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STATEMENT OF

ALLAN I. MENDELOWITZ
ASSOCIATE DIRECTOR, NATIONAL SECURITY AND
INTERNATIONAL AFFAIRS DIVISION

BEFORE THE

SENATE COMMITTEE ON BANKING, HOUSING
AND URBAN AFFAIRS

ON

FOREIGN POLICY EXPORT CONTROLS



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Mr. Chairman and Members of the Committee:

At your request, Mr. Chairman, we are here to present our views on the Secretary of Commerce's January 1986 report to the Congress on the extension of foreign policy export controls in effect prior to the passage of the Export Administration Amendments Act of 1985 (the Act) and to discuss the role assigned GAO by the Act. We have also addressed the consultation process used by the Department of Commerce in soliciting businesses' views on the controls' extension.

To assess the Secretary's report, we have initiated work to (1) review the Act and its background; (2) examine the report for compliance with the Act's requirements; (3) discuss its development with Commerce and State Department employees involved in its preparation; and (4) examine the documentation, analysis, and methodology supporting it. To obtain affected businesses' views on the consultation process, we contacted the nine parties providing comments on the controls' extension. We did most of our work in preparation for this hearing at Commerce and would like to recognize the prompt and complete cooperation given to us by the Department. Because we have just begun our review of the Secretary's report, the views we are expressing today are preliminary.

THE 1985 EXPORT ADMINISTRATION AMENDMENTS ACT

In 1985, Congress passed the Export Administration Amendments Act of 1985, Public Law 99-64. This Act significantly modified the 1979 Export Administration Act. The

Act authorizes the President to establish export controls for economic, national security, and foreign policy reasons. The new law made important changes in the President's authority with respect to foreign policy export controls.

The major aim of these changes was to limit the President's use of foreign policy controls that have an impact on U.S. exports. For example, under the new law the President may only impose, expand, or extend export controls if he first (1) consults with Congress, (2) makes certain determinations regarding the impact, significance, and effectiveness of proposed controls, and (3) reports to Congress. The act also requires the President to consult with industry and foreign countries. For extensions of foreign policy controls in effect prior to the enactment of the 1985 Act, the President does not have to make any determinations regarding the impact, significance, and effectiveness of these controls. Rather, as under the previous law, he must only consider their impact, significance, and effectiveness.

In addition, under the 1985 Act if the Secretary determines that goods and technology subject to foreign policy controls are available from foreign sources, he shall license exports of controlled items. There are, however, certain limitations on this provision's applicability, which I shall discuss shortly.

The 1985 act specifies that the report submitted to Congress before imposing, expanding, or extending controls address several subjects. The report must, in essence, specify

the purpose of the controls; detail the President's determinations (or for existing controls, considerations) and the bases for such determinations (or considerations) and any adverse foreign policy consequences; describe consultations with industry and other countries; specify what alternative means were considered or any reasons why such actions were not feasible; describe the availability of comparable foreign goods and technology and the results of efforts to secure foreign government cooperation; and indicate how the controls will significantly advance U.S. foreign policy.

The Act also provides that the General Accounting Office will assess each report. This requirement was added to assure that the executive branch has fully considered all the factors required by the new law and has kept Congress fully informed about its intentions.

A PRELIMINARY ASSESSMENT OF
THE SECRETARY'S 1986 REPORT

This Committee, in its 1983 report on proposed amendments to the Export Administration Act, expressed dissatisfaction with prior export control reports. The Committee offered the view that these reports should be comprehensive and detailed and not a paper-writing exercise.

Reports to the Congress regarding the imposition, expansion, or extension of controls have been required since enactment of the Export Administration Act of 1979. The reporting process is an incremental one, with each year's report using the previous year's as a base. Relevant personnel at Commerce

and State were asked to review the 1985 report and indicate what, if any, changes were appropriate for the 1986 report. A cursory comparison of the two reports indicates that much of their language is similiar and sometimes identical.

Our preliminary analysis indicates that the report addresses each subject required by the Act. However, while several sections of the report, particularly the ones on economic impact and foreign availability, contain substantive discussion, others, such as the sections on enforcement and alternative means, contain declarative statements with little or no explanation.

The economic impact statements in the report, for example, generally examine the economic effects of particular export controls. Most of the statements provide data and analysis that help explain the costs to U.S. businesses of the various export restrictions. It must be noted, however, that it becomes more difficult to accurately assess the economic impact of foreign policy controls over time, as those controls not only decrease actual export sales but discourage industry from competing for future sales. In addition, it is very difficult, if not impossible, to quantify the extent to which foreign purchasers may view the United States as an unreliable supplier because of the controls and, as a result, reduce their purchases of U.S. products.

Other sections of the report do not contain supporting analysis or explanations for the positions taken or the

statements made in them. For example, the enforcement section does not address the ability of the United States to enforce the controls. The report generally contains the statement that enforcement presents no unusual problems and sometimes notes that reexports do create enforcement problems. No further discussion is included.

The section on alternative means is to specify the nature and results of any alternative means attempted or the reasons for extending the controls without attempting any such means. The report sometimes addresses alternative means in the context of alternatives for preventing U.S. exports, sometimes in the context of diplomatic means, and sometimes in a context that makes its meaning unclear. However, the report does not indicate what range of alternative options were considered.

FOREIGN AVAILABILITY

The 1985 amendments to the Act gave increased emphasis to the foreign availability of controlled items. The original 1979 Act only required that the President take all feasible steps to secure the cooperation of foreign governments in controlling the export of the controlled item. As modified in 1985, section 6(h) of the Act now provides that if the President is not successful in securing this cooperation and the Secretary of Commerce determines that there is sufficient availability so that denial of an export license would be ineffective in achieving the purposes of the controls, then the Secretary shall approve any required export license and remove the commodity

from the export control list. The Act does provide several exceptions, such as for controls against countries supporting international terrorism.

In extending the existing controls, the Commerce Department has apparently decided that if the purpose of the control is defined in the context of restricting U.S. exports or distancing the United States from a target country, then the existence of foreign availability does not render the control ineffective because the foreign availability would not prevent achieving the control's purpose. The Secretary's report indicates that there is widespread foreign availability of virtually all controlled items. However, because the foreign policy purpose of these controls is always drawn in the context of restricting U.S. items or distancing the U.S. from specific actions, the controls were extended irrespective of foreign availability.

Defining the purpose of the control in this way appears to allow maintaining a control despite the foreign availability of the controlled item. While Commerce and State Department officials involved in preparing the report agreed with our assessment, they also emphasized that the foreign availability provisions are producing greater deliberations about the imposition and extension of controls.

CONSULTATION WITH INDUSTRY

The 1985 Act requires the Secretary to consult with and seek advice from affected U.S. industries and appropriate advisory committees prior to imposing any foreign policy export

controls. This provision of the Act thus applies to new controls and not the extension of existing controls. As the 1986 report only extended existing controls, no prior consultation with industry was required.

The Department of Commerce did, however, place a notice in the Federal Register on October 21, 1985, seeking public comment on the controls' extension in accordance with the Department's own standard operating procedure and in an effort to work within the "spirit" of the Act. Nine parties responded to the notice with written comments. We believe that the discussion of public comments in the Secretary's report fairly characterizes and summarizes these comments. The primary focus of the comments, accounting for six of the nine responses, was on the sale of oil and gas equipment to the Soviet Union. Numerous arguments and much specific data were set forth, with each party urging the Department of Commerce not to extend these controls.

In discussions with this committee, we agreed to solicit the views of commenters concerning the consultation process. We contacted each of the nine commenters to solicit their views on the acceptability and effectiveness of the consultation process used by the Department. We found that a majority of commenters, eight of nine, felt the solicitation of comments through the Federal Register was an unacceptable or ineffective form of consultation. The most common concerns were that it is often difficult to become aware of the Federal Register notice and that potential commenters are dissuaded from submitting comments

because they do not feel their comments affect policy. One respondent added that firms are often reluctant to comment for fear that negative comments would harm their chances for obtaining future licenses.

When asked to provide suggestions for changes in the consultation process, seven commenters advocated that a more active role be played by the Department of Commerce, either through the direct solicitation of opinions from affected industries or by holding public hearings in Washington and other selected cities.

OBSERVATIONS

As a practical matter, foreign policy controls can be used for several purposes. These include influencing a country to modify behavior that the U.S. finds objectionable by imposing economic costs on the target of the controls; punishing a country for such behavior by imposing economic costs; or symbolically demonstrating displeasure or distancing the United States from a specific country or behavior by restricting U.S. exports. When controls are only symbolic, the target of the controls incurs essentially no cost. We believe many of the foreign policy controls extended in the Secretary's report are symbolic because (1) their stated purpose is to limit U.S. involvement with a specific country and (2) acknowledged foreign availability means the targets of the controls incur little or no costs. The costs of such controls are borne by American businesses, which lose export sales to firms in other

countries not participating in the export controls.

By requiring a series of determinations and other actions concerning the controls' potential effectiveness, the 1985 Act placed restrictions on how the President may use foreign policy export controls. When the purpose of the control is to induce a country to modify its behavior or punish it for that behavior, it appears to us that the Act does, as a practical matter, restrict Presidential discretion. This is because he would not be able to maintain controls when there is widespread foreign availability. When the purpose, however, is symbolic, it appears to us that the Act leaves Presidential discretion intact. The practical result of the statutory change in such cases is to require the administration to make a more "eyes open" decision than in the past as to the consequences of such actions. As a consequence, when foreign availability or other considerations make foreign policy export controls unsuitable as a meaningful penalty, the President may simply choose a symbolic objective for the controls.

It is important to note, as a final point, that even when controls are imposed for symbolic purposes, they take on dimensions beyond their original purpose when their renewal is considered. Once in place, as in the case of some of the controls just extended under the Secretary's report, their possible removal is viewed as signalling a lessening of U.S. resolve or commitment. Based on preliminary discussions, even if the control is symbolic and it is believed unlikely that it

will affect the objectionable behavior which precipitated it, there is reluctance to remove those controls without some quid pro quo. In the meantime, U.S. businesses continue to bear costs while essentially no costs are imposed on the targets of the controls. Consequently, we believe that it becomes that much more important when either imposing foreign policy controls or extending them, that the administration fully explore and evaluate all realistic alternative means of achieving the foreign policy purpose and that the report to Congress include a full discussion of this effort.

Mr. Chairman, this completes my prepared statement. I will be happy to try to answer any questions you may have.

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