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International Security Assistance and Arms Export Control Act of 1976

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C. Competition Law and Unfair Trade Practices

THE INTERNATIONAL SECURITY ASSISTANCE AND ARMS EXPORT CONTROL ACT OF 1976

The International Security Assistance and Arms Export Control Act of 1976,[1] which amends the Foreign Assistance Act of 1961[2] and the Foreign Military Sales Act,[3] was signed into law by former President Gerald R. Ford on June 30, 1976. Enacted principally to authorize foreign military appropriations,[4] provisions of the Act increase congressional surveillance of arms sales and terminate grant military assistance.[5] The Act also restricts

1. The International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified at 22 U.S.C. 2151 (1976)) (hereinafter referred to as *Act*).

2. 22 U.S.C. § 2301 *et seq.* (1970 & Supp. IV 1974).

3. 22 U.S.C. § 2751 *et seq.* (1970 & Supp. IV 1974).

4. H.R. REP. No. 1144, 94th Cong., 2d Sess. 4 (1976).

5. Grant military assistance is military aid provided through grants.

> [There] are three different ways in which we provide military assistance: military grants, FMS [Foreign Military Sales] cash purchases and FMS credit sales.
>
> The cash purchases and credit sales presumably cost us nothing, since the cash we get on the barrel and the credit sales are repaid. It is only the military grants, then, that represent the net drawdown on the Treasury.

Hearings on H.R. 13680 before the House Committee on International Relations, 94th Cong., 2d Sess. 153 (1976). (Hereinafter cited as *Hearings*.)

United States arms sales to nations which deny basic human rights; discriminate against United States persons on the basis of race, religion, sex, or national origin; grant sanctuary to international terrorists; or breach military assistance agreements with the United States.

As enacted, this legislation fails to impose a ceiling on annual arms sales. A predecessor bill, S. 2662,[6] which included a $9 billion ceiling, was passed by both Houses of Congress, but was vetoed by President Ford on May 4, 1976.[7] In response to this veto, H.R. 13680 and S. 3439 were drafted.[8] The House bill was passed and sent to the Senate where it was amended to conform to S. 3439.[9] Differences between the House and Senate versions were resolved by a joint Conference Committee. While the Conference Committee agreed that United States arms sales should not exceed their present level, the arms ceiling was stricken as a concession to the Presidential veto. Nevertheless, the Committee requested that the President consider congressional concern regarding the rapidly accelerating pace of United States arms sales, and required him to submit a report to Congress within one year, analyzing the ramifications and feasibility of such a ceiling.[10]

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6. The International Security Assistance and Arms Export Control Act of 1976, S. 2662, 94th Cong., 2d Sess. (1976) was amended in conference to include provisions from the House version of the *Act*, H.R. 11963, 94th Cong., 2d Sess. (1976). (1976).

7. In the message accompanying his veto of S. 2662, President Ford criticized those provisions which (1) imposed a $9 billion ceiling on arms sales; (2) required compliance with basic human rights as a condition for continued U.S. assistance; (3) lifted the trade embargo imposed on Viet Nam; (4) terminated grant military assistance and advisory groups, except those specifically authorized by Congress; and (5) subjected major arms transfers to possible congressional disapproval by concurrent resolution. *Presidential Message accompanying Veto of S. 2662 — International Security Assistance and Arms Export Control Act of 1976*, S. Doc. No. 94–185, 122 CONG. REC. 6715 (1976).

8. The provision in S. 2662 temporarily lifting the trade embargo of Viet Nam was omitted in H.R. 13680 *supra* note 5, the bill that was finally signed by the President. In drafting H.R. 13680, the House also decreased from seven to two the provisions permitting congresisonal veto of executive action in the arms sales area.

9. S. REP. No. 876, 94th Cong., 2d Sess. 13 (1976). The annual arms sales ceiling, carried over from S. 2662 by the House in H.R. 13680, was stricken by the Senate Committee in response to the veto of S. 2662.

10. *Conference Report on International Security Assistance and Arms Export Control Act of 1976*, H.R. REP. No. 1272, 94th Cong., 2d Sess. 50 (1976). (Hereinafter cited as *Conference Report.*)

GENERAL LIMITATIONS ON SECURITY ASSISTANCE

Human Rights

Prior to the enactment of the International Security Assistance and Arms Export Control Act of 1976, the Foreign Military Sales Act withheld approval of security assistance to military dictators who denied the growth of fundamental rights and social progress to their own people.[11] However, neither the Department of State[12] nor the Department of Defense[13] was able to cite a single instance in which this provision was applied to withhold or alter a grant of security assistance. Furthermore, specific examination of past military assistance to South Korea revealed that "[t]here has been a complete failure of our ability to [affect] their human rights situation by all the persuasion and overtures that we have been able to make." Despite this fact, United States security assistance to South Korea continued undiminished.[14]

Confronted by the ineffectiveness of existing law, Congress amended the Foreign Assistance Act to broaden the prohibition forbidding all security assistance to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."[15] Gross violations of human rights include "torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, and other flagrant denials of the right to life, liberty, or the security of person."[16]

The Act provides for a Coordinator for Human Rights and Humanitarian Affairs within the State Department, whose primary responsibility is to garner information about human rights in nations under consideration for military assistance, and to communicate this information to Congress.[17] If Congress requests a report about a particular nation, the Coordinator must provide the necessary information within thirty days. Based on this report, Congress may vote to terminate, restrict or continue security assistance by joint resolution. If a report is not received within

11. 22 U.S.C. § 2751 (1976).

12. Testimony of The Hon. Carlyle E. Maw, Under-Secretary of State for Security Assistance, in *Hearings, supra* note 5, at 14–15.

13. Testimony of Lt. Gen. Howard M. Fish, USAF, Director Security Assistance Agency, in *Hearings, supra* note 5, at 140–141.

14. *Hearings, supra* note 5, at 20.

15. *Act,* § 301(a) (amending 22 U.S.C. § 2304 (1976)).

16. *Act,* § 301(a) (amending 22 U.S.C. § 2304 (1976)).

17. *Act,* § 301(a) (amending 22 U.S.C. § 2384 (1976)); *Conference Report, supra* note 10, at 51.

the thirty day period, the Act states that all security assistance to the nation involved will be terminated.[18]

Discrimination

The new Act also amends the Foreign Assistance Act and the Foreign Military Sales Act to prohibit arms sales or assistance to any foreign nation which discriminates on the basis of race, religion, national origin or sex against United States persons[19] engaged in furnishing defense articles or services under either act.[20] Congress must be notified of reported acts of discrimination and has authority to respond by terminating or restricting military assistance if necessary.[21] Therefore, nations receiving United States military aid which discriminate against United States persons do so at the risk of losing that military assistance.

International Terrorism

A unique addition to the Foreign Assistance Act prohibits military assistance to countries which grant sanctuary to international terrorists, except where the President finds that national security requires that assistance be given regardless.[22] Unlike the human rights and discrimination provisions of the Act, the anti-terrorism sanctions expire at the end of one year.

Ineligibility

Nations which violate the Foreign Assistance Act or the Foreign Military Sales Act may be declared ineligible by the President or Congress to receive further security assistance in any form: sales, credit, or grant. Violations include using defense articles and services for purposes other than those authorized by United States law, transferring them without United States consent and failing to maintain the security of these articles and

18. *Act*, § 301(a) (amending 22 U.S.C. § 2304 (1976)).

19. *Act*, § 302(a) (amending 22 U.S.C. § 2314 (1976)) defines the term "United States Person" (as defined in section 7701(a)(30) of the Internal Revenue Code of 1954) as:

(A) a citizen or resident of the United States,

(B) a domestic partnerships,

(C) a domestic corporation, and

(D) any estate or trust (other than a foreign estate or foreign trust within the meaning of section 7701(a)(31) (of the Internal Revenue Code of 1954)).

20. *Act*, § 302(b) (amending 22 U.S.C. § 2755 (1976)).

21. *Conference Report, supra* note 10, at 52.

22. *Act*, § 303 (amending 22 U.S.C. § 2371 (1976)).

services.[23] The previous Foreign Military Sales Act did not specifically delineate those violations which would warrant a finding of ineligibility. The new, detailed provisions of the 1976 Act clarify congressional intent to withhold military aid from nations breaching agreements with the United States. These amendments should also facilitate congressional efforts to identify and penalize violators.

National Security Exception to Humanitarian Provisions

The effect of denying United States military assistance to nations which violate basic human rights, discriminate against United States persons, grant sanctuary to international terrorists or breach military agreements with the United States is to impose United States standards upon recipient nations. While the United States has the right to impose whatever criteria it chooses upon the dissemination of military assistance, absolute restrictions could have the effect of denying necessary aid to nations whose military security is in the United States national interest. Foreseeing this possibility, Congress permitted exceptions when necessary for reasons of national security.

TRANSFER OF ARMAMENTS

Policy: Reduced International Trade in Implements of War

Prior to passage of the International Security Assistance and Arms Export Control Act of 1976, United States policy was to encourage regional arms control and disarmament agreements, and to discourage arms races.[24] Within these policy limitations, however, Congress recognized a need for international defense cooperation among allies which often required supplying armaments to friendly nations. Government-to-government sales, credit sales and guarantees were reduced to the smallest amount possible, in order to diminish the role of the government as an arms supplier.[25] Commercial sales were not similarly restricted.

The International Security Assistance and Arms Export Control Act of 1976 abandons this preference for commercial over

23. *Act*, § 304(a) (amending 22 U.S.C. § 2314 (1976)) and § 304(b) (amending 22 U.S.C. § 2753 (1976)).

24. 22 U.S.C. § 2751 (1976).

25. *Id.*

government-to-government arms sales and imposes upon the United States a requirement of world leadership aimed at reducing international trade in implements of war. In furtherance of this policy, the President is required to work with other nations to control the international sale and distribution of conventional weapons and to consider limitations on the international arms trade in the interests of peace.[26]

Rather than limiting its supervision to the United States government's arms sales, Congress has explicitly sought to monitor both governmental and commercial arms exports, and has committed itself to reducing the overall level of international arms sales.[27]

Congressional Surveillance

Prior to the enactment of the International Security Assistance and Arms Export Control Act of 1976, all proposed offers to sell defense articles or services worth $25 million or more had to be submitted to Congress by the President. Congress then had twenty days to pass a concurrent resolution rejecting the proposed sale, though the President could waive this waiting period in an emergency.[28] The President was required to submit quarterly reports to aid Congress in making these decisions, including lists showing the value of all excess defense articles delivered to each recipient nation,[29] as well as similar lists for credit sales and guaranty agreements, and the projected cumulative values of arms to be transferred to each county during the subsequent quarter of the fiscal year.[30]

The 1976 amendments to the Foreign Military Sales Act require that the President submit to Congress each letter or offer of sale which proposes the sale of any major defense equipment[31] for $7 million or more, or which offers to sell any defense article or service[32] for $25 million or more. Congress has thirty days in which to pass a concurrent resolution rejecting the proposed sale, subject to Presidential waiver in a national emergency. To

26. *Act*, § 202(a) (amending 22 U.S.C. § 2751 (1976)).
27. *Act*, § 211(a) (amending 22 U.S.C. § 2776 (1976)).
28. 22 U.S.C. § 2776(b) (1976).
29. 22 U.S.C. § 2321b(d) (1976).
30. 22 U.S.C. § 2776(a) (1976).
31. *Act*, § 215(3) (amending 22 U.S.C. § 2794 (1976)); *see also* Conference *Report supra* note 10, at 50.
32. *Act*, § 215(3) (amending 22 U.S.C. § 2794 (1976)).

enable Congress to make an informed decision about proposed sales, the President must submit a detailed, unclassified[33] report to Congress with the letter or offer of sale.[34] The congressional committee considering the sale may ask for additional data, which the President must supply on demand.[35]

Quarterly and annual reports must also be compiled by the Executive and submitted to Congress, showing not only government-to-government arms sales and transfers, but revealing the total amount of United States arms exports, both by the government and by private commercial enterprises.[36] These country-by-country lists shall include all sales and offers to sell equipment worth $1 million or more.

Dissatisfaction with State Department criteria for approving arms transfers and the desire to play a greater role in making these decisions led Congress to increase its participation by establishing specific criteria for arms sales, rather than permitting such transfers to proceed automatically.[37] Increased congressional surveillance is effected primarily by expanding the scope of reports to Congress about arms sales and transfers. The information so provided should permit Congress to oversee United States arms exports effectively and maintain a relatively high degree of Congressional involvement in this important area of United States foreign policy.[38]

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33. Certain descriptions of defense articles or services offered or sold and the dollar amount of the offer to sell or the sale and the number of defense articles offered or sold may be classified when the public disclosure of such information would be detrimental to the security of the United States. *Act,* § 211(a) (amending sections 36(a)(8) and 36(b)(1)(M) of the *Foreign Military Sales Act,* 22 U.S.C. § 2776 (1976)).

34. This report must include a certification specifying the recipient of the goods or services, the dollar amount of the sale, a description of the article offered for sale, the number of articles involved, and the United States Armed Force or other agency making the offer to sell or the sale. *Act,* § 211(a) (amending section 36(a)(8) of the *Foreign Military Sales Act,* 22 U.S.C. § 2776 (1976)).

35. *Act,* § 211(b) (amending section 36(b)(1) of the *Foreign Military Sales Act,* 22 U.S.C. § 2776 (1976)).

36. *Act,* § 211(a) (amending sections 36(a)(3) and 36(a)(4) of the *Foreign Military Sales Act,* 22 U.S.C. § 2776 (1976)).

37. H.R. REP. No. 1144, 94th Cong., 2d Sess. 11–12 (1976).

38. During the hearings before the House Committee on International Relations, several congressmen expressed their concern that a cash purchase of military equipment by Chile, totalling $20 million, would not be subject to Congressional scrutiny under that portion of the H.R. 13680 which gave Congress jurisdiction over foreign military sales of $25 million or more. This provision was altered to extend

Termination of Grant Military Assistance and Advisory Groups

In past years Congress authorized substantial appropriations for grant military aid and military assistance advisory groups.[39] However, believing that recipients of grant aid are increasingly able to provide for their own needs with cash or credit purchases,[40] Congress specifically terminated the grant military assistance program as of September 30, 1977,[41] and all military assistance advisory groups and similar organizations as of October 1, 1977.[42] Both forms of aid may be revitalized on a country-to-country basis with the express approval of Congress.

Former recipients of grant aid which still require military supplies may make cash or credit purchases if they are economically able to do so. Consequently, the elimination of grant aid may not actually decrease the quantity of United States military exports, though it should reduce the cost of United States military aid, consistent with congressional concern about the balance-of-payments.[43] The United States generally suffers no economic loss from cash or credit sales, since prices and interest rates charged equal the cost to the United States government,[44] and

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congressional surveillance to sales of major military equipment for $7 million or more, *Act*, § 211(a) (amending section 36(b)(1) of the *Foreign Military Sales Act*, 22 U.S.C. § 2776 (1976)). In addition, Congress provided that a report of all licenses and approvals for the commercial sale of major defense equipment for $1 million or more must be made quarterly. *Act*, § 211(a) (amending section 36(a)(4) of the *Foreign Military Sales Act*, 22 U.S.C. § 2776 (1976)). *See Hearings, supra* note 5, at 184.

The possibility of arms sales to Chile was of particular concern to Congress because of that nation's disregard of basic human rights. Section 406(a) of the *Act* severely limits the economic assistance, military assistance, sales and sales credits for Chile. Section 406(b)(2)(A) of the *Act* makes the availability of future economic assistance to Chile contingent upon, among other things, certification by the President of the United States that the Government of Chile is not engaged in a "consistent pattern of gross violations of universally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges of trial, or other flagrant deniels of the right to life, liberty, or the security of the person."

39. *Hearings, supra* note 5, at 24–25, 103–104 and 134–135.
40. H.R. REP. No. 1144, 94th Cong., 2d Sess. 12 (1976).
41. *Act*, § 105 (amending 22 U.S.C. § 2321j (1976).
42. *Act*, § 104 (amending 22 U.S.C. § 2321i (1976)).
43. S. REP. No. 876, 94th Cong., 2d Sess. 9 (1976).
44. *Act*, § 205 (amending 22 U.S.C. § 2761 (1976)).

since no nation has yet defaulted on a loan made for a foreign military credit sale.[45]

Military education and training of foreign personnel, formerly carried out under the grant military assistance program, is specifically retained by the International Security Assistance and Arms Export Control Act of 1976. Consistent with the policy underlying the Act, these educational and training activities are intended to increase understanding between the United States and foreign nations in the pursuit of peace, and to contribute to greater self-reliance on the part of participating foreign nations.[46]

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45. Testimony of Deputy Secretary of Defense Robert Ellsworth. *Hearings, supra* note 5, at 95 and 110–112.

46. *Act*, § 106 (amending 22 U.S.C. § 2347 (1976)).