
CRS Report for Congress

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Nuclear Sanctions: Section 102(b) of the Arms Export Control Act and Its Application to India and Pakistan

Updated December 9, 1999

Jeanne J. Grimmett
Legislative Attorney
American Law Division

ABSTRACT

This report describes § 102(b) of the Arms Export Control Act, which provides for the imposition of mandatory economic and military sanctions against countries that have engaged in certain types of nuclear proliferation, and discusses its application to India and Pakistan, each of which conducted a series of nuclear weapons tests in May 1998. It also discusses subsequently enacted legislative mandates and authorities which have resulted in the lifting of some of the § 102(b) sanctions originally imposed on these two countries. This report will not be updated.

Nuclear Sanctions: Section 102(b) of the Arms Export Control Act and Its Application to India and Pakistan

Summary

Section 102(b) of the Arms Export Control Act (AECA) requires the President to impose sanctions on any country that he has determined is a "non-nuclear-weapon state" and has received or detonated a "nuclear explosive device." Sanctions include prohibitions on foreign assistance; munitions sales and licenses; foreign military financing; government credits, guarantees, and financial assistance; U.S. support for multilateral financial assistance; private bank lending to the affected government; and exports of certain specific controlled goods and technology. Specific exceptions exist for humanitarian aid; food and agricultural exports; food assistance; private bank loans and credits for purchases of food and agricultural commodities; and certain transactions involving intelligence activities. The President imposed § 102(b) sanctions on India and Pakistan in May 1998 following nuclear tests by those countries earlier that month. Full implementation, which involved numerous federal agencies, provoked a number of legal and policy issues. Section 102(b) had never before been invoked and there were no regulations implementing it. After an inter-agency review to develop a comprehensive sanctions policy for the two countries, the Administration announced its overall implementation plan June 18, 1998.

Section 102(b) does not provide for terminating or suspending the sanctions once imposed. Concerns over the lack of an exemption for agricultural goods in § 102(b)(2)'s prohibition on government credits and guarantees led to enactment of the Agriculture Export Relief Act (P.L. 105-194), which exempted Department of Agriculture programs through FY99. The statute also permanently exempts government financing for medicine and medical supplies and allows private loans for exports of fertilizer. In October 1998, Congress authorized the President to waive for one year § 102(b)(2) prohibitions on foreign assistance, non-military government financing, multilateral lending, and private bank loans as applicable to India or Pakistan, as well as other related statutory restrictions (India-Pakistan Relief Act, P.L. 105-277). The President exercised this authority December 1, 1998, the waiver expiring October 21, 1999.

Congress has since authorized the President to waive, without time restriction, all of the sanctions contained in §§ 101 or 102 of the AECA, a nuclear-related restriction in the Export-Import Bank Act, and § 620E(e) of the Foreign Assistance Act (Pressler Amendment), which restricts military aid and exports to Pakistan, as these laws relate to the two countries (Department of Defense Appropriations Act, 2000, P.L. 106-79, § 9001). The President may waive the military and export control sanctions in the AECA, however, only if he certifies to Congress that a particular restriction would not be in U.S. national security interests; in addition, licenses for defense exports must be notified to Congress and are subject to congressional review. Waivers under the new law will no longer apply to India or Pakistan if the respective country detonates a nuclear explosive device or takes one of the nuclear-related actions that would require the President to report to Congress under § 102(b)(1) of the AECA. On October 27, 1999, the President waived sanctions imposed on the two countries with regard to specific programs and commercial transactions. This report will not be updated.

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Nuclear Sanctions: Section 102(b) of the Arms Export Control Act and Its Application to India and Pakistan

This report describes the requirements of § 102(b) of the Arms Export Control Act, 22 U.S.C. § 2799aa-1(b)(AECA or Act), which provides for the imposition of economic and military sanctions against countries that have engaged in certain types of nuclear proliferation, and discusses its application to India and Pakistan, which conducted nuclear weapons tests in May 1998. It also discusses subsequently enacted legislation authorizing the removal or some or all of these sanctions and presidential action taken pursuant to these new authorities.

Section 102(b), also known as the Glenn Amendment, was enacted in the Nuclear Proliferation Prevention Act of 1994 and is an amended version of the now repealed § 670(b) of the Foreign Assistance Act of 1961, originally enacted in 1977.¹ In pertinent part, § 102(b)(1) requires the President to impose sanctions on any country that he has determined is a "non-nuclear-weapon state" and has received or detonated a "nuclear explosive device" and on any country that has transferred such a device to a non-nuclear-weapons state.

The required sanctions include prohibitions on foreign assistance; sales and licenses under the AECA; U.S. government credits, credit guarantees, and financial assistance; U.S. support for multilateral financial assistance; private bank lending to the affected government; and exports of certain specific controlled goods and technology. Humanitarian aid, food and agricultural exports, food assistance, and bank loans and credits for purchases of food and agricultural commodities are exempted, as are certain transactions involving intelligence activities.

Congress amended portions of these sanctions provisions in July 1998 and subsequently granted the President authority temporarily to waive particular sanctions with regard to India and Pakistan as of October 21, 1998. The President formally exercised this waiver authority December 1, 1998, the waiver expiring October 21, 1999. In an October 25, 1999 enactment, Congress granted the President authority to waive AECA sanctions without time limit; the President used this authority October 27, 1999 to waive statutory restrictions with regard to specified U.S. government programs and commercial transactions involving the two countries.

¹Foreign Assistance Act of 1961, § 670, *added by* P.L. 95-92, § 12, *amended and restated by* P.L. 97-113, § 737(c). The provision adding § 102 to the AECA, which is contained in Part B of the Nuclear Proliferation Prevention Act of 1994, was enacted in § 826(a) of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, P.L. 103-236. The Nuclear Proliferation Prevention Act of 1994 was enacted as Title VIII of P.L. 103-236.

Requirements of § 102(b) of the Arms Export Control Act (AECA)

The text of § 102(b)(1) of the Arms Export Control Act under discussion here provides as follows:

Except as provided in paragraphs (4), (5), and (6), in the event that the President determines that any country, after the effective date of part B of the Nuclear Proliferation Prevention Act of 1994 —

- (B) is a non-nuclear-weapon-state and either —
 - (i) receives a nuclear explosive device, or
 - (ii) detonates a nuclear explosive device,

then the President shall forthwith report in writing his determination to the Congress and shall forthwith impose the sanctions described in paragraph (2) against that country.

The statute defines a "non-nuclear-weapon state" as "any country which is not a nuclear-weapon state, as defined in Article IX(3) of the Treaty on the Non-Proliferation of Nuclear Weapons" (AECA, § 102(c)). Under Article IX(3) of the Treaty, a nuclear weapon state is "one which has manufactured and exploded a nuclear weapon or other nuclear device prior to January 1, 1967" (21 U.S.T. 492-93). The term "nuclear explosive device" is to be defined pursuant to § 830(4) of the Nuclear Proliferation Prevention Act, 22 U.S.C. § 3201 note, and thus includes "any device, whether assembled or disassembled, that is designed to produce an instantaneous release of an amount of nuclear energy from special nuclear material that is greater than the amount of energy that would be released from the detonation of one pound of trinitrotoluene (TNT)."

Section 102(b)(2) of the AECA sets forth the sanctions to be imposed after a presidential determination. As they existed in May 1998, these sanctions were as follows:

- (A) The United States Government shall terminate assistance to that country under the Foreign Assistance Act of 1961, except for humanitarian assistance or food or other agricultural commodities.
- (B) The United States Government shall terminate —
 - (i) sales to that country under this Act [*i.e.* the AECA] of any defense articles, defense services, or design and construction services, and
 - (ii) licenses for the export to that country of any item on the United States Munitions List.
- (C) The United States Government shall terminate all foreign military financing for that country under this Act [*i.e.* the AECA].
- (D) The United States Government shall deny to that country any credit, credit guarantees, or other financial assistance by any department, agency, or instrumentality of the United States Government, except that the sanction of this subparagraph shall not apply —

- (i) to any transaction subject to the reporting requirements of title V of the National Security Act of 1947 (relating to congressional oversight of intelligence activities), or
 - (ii) to humanitarian assistance.²
- (E) The United States Government shall oppose, in accordance with section 701 of the International Financial Institutions Act (22 U.S.C. 262d), the extension of any loan or financial or technical assistance by any international financial institution.³
- (F) The United States Government shall prohibit any United States bank from making any loan or providing any credit to the government of that country, except for loans or credits for the purpose of purchasing food or other agricultural commodities.
- (G) The authorities of section 6 of the Export Administration Act of 1979⁴ shall be used to prohibit exports to that country of specific goods and technology (excluding food and other agricultural commodities), except that such prohibition shall not apply to any transaction subject to the reporting

²In addition, § 2(b)(4) of the Export-Import Bank Act, 12 U.S.C. § 635(b)(4)(as amended by § 1303(a) of P.L. 104-201) prohibits the Bank from giving approval to guarantees, insurance, credit extensions or participations in the extension of credit in support of U.S. exports to any country that the Secretary of State has determined is not a nuclear-weapon state and has detonated, after October 26, 1977, a nuclear explosive device. The statute gives the President authority to waive the prohibition if he finds Bank approvals to be in the "national interest." The Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1999, prohibited the Export-Import Bank from using funds available to it in FY1999 "to make expenditures, contracts, or commitments for the export of nuclear equipment, fuel, or technology to any country other than a nuclear-weapon state as defined in Article IX of the Nuclear Non-Proliferation Treaty eligible to receive economic or military assistance under this Act that detonates a nuclear explosive after the date of enactment," *i.e.*, October 21, 1998. Pub. L. No. 105-277, § 101(d), Title I, 112 Stat. 2681-151. The same provision appears in Title I of H.R. 3422, the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2000, as enacted into law by § 1000(a)(2) of P.L. 106-113.

³Section 701 of the International Financial Institutions Act, 22 U.S.C. § 262d, sets forth human rights and U.S. assistance policies with international financial institutions. Among other covered institutions are the International Bank for Reconstruction and Development (World Bank), the International Development Association, the International Finance Corporation, the Asian Development Bank, and the International Monetary Fund (IMF). In carrying out his or her duties, the United States Executive Director of each of the named institutions is to consider, among other things, whether the recipient country has detonated a nuclear device. 22 U.S.C. § 262d(b)(3)(C). In addition, the U.S. Government is to "seek to channel assistance to projects which address basic human needs of the people of the recipient country." 22 U.S.C. § 262d(d).

⁴The authorities of the Export Administration Act, which expired in 1990 and was temporarily reauthorized in 1994, have been carried forward in Executive Order No. 12924 of August 19, 1994, issued under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* 59 Fed. Reg. 43437 (1994). Section 6 of the Export Administration Act, 50 U.S.C. App. § 2405, authorized the President to impose export controls for foreign policy reasons, subject to certain conditions and restrictions.

requirements of title V of the National Security Act of 1947 (relating to congressional oversight of intelligence activities).

While the statute requires that the President impose the sanctions "forthwith," it does not specify a date by which they must be imposed. Section 102(b)(4)(B) of the Act, however, authorizes the President to delay the imposition of sanctions for a maximum of 30 days of continuous session of Congress if he first transmits to the Speaker of the House of Representatives and the Chairman of the Senate Foreign Relations Committee "a certification that he has determined that an immediate imposition of sanctions on that country would be detrimental to the national security of the United States." This section permits only one certification to be transmitted to the Congress for a country regarding the same detonation, transfer, or receipt of a nuclear explosive device.

Section 102(b) does not allow the President to waive one or more of the sanctions unilaterally, but does provide for the enactment of legislation on an expedited basis that would permit such a waiver. If the President transmits a certification to the Congress for the delay of sanctions, a joint resolution to authorize the exercise of waiver authority will be considered under expedited procedures in the Senate if the legislation is introduced in either House within 30 days of continuous session after Congress receives the President's certification (AECA, § 102(b)(4)(B),(C)).

The waiver authority allows the President to waive "any sanction" that must otherwise be imposed under § 102(b)(2) if he determines and certifies in writing to the Speaker of the House and the Chairman of the Senate Foreign Relations Committee that "the imposition of the sanction would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security" (AECA, § 102(b)(5)). The certification must include a statement setting forth the specific reasons for the waiver. The waiver authority would be limited to the country that has engaged in the proscribed conduct.

As described earlier, sanctions are to be imposed against the "country" involved, except for prohibitions on private bank loans, which apply to the "government of that country." Neither of these terms is defined in the statute, however, and thus it is not clear whether they are intended to include sub-national or government-owned entities.⁵ Other terms (for example, "humanitarian aid") also remain undefined. The legislation does not contain a contract sanctity provision, which would bar the President from prohibiting transactions in performance of contracts entered into before the date of the sanctions. Legislative history of the measure indicates that sanctions imposed under § 102(b)(2) are intended to be "prospective."⁶

⁵Compare § 2(b)(4) of the Export-Import Bank Act (see *supra* note 2), which provides that the term "country" is to have the meaning given to the term "foreign state" in 28 U.S.C. § 1603(b), a provision of the Foreign Sovereign Immunities Act. Under this provision, the term "foreign state" is to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."

⁶House Conference Report language on the provision, which was adopted as a Senate floor (continued...)

Section 102(b) does not provide for the removal or suspension of one or more of the sanctions once certain conditions are met⁷ nor does it provide for the termination of sanctions after they have been imposed. Thus, in the absence of other provisions of law that may be invoked, legislation must seemingly be enacted to achieve these ends.⁸

Application of § 102(b) of the AECA to India and Pakistan

On May 11, 1998, India stated publicly that it had conducted three underground nuclear tests that day; on May 13, it announced that it had conducted two additional tests. Pakistan announced May 28 that it had conducted five underground nuclear tests; it reported a sixth test May 30. Because neither India nor Pakistan had detonated a nuclear device before January 1, 1967, each is considered to be a "non-nuclear-weapon state" for purposes of § 102(b)(2).

On May 13, 1998, President Clinton signed Presidential Determination No. 98-22, a memorandum for the Secretary of State, in which he determined "in accordance with section 102(b)(1) of the Arms Export Control Act ... that India, a non-nuclear-weapon state, detonated a nuclear explosive device on May 11, 1998," and directed

⁶(...continued)

amendment and not contained in the House bill, states that the "conference substitute is similar to the Senate amendment, but ... refines the language on sanctions with respect to transfers or detonations of nuclear explosive devices (or transfers or designs or components thereof) to ensure that such sanctions are prospective." H.Rept. 103-482, 103d Cong., 2d Sess. 264 (1994).

⁷For example, § 102(b) applies to a country that has detonated a nuclear explosive device when it had the status of a "non-nuclear-weapon state," an act whose character cannot be modified were that status subsequently to change.

⁸Legislative history of P.L. 103-236 does not appear to address the termination of § 102(b) sanctions. *See* 140 Cong. Rec. S411-S413 (daily ed. January 31, 1994) and H.Rept. 103-482, 103d Cong., 2d Sess. 261-266 (1994). Section 102(b) may be compared, however, to § 824 of the Nuclear Proliferation Prevention Act, which, like § 826(a), the section enacting § 102(b), is also contained in Part B of the Act. Section 824, which provides for the imposition of sanctions on persons found to have assisted nuclear proliferation through the provision of financing, requires that sanctions continue in effect for 12 months and provides that they will cease to apply after that period only if the President makes certain determinations.

It should also be noted that while the President has independent powers in the area of foreign relations, the power of the President (or other entities of the Executive Branch) to engage in the activities covered by the sanctions (*e.g.*, providing foreign assistance, licensing arms exports) and to prohibit the particular transactions listed in the Act is based on statutory grants of delegated authority. In areas where Congress has exercised its express constitutional powers, the President may not use his independent authority to contravene an expression of congressional will. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952)(Justice Jackson concurring); *Consumers Union of U.S. v. Kissinger*, 506 F.2d 136 (D.C.Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *affirmed on other grounds*, 348 U.S. 296 (1955). *See generally* L. Henkin, *Foreign Affairs and the U.S. Constitution* 86-96 (1996).

"the relevant agencies and instrumentalities of the United States Government ... to take the necessary actions to impose the sanctions described in section 102(b)(2) of the Act."⁹ On May 30, the President made an identical determination (No. 98-25) with respect to Pakistan's May 28 tests.¹⁰ In each case, the President decided not to invoke that part of § 102(b) allowing a 30-day delay of sanctions. By doing so, the President appeared to forego the possible expedited enactment of a joint resolution authorizing him to waive any sanction with respect to India or Pakistan, as provided in § 102(b)(4)(B). Congress could choose to enact separate legislation, however, authorizing such a waiver or a version thereof.

The President's determination regarding India was the first invocation of § 102(b). At the time, no regulations had been issued governing its implementation. While the Executive Branch has implemented many forms of sanctions legislation in the past and could draw on this experience in implementing § 102(b), it had no prior regulatory precedents for administering this specific statute. The absence of certain definitions in § 102(b) might present problems for agencies, but might also afford them flexibility in implementing these measures. Agencies involved in administering the sanctions include the Department of State, the Department of Defense, the Agency for International Development (AID), the Overseas Private Investment Corporation (OPIC), the Department of Commerce, the Office of Foreign Assets Control of the Department of the Treasury (OFAC), the U.S. Export-Import Bank,

⁹Presidential Determination No. 98-22 of May 13, 1998, 63 Fed. Reg. 27665 (1998).

¹⁰Presidential Determination No. 98-25 of May 30, 1998, 63 Fed. Reg. 31881 (1998). The United States suspended economic and military aid to Pakistan in April 1979 after receiving what it considered to be incontrovertible evidence of covert efforts by that country to construct a uranium enrichment facility. This action was taken under § 669 of the Foreign Assistance Act of 1961 (currently replaced by § 101 of the AECA), which prohibited all U.S. economic and military assistance to any nonnuclear weapons country that had received nuclear enrichment equipment, materials or technology which had not been placed under International Atomic Energy Agency safeguards, unless the President made certain certifications. Pursuant to subsequent legislation, sanctions were waived and later reappplied. The FAA provides that the President may waive the prohibition in § 101 of the AECA with respect to Pakistan with respect to any grounds for the prohibition of assistance arising before the effective date of the Nuclear Proliferation Prevention Act of 1994 if he determines that to provide assistance is in the national interest of the United States (FAA, § 620E(d), 22 U.S.C. § 2375(d)).

Under § 620E(e) of the Foreign Assistance Act, added in 1985 and amended in 1996 (P. L. 104-107)(Pressler Amendment), Pakistan is prohibited from receiving certain military assistance and military equipment or technology unless the President can certify during the fiscal year in which such assistance or sales or transfers are to take place, "that Pakistan does not possess a nuclear explosive device and that the proposed military assistance program will reduce significantly the risk that Pakistan will possess a nuclear explosive device." Pakistan has not been certified with respect to non-possession of a nuclear explosive device since Presidential Determination No. 90-1 of October 5, 1989 (54 Fed. Reg. 43797 (1989)). The President was able to waive § 101 of the AECA and § 620E(e) of the FAA for one year as these provisions applied to India or Pakistan under the India-Pakistan Relief Act of 1998 (*see* pages 12-13, *infra*) and may now do so without time restriction under authority granted in § 9001 of the Department of Defense Appropriations Act, 2000, P.L. 106-79 (*see* pages 13-15, *infra*). Regarding sanctions imposed on Pakistan, *see generally* CRS Report 92-631, *Economic Sanctions Imposed by the United States Against Specified Countries: 1979 Through 1992*, at 193-96.

and the Commodity Credit Corporation (CCC). As noted earlier, absent other provisions of law that may apply, authority for the modification, suspension, or termination of these sanctions would appear to depend on a future congressional enactment.¹¹

Details of § 102(b) Sanctions Imposed on India and Pakistan

After conducting an inter-agency review to develop a comprehensive sanctions policy with respect to India and Pakistan, the Administration announced its original implementation scheme for the two countries June 18, 1998.¹² Highlights of the sanctions, as modified by the Agriculture Export Relief Act of 1998 and the India-Pakistan Relief Act of 1998, are described immediately below. The 1998 enactments are discussed in greater detail in the following section of this report. Provisions of P.L. 106-79, enacted October 25, 1999, granting the President broad waiver authority and repealing the India-Pakistan Relief Act of 1998, along with the President's actions under the new statute, are discussed in the last section of this report.

Foreign assistance: The United States terminated or suspended foreign assistance under the Foreign Assistance Act, with those exceptions provided by law.¹³ On December 1, 1998, the President exercised his authority under the India-Pakistan Relief Act of 1998 (enacted October 21, 1998) to waive until October 21, 1999, the § 102(b) prohibition as it applied to Trade and Development Agency (TDA) activities involving both India and Pakistan. The President also exercised his waiver authority to allow assistance to both countries under the International Military Education and

¹¹In testimony before the Senate Foreign Relations Committee, the State Department expressed the view that new legislation was needed to enable the Executive Branch to terminate § 102(b) sanctions. *Crisis in South Asia: India's Nuclear Tests; Pakistan's Nuclear Tests; India and Pakistan: What Next? Hearings Before the Subcomm. on Near Eastern and South Asian Affairs of the Senate Comm. on Foreign Relations*, 105th Cong., 2d Sess. 18-19 (1998)(testimony of Robert Einhorn, Assistant Secretary of State). See also *Economic Sanctions and U.S. Policy Interests: Hearing Before the House Comm. on International Relations*, 105th Cong., 2d Sess. 25 (testimony of Stuart Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs).

¹²Dep't of State, "Fact Sheet on India and Pakistan Sanctions," June 18, 1998 [hereinafter cited as DOS Fact Sheet]; Dep't of State, "India-Pakistan Sanctions," On-the-Record Briefing, Washington, D.C., June 18, 1998 <<http://www.state.gov>>[hereinafter cited as DOS Briefing]. See also *India-Pakistan Nuclear Proliferation in South Asia: Hearing Before the Subcomm. on Asia and the Pacific of the House Comm on International Relations*, 105th Cong., 2d Sess. (1998) [hereinafter cited as HIRC Hearing]. For additional information on the implementation of these sanctions, see CRS Report 98-570, *India-Pakistan Nuclear Tests and U.S. Response*.

¹³DOS Fact Sheet, *supra* note 12, at 1. The Fact Sheet cites the § 102(b) exceptions for humanitarian assistance and food and agricultural commodities as examples. The Department also noted that most assistance to Pakistan had already been prohibited. *Id.*

Training (IMET) program.¹⁴ Prior to the waiver, TDA would not consider new projects in the sanctioned countries,¹⁵ but commitments made by the TDA before May 13, 1998, for India and before May 30, 1998, for Pakistan were honored “in accordance with applicable law.”¹⁶ Policy regarding Overseas Private Development Corporation (OPIC) programs, which are authorized in §§ 231 *et seq.* of the Foreign Assistance Act, is discussed under “Government credits, credit guarantees, and other financial assistance,” below.

Military sales, exports, and financing: The United States has terminated foreign military sales under the AECA, revoked licenses for the commercial sale of any item on the United States Munitions List, and suspended delivery of previously approved defense articles and services to India.¹⁷ Pakistan is prohibited from receiving certain U.S. military assistance, as well as U.S. military equipment and technology, pursuant to § 620E(e) of the Foreign Assistance Act of 1961 (Pressler Amendment), a restriction which may now be waived under § 9001 of P.L. 106-79.¹⁸

Government credits, credit guarantees, and other financial assistance: The Export-Import Bank (Eximbank) had issued notices terminating new business in India and Pakistan prior to the Administration’s June 18 announcement.¹⁹ This policy was later adopted by the Overseas Private Investment Corporation (OPIC) and the

¹⁴The IMET program is authorized in Part II, Chapter 5 of the FAA (§§ 541-546), 22 U.S.C. §§ 2347-2347e. Along with the ban on foreign assistance under § 102(b)(2)(A) of the AECA, § 101(a) of the Act bars FAA military assistance and grant military education and training as a sanction for engaging in certain nuclear enrichment transfers, unless the President makes specified certifications. The Pressler Amendment ban on military assistance to Pakistan, however, excludes IMET assistance and certain other FAA programs. FAA, § 620E(e)(2), 22 U.S.C. § 2375(e)(2).

¹⁵DOS Fact Sheet, *supra* note 12, at 1.

¹⁶HIRC Hearing, *supra* note 12, at 9 (testimony of David Aaron, Under Secretary of Commerce for International Trade).

¹⁷DOS Fact Sheet, *supra* note 12, at 1. In a May 20 *Federal Register* notice, the Bureau of Political-Military Affairs of the State Department announced that “all licenses and other approvals to export or otherwise transfer defense articles and defense services from the United States to India, or transfer U.S. origin defense articles and defense services from a foreign destination to India, or temporarily import defense articles from India pursuant to Section 38 of the Arms Export Control Act are immediately revoked.” 63 Fed. Reg. 27781 (1998). The Department also stated that it would subsequently “deny all applications and other requests for approval to export or otherwise transfer or retransfer defense articles and services to India.” *Id.* The State Department’s notice revoking munitions export licenses and other approvals for Pakistan is set forth at 63 Fed. Reg. 33122 (June 17, 1998).

¹⁸See *supra* note 10.

¹⁹The Export-Import Bank announced a prohibition on financing of new transactions in the public and private sectors in India May 13, 1998. It did the same for Pakistan June 1. The sanctions were imposed under both § 102(b) of the AECA and § 2(b)(4) of the Export-Import Bank Act. Ex-Im Bank Press Releases, May 13, 1998, and June 1, 1998 <<http://www.exim.gov/press>>.

Commodity Credit Corporation (CCC).²⁰ Transactions approved by Eximbank as well as legally binding commitments made by OPIC and the CCC did, however, go forward.²¹ The Agriculture Export Relief Act, enacted July 14, 1998, amended the AECA to provide an exemption through FY1999 for U.S. Department of Agriculture financing covered by § 102(b)(2)(D). This enactment permitted U.S. wheat farmers to participate in a 365,000 metric ton wheat tender by Pakistan that closed the following day.²² The new statute also permanently exempted from the AECA prohibition federal government financing for medicine and medical supplies. On December 1, 1998, the President used his authority under the India-Pakistan Relief Act of 1998 to waive until October 21, 1999, the AECA prohibition on Eximbank and OPIC activities with regard to both India and Pakistan, as well as nuclear-related restrictions on Eximbank activities contained in § 2(b)(4) of the Export-Import Bank Act.²³

Support for international financial assistance: This sanction affects U.S. support for the programs of such international financial institutions (IFIs) as International Bank for Reconstruction and Development (World Bank), the International Development Association, the International Finance Corporation, the Asian Development Bank, and the International Monetary Fund (IMF).²⁴ In the Administration's June 19 press briefing, the Treasury Department spokesman stated that "[t]here is now a G-8 consensus ... on two key points: first, that loans to India and Pakistan in the category of basic human needs will go forward; and second, that loans that are outside of that category — non-basic human needs — will be postponed. With the voting share that the G-8 have at the IFIs, we expect that consensus to be sustained."²⁵ In a written summary, the State Department noted that the United States has "gained G-8 support to postpone consideration of non-basic human needs (BHN) loans for India and Pakistan by the International Financial Institutions (IFI) to bolster the effect of the Glenn Amendment requirement that the U.S. oppose non-BHN loans."²⁶ In July 1998, U.S. officials announced that the

²⁰DOS Fact Sheet, *supra* note 12, at 1.

²¹DOS Briefing, *supra* note 12 (response of Under Secretary of the Treasury David Lipton); HIRC Hearing, *supra* note 12, at 9 (testimony of David Aaron, Under Secretary of Commerce for International Trade).

²²"White House Amends Sanctions Law in Time for Pakistan Wheat Tender," *Inside U.S. Trade*, July 17, 1998. For background on agricultural issues, see CRS Report 98-770, *U.S. Agricultural Exports and the Nuclear Nonproliferation Sanctions on India and Pakistan*.

²³Section 2(b)(4) of the Export-Import Bank Act is described at note 2, *supra*.

²⁴See *supra* note 3.

²⁵DOS Briefing, *supra* note 12 (statement of Under Secretary of the Treasury David Lipton). The G-8 countries referred to are the United States, the United Kingdom, France, Germany, Japan, Canada, Italy, and Russia.

²⁶DOS Fact Sheet, *supra* note 12, at 2; see *supra* note 3. The Department added that these restrictions included a postponement of \$1.17 billion in IFI lending for India and "although no IFI loans for Pakistan have been presented for board consideration, \$25 million in IMF assistance has been postponed for failure to meet economic benchmarks." *Id.* The Treasury

(continued...)

United States would not oppose the negotiation of IMF loans to Pakistan, although it would abstain from an IMF board vote to approve any resulting loan agreement, an action the Administration viewed to be in compliance with its statutory obligation under § 102(b).²⁷ On December 1, 1998, the President invoked the India-Pakistan Relief Act to waive this provision until October 21, 1999, as it applies to “the extension of any loan or financial or technical assistance to Pakistan by any international financial institution in support of the assistance program that Pakistan is negotiating with the International Monetary Fund.”

Private bank loans: The Administration stated that it planned to implement the § 102(b)(2)(F) prohibition on certain private lending in a future Executive Order.²⁸ This prohibition appeared to have posed considerable difficulty for regulators, in part because of the level and nature of governmental involvement in the Indian banking system.²⁹ As noted earlier, the prohibition’s exemption for agricultural commodities was legislatively expanded in July 1998 to include fertilizer. On December 1, the President used his authority under the India-Pakistan Relief Act of 1998 to waive § 102(b) until October 21, 1999, as it applies to “the extension of any loan or the providing of any credit to the Government of India or the Government of Pakistan by any U.S. bank.”

Exports: The Commerce Department's Bureau of Export Administration (BXA) issued interim guidance for exporters May 28 and June 3, 1998, but a number of questions as to which dual-use items were to be covered and which recipients were to be embargoed remained unresolved.³⁰ Following the Administration's June 18 statement, the Bureau issued its updated export policy June 22, stating that it would apply this policy to new and pending license applications. The controls are grouped into three categories addressing items to be exported and end-users, the first category representing the most severe level of controls. These categories are: (1) nuclear and missile-related items and entities of concern; (2) exports of national security-related items (including certain computers) and military entities; and (3) other dual-use

²⁶(...continued)

Department spokesman at the Administration's June 19 press briefing described BHN loans as including loans in "categories such as education, maternal and child health, water and sewage, low-income housing, rural development." DOS Briefing, *supra* note 12 (statement of Under Secretary of the Treasury David Lipton).

²⁷State Department Background Briefing, July 21, 1998, *as reported by* Federal News Service, *available in* LEXIS, News Library, Curnws File; “Despite A-Test, U.S. Won’t Bar Pakistan Bailout,” N.Y. Times, July 22, 1998, at A3. *See generally* CRS Report 98-570, *India-Pakistan Nuclear Tests and U.S. Response*, at 26-27.

²⁸DOS Fact Sheet, *supra* note 12, at 2.

²⁹*See, e.g.*, “Banks Lobby Washington for Slack in India Sanctions,” Wall St. J., May 22, 1998, at A15. For a discussion of banking issues, *see* CRS Report 98-537, *Bank Loan Denial for Nuclear Proliferation under Section 102(b) of the Arms Export Control Act as Applicable to India and Pakistan*.

³⁰“U.S. Is Wrestling Over Limits on High-Tech Exports to India,” Wall St. J., June 10, 1998, at A14; “Albright Makes Push for Flexibility on India, Pakistan Nuclear Sanctions,” Inside U.S. Trade, June 12, 1998.

items.³¹ Controls range, for example, from an absolute prohibition on exports of any dual-use item controlled for nuclear or missile proliferation reasons to all end users (category 1) to end-user based controls on computers of over 2000 MTOPS (category 2) to favorable case-by-case consideration of license applications for dual-use items to Indian and Pakistani entities where neither the item nor the entity is covered by either of the first two categories. In codifying its regulations November 19, 1998, BXA, among other things, added to its general Entities List at 15 C.F.R. Part 744, Supp. 4, the names of Indian and Pakistani government, parastatal, and private entities determined to be involved in nuclear or missile activities, as well as the names of Indian and Pakistani military entities.³² The agency stated that, with limited exceptions, it would require a license for the export of any item over which BXA exercises regulatory jurisdiction to the entities cited for nuclear and missile activities, and presume denial with regard to items specifically listed on the Commerce Control List for export to the named military entities.³³

1998 Sanctions Relief Legislation

Concern over the lack of an exemption for food and agricultural products in the § 102(b)(2)(D) prohibition on government credits, guarantees, and financing led to the July 14, 1998, enactment of the Agriculture Export Relief Act (AERA), P.L. 105-194, which amended this AECA section to exempt credits, credit guarantees, and financial assistance programs provided by the U.S. Department of Agriculture (USDA) to support the purchase of food or other agricultural commodities, and makes this amendment applicable to USDA credits, guarantees, and assistance made

³¹Bureau of Export Administration, "U.S. Sanctions on the Export of Dual-Use Goods to India and Pakistan" (June 22, 1998) <<http://www.bxa.doc.gov>>. By prohibiting the export of missile-related goods and possibly some dual-use items, DOC appears to have disagreed with some industry arguments that the NNPA permitted the Department to restrict only nuclear-related goods and technology. See "Business Groups Face Uphill Battle in Effort to Limit India Sanctions" and letters of Industry Coalition on Technology Transfer and Electronic Industries Association to Samuel B. Berger, Assistant to the President to the President for National Security Affairs, *Inside U.S. Trade*, May 22, 1998.

³²Dep't of Commerce, Bureau of Export Administration, "India and Pakistan Sanctions and Other Measures; Interim Rule," 63 Fed. Reg. 64322-42 (November 19, 1998). In its June 22 export policy statement (*supra* note 31), BXA announced that, pursuant to the Enhanced Proliferation Control Initiative (EPCI), it would publish a list of Indian and Pakistani government and private entities involved in nuclear and missile activities and would prohibit the exports and reexports of all items subject to the EAR to the listed entities. Under the EPCI, originally imposed by Executive Order 12735 of November 16, 1990 (55 Fed. Reg. 48587) and a December 1990 presidential directive (26 Weekly Comp. Pres. Docs. 2033 (1990)), foreign policy export controls have been imposed on specific items intended for proliferation-related uses and on goods that a U.S. exporter knows will be used for proliferation purposes. Bureau of Export Administration, "Imposition of Foreign Policy Export Controls under the Enhanced Proliferation Control Initiative; Report to the Congress" (February 1991).

³³63 Fed. Reg. at 64322-23. The agency will consider export license exceptions for items related to the safety of civil aviation and the safe operation of commercial passenger aircraft. *Id.* at 64322.

before, on, or after the date of enactment, through September 30, 1999.³⁴ The Act also lifted, through September 30, 1999, any sanctions that had already been imposed under § 102(b) involving these USDA programs.³⁵ Additionally, the AERA made the general prohibition on U.S. credits, credit guarantees, and financial assistance inapplicable to medicine and medical supplies and permanently lifted any sanctions imposed on such items before the date of enactment.³⁶ Finally, the Act amended the private loan exemption for agricultural commodities to specifically include fertilizer and permanently lifted any sanctions imposed on such items before the date of enactment.³⁷

The India-Pakistan Relief Act of 1998 (IPRA), enacted October 21, 1998, authorized the President to waive “for a period not to exceed one year upon enactment” all or part of the § 102(b) sanctions imposed on India or Pakistan related to FAA and governmental financial assistance, international financial assistance, and private bank loans, as well as all or part of the following: § 620E(e) of the Foreign Assistance Act, prohibiting military assistance to Pakistan based on its nuclear activities (Pressler Amendment); § 2(b)(4) of the Export-Import Bank Act, generally restricting financing based on the detonation of a nuclear device; and § 101 of the AECA, which prohibits certain FAA and AECA assistance to countries engaged in nuclear enrichment transfers.³⁸ The Act maintained § 102(b) prohibitions on sales of defense articles and services, export licenses for U.S. Munitions List items, foreign

³⁴Agriculture Export Relief Act (AERA), Pub. L. No. 105-194, § 2(a)(3), § 2(d). Of primary concern at the time were the CCC General Sales Manager (GSM) programs, which provide export credit guarantees for U.S. agricultural commodities (7 C.F.R. Part 1493). The Justice Department had reportedly concluded that § 102(b)(2)(D) did not allow the Administration to provide agricultural credits for exports to sanctioned countries. "No Flexibility for Food," Dow Jones News Service, June 11, 1998, *available in* WESTLAW, ALLNEWSPLUS File; "U.S. moves to exempt Pakistani wheat credits from sanctions," AP, June 12, 1998; "Congress May Lift Ban on Wheat Sales to India and Pakistan," N.Y. Times, June 15, 1998, at A17. Unlike certain other sanctions that must be imposed under § 102(b) — namely, the prohibition on Foreign Assistance Act assistance, the prohibition on private bank lending, and the use of Export Administration Act authority to prohibit exports — the prohibition on government credits, credit guarantees and financial assistance does not include an express exemption for food and agricultural commodities. *Compare* AECA, § 102(b)(2)(D), as in effect in May 1998, with AECA, §§ 102(b)(2)(A), (F), (G).

Amendments exempting USDA programs were originally attached to the reported version of H.R. 4101 (105th Cong.), the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Bill, 1999, at § 737 (H.Rept. 105-588, 105th Cong., 2d Sess.) and to the reported version of S. 2159, the Senate agriculture appropriations bill for FY1999, at § 738 (S.Rept. 105-212, 105th Cong., 2d Sess.). The Agriculture Export Relief Act of 1998 was later enacted as freestanding legislation.

For further discussion of economic sanctions as they relate to the agricultural sector, *see* CRS Report RL30108, *Economic Sanctions and U.S. Agricultural Exports*.

³⁵AERA, §§ 2(d), 2(e).

³⁶AERA, §§ 2(c), 2(e).

³⁷AERA, §§ 2(b), 2(e).

³⁸Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, P.L. 105-277, § 101(a), Title IX, § 902(a), 112 Stat. 2681-40.

military financing under the AECA, and export controls under § 6 of the Export Administration Act.³⁹ Before exercising his waiver authority, the President was required to consult with the Senate Foreign Relations Committee, the House International Relations Committee, and the Senate and House Appropriations Committees. In addition, the Secretary of State was required to submit a report to these committees, at least 30 days before a one-year waiver period expired, on economic and national security developments in India and Pakistan.

On November 7, 1998, the President announced that he would waive some of the existing nuclear sanctions because of Indian and Pakistani commitments regarding further nuclear testing.⁴⁰ As noted earlier, the President formally exercised his IPRA authority December 1, 1998, waiving until October 21, 1999, the statutory provisions covered by the new law, with regard to specific programs and activities.⁴¹

1999 Sanctions Relief Legislation and Presidential Action

A number of bills were introduced in 1999 to narrow the application of § 102(b) of the AECA and other provisions of law as they pertain to India and Pakistan.⁴² Three bills containing sanctions relief legislation for India and Pakistan were acted upon: **H.R. 973** passed the House June 15, 1999; **H.R. 2415** passed the House July 21, but passed the Senate August 3 in a form that did not contain sanctions relief provisions; **S. 1122** passed the Senate June 8, and was later inserted into **H.R. 2561**, the Department of Defense Appropriations Act, 2000. H.R. 2561 passed the Senate

³⁹P.L. 105-277, § 101(a), Title IX, § 902(b).

⁴⁰“President Clinton Eases Some Sanctions Against India, Pakistan After Nuke-Test Ban,” 15 Int’l Trade Rep. 1931-32 (BNA 1998).

⁴¹Presidential Determination No. 99-7, December 1, 1998 <<http://www.pub.whitehouse.gov>>. At the request of the House Ways and Means Committee, the International Trade Commission (ITC) in April 1999 began a factfinding investigation regarding the economic effect of the AECA sanctions imposed on India and Pakistan, publishing its report in September 1999. As the ITC stated in the report’s abstract, AECA sanctions “appeared to have had a relatively minimal overall impact on India, while they appeared to have had a more pronounced adverse impact on Pakistan. However, for both countries it is difficult to isolate the effects of the U.S. sanctions from other concurrent economic events, such as each country’s domestic economic policies and sanctions imposed by other countries.” The ITC also stated that “[r]ecent trade data indicated that reimposition of the Glenn Amendment sanctions prohibiting USDA export credits and guarantees most likely would adversely affect U.S. wheat exports to Pakistan, which is an important customer for white wheat grown in the U.S. Pacific Northwest states.” U.S. Int’l Trade Comm’n, *Overview and Analysis of the Economic Impact of U.S. Sanctions with Respect to India and Pakistan* iii (September 1999)(Pub’n 3236).

⁴²Undersecretary of State Stuart Eizenstat reportedly stated in testimony before the House Agriculture Committee in June 1999 that the Administration favored having “waiver authority, full and permanent waiver authority, for all of the Glenn sanctions with respect to India and Pakistan.” *Economic Sanctions and the Effect on U.S. Agriculture; Hearing Before the House Comm. on Agriculture*, June 9, 1999, transcript reported by Federal News Service, available in LEXIS, News Library, Curnws File (response of Mr. Eizenstat to question by Mr. Pomeroy).

as amended July 28, and was enacted into law October 25 with sanctions relief language.

The new law, P.L. 106-79, § 9001, authorizes the President to waive, without time limitation, all of the sanctions contained in §§ 101 or 102 of the AECA, the nuclear-related restriction in § 2(b)(4) of the Export-Import Bank Act, and § 620E(e) of the Foreign Assistance Act (Pressler Amendment), as these apply to India or Pakistan. The President may waive military and export control sanctions in § 102(b)(2), however, only if he certifies to Congress that a particular restriction would not be in U.S. national security interests. Further, the issuance of a license for defense exports is subject to the same requirements as those contained in § 36(c) of the AECA, 22 U.S.C. § 2776(c), which requires the President to certify to Congress specified information on a proposed defense export before an export license is issued.⁴³ Section 36(c) also provides that unless the President states in his certification that an emergency exists which requires the proposed export in the U.S. national security interests, such a license may not issue until 30 calendar days after the certification is received by Congress, unless a joint resolution of disapproval is enacted in the interim. Waivers issued under the law will cease to apply to India or Pakistan if the respective country detonates a nuclear explosive device or takes one of the nuclear-related actions that would require the President to report to Congress under § 102(b)(1) of the AECA. The statute also repeals the India-Pakistan Relief Act of 1998.

On October 21, the President waived the statutory restrictions covered by the new law as applicable to specific U.S. government programs and commercial transactions.⁴⁴ The waiver for India covers the following:

- Export-Import Bank programs;
- OPIC programs;
- Trade and Development Agency programs;
- assistance under the International Military Education and Training (IMET) program;
- private U.S. bank loans and credits to the Government of India;
- assistance to the Asian Elephant Conservation Fund, the Rhinoceros and Tiger Conservation Fund, and the Indo-American Environmental Leadership program; and
- USDA credits, credit guarantees, and other financial assistance to support the purchase of food or other agricultural commodities.

The waiver for Pakistan is more limited, covering private U.S. bank loans and credits to the Government of Pakistan, and USDA credits, credit guarantees, and other financial assistance to support the purchase of food or other agricultural commodities. The United States had earlier terminated aid to Pakistan under an

⁴³Section 36(c), as written, applies to exports of major defense equipment and other defense articles and services valued over threshold dollar amounts.

⁴⁴Presidential Determination No. 2000-04, 64 Fed. Reg 69649 (1999). This document is also posted at <<http://www.pub.whitehouse.gov/uri-res/I2...pdi://oma.eop.gov.us/1999/10/28/2/text.1>> .

annual foreign operations appropriations act provision cutting off all assistance financed by funds appropriated under the statute to any country whose duly elected head of government is deposed by military coup or decree, a provision that was triggered by the October 12, 1999 military coup in Pakistan.⁴⁵

⁴⁵Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1999, § 508, P.L. 105-277, § 101(d), 112 Stat. 2681-171. Aid may be resumed if the President determines and reports to the House and Senate Appropriations Committees that a democratically elected government has taken office subsequent to the termination of aid. The same provision appears in § 508 of H.R. 3422, the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2000, as enacted into law by § 1000(a)(2) of Pub. L. No. 106-113.

