ITAR can be viewed at the GPO site: <http://www.gpoaccess.gov/cfr/index.html> or, in a timely manner, at the Bureau of Political-Military Affairs, Directorate of Defense Trade Control (PM/DDTC) web site: http://www.pmdtc.state.gov/consolidated_itar.htm. Both the DSCA and DISAM webs provide convenient 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 FR is a daily publication of rules, proposed rules, notices by federal agencies, executive orders, and other Presidential documents. Though it is only paper printed twice each year, the most current FR can be accessed through the GPO web site at: <http://www.gpoaccess.gov/fr/index.html>. Both the printed document and the web site 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 DOD/DSCA of a proposed 36(b)(1) FMS to Iraq. Section 36(b)(1), AECA [22 USC 2776(b)(1)] requires this advance notification to Congress. Section 155, P.L.104-164, 21 July 1996, amended the USC with a new Section 36(f), AECA [22 USC 2776(f)] requiring the full unclassified text of any advance notification of a sale to Congress be published in the FR. It should be noted that DSCA provided a routine and prompt public announcement of this proposed 36(b)(1) FMS notification on 18 May 2007 on its web site specifically at: http://www.dsca.mil/PressReleases/36-b/2007/Iraq_07-30.pdf.

Defense Institute of Security Assistance Management Web Page

Selected SA legislation and other related policy documents listed below can be located and viewed via the DISAM web site at: <http://www.disam.dsca.mil/pubs/USG/USGPub.htm>.

- Congressional Budget Justifications (CBJ) for Foreign Operations (FY XX)
- Current and recent past (S/FOAAs)
- Current and recent past related *Supplemental Appropriations Acts*
- Current and recent past SA legislation articles from the *DISAM Journal*
- FAA and the AECA
- DOS and United States Agency for International Development (USAID) Strategic Plan for FY 2007 – FY 2012
- DOS active world map with useful SA information
- *Conventional Arms Transfer Policy* (PDD-34) of 17 February 1995
- *Defense Trade Security Initiative* (DTSI) of 26 May 2000
- The ITAR

- DOD/DSCA 36(b), AECA, congressional notifications for FMS Letters of Offer and Acceptance (LOAs)
- DOS/PM/DDTC 36(c) and 36(d), AECA, congressional notifications for DCS licenses
- *International Program Security (IPS) Handbook*
- *International Armaments Cooperation (IAC) 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. Identified in the report is 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 to each. It should be noted that this report does not always become available within the legislated thirty days.

Section 634(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 which have not been justified to Congress or which are in excess of the amount justified to the 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 \$1,000,000 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 \$5,000,000. The notification to Congress 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, 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 which have not been previously justified to Congress, or which exceed by twenty percent the quantities previously justified to Congress. 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.111-8]

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. [Section 7011, P.L.111-117] These funds shall remain available for an additional four years from the date of which 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 FY, 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 \$1M of the total funding appropriated for IMET is to remain available until expended. This figure was changed to \$3M for each FY beginning with FY 2002. Beginning in FY 2009, it is now \$4M. This authority is to allow

for the expenditure of all IMET funding without the loss of it at the end of the FY. [Title IV, P.L.111-117]

Non-Refunded Security Assistance Programs

The FMS and DCS components of the SA are fully funded by direct cash outlays of the purchasing countries. Consequently, these SA activities 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, and FMS cash activities are documented in the annual U.S. budget in terms of the FMS Trust Fund. This trust fund will be further addressed in later Chapter 12 of this text, “Foreign Military Sales Financial Management.”

BASIC POLICIES

The remainder of this chapter discusses a broad variety of statutory provisions which govern the management of SA. These provisions have been selected from the FAA, the AECA, or other sources, as identified, and are representative of the wide range of legislative rules which enable Congress to exercise its 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

The Congress reaffirms the policy of the U.S. to achieve international peace and security through the United Nations (U.N.) so that armed forces shall not be used except for individual or collective self-defense. The Congress hereby finds that the efforts of the U.S. and other friendly countries to promote peace and security continue to require measures of support based upon the principle of effective self-help and mutual aid. [Section 501, FAA]

Ultimate Goal

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

Purpose of Arms Sales

Congress recognizes that 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. It is the policy of the U.S. to facilitate the common defense by entering into international arrangements which 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 Charter of the United Nation. [Section 1, AECA]

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

- 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 DOS and USAID Strategic Plans for FY 2007 through 2012 include five overall strategic goals:

- Achieve peace and security
- Governing justly and democratically
- Investing in people
- Promoting economic growth and prosperity
- Providing humanitarian assistance

The DOS and USAID Strategic Plan for FYs 2007 through 2012 can be found at: <http://www.state.gov/documents/organization/82819.pdf>.

The FAA and AECA provide various conventional arms transfer authorities to the President. The post-cold war era decision-making criteria used by the administration for determining FAA and AECA-authorized arms transfers was promulgated by the White House on 17 February 1995 as Presidential Decision Directive (PDD) 34, U.S. Conventional Arms Transfer Policy (CATP) which can be viewed both in the attachments to this chapter and on the internet at: <http://www.disam.dsca.mil/pubs/USG/pressrelease/ARMSTRAN95.htm>. Though the CATP was promulgated in 1995, it continues to be used today by the USG for determining whether an arms transfer is to take place.

Effect on United States Readiness

FMS sales which would have an adverse effect on U.S. combat readiness shall be kept to an absolute minimum. For such sales, special congressional reporting is required. [Section 21(i), AECA]

Conventional Arms Restraint

Congress encourages the President 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]

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. Within 48 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 the format specified) to the Congress. [Section 21(c), AECA]

Limitation on Assistance to Security Forces

No funding appropriated by the annual S/FOAA will be made available to any unit of the security forces of a country if the Secretary of State has credible evidence that such unit has committed gross violations 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 620J, FAA]. This is commonly referred to as the Leahy Amendment. Annual DOD funding for U.S. exercises or training with foreign security force units are likewise restricted. [Section 8061, P.L.111-118 for FY 2010] 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 apply to a country with long-standing democratic tradition, standing armed forces, and no consistent pattern of gross violations of internationally recognized human rights. [Section 660, FAA] This prohibition is not provided for AECA-authorized programs.

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. [10 USC Section 2751, and Section 605(a), P.L.94-329]

Eligibility for Grant Aid

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

- It will not, without the consent of the President, permit any use of such articles or services by anyone 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. 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 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 any 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. This requirement is established in Section 503, FAA, and Section 3, AECA. The relevant provisions of these two laws require that grant military assistance or a sales program for any country may be authorized only when:

. . . the President finds that the furnishing of defense articles and defense services to such country or international organization will strengthen the security of the U.S. and promote world peace . . .

Consequently, annual budgetary planning and programming for SA is generally limited to those countries and international organizations for which such PDs of eligibility have been issued.

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 published in the FR at the time of approval. A list of all such determinations approved to date can be found in the annual *Congressional Budget Justification (CBJ) for Foreign Operations, Fiscal Year 20XX*. This budget justification document was once referred to as the Congressional Presentation Document (CPD).

Such a determination is only a preliminary finding of eligibility, and it 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 which 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 finds national security or U.S. interests require otherwise, no assistance shall be provided to countries that:

- Repeatedly provide support to international terrorists. [Section 620(a), FAA]
- Are communist, to include, but not limited to: 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. citizen for goods or services (where legal remedies are exhausted, the debt is not denied or contested, etc.). [Section 620(c), FAA] U.S. citizens, corporations, etc. [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 from being 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.111-8]. This prohibition is renewed in the annual S/FOAA, and is generally referred to as the Brooke-Alexander Amendment.
- Prohibit or otherwise restricts, directly or indirectly, the transport or delivery of U.S. humanitarian assistance. [Section 620I, FAA]

- Grants sanctuary from prosecution to any individual or group which has committed an act of international terrorism or otherwise supports international terrorism. [Section 7022, P.L.111-8]
- Fail to comply, or make significant efforts for compliance, with minimum standards for combating the trafficking of people (TIP). [Section 110, P.L.106-386]
- Tax U.S. goods and services being imported as U.S.-funded assistance. [Section 7013, P.L.11-117]
- Do not pay any accumulated automobile parking fines or property taxes in New York City or the District of Columbia. [Section 7055, P.L.111-117]
- Knowingly transfers Man-Portable Air Defense Systems (MANPADs) to a government or organization that supports terrorism. [Section 12, P.L.109-472]
- Recruit or use 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 or decree. [Section 7008, P.L.111-117]

Human Rights

The U.S. shall, in accordance with its international obligations as set forth in the *Charter of the United Nations* and in keeping with the constitutional heritage and traditions of the U.S., promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of U.S. foreign policy shall be to promote the increased observance of internationally recognized human rights by all countries. Furthermore, in the absence of a Presidential certification to the Congress that extraordinary circumstances exist warranting the provision of such assistance, no SA may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. [Section 502B, FAA]

The Secretary of State shall transmit to the Congress, as part of the presentation materials for SA programs proposed for each, a full and complete report, prepared with the assistance of the Assistant Secretary of State for Human Rights and Humanitarian Affairs, with respect to practices regarding the

observance of and respect for internationally recognized human rights in each country proposed as a recipient of SA. [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), etc. A more in-depth description of the duties of an SCO is provided in this text 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 an SCO to perform one or more of the following seven functions:

- Equipment and services case management
- Training management
- Program monitoring
- Evaluation and planning of the host government’s military capabilities and requirements
- Administrative support
- Promoting rationalization, standardization, interoperability, and other defense cooperation measures
- 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, rather, 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 an 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 that 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]

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 LOA case. This FMS case can be filled by sale from U.S. stock, 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 of this text, “Foreign Military Sales Process.”

The second purchasing method is DCS by allowing, with an export license issued by the DOS, the country or international organization to purchase directly from U.S. industry. The DCS process and policies will be further addressed in later 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 of production costs less any depreciation in value
- The full cost to the USG for defense services; in the case of a country which 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:
 - 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, 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 by which it agrees to pay the full amount of such contract which will assure the USG against any loss; to 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 FMFP either as a grant or loan. With a couple of exceptions, recent FMFP has been all grant 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 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, provided that such services may be performed only if:

- 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 the article was 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, services, 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 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 DOD of an aggregate value not to exceed \$100 million in any FY. [Section 506(a)(1), FAA]

A second special drawdown authority of \$200M in defense articles, services, and training for each FY also has been established. [Section 506(a)(2), FAA] The authorized purposes for the latter drawdown authority include counter-narcotics, anti-terrorism, non-proliferation, disaster relief, migration and refugee assistance, and support of Vietnam War era missing-in-action/prisoners of war (MIA/POW) location and repatriation efforts. Restrictions in the annual Section 506(a)(2) drawdown include not more than \$75M may come from DOD resources, not more than \$75M may be provided in support of counter-narcotics, and not more than \$15M 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 counter-narcotics or anti-terrorism 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 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 \$25M 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 FY 2010 S/FOAA authorizes the FY 2010 drawdown of up to \$30M in commodities and services in support of the United Nations War Crimes Tribunal established with regard to the former Yugoslavia for the just resolution of changes regarding genocide or other violation of international humanitarian law. The International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone are also eligible for this drawdown authority. [Section 7049, P.L.111-117]

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 military aircraft (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 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 FMS LOA to sell defense articles or services for \$50 million or more, or any design and construction services for \$200 million or more, or MDE for \$14 million or more. The higher dollar thresholds for notification for NATO countries, Japan, Australia, Republic of Korea, and New Zealand are \$100 million, \$300 million, and \$25

million respectively. Approval for FMS must be provided by the DOS to DOD prior to any congressional notification. Once a potential FMS is approved by DOS, DSCA provides the official notification to Congress.

MDE means 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: <http://www.pmdtc.state.gov/reference.htm#regs>.

The LOA shall not be issued if the 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 which requires such sale in the national security interests of the U.S. [Section 36(b)(1), AECA]

In order to provide the Congress with sufficient time to review such cases, the DSCA has agreed to provide Congress with a 20-day informal notification of such cases prior to the formal submission of the thirty-day statutory notification. [*Security Assistance Management Manual (SAMM)*, Section C5.6.3] Additionally, while the law does not address this, policy has been established that notifications will not be provided unless Congress is in session to receive the notification.

An exception to the above 20-day/30-day procedure exists for NATO, NATO member countries, Australia, Japan, Republic of Korea, and New Zealand. For these exempted countries, the formal statutory notification period is only fifteen days. Furthermore, the twenty days informal, advance notification period is not required for these countries.

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. Dollar thresholds for notification for NATO countries, Japan, Australia, Republic of Korea, 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. The twenty-day informal advance notification required for FMS does not apply to the DCS licensing process. 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, 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 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 channels. [SAMM, C4.5.9] The President may also require that persons engaged in commercial negotiation for the export 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 Country 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, and New Zealand) for proposed third country 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, and New Zealand are \$25 million and \$100 million respectively. [Section 3(d), AECA]

The following are exceptions to this congressional review process for third country 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.

The Congress can adopt a joint resolution of disapproval of the proposed transfer during the fifteen or thirty-day review period. However, Presidential approval is not required for third country transfers or change in end-use if all the following conditions are satisfied:

- The U.S. article is being incorporated as a component within a foreign defense article
- The recipient is the government of a NATO country, Japan, Australia, Republic of Korea, or New Zealand
- The recipient is not a Section 620A, FAA-designated country (supports international terrorism)
- The U.S.-origin component is not SME, an article requiring Section 36(b), AECA notification, and identified by regulation as an Missile Technology Control Regime (MTCR) item
- The country or organization provides notification to the USG within thirty days after the transfer [Section 3(b), AECA]

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:

- 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 of the articles that 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 which 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:

- In the event the USG intends to replace the item, the replacement cost of the item
- In the event the USG does not intend to replace the item, the actual value (less any depreciation in the value) specified in the lease agreement [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, but may not be leased to a foreign country or international organization under the authority of 10 USC 2667.

For any lease for a period of one year or longer, the Congress must be given a thirty-day advance notification. Like FMS, the Presidential decision authority to lease has been delegated to 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, the 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, 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, 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, as well as for third country transfers and leases of U.S. defense articles. The mechanism for such congressional action is a joint resolution. This is 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. This joint resolution must be then sent to the President for review and approval by enactment. Since the President is unlikely to approve the rejection of an action which his administration originally proposed to Congress, the President will likely veto such a joint resolution, returning it to Congress. 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, which is by no means all inclusive, is representative of such reports. A comprehensive listing of SA reports submitted to Congress by DOD elements can be found DOD 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 for MDE valued at \$1 million or more. [Section 36(a)(1), AECA]
- A listing of all LOAs accepted during the FY. [Section 36(a)(2), AECA]
- The cumulative dollar value of sales credit agreements during the FY. [Section 36(a)(3), AECA]
- A listing of all commercial export licenses issued during the FY 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

On or before 1 February of each year, the President shall transmit to the 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 generally classified written report is required by Section 25(a), AECA, and is routinely referred to as the *Javits Report*, named for its principal sponsor, former Senator Jacob Javits (D-NY). By policy, no sales or licensing notifications will take place for the FY until the *Javits Report* is received by and briefed to Congress, which of course must be in session to receive the report.

End-Use Monitoring

With the annual *Congressional Budget Justification for Foreign Operations, FY 20XX*, submitted not later than 1 February to the Congress [Section 634, FAA], a report regarding the implementation of end-use monitoring (EUM) to include costs and numbers of personnel associated with the program shall be included. Additionally, the report will include numbers, range, and findings of EUM of U.S. transfers of small arms and light weapons [Section 40A(c), AECA].

Possible Excess Defense Articles

Beginning with FY 2003, like the *Javits Report* for sales, the President shall transmit to the Congress not later than 1 February annually a 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]

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 Training Report

A joint Secretary of State and Secretary of Defense report is to be submitted to Congress not later than 31 January each year to include training provided the previous and current FYs. For each training activity, it is to include foreign policy justification and purpose plus number of foreign personnel trained their units, and the location. For each country, it is to include aggregate number of students and costs. With respect to the U.S. personnel, it is to include operational benefits derived and what units were involved. Beginning 30 September 2002, unless notified in writing ninety calendar days in advance for a specified country, this report is not to include any training provided to NATO countries, Australia, Japan, Republic of Korea, or New Zealand. [Section 656, FAA]

Anti-Boycott Determination

The *Anti-Economic Discrimination Act of 1994* [Sections 561-565, P.L.102-236] 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 the secondary or tertiary Arab economic 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. For the 2009 report, the secretary waived the prohibition against Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, the United Arab Emirates, and Yemen until 1 May 2010 on the basis of national interest and the promotion of U.S. objectives to eliminate the boycott. The countries of Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Iraq, Jordan, Mauritania, Morocco, Nigeria, Oman, Pakistan, Somalia, Sri Lanka, Tanzania, Tunisia, and Uganda were determined to have no current boycott policy of practice.

ADDITIONAL PROVISIONS RELATING TO NATO, NATO MEMBERS, JAPAN, AUSTRALIA, NEW ZEALAND, REPUBLIC OF KOREA, 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, Republic of Korea, 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 co-production arrangements. [Section 21(e)(2)(A), AECA]

Beginning in FY 1997, NRC for research and development (R&D) may also be waived for an FMS to any eligible country if:

- 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 Maintenance and Supply Agency (NAMSA) 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 USC 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, and Thailand 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:

- Priority delivery of EDA, only to include Egypt, Jordan, and Israel. [Section 516 (c)(2), FAA]
- Stockpiling of U.S. defense articles. [Section 514 (c)(2), FAA]
- Purchase of depleted uranium anti-tank rounds. [Section 620G, 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. [Section 7083, P.L.111-117]

Incremental Tuition Pricing for International Military Education and Training - Designated for 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]

Effective 14 November 2005, though not an IMET recipient and only receiving FMFP assistance, Israel 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 30 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 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 DOD to reduce customer waiting times for selected items and to improve its responses to emergency foreign requirements, as well as to 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:

- Collections from FMS sales of DOD stocks not intended to be replaced
- Asset use collections and contractor payments for the use of U.S.-owned facilities equipment
- 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 which represented a total of the value of articles on hand and on order, as well as all unobligated funds. [10 USC 114(c)] 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. The Defense Security Cooperation Agency (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 begun 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, \$140,000,000 in OA was carried over from FY 1994, plus an added OA of \$20,000,000 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. Since prior year funds remain available in the SDAF account for obligation, and since numerous items remain on order, the SDAF account should be operational for several more years before all contracts are closed. 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. [DOD 5105.38-M, SAMM, C11.14] At the Administration's repeated request for the recent years, SDAF may be reactivated but renamed Defense Coalition Support Fund (DCSF) possibly within 10 USC authorities.

EXCESS DEFENSE ARTICLES

The term EDA is applied collectively to U.S. defense articles which 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 it 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. [Section 9(b), P.L.102-583]

The *National Defense Authorization Act for FY 1993* (NDAA) amended 10 USC by adding a new Section 2552 which 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:

- Department or agency of the USG (excluding DOD), and no state, and no other person or entity eligible to receive excess or surplus property submits a request for such equipment from the Defense Reutilization and Marketing Service (DRMS) during the period for which such a request may be accepted by the DRMS.
- 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 firefighting equipment. [Section 4304(c), P.L.102-484]

The intent of this change is to permit other federal agencies and the 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 above of construction equipment from the definition of excess defense equipment essentially limits the defense authorization act's restrictions to fire equipment.

As defense articles actually 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 cognizance 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 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] Charges must be levied on such sales as well as on grant transfers (with certain exceptions) for the costs of PCH&T. Charges for any requested spares support, training, repair work, or any upgrades will also be levied.

Grant Transfer of Excess Defense Articles

P.L.104-164, 21 July 96, rationalized the 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 counter-narcotics 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 letter provided by DSCA after coordination with State Department Bureau of Political-Military Affairs, Office of Regional Security and Arms Transfers (PM/RSAT).

Grant EDA transfer limitations include:

- Item must be drawn from existing DOD stocks
- No DOD procurement funds are to be used during the transfer
- Transfer is to have 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:
 - Transfer must be determined to be in the national interest
 - Recipient is a developing country receiving less than \$10M 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(c)(2), FAA] DOD

Congressional notification 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 \$7M or more. [Section 516(f)(1), FAA] Additionally, beginning in FY 1997, not more than \$425M (current value) in defense articles may be transferred in one FY as grant EDA. [Section 516(g), FAA] Any authorization for the grant EDA transfer of ships 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, amended the NPA to also include the country of Slovakia. 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.

Recently enacted *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 RESERVES 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. Then, for FY 1990, at the initiative of Congress, \$100 million in defense articles was authorized to establish a stockpile in Israel. For FY 1991, Congress authorized stockpiles in the major non-NATO allies' countries, and \$378 million in stockpile additions, of which not less than \$300 million was designated for stockpiles in Israel, with the remainder divided between the Republic of Korea (\$68M) and Thailand (\$10M). For FY 1993, Congress authorized a total of \$389M worth of U.S. defense equipment to be transferred to the WRSA in FY 1993; not less than \$200,000,000 was designated for stockpiles in Israel, and up to \$189,000,000 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 541(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 541(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 which 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 which have been placed in these stockpiles remain U.S. military service-owned and controlled stocks. As the term “war reserve” implies, these stocks are intended only for use in emergencies. 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] with respect to the Republic of Korea. The Secretary of Defense in coordination with the Secretary of State was permitted to transfer to the Republic of Korea obsolete or surplus items in the DOD inventory 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 which identifies the items transferred and the concessions to be given.

Section 112, P.L.106-280, provided a similar transfer authority with the government of Israel that expired 6 October 2003. Section 13(a)(1) of the *Department of State Authorities Act of 2006*, P.L.109-472, 11 January 2007, extended this transfer of WRSA for concessions authority to expire 5 August 2008. Section 13(a)(2) of P.L.109-472 also amended Section 514(b)(2), FAA, authorizing up to \$200 million annually in WRSA stocks for Israel during FY 2007 and FY 2008, retroactive to 5 August 2006.

COUNTRY-SPECIFIC LEGISLATION

Numerous legislative provisions are enacted annually which apply only to one specific country, or which may apply, on occasion, to a specified group of countries. Such statutes may range from a total prohibition on the provision of any form of U.S. assistance to a particular country, to a limited ban on furnishing certain types of assistance (e.g., a provision which prohibits military assistance but permits economic assistance). Thus, the S/FOAA for FY 2010 [Section 7007, P.L.111-117] prohibits any direct assistance to Cuba, Iran, North Korea, and Syria. A legislative prohibition on FY 2010 IMET assistance, requiring prior notification to Congress, was applied to Angola, Bangladesh, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of the Congo, Nigeria, Sri Lanka, Nepal, Ethiopia, Guatemala, Guinea, Haiti, and Libya. [Title IV, P.L.111-117]

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, cracked 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 the NATO member

countries and the major non-NATO allies. This prohibition has been renewed annually through FY 1995 by Congress and 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 620G, 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 has 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.

Missile Technology Control Regime

Another type of armaments regulation was introduced in the *National Defense Authorization Act, Fiscal Year 1991*, P.L.101-510, Section 1703, which added to the AECA a new Chapter 7, 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 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. Under the provisions of Chapter 7, sanctions may be applied against persons, defined to include individuals, corporations, and countries, which unlawfully transfer such equipment or technology. The sanctions range from the denial of USG contracts relating to missile equipment or technology, to the denial of all USG contracts to the denial of all U.S. export licenses and agreements involving items on the USML. A waiver of these sanctions may be granted if the President determines and notifies Congress that such a waiver is either:

- 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 (f), 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 Fiscal Years 1992 and 1993*. This legislation added a new Chapter 8 to the AECA, entitled, "Chemical or Biological Weapons Proliferation," and it mandates a variety of sanctions which the U.S. may take against persons, companies, and countries which unlawfully aid in the transfer of C/B weapons or the illegal use of such weapons. The sanctions range from the denial of USG procurement contracts for a company which 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 Landmines

In a unique action, the *National Defense Authorization Act, Fiscal Year 1993* established a one year moratorium on the transfer of anti-personnel landmines. [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 for 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 landmines, or the furnishing of any foreign assistance related to the transfer of such landmines during the period 23 October 1992 through 22 October 1993. [Section 1365(d), P.L.102-484]

Subsequent annual legislation extended the moratorium to 23 October 2014 [Section 646, P.L.110-161], and provided the permanent authority for the grant transfer of demining equipment available from USAID or DOS. [Section 7056(a), P.L.111-8] The command-activated claymore mine has been legislatively defined as not an antipersonnel landmine. [Section 580(b)(2), P.L.104-107] Of interest are some of the statistics cited in the statute regarding anti-personnel landmines: over thirty-five 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 landmines and the DOS approved ten licenses for the commercial export of such landmines 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, and diplomatic efforts are well underway, both through the U.N. 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 7056, P.L.111-117]

SUMMARY

Security assistance, like other USG programs, is governed by U.S. statute. The primary or basic laws are the FAA, as amended, and the AECA, as amended. Funds are appropriated for SA in the annual S/FOAA, FY 20XX. Even though 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 and has incorporated certain control and reporting measures over the years into the law affecting these as well as appropriated programs.

Given the wide variety and complex details of these country-specific and weapons specific provisions, for additional information the reader is encouraged to consult the various legislative sources cited herein. Additionally, a useful source of such information appears in the analytical reports of new SA legislation published annually in the winter or spring issue of *The DISAM Journal*, depending on the passage of the annual legislation.

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ATTACHMENT 2-1
UNITED STATES CONVENTIONAL ARMS TRANSFER POLICY
PRESIDENTIAL DECISION DIRECTIVE 34

[The following is a reprint of Secretary of State message DTG 180317Z Feb 1995, Subject: Conventional Arms Transfer Policy. This message includes the following: Department of State comments; White House Press Secretary Statement of 17 February; White House Fact Sheet on Conventional Arms Transfer Policy, 17 February; and White House Fact Sheet on Criteria for Decision-Making on U.S. Arms Exports, 17 February. The final item in this group of documents is a related 17 February press briefing by Eric Newsom, the Principal Deputy Assistant Secretary of State, Bureau of Political-Military Affairs. This is the first release of a formal policy statement on conventional arms transfers since the announcement by the Reagan Administration of its Conventional Arms Transfer Policy on 8 July 1981.]

1. The President recently approved a new policy on conventional arms transfers. This policy will affect future arms transfer issues involving many posts' host governments. Posts are requested to draw on the White House statement and fact sheets in paragraphs 4-6 and present this information to host governments as the Chief of Mission sees appropriate.
2. Introduction — On February 17, the Administration announced its Presidential Decision Directive (PDD-34) on Conventional Arms Transfers. It is the Administration's view as in previous administrations, that sales of conventional weapons are a legitimate instrument of U.S. foreign policy, enabling allies and friends to better defend themselves, as well as help support our defense industrial base. The Administration is determined to ensure a balanced approach, supporting legitimate transfers while restraining those which could threaten our foreign policy and national security interests.
3. At the same time, it is clear that defense exports have important foreign policy and national security implications that differ dramatically from strictly commercial exports.
 - PDD-34 should be seen as a summation and codification of this administration's decision-making in the arms transfer arena, rather than a dramatic departure from previous practice. The policy—now in one document—has been reflected in the decisions we have made on arms transfers and efforts at restraint over the past two years.
 - While the policy does not represent a radical departure from our historic approach to arms transfers issues, we are giving increased weight—in the changed environment of the post-cold war era—to specific conditions within each region. Just as in our broader defense and non-proliferation strategies, arms transfer policy must be conducted with a focus on the dynamics of regional power balances and the potential for destabilizing changes in those regions.

STATEMENT BY THE WHITE HOUSE PRESS SECRETARY — CONVENTIONAL ARMS TRANSFER POLICY, FEBRUARY 17, 1995:

The President has approved a comprehensive policy to govern transfers of conventional arms. This policy, as detailed in the attached fact sheets, serves our nation's security in two important ways. First, it supports transfers that meet the continuing security needs of the United States, its friends, and allies. Second, it restrains arms transfers that may be destabilizing or threatening to regional peace and security.

This policy reflects an approach towards arms transfers that has guided the Administration's decisions over the last two years. Specifically, the United States continues to view transfers of conventional arms as a legitimate instrument of U.S. foreign policy—deserving U. S. government support—when they enable us to help friends and allies deter aggression, promote regional security, and increase interoperability of U.S. forces and allied forces. Judging when a specific transfer will meet that test requires examination of the dynamics of regional power balances and the potential for destabilizing changes in those regions. The criteria guiding those case-by-case examinations are set forth in the attached guidelines for U.S. decision-making on conventional arms transfers.

The centerpiece of our efforts to promote multilateral restraint is our initiative to work with allies and friends to establish a successor regime to Coordinating Committee for Multilateral Export Controls (COCOM).

The new regime should establish effective international controls on arms sales and the transfer of sensitive technologies—particularly to regions of tension and to states that pose a threat to international peace and security. While pursuing multilateral restraint through this and other mechanisms such as the U.N. conventional arms register and regional initiatives, the United States will exercise unilateral restraint in cases where overriding national security or foreign policy interests require us to do so.

WHITE HOUSE FACT SHEET ON CONVENTIONAL ARMS TRANSFER POLICY, FEBRUARY 17, 1995.

U. S. conventional arms transfer policy promotes restraint, both by the U.S. and other suppliers, in transfers of weapons systems that may be destabilizing or dangerous to international peace. At the same time, the policy supports transfers that meet legitimate defense requirements of our friends and allies, in support of our national security and foreign policy interests.

Our record reflects these considerations. U.S. arms sales during this period have been close to our historical average—approximately \$13 billion in government-to-government sales agreements in FY 1994. U.S. arms deliveries have also remained flat. These sales have been primarily to allies and major coalition partners such as NATO member states and Israel.

United States Goals

The policy issued by the President will serve the following goals:

- 1) To ensure that our military forces can continue to enjoy technological advantages over potential adversaries.
- 2) To help allies and friends deter or defend themselves against aggression, while promoting interoperability with U.S. forces when combined operations are required.
- 3) To promote regional stability in areas critical to U.S. interests, while preventing the proliferation of weapons of mass destruction and their missile delivery systems.
- 4) To promote peaceful conflict resolution and arms control, human rights, democratization, and other U.S. foreign policy objectives.
- 5) To enhance the ability of the U.S. defense industrial base to meet U. S. defense requirements and maintain long-term military technological superiority at lower costs.

Supporting Arms Control and Arms Transfer Restraint

A critical element of U.S. policy is to promote control, restraint, and transparency of arms transfers. To that end, the U.S. will push to increase participation in the U.N. Register of Conventional Arms. We will also take the lead to expand the Register to include military holdings and procurement through national production, thereby providing a more complete picture of change in a nation's military capabilities each year.

The U.S. will also support regional initiatives to enhance transparency in conventional arms such as those being examined by the OAS [Organization of American States] and ASEAN [Association of Southeast Asian Nations], and will continue to adhere to the London and OSCE [Organization for Security and Cooperation in Europe] guidelines, while promoting adherence to such principles by others.

The U.S. will continue its efforts to establish a successor export control regime to the Cold-War era COCOM. Our goals for this regime are to increase transparency of transfers of conventional arms and related technology, to establish effective international controls, and to promote restraint—particularly to regions of tension and to states that are likely to pose a threat to international peace and security.

The United States will also continue vigorous support for current arms control and confidence-building efforts to constrain the demand for destabilizing weapons and related technology. The United States recognizes that efforts such as those under way in the Middle East and Europe bolster stability in a variety of ways, ultimately decreasing the demand for arms in these vital regions.

The United States will act unilaterally to restrain the flow of arms in cases where unilateral action is effective or necessitated by overriding national interests. Such restraint would be considered on a case-by-case basis in transfers involving pariah states or where the U.S. has a very substantial lead on weapon technology, where the U.S. restricts exports to preserve its military edge or regional stability, where the U.S. has no fielded

countermeasures, or where the transfer of weapons raises issues involving human rights or indiscriminate casualties, such as anti-personnel landmines.

Finally, the U.S. will assist other suppliers to develop effective export control mechanisms to support responsible export policies. The United States will also continue to provide defense conversion assistance to the states of the former Soviet Union and Central Europe as a way of countering growing pressures to export.

Supporting Responsible United States Transfers

Once an approval for a transfer is made, the U.S. Government will provide support for the proposed U.S. export. In those cases the United States will take such steps as tasking our overseas mission personnel to support overseas marketing efforts of American companies bidding on defense contracts, actively involving senior government officials in promoting sales of particular importance to the United States, and supporting official Department of Defense participation in international air and trade exhibitions when the Secretary of Defense, in accordance with existing law, determines such participation to be in the national interest and notifies Congress.

Decision-Making on United States Arms Exports: Criteria and Process

Given the complexities of arms transfer decisions and the multiple U.S. interests involved in each arms transfer decision, decisions will continue to be made on a case-by-case basis. These case-by-case reviews will be guided by a set of criteria that draw the appropriate balance between legitimate arms sales to support the national security of our friends and allies, and the need for multilateral restraint against the transfer of arms that would enhance the military capabilities of hostile states or that would undermine stability.

WHITE HOUSE FACT SHEET ON CRITERIA FOR DECISION-MAKING ON UNITED STATES ARMS EXPORTS, FEBRUARY 17, 1994

Given the complexities of arms transfer decisions and the multiple U.S. interests involved in each arms transfer decision, the U.S. Government will continue to make arms transfer decisions on a case-by-case basis. These case-by-case reviews will be guided by the criteria below.

General Criteria

All arms transfer decisions will take into account the following criteria:

- Consistency with international agreements and arms control initiatives.
- Appropriateness of the transfer in responding to legitimate U.S. and recipient security needs.
- Consistency with U.S. regional stability interests, especially when considering transfers involving power projection capability or introduction of a system which may foster increased tension or contribute to an arms race.
- The degree to which the transfer supports U.S. strategic and foreign policy interests through increased access and influence, allied burden sharing, and interoperability.
- The impact of the proposed transfer on U.S. capabilities and technological advantage, particularly in protecting sensitive software and hardware design, development, manufacturing, and integration knowledge.
- The impact on U.S. industry and the defense industrial base whether the sale is approved or not.
- The degree of protection afforded sensitive technology and potential for unauthorized third-party transfer, as well as in-country diversion to unauthorized uses.
- The risk of revealing system vulnerabilities and adversely impacting U.S. operational capabilities in the event of compromise.
- The risk of adverse economic, political, or social impact within the recipient nation and the degree to which security needs can be addressed by other means.
- The human rights, terrorism, and proliferation record of the recipient, and the potential for misuse of the export in question.

- The availability of comparable systems from foreign suppliers.
- The ability of the recipient effectively to field, support, and appropriately employ the requested system in accordance with its intended end-use.

Upgrade Criteria

Upgrades of equipment — particularly that of former Soviet-bloc manufacture — is a growing segment of the market. The U.S. government should support U.S. firms' participation in that market segment to the extent consistent with our own national security and foreign policy interests. In addition to the above general criteria, the following guidelines will govern U.S. treatment of upgrades :

- Upgrade programs must be well-defined to be considered for approval.
- Upgrades should be consistent with general conventional arms transfer criteria outlined above.
- There will be a presumption of denial of exports to upgrade programs that lead to a capability beyond that which the U.S. would be willing to export directly.
- Careful review of the total scope of proposed upgrade programs is necessary to ensure that U.S. licensing decisions are consistent with U.S. policy on transfers of equivalent new systems.
- U.S. contributions to upgrade programs initiated by foreign prime contractors should be evaluated against the same standard.
- Protection of U.S. technologies must be ensured because of the inherent risk of technology transfer in the integration efforts that typically accompany an upgrade project.
- Upgrades will be subject to standard USG written end use and retransfer assurances by both the integrator and final end user, with strong and specific sanctions in place for those who violate these conditions.
- Benchmarks should be established for upgrades of specific types of systems, to provide a policy baseline against which individual arms transfer proposals can be assessed and proposed departures from the policy must be justified.

ATTACHMENT 2-2

UNITED STATES CONVENTIONAL ARMS TRANSFER POLICY: PRESS BRIEFING

BY
ERIC NEWSOM, PRINCIPAL DEPUTY ASSISTANT SECRETARY OF STATE,
BUREAU OF POLITICAL-MILITARY AFFAIRS

As you know, the White House has announced the release of the Administration's policy on conventional arms transfers. I'd like to make a short presentation on the Administration's policy, Presidential Decision Directive (PDD 34).

- The PDD codifies policies that the Administration has been following in this area for the past two years for decisions on individual arms transfers.
- Does not represent a new departure from our current national security and foreign policy goals.
- First, the conventional arms transfer policy, defined in PDD-34, is based on two fundamental emphases:
- We seek to promote restraint, both by the U.S. and other suppliers, in transfers of weapons systems that may be destabilizing or dangerous to international peace.
- At the same time, we approve transfers to meet legitimate defense requirements that support our national security and foreign policy interests abroad.
- The Administration's record in the past two years reflects these two emphases.
- This policy also is predicated on the reality that the end of the Cold War has not meant the end of dangers to the U.S., or to our interests abroad.
- In this still insecure world, conventional weapons remain legitimate instruments for self-defense and important elements of U.S. national security policy.
- Because not every state can produce the full range of weapons necessary for legitimate defense needs, trade in weapons is inevitable.
- Our policy also recognizes that conventional weapons, particularly with the advances of modern technology, can do enormous harm in the hands of hostile states or groups, and appropriate restraint measures can serve our national security interests.
- Unneeded or destabilizing weapons can also exacerbate tensions and place significant economic burdens on some states that seek to obtain and support large militaries.
- These facts argue for continued regulation and restraint in the transfer of weapons and related technology.
- Reflecting the continued role of conventional arms transfers for U.S. national security interests, our approach reflects continuity with past arms transfer policy. However, this Administration has given a new emphasis—in its foreign and national security policies—to regional security and stability. Examples:
- Our nonproliferation efforts, which are focused on regions of particular tension;
- Our defense strategy, which is based on planning for two major regional contingencies.

We will be placing the same type of regional emphasis and focus on our conventional arms transfer decisions.

United States Goals

The major goals which our conventional arms transfer policy will serve are:

- 1) Ensuring that our military forces can continue to enjoy technological advantages over potential adversaries.

- 2) Helping allies and friends deter, or defend against, aggression while promoting interoperability with U.S. forces when combined operations are called for.
- 3) Ensuring regional stability in areas critical to U.S. interests while preventing the proliferation of weapons of mass destruction and their missile delivery systems.
- 4) Promoting peaceful conflict resolution and arms control, supporting regional stability, avoiding human rights violations, and promoting other U.S. foreign policy objectives such as the growth of democratic states.
- 5) Supporting the ability of the U.S. defense industrial base to meet U.S. defense requirements and maintain long-term military technological superiority at lower costs.

The Global Arms Transfer Market

This Administration's record in transfers reflects an understanding of the need for restraint coupled with the realization that transfers to allies and friends bolster our own security. Let me now briefly review basic trends in global arms transfers, to give you the context for our conventional arms transfer policy. U.S. government arms sales agreements under this Administration have returned to levels below our historical average — approximately \$12 billion a year. Meanwhile, U.S. arms deliveries have remained basically flat, a trend we expect to continue.

- Sales during this Administration have been primarily to NATO allies and other major friendly states such as Israel.
- U.S. market share has grown not because the U.S. is selling more weapons but because other suppliers — notably the Soviet Union — have disappeared from the market.
- The global market for arms has also shrunk because domestic procurement budgets have decreased.
- We expect that demand for U.S. arms will remain steady through the remainder of the decade.

The central fact in the international trade in arms is that the global market in conventional arms — measured in deliveries — has declined dramatically.

- Especially notable is the dropoff in sales by the states of the former Soviet Union.
- Over this same period, U.S. conventional arms deliveries stayed relatively steady.

Arms Transfer Policy Criteria

This Administration will allow a sale only if it meets a set of rigorous criteria. The list is rather long, but some of the most important are:

- Consistency with international agreements and arms control initiatives;
- The appropriateness of the transfer as a response to legitimate U.S. and recipient-country security needs;
- The transfer must be consistent with the U.S. interest in regional stability;
- A transfer must afford protection to sensitive technology, as well as protecting against unauthorized transfer to a third party;
- We will examine closely the human rights, terrorism and proliferation-related record of the recipient, and the potential for misuse of the export in question; and
- We will also examine closely the impact of any proposed transfer on U.S. military capabilities, and on the technological advantage enjoyed by U.S. forces.

Support for United States Industry

Our arms transfer decisions will not be driven by commercial considerations. However, once a decision has been made on national security grounds to approve a transfer, it is important that U.S. firms receive the support of this government to make the sale. The Administration will provide the following support to U.S. industry:

- Task our overseas mission personnel to support marketing efforts of American companies bidding on defense contracts;
- Support official Department of Defense participation in international air and trade exhibitions;
- Actively involve senior U.S.G. Officials in promoting sales of particular importance to the United States
- Seek legislation to repeal the statutory requirement to recoup nonrecurring costs on government-to-government sales, and align retransfer restrictions applied to government-to-government sales with those now applicable to commercial sales.

A fundamental point here is that we see support for a strong, sustainable U.S. defense industrial base as a key national security concern of the United States, rather than a purely commercial matter.

Maintaining this industrial base against the uncertainties of future international development is a necessary investment in America's security.

Arms Control and Restraint

At the same time, a critical part of our policy is the control and restraint of arms and their transfer. We also seek to increase the transparency of arms transfers.

- Restraint and transparency are not ends in themselves.
- They are tools to help reduce mistrust, tension, instability, and ultimately, the destructive cost of conflicts when they occur.

We have made and continue to work on a number of initiatives to establish a new, global pattern of restraint on transfers of conventional arms:

- We will continue to negotiate the COCOM successor regime.
- On transparency, the U.S. will also push to increase participation in the U.N. Register of Conventional Arms.
- Since the categories of weapons contained in the Register may not be the most relevant to some regional situations, the U.S. will also support regional initiatives to enhance transparency in conventional arms.
- We will also continue to expand our successful programs in export control assistance to Central and Eastern Europe.
- Finally, we will continue our efforts with new emerging suppliers such as South Africa, to provide them with information on how to adopt and apply responsible arms transfer policies.

Supporting Responsible United States Transfers

The U.S. system of reviewing and considering arms transfers is the most rigorous and open in the world.

Arms transfers will continue to be made on a case-by-case basis.

We believe that the Administration's conventional arms transfer policy will achieve all of these goals, in the service of U.S. national security and foreign policy objectives.