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Statement of

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Subcommittee on International Economic Policy and Trade

House Committee on Foreign Affairs

on

[Administration of Export Controls]

Mr. Chairman and Members of the Committee:

We are pleased to be here today to discuss with you the administration of export controls. Last October, we issued a report on this subject, and we recently issued a second report which discusses additional export control issues. As you know, our 1976 report on East-West trade 1/ also discussed aspects of export control administration.

Account

In summary, our recent reports point out that the Government does not have an effective policymaking structure to reconcile the conflicting goals of export promotion and export control. Further, the decisionmaking apparatus for

1/ The Government's Role in East-West Trade--Problems and Issues, February 4, 1976

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determining what technology or products should be controlled is unwieldy and time consuming. On top of these problems, the export licensing system is characterized by delay, uncertainty, and lack of accountability.

Congress
We have recommended to the Congress in these reports that it should provide for realignment of the export policy structure, centralization of export licensing management, and certain other processes to facilitate the efficient and timely administration of export controls.

OVERVIEW

★ A number of developments are occurring which parallel this Committee's deliberations to extend and amend the Export Administration Act.

ACCESS
1. The Administration completed last year its Presidential Review Memorandum No. 31 on East-West technology transfer. This memorandum's implementation plan has incorporated a Department of Defense study which seeks to define export control in terms of "critical" technology. This work derives from a 1976 report of the Defense Science Board Task Force on the Export of U.S. Technology. According to the report, known informally as the "Bucy Report," design and manufacturing know-how, as opposed to the products of technology should be the principal focus of ^{current} strategic technology control.

2. The United States and 14 other governments that participate in the international export control advisory

committee known as COCOM are revising the international control list. This list forms the basis of the U.S. Government's national security controls.

3. The President recently announced a number of steps to reduce barriers which impede exports. He emphasized that the availability of items from other countries should be considered when exports are controlled for foreign policy purposes.

4. Finally, we understand that the Department of Commerce is reviewing a number of proposals, including GAO's, to change aspects of export control administration.

All of these events form a backdrop to your deliberations on the Export Administration Act.

lies with the
My remarks today are ^{Current concern} concerned with the export control ~~of~~ so-called dual-use commodities, ⁽²⁾ that is, commodities like electronic instruments which are not necessarily produced for military purposes but which could have military applications. In this respect, it is important to note that such controls are applied for either or both national security and foreign policy purposes. National security controls are designed to delay the acquisition of technology and restrict products that potential adversaries seek. Foreign policy controls are designed to support our foreign policy objectives such as the enhancement of fundamental human rights.

② EXPORT CONTROL ADMINISTRATION
AS A BARRIER TO TRADE EXPANSION

Expanding the U.S. share of international trade is an important goal. The President clearly affirmed this view in his export policy declaration last September. Export controls also have important purposes. The problem is that some aspects of export control administration have become unintended and unnecessary barriers to expanding the trade we clearly need to help alleviate our current balance of payments problems.

Crucial to building and maintaining trade relationships is the need for predictability. Sellers must know with some predictability what they can and cannot sell and buyers must have confidence that the U.S. is a reliable supplier. Suddenly used, or inadequately explained, export controls are clearly corrosive to these relationships. U.S. exporters can be tagged with a reputation for unreliability in such a situation, and the business, that might otherwise be theirs, may simply go to others.

There are a number of reasons why we believe export control administration has become an unintended barrier to expanding international trade. One of these concerns the growing use of controls to support foreign policy goals as opposed to national security goals.

5 The Use of Controls for
Foreign Policy Purposes

Controlling exports for foreign policy purposes raises an especially complicated regulatory problem. This committee has heard considerable testimony which highlighted the concern U.S. exporters have with the impact of such controls on foreign trade.

Even if one agrees that export controls should support some foreign policy goals, their inconsistent and unpredictable application can erode trading relationships which, by their nature, take a considerable time to nourish. How many sales are lost, because a foreign buyer, contemplating what appears to them to be an erratic use of controls, simply writes off a potential U.S. seller in favor of someone else? We found this to be impossible to answer quantitatively. However, exporters have strongly advised us that the adverse impact is significant.

It is important to note that when the United States uses export controls for foreign policy purposes it usually does so alone. The other governments that jointly control exports for mutual security purposes through COCOM are under no obligation to support our foreign policy controls. The use of such controls needs to be preceded by a carefully conceived policy which at the very least addresses the long term impact such controls might have on our international trading position.

In our most recent report, we noted that the Congress is not regularly and systematically informed about how and why foreign policy controls are being used. The Congress does not have an adequate basis for evaluating the merit of such controls, much less the impact they have on our international trade.

The Export Administration Act requires Commerce to prepare a semiannual report to the Congress and the President on the use of controls. However, the discussion on controls for foreign policy purposes in this report is brief and, we believe, inadequate because it does not discuss (1) the specific foreign policy goals that trade controls are supposedly designed to serve nor (2) whether they are serving those goals well or poorly.

We recommended in our recent report that the Congress require that the semiannual report discuss in more detail the uses and reasons for foreign policy controls.

(U) Determining Availability of
Commodities from Other Countries

International trade is highly competitive. The Export Administration Act recognizes this principle, in relation to national security controls, by requiring the Government to show cause why a commodity should not be licensed for export if a comparable commodity is amply available from other sources. The President also recognized this principle in his September 1978 announcement by requiring

a similar test with respect to the use of foreign policy controls. The importance of foreign availability is obvious; not to insist on this consideration can divert sales to other sources.

While the President's statement is clearly important, its effect may very well be nullified if foreign availability analyses and evaluations are diffused and inconsistently interpreted throughout the many agencies involved in export control. We are not suggesting that these analyses and evaluations are easy to make. However, the absence of reasonably clear availability standards and criteria contribute to this problem.

We were unable to determine whether efforts were underway to establish such standards or criteria or, indeed, whether foreign availability is being systematically judged. For example, preparatory to the current ^{DLG-01204} COCOM commodity list review, no one appears to have been specifically charged with the responsibility of developing and applying such standards or criteria.

Foreign availability is now just one of many concerns competing for the attention of the Government's technical evaluators when reviewing export license applications or the commodity control list. Its importance is, however, mandated by law, and further, it is of sufficient complexity to require a separate detailed effort by the export control, intelligence, and exporting communities.

Export Control Coordinating Committee

If we are to make trading relationships more predictable and less uncertain, we need to change the way we determine foreign availability. Simply stated, the Government needs to put someone in charge who can administer the required analyses and make evaluative judgments.

In our recent report we recommended that the Congress amend the Export Administration Act by requiring that foreign availability be administered as a separate effort under a "foreign availability evaluator."

We further recommended that the Act be amended to state that the President shall consider foreign availability when imposing export controls for foreign policy purposes.

4) Determining What Should Be Controlled

At the very heart of export control administration is the commodity control list. As noted earlier, the so-called international, or COCOM list, is now being revised as it is every 2-3 years. A new list will become effective late this year.

The control list is not in the literal sense a list of products. Rather it is a list of specifications which may or may not be applicable to a product. The current international list consists of 105 such categories, and the Government unilaterally controls an additional 38 categories. Export control decisions necessarily involve a comparison between a specific

product that an exporter wishes to sell and the appropriate specifications on the control list.

For the current COCOM list review, representatives from industry, ³² Defense, State, ^{ABC 00912} Commerce, Energy, and the intelligence agencies spent considerable time reviewing the need for and adequacy of controls on existing items. Their effectiveness was limited, however, because specially formed technical review groups were unable to furnish complete analyses and adequate support for their recommendations at the expected time. The inability of higher level review committees to reach agreement further hindered the establishment of a U.S. position for some categories. The regular work of the Government's technical evaluators took priority. For example, list review preparations received a low priority within Defense principally because there was no budget line against which to charge time for the work performed.

This important function needs more priority attention and management direction. We propose that it should be administered as part of the policymaking structure we recommended in our recent report.

Presidential Review Memorandum on
East-West Trade: Defense's Critical
Technology Analysis

The credibility of the export control program may very well hinge on the question of whether or not a revised list truly reflects the complex relationship between products,

technology, and a calculation of their military significance. The list review is the traditional means by which this relationship is defined. Concurrent with the list review, Defense is implementing what has come to be called the "critical technology approach" to export controls. The Government controls both product and technology exports. Defense is trying to systematically define the relationship between the two by specifying technologies which are most critical from the military's perspective, and which therefore presumably ought to be rigorously controlled.

Defense is advertising this effort as "strongly enforcing control on the export of selected critical technologies while simultaneously relaxing many existing product controls." They have further characterized this as a "refocusing of export control regulations" but have noted that there "will always be some number of products which have to be controlled because they have a large intrinsic military value or can be readily reverse-engineered." However, Defense may be running the risk of promising more than it can deliver. The critical technology approach is far from complete. A Defense-led task force report is due in April 1979, and the current analytical effort is not expected to be fully completed before 1980.

Since multilateral export control is a necessary part of the Government's own control system, the critical technologies approach would have to become part of each participating CCOM

member's control system. Implementing this approach through COCOM will, however, take time since the current COCOM list review involves no major attempt to clarify the relationship between technology and product control for specific items. Since COCOM list reviews are held once every 2 or 3 years, this whole effort probably cannot be fully implemented internationally for a number of years.

Administering Controls Through COCOM

Whether the critical technology approach becomes a substitute for, or a supplement to, the current international control system, one fact seems obvious. We will need the continued cooperation of our COCOM partners. The effectiveness of our national security controls is dependent on parallel controls being applied by other member governments.

These governments, as well as our own, may on behalf of their exporters ask that particular sales be exempt from international control. These exception requests, as they are called, are reviewed by the United States and other COCOM member governments.

While the U.S. Government only rarely recommends that an exception request be denied, it often takes considerable time to give its approval, although these requests have already been approved by the submitting government. The United States

lengthy review process is causing discontent on the part of other governments and could ultimately lessen COCOM effectiveness.

There are a number of additional issues which are also complicating relations with our COCOM partners. The United States is the only COCOM member to require reexport licensing. This requirement means that any item or technology subject to U.S. export licensing must be relicensed each time it is further exported. Approximately one-quarter of the COCOM exception requests submitted by other members include equipment or technology subject to U.S. export licensing. These are thus reviewed twice by our Government; once as a reexport licensing case and again as an exception request.

This practice has been viewed as infringing on the COCOM system, implying a distrust of our allies' national control processes, and can result in foreign firms finding or developing substitutes for U.S. components to avoid delays in obtaining approval for their sales.

The Department of State has proposed to change this situation by substituting the exception request review for the reexport licensing review. We support this proposal. A single review would still meet U.S. security concerns while eliminating the duplication in the present system.

Unlike some of his colleagues, the U.S. COCOM delegate does not have authority to independently approve exception requests made routine by clear precedent. All requests must be sent to Washington for review, thus delaying consideration of other governments' exception requests. Therefore, we support a State Department proposal to give our COCOM delegate authority to approve these kinds of routine requests.

While these kinds of proposals would better our participation in COCOM by making it consistent with our allies, export control administration as a whole needs more basic change.

Reorganization of Export Control Administration

Shue A major conclusion of our two recent reports is that export control administration is so complex that the Congress should direct its reform. To this end, we have recommended a reorganization plan for your consideration, and we should like to talk now about how and why this reform should be undertaken. *→ (E, AC)*

The goals of the export control program cannot be fully achieved without closely considering the administrative means by which they are attained. Currently, these goals are frustrated by a decisionmaking system in which authority to manage licensing is diffused among too many government agencies. The consequence is, to be sure, lengthy review times for some export

license applications. Previous legislative hearings on the Export Administration Act are replete with concerns about processing time. This has, and continues to be, a serious problem for some exporters.

This complex regulatory system makes it difficult for exporters to know how and why the Government makes its export control decisions. This uncertainty hinders business operations and is inconsistent with our trade expansion goals. It is quite possible that many businesses simply shun the idea of exporting because of the uncertainty and frustration this system creates.

It is true that in a limited sense export control seems relatively benign. Most export license applications are approved although some in amended form. In 1978, for example, over 56,000 licenses were approved while only 210 were denied.

In another sense, however, it is rather less than benign. As shown in our October 1978 report, the delays in approving licenses have been an increasing problem. Since exporters have important deadlines they must meet in order to preserve long term international trading relationships, the delays and uncertainty in obtaining export licensing decisions damages their reputation as suppliers and further business can be lost. Thus, the real impact on U.S. exporters is probably greater than the fact of a few denials.

We found repeated instances where frustrated exporters could not get ready answers to what are really simple yet important questions, such as, what is happening to a license application and why. Exporters who can't afford to maintain license expeditors in Washington are particularly disadvantaged by this complex system. Our October 1978 report detailed the frustrating experiences some exporters have in trying to get needed information about their applications.

If we are to have an effective export control system which does not function as an unintended trade barrier, we should consider changing the whole and not just a part here or there.

Export Licensing Administration
Needs to be Centralized

Central to the reorganization plan we recommended in our report is a very straight forward idea: one agency should be designated the licensing manager for the executive branch. The Export Administration Act authorizes Commerce to issue export licenses and its Office of Export Administration (OEA) is the appropriate office to have full management responsibility. Export control regulation is, after all, an executive branch function, and it is important to think of it in this way, rather than in terms of individual agency prerogatives.

License applications should be sent directly to various agency technical evaluators by OEA and not, as is the custom now, to various coordinators in the reviewing agencies. This

simple, obvious procedure could eliminate much of the delay associated with applications which are referred to other agencies. All the steps which currently intervene between OEA's licensing officers and technical evaluators in other agencies could be eliminated. Regardless of who actually employs them, technical evaluators should serve as consultants to OEA for export control purposes, and their agencies should be reimbursed by Commerce for the services OEA requests.

The Export Administration Act gives Defense a special role in the licensing process. Our plan does not alter the intent of the Act. Defense would be sent copies of all technical evaluations for certain types of applications for their policy review and possible veto.

Export Policy Making Structure
Needs to be Established

The Government has no effective policy making structure to reconcile the conflicting goals of export promotion and control. For this reason, we believe that export control policy making should be the responsibility of one organization--a multiagency Export Policy Advisory Committee. It is at the policy making level, and not at the licensing level, that each relevant agency should be represented as an agency.

This committee should be given real decisionmaking power in the person of an executive director appointed by the President and responsible to him. Agency members should serve on the committee in order to advise him, but the

director should have the authority to make the policy decisions. If a committee member, however, considers a decision unsatisfactory, the member could appeal it to the Export Administration Review Board and to the President. This committee should not review license applications except in the most unusual circumstances. Rather, its goal should be to write policy guidelines of sufficient clarity so that they can be applied to reviews of license applications by OEA's staff.

This policy committee should additionally administer the Government's preparation for periodic COCOM list reviews and continuously administer reviews of the Government's unilateral control list. In short, policy making should be made by an organization specifically responsible for that function.

The current multiagency review committees such as the Advisory Committee on Export Policy (ACEP), and the Economic Defense Advisory Committee (EDAC), would be abolished in conjunction with the above recommendations. As you know, the various committees of the ACEP structure, particularly its Operating Committee, review some license applications. EDAC is the somewhat similarly structured set of committees which reviews COCOM exception requests. Our reorganization plan allows for only one review pattern for both types of cases. The only difference is that while Commerce would make final U.S. licensing decisions, State, as our COCOM negotiator,

would make final decisions on other governments' exception requests.

COMMENTS ON H.R. 2539 TO EXTEND AND
REVISE THE EXPORT ADMINISTRATION ACT

Mr. Chairman, we have reviewed as you requested the bill you introduced to extend and revise the Export Administration Act. We generally found that the proposed bill comprehensively addresses most of the problems noted in our reviews of export administration. Specifically, we found the bill:

1. Properly emphasizes the importance of exports while at the same time providing for national security and foreign policy consideration.

2. Provides for clarification and essential changes in the roles and responsibilities of involved agencies and clearly establishes the Secretary of Commerce as being "in charge."

3. Provides the potential for substantially reducing the number of items to be controlled by fundamentally changing the criteria for determining items subject to control for national security purposes. We would, however, like to point out that controls for certain commercial type items which have significant military application but do not transfer critical technology could be weakened.

4. Places substantial additional responsibilities upon the Administration to justify, publicize, and keep the Congress advised of controls applied for foreign policy purposes. We

believe this is a desirable provision which gives us only one concern--in some cases the sensitivity and nature of foreign policy decisions could cause some difficulties in implementing the much stricter requirements.

5. Finally, the bill with a high degree of specificity prescribes new administrative procedures which should contribute substantially to the lessening of both costs and the time needed to process licenses.

Mr. Chairman, this completes my statement. We would be pleased to answer any questions you may have.