

June 14, 1979

## **THE EXPORT ADMINISTRATION ACT** **(S.737 - H.R.4034)**

### INTRODUCTION

The Executive branch and Congress are currently dealing with many facets of U.S. export policy, attempting to transfer their heightened awareness of the importance of exports into advantageous legislation. The Administration recently created a new U.S. Export Council and is now actively seeking support for the Multilateral Trade Negotiations (MTN) implementing legislation, on which Congress must vote. Meanwhile, congressional intentions to combine all foreign trade responsibilities within the Commerce Department or in a new Department of International Trade and Investment have surfaced. Most critically, however, the past several months of congressional hearings on U.S. export policy and controls have resulted in legislation proposed to extend and revise the Export Administration Act of 1969, as amended.

Exports of U.S. civilian goods and technology have been controlled since 1949 when the Export Control Act (P.L. 81-11) was signed into law, establishing precedent for controls for national security reasons, foreign policy objectives, and domestic short supply concerns. P.L. 81-11 barred all exports to Cuba, North Vietnam, North Korea, and Communist China, while prohibiting only exports of weapons and strategic goods to the U.S.S.R. and other Eastern European communist nations. The Export Administration Act of 1969 (P.L. 91-184) replaced the Export Control Act and relaxed the ban on non-strategic goods to communist nations while delegating authority to various government agencies in the U.S. to monitor specific exported commodities. Most recently amended in December 1977, the Export Administration Act requires congressional action prior to its September 30 expiration date in order to rectify sorely

fragmented controls and clarify government policy.

The debate over the necessity of export controls reflects the serious consternation surrounding the inherent conflict between facilitating all exports and safeguarding what are currently referred to as "critical" goods and technology. The Export Administration Act, although increasingly attacked for its vagueness, nonetheless remains a vital piece of legislation which prescribes the major export controls for both foreign policy and national security interests while simultaneously attempting to provide relief for the suffering U.S. trade balance by streamlining export controls. Neither the President nor Congress denies the graveness in adhering to fundamental controls which safeguard U.S. national security. With this underlying concern, examination of the proposed revisions to the Export Administration Act of 1969 must review how such legislation attempts to allay uncertainties which are costly to exports without abandoning vital security precautions.

#### STATUS

As reported out of the Senate Banking Committee in May, S. 737, the "Export Administration Act of 1979," sponsored by Senator Adlai Stevenson (D.-Ill.), is the outgrowth of numerous hearings by several committees. Floor action on S. 737 is expected the week of June 11th following consideration of the Military Procurement Authorization Act, S. 428.

H.R. 4034, "The Export Administration Act Amendments of 1979," sponsored by Rep. Jonathan Bingham (D.-N.Y.), is a compilation of many bills introduced to the House Foreign Affairs Subcommittee on International Economic Policy and Trade. In an unusual parliamentary procedure, H.R. 3216, the "Export Administration Reform Act of 1979," as introduced by Reps. Lester Wolff (D.-N.Y.), Richard Ichord (D.-Mo.), and Clarence Miller (R.-Ohio) along with twenty two additional co-sponsors, was referred to both the Foreign Affairs and Armed Services Committees, thereby allowing the Research and Development Subcommittee of Armed Services to hold hearings on H.R. 3216 subsequent to a ruling on H.R. 4034, which incorporates portions of H.R. 3216.

H.R. 3216 will be reviewed independently of H.R. 4034, as Congressman Ichord, Chairman of the Research and Development Subcommittee, has announced that several amendments from this bill will be introduced during floor debate on H.R. 4034.

The following analysis of the Senate and House legislation refers to the numbered sections found in the specific bills (Senate sections appear first) which contain compatible issues. Where there is no corresponding reference only one section number is noted; those in parenthesis denote H.R. 4034.

## SECTION 2 (SECTION 2 - TITLE I), FINDINGS

Introducing both bills are statements declaring the importance of exports to the U.S. economy. References to foreign availability as regards distribution of U.S. exports and achievement of foreign policy objectives are similar to the current law. Also the necessity of controlling goods which could contribute significantly to the military capabilities of countries endangering U.S. security is again stressed. Both bills add a new "finding" which charges that national security controls on exports must emphasize control of technology transfers which have significant military potential to any country which could jeopardize U.S. security.

## SECTION 3 (SECTION 3), POLICY

Both bills maintain exports should be controlled only when necessary to prevent risk to the U.S. national security, to further foreign policy goals (although S. 737 adds the qualifier, "to significantly further"), and to avoid a domestic short supply situation. No changes were made in either bill with respect to foreign boycotts. Similar new sections were added to strengthen the U.S. commitment to cooperate with countries with which we maintain defense treaties to restrict potentially harmful exports of goods and technology. H. R. 4034 adds the phrase that controls will not be retained "unless their efficacy is annually established" in reports available to Congress and the public.

## SECTION 4(g), AUTHORITY; (SECTION 107), DOMESTIC CRUDE OIL

Although the Administration wanted export controls on domestic oil dropped from the Act, both proposed revisions retain restrictions, strengthening them somewhat in their modification. Exemptions from the controls are granted for any U.S. bilateral agreements designed to supply oil to foreign nations signed prior to May 1, 1979 in H.R. 4034 and June 25, 1979 in S. 737.

The new provisions would permit the export of domestic crude oil only if, among other requirements, within three months the action results in acquisition costs to the refiners lower than those they would pay for domestic supplies. A notable change in the congressional role would require that the President obtain within sixty days of notification a concurrent resolution of approval of oil exports, whereas the current legislation allows for a one-house veto of such export actions.

These new provisions, when applied to the current U.S. energy shortage situation, are conflicting in nature. On the one hand the U.S., without restriction, will export oil to Israel as agreed

upon during the Middle East peace negotiations. Simultaneously, the probability of any U.S. Alaskan North Slope (ANS) oil swaps with Japan in exchange for Saudi Arabian oil imports to the Gulf Coast region has been reduced. Tightening the restrictions on these oil swaps prohibits a more efficient and cheaper oil distribution for U.S. consumers. The AMS crude oil is isolated in the northwest due to inefficient transportation systems and also requires a more complicated refining process than the lighter Saudi crude. The cost of transporting ANS crude to the Gulf Coast by tanker through the Panama Canal is approximately \$3/barrel. Although many in Congress maintain that exporting U.S. domestic crude oil during an energy crisis is illogical, it is more unreasonable to allow U.S. oil exports to Israel while cheaper gas prices for U.S. consumers are legislatively restricted.

#### SECTION 4, AUTHORITY: NATIONAL SECURITY AND FOREIGN POLICY CONTROLS

The policy that national security controls are not to be based solely on a nation's communist or non-communist status is continued. These controls are to be reviewed every three years where applied multilaterally (such as through COCOM, the Coordinating Committee composed of 14 Western nations plus Japan formed in 1950 to safeguard transfers of strategically vital materials) and annually if they are unilaterally applied by the U.S.

It is proposed that foreign policy export controls expire December 31, 1979, or one year after their application, whichever is longer, but can be extended by the President for one year. In making such a decision he must weigh the factor of foreign availability. If controls are applied for either national security or foreign policy reasons when foreign availability is known, the President is authorized to undertake negotiations with foreign sources to halt this availability. It is the intention of this bill that the use of foreign policy controls be severely restricted, expressing greater concern over the potential loss of U.S. exports to foreign competitors.

The Secretary of Commerce is given authority to reorganize the Department where necessary to carry out this Act and within the Office of Export Administration a capability to monitor foreign availability of controlled items is to be developed.

#### (SECTION 5), NATIONAL SECURITY CONTROLS

Unlike S. 737, H.R. 4034 contains separate sections authorizing the use of national security and foreign policy controls. In Sec. 5 the Secretary of Defense is held responsible for drawing up a list of "military critical technologies" which will be incorporated into the Commerce Department's Commodity Control List (CCL). A new paragraph was added dealing with the license applications which states that "to the maximum extent practicable, consistent with

national security", validated licenses are to be reserved only for commodities on the multilateral control list which require individual approval, articles which contain capabilities unique to the U.S., and articles over which the U.S. is currently negotiating with foreign sources to end additional availability.

Subsection i(3) of Section 5, which deals with the application of multilateral controls, relinquishes the U.S. authority to control the re-transfer of technology approved for export by COCOM in stating that where an agreement for exportation of goods or technology to a country which participates in COCOM has been made, "...no condition shall be imposed by the United States with respect to the further export of such goods or technology from such countries." Congressman Ichord recently expressed his concern over this provision stating that "it creates a loophole you could drive a truck through."<sup>1</sup>

#### (SECTION 6), FOREIGN POLICY CONTROLS

To emphasize the factor of foreign availability, U.S. industry must be consulted before the Secretary of Commerce imposes any export controls under this section. Congress in the House bill is given veto power over presidential decisions surrounding foreign policy export controls, granting Congress the right within sixty days of notification of the control to pass a concurrent resolution of disapproval, which immediately nullifies the control. The Secretary of Commerce in consultation with the Secretary of State will maintain a control list.

As contained in the current Export Administration Act, the control of international terrorism is the only foreign policy goal specifically mentioned.

#### ANALYSIS OF NATIONAL SECURITY AND FOREIGN POLICY CONTROLS IN S. 737 AND H. R. 4034

The utility of national security and foreign policy controls cannot be ignored. One need only be reminded of the U.S. financial and technological support given to build the Soviet KAMA truck factory and Export-Import Bank financing and U.S. technology involved through Occidental Petroleum in building ammonia plants in the U.S.S.R. The Soviets, who signed an end-use pledge guaranteeing they would not use the truck facility for any military purposes have flagrantly violated the pact. Yet little significant recourse

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1. Rep. Richard Ichord held a press conference on June 7 at the American Security Council where he stressed the critical need to control technology transfers to controlled countries.

of action remains; the U.S. cannot dismantle the plant. The Soviet ammonia plants have now expanded and, through exports to the U.S., have contributed to the shut down of several southern state U.S. domestic factories. Transfers of many types of technology thus have direct economic and military consequences for the U.S. It is this type of occurrence (especially those of military significance) that H.R. 3216 addresses and which warrants a closer scrutiny than is witnessed in S. 737 and H.R. 4034.

Another question addressed in both bills is the role foreign availability should play in the application of export controls and how the U.S. can better negotiate with COCOM and other foreign source suppliers to comply with U.S. export controls. Stressing that the President must consider foreign availability prior to imposing controls for either national security or foreign policy reasons, and establishing an office whose sole function will be to monitor foreign competitive sources, the legislative proposals leave the final determination with the President. Foreign availability must not be used to condone the transfer of goods and technology which have potential military and/or economic importance for recipient countries. The tangential argument often used in discussing foreign availability, and one frequently espoused by former Secretary of State Henry Kissinger, that of creating dependency on U.S. technology on the part of other nations, especially communist nations, is now much more difficult to sustain. This is due to the fact that, as many businessmen so adamantly point out in lobbying for fewer export controls, Soviet lag time in many aspects of technology is diminishing. If the United States still has the most up-to-date technology, even if relatively comparable items are available elsewhere, the U.S. need not surrender its weakening edge. Furthermore, if Soviet capabilities, for instance, are expanding so rapidly they will never be dependent upon any technology from the West. Instead, they will merely copy the basic principles through reverse engineering of un-controlled commercial goods and develop more sophisticated applications on their own.

H. R. 3216 , THE EXPORT ADMINISTRATION REFORM ACT OF 1979 (THE WOLFF-MILLER BILL)

Several of the twenty-five original sponsors of this bill introduced a similar proposal late in the 95th Congress entitled the "Technology Transfer Ban of 1978" (H.R. 14081). That act was specifically aimed towards preventing the transfer of any goods or technology which contained potential economic or military benefits to communist countries. It proposed that the Secretary of Defense be given review responsibility for all exports to controlled countries. Although H.R. 14081 gained much support, no action on the bill took place before adjournment.

H.R. 3216 carries much of the same thrust of H.R. 14081. It transfers major authority to review national security export controls to the Secretary of Defense, away from the Secretary of Commerce. The Secretary of Defense is also charged with classifying these items into categories of "critical" and "significant" articles. To aid the Secretary with these added responsibilities the bill provides for the creation of an Office of Technology Export within the Office of the Under Secretary of Defense for Research and Engineering.

Further strengthening the role of the Secretary of Defense, the Wolff-Miller bill proposes that the President can not overrule the Secretary's decision on classification or foreign availability unless neither House of Congress adopts a resolution disapproving of his action within thirty days of notification and receipt of a military impact statement provided by the President.

In spite of all the concern over foreign availability, a provision which would grant the President authority in negotiating with foreign governments to use the threat of cutting off economic and/or military aid where applicable was not incorporated in H.R. 4034.

H.R. 3216 places greater emphasis on the control of technology transfers and the role of the Secretary of Defense than either S. 737 or H.R. 4034. Although problems in obtaining information vital to the hearings on H.R. 3216 have plagued the Armed Services Subcommittee on Research and Development, it appears certain that the issue of technology transfer controls will be represented in the form of amendments to H.R. 4034.<sup>2</sup>

#### SECTION 7, PETITIONS FOR MONITORING CONTROLS

Any "entity" which is "representative of an industry or a substantial segment of an industry which processes any material or commodity" may submit a written petition to the Secretary of Commerce requesting export controls or monitoring. Such actions will, it is hoped, keep the government better aware of measures which can facilitate exports or at least place U.S. goods in a more competitive position.

#### SECTION 8, CONSULTATIONS AND STANDARDS; (SECTION 5(h)), NATIONAL SECURITY CONTROLS

With respect to national security-imposed controls the President should, according to S. 737, consult with private industry before taking any action. Imposition of quantitative restrictions shall be followed by a Federal Register notice inviting comment by industries. Where goods are difficult to evaluate with respect to foreign availability and technical matters, the Secretary of Commerce is authorized to appoint a technical advisory committee.

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2. At his June 7 press conference, Chairman Ichord told of his Subcommittee's difficulties in obtaining a list prepared by the Deputy Under Secretary of Defense for Research and Engineering which details instances of Soviet diversion of U.S. transferred technologies to military use.

Here the attempt to integrate much more private sector/industrial exchange is accomplished.

In H.R. 4034, upon written request by a major sector of any involved industry, the Secretary of Commerce is authorized to create a technical advisory committee to again investigate foreign availability and the practicality of controls. In both bills, the Secretary of Commerce maintains the role of major coordinator and implementor of export controls.

## CONCLUSION

As George P. Schultz, president of Bechtel Corporation, recently stated in an article entitled "Light-switch diplomacy," what U.S. exporters need are "rules instead of authorities - rules that we can read; rules that are predictable."<sup>3</sup> It is the intention of Congress through revision and extension of the Export Administration Act of 1969 to work towards this goal of clarification and certainty. Yet many of the complexities in the export business will require further consideration.

The major controversy with the Export Administration Act remains focused on the transfer of technology with respect to military and security considerations. In January the Department of Defense released a Military Critical Technologies List comprised of 15 items in an attempt to clarify controlled goods. However, the generality of the list has already been criticized. During a May Senate hearing on export policy, Comptroller General of the U.S. Elmer B. Staats testified that there are currently 105 items controlled by COCOM and an additional 38 items the U.S. controls unilaterally. COCOM is in the process of revising its list, and both versions of revisions to the Export Administration Act require a review of multi-lateral controls every three years and U.S. unilateral controls every year to prevent the retention of obsolete technologies.

Whatever the final outcome of the floor action on S. 737 and H.R. 4034 there will likely be needed changes in the Export Administration Act adopted to facilitate the flow of non-controversial exports. The conflict over critical goods and technologies and foreign availability will remain but serious steps will have been taken to address these problems. An exhaustive list of controlled goods and technology punctually circulated to American businessmen would prevent the costly and frustrating experience of opening new markets abroad only to later find U.S. government controls restricting such operations. How to best compile and maintain such a list is still being pondered.

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3. George P. Schultz, "Light-switch diplomacy," Business Week, May 28, 1979, p. 25.