

Unmanned But Not Unarmed: State Dept.'s New Drone Policy

--By Charles A. Blanchard, John P. Barker, John B. Bellinger III and Brandon M. Bodnar, Arnold & Porter LLP

Law360, New York (March 25, 2015, 10:23 AM ET) -- The U.S. State Department has announced a new export policy governing the sale, transfer and subsequent use of drones, or unmanned aerial systems, that originate from the United States. While the new export policy places significant conditions on the sale or transfer of military drones, it also for the first time provides explicit guidance regarding under what circumstances the United States will approve the sale of armed drones to the U.S. allies and coalition partners.

Previously, U.S. military drone manufacturers could apply for a State Department license to export drones. For unarmed drones, the State Department has approved requests for the sale, transfer, and subsequent use of surveillance drones to various NATO allies, including Italy and France. However, the U.S. government had not provided clear guidance concerning when the State Department would approve such requests.

Under what circumstances the State Department would approve requests to export armed military drones was even more unclear. Prior to the new export policy, the United States had authorized sales of armed drones only to the United Kingdom. In 2012, the State Department announced it intended to allow the Italian Air Force to upgrade six of its unarmed drones to allow mounting of Hellfire missiles and precision-guided bombs. The Italian Air Force requested the upgrades following the death of an Italian soldier where an unarmed drone had been in the local area but was incapable of defending the soldier. Members of Congress had pushed back against the proposal to arm Italy's drones, expressing concerns over potential misuse of armed drones by foreign governments.

The State Department asserts the new export policy will provide a "disciplined and rigorous framework" to ensure that the exports of both military and commercial drones comply with existing export laws and international agreements. While the official policy is classified, the State Department's fact sheet states that authorization to sell military drones will be on a case-by-case basis and will impose a number of conditions, including:

- Sales and transfers of sensitive systems will be through the Foreign Military Sales program;
- The Technology Security Foreign Disclosure Office will review potential transfers of military drones;
- The receiving country must agree to particular end-use requirements as a condition of sale or transfer;
- The U.S. may monitor the receiving country's end-use of the drones and impose other potential security conditions; and
- The receiving country must agree to certain principles for proper use of drones.

The new policy establishes principles to govern the receiving country's end use. These principles include that:

- Use of these systems must comply with applicable international laws, including international humanitarian law and international human rights law;
- Armed and other advanced drones may be used in operations involving use of force only if international law provides a lawful basis for the use of such force;

- Military drones may not be used for unlawful surveillance or to employ unlawful force against the receiving country's domestic population; and
- Receiving countries must provide their drone operators with appropriate training on the drones' use to reduce the risk of collateral injury or damage.

The State Department described the policy as part of a broader drone policy review and indicated a desire for the U.S. to work with other nations to develop international standards governing the export of military drones. Additionally, the State Department asserted that the new export policy enables to United States to achieve particular national interests including enabling its trusted partners to enhance their operational capabilities during coalition operations while reducing the stress on U.S. forces that had been providing this capability and ensuring proper use of drones. The State Department also stated a clear United States interest in enabling U.S. drone manufactures to compete in the emerging global market for drones.

However, certain aspects of drone export policy will remain unchanged. For example, the new export policy will not alter the United States' commitments from its membership in the Missile Technology Control Regime, an informal and voluntary group of 34 countries that coordinate their export licensing rules to restrict proliferation of unmanned systems capable of delivering weapons of mass destruction. In accordance with the MTCR commitments, drones with a potential range of 300 kilometers or more, and that can carry a 500 kilograms payload will continue to face a "strong presumption of denial" for an export license. However, the State Department notes that it will issue license on "rare occasions" for situations after considering the following factors from the MTCR guidelines:

- Concerns regarding proliferation of WMDs;
- Capabilities and objectives of the receiving country's missile and space programs;
- Significance of the transfer in potentially developing delivery systems for WMDs;
- Assessment of the receiving country's end use of the drones, including specific assurances that (1) they will be used only for a stated purpose, (2) the end use and the drones will not be modified or replicated without the United States' prior consent, and (3) the drones will not be retransferred without the United States' consent;
- Applicability of relevant multilateral agreements; and
- Risk of the drones falling into the hands of terrorist groups and individuals.

The State Department also referenced potential changes for the Export Administration Regulations governing the sale, transfer and subsequent use of commercial drones. The State Department asserted that the United States is equally commitment to placing stringent standards for exports of commercial drones, and directs that potential exports will be reviewed under the requirements and licensing policies outlined in the EAR.

The State Department's new drone export policy will provide better clarity about the criteria the United States will use in reviewing requests to sell and transfer military drones to trusted US allies. The potential for an expanded marketplace is a boon to the U.S. drone industry as global demand for advanced drone technology increases. However, the State Department also indicated that export authorizations will remain on a case-by-case basis and the United States will impose significant conditions on both the exporter and the receiving country to authorize military drone sales.

[Charles Blanchard](#) is a partner in Arnold & Porter's Washington, D.C., office and former general counsel and chief ethics officer for the U.S. Air Force.

[John Barker](#) is a partner in the firm's Washington office and former deputy assistant secretary for nonproliferation controls at the U.S. Department of State.

[John Bellinger](#) is a partner in the firm's Washington office and former legal adviser to the State Department.

[Brandon Bodnar](#) is an associate in the firm's Washington office and a former staff sergeant in the Air Force.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.