

EXPORT ADMINISTRATION ACT, EXTRATERRITORIALITY,COCOM:

The use of U.S. export control legislation and the Export Administration Regulations in 1982 by President Reagan in the Siberian-European Gas Pipeline affair remains a matter of some controversy. It involved attempts to regulate the behaviour of subsidiaries of U.S. companies in Europe and in England, a company which was not owned or controlled by U.S. interests. One Australian company, Santos Ltd was indirectly affected by the dispute, and to ensure the delivery to it of certain gas compressors, arranged for the contract to be transferred from Dresser France, then under U.S. sanctions to a Dresser Inc. subsidiary in the U.S: Australian Financial Review 4 October 1982.

The Act was to expire on 30 September 1983 but has been extended from time to time while debate rages in the U.S. Congress over the final form of the legislation. As is the U.S. practice, conflicting bills are being considered. The principal issues are extraterritoriality; one bill would severely limit the Presidential power here in the absence of a specific constitutional provision; retroactivity i.e. the effect on existing contracts; COCOM related questions, in particular the question of the degree of enforcement by COCOM countries of re-export of certain goods to the USSR and allies; and finally questions relating to particular products - microprocessors, nuclear technology and agricultural commodities. These issues are discussed in detail by Stephen B. Ives: US Export Control Legislation: Status and Prospects, Vol 2, No 2 Trade/USA 9 (February 1984).

The extensive authority claimed in export trade was recently highlighted by a letter sent from IBM in Britain to British companies which had leased certain advanced systems. The letter reminded them that US Commerce Department approval would be necessary before any lease was transferred to another British company.

D.F.

EXPORT ADMINISTRATION ACT, 1979 -COCOM AND THE EXPORT OF HIGH TECHNOLOGY - THE U.S. VIEW *

As part of your Subcommittee's review of the Export Administration Act of 1979, you have asked me to outline the Department of State's responsibilities under this act. I shall also describe some of our negotiations with our allies to strengthen the coordinating committee for Multilateral Security Export Controls (COCOM). I am particularly pleased to have this opportunity since the Administration has undertaken vigorous efforts in working with our allies to reduce the transfer of militarily significant technology and equipment to the Soviet Union and the Warsaw Pact.

We know that the development of sophisticated weapons is based on a myriad of advanced supporting technologies that are not innately restricted to military versus civilian applications. Consequently, it becomes increasingly more difficult to identify and control commercial transactions that can support military production and that could constitute a threat to our national security. This underscores the need for increasing Western efforts to develop stronger and more effective controls on

the transfer of technology from the West to the East. The U.S.S.R., for example, has relied on Western high-technology exports in its military buildup, and we know that Western technology has been a significant factor in the Soviet development of advanced missiles as well as in the advancement of industry that supports the Soviet war-making capability.

Current controls are based on the importance of advanced technology in military forces and its supporting industrial sectors and the existence, partly due to government-sponsored research and development and partly due to differences in industrial capabilities, of a technology gap between the United States and the Soviet Union. A technological gap in our favor is also a means of reducing the risk of technological surprise. Technological breakthroughs, given the current rate of technological change, is a real possibility and a real danger to our security in that a particular technological development could give the discoverer a decisive advantage. Consequently, one of the major means of preventing war is to avoid technological surprise.

How the Soviets Obtain Western Technology

The Soviets obtain Western technology

illegally through their intelligence services using classical espionage as illustrated by the recent spy cases in Germany and Italy. They also evade export

controls through diversion, retransfer, and dummy companies. One legal way technology is passed to the East is through a kind of buy-back project in which Western companies contract with Eastern states to export factory equipment and the plans for building the plant on credit. It is estimated that these projects involved an exchange of some \$10 billion between the East and the West in 1980. The West in return for its exports receives a share of the products as part payment. An example of this is the Siberian gas pipeline in which pipeline equipment is being bought from the West and the fuel is sold to Western Europe upon completion of the pipeline. The Kama River truck plant was built with the help of U.S. companies using Western technology and U.S. export licenses. The plant has been used to supply trucks for the transport of troops to Afghanistan and the support of Soviet conventional military needs.

Today, there continues to be a serious threat to our national security from Soviet technology piracy, in which an increasing one-way stream of U.S. technology is moving to the Soviet Union. Nearly all new technological developments have direct or indirect military application. The critical importance of our technology loss may be emphasized by the example of the Soviet intercontinental-range missiles achieving improved accuracy through better gyroscope systems. The Soviet gyroscopes were developed using precision bearings produced with advanced grinding machines obtained from the West in the 1970s. Other examples include: U.S.-developed laser optical mirrors with direct military application have been smuggled to the U.S.S.R.; advanced American computerized drafting equipment was diverted to the Soviets through a foreign corporation; the Soviets illegally acquired IBM 360 and 370 computers from the West in 1972. We have noted to our despair that the Soviet RYAD computer series uses the same repair manuals as the IBM computers.

The Soviet technological gains obtained through a carefully crafted acquisition program are providing them with:

* [Statement by William Schneider Jr., Under Secretary for Security Assistance, Science and Technology in the U.S. Administration to the sub-committee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing and Urban Affairs on 2 March 1983, published in Department of Housing Bulletin, June 1983 at 71-74.]

Significant savings in time and money in their military research and development programs;

- Rapid modernization of their defense industrial infrastructure;
- A closing of gaps between our weapons systems and theirs;

- The rapid development of neutralizing countermeasures to our own technological innovations; and

- A freezing of capital to be used in more direct military application.

Facts About COCOM

Before moving to our current negotiations with our allies, I would like to review a few facts about COCOM. The coordinating committee was established as a voluntary organization in 1950. Its present membership includes Japan and all the NATO countries, except Iceland and Spain, but it has no formal relationship to NATO or to any other organization. It is not based on any treaty or executive agreement. The members, therefore, have no legal obligation as such to participate in COCOM or to abide by commitments made there. On the other hand, over its more than three decades of existence, there have been only a few instances when a member nation has exercised its sovereign right to deviate from COCOM decisions. Many of the other member governments continue to make it clear to us that they attach considerable importance to maintaining COCOM's informal nature and the confidentiality of its proceedings.

All important COCOM decisions are made on the basis of unanimity, which is perhaps the basic reason for its durability. For example, no change in the COCOM list can be made, and no specific export of controlled items can be approved, if any member objects.

Traditionally, COCOM has had three major functions.

First is the establishment and updating of the lists of embargoed products and technologies. Although the COCOM lists are not published, they provide the basis for the national control lists administered by each of the member governments. There are three COCOM lists: a list of military items and technologies; an atomic energy list; and a list covering commodities and technologies which can have both military and civil applications. COCOM is now conducting a major review of these lists to insure that they reflect current strategic concerns. Such reviews are conducted about every 3 years.

Second, COCOM acts as the clearinghouse for individual requests submitted by the member governments to permit the shipment of specific embargoed items to the proscribed countries when the risk of diversion to military use is sufficiently small. The

proscribed countries for COCOM purposes are the Soviet Union, the other Warsaw Pact countries, Albania, the People's Republic of China, and the other Communist countries in Asia. COCOM reviews on an annual basis between 1,200 and 1,500 of these possible export transactions, rejecting those exports which are too risky.

Third, the committee serves as a means of coordinating the administration and enforcement activities of the member governments.

COCOM has a permanent secretariat which is located in Paris. Its staff is small—between 12 and 15 members—and its activities are generally confined to translation, transcription, interpretation, and the publication and distribution of documents.

The permanent U.S. delegates to the organization are State Department officers who, for administrative purposes, are attached to our delegation to the Organization for Economic Cooperation and Development (OECD). This delegation is augmented by scores of technical experts and other U.S.-based officials as needed for the negotiations in COCOM.

As part of this Administration's review of the transfer of sensitive technologies to the Soviet Union and the other Warsaw Pact countries, we have carefully examined the effectiveness of COCOM. We are confident that the national security controls coordinated through this organization have been useful in restricting exports of items for which license applications have been reviewed by COCOM governments.

Without COCOM, competition among Western exporters would have escalated the quality and quantity of technology sales to the Soviet Union and other Communist countries. On the other hand, it became evident during our review that over the years, the Soviet Union and the Warsaw Pact have obtained some equipment and technology of strategic and military importance from the West. This has occurred either through violations of the COCOM controls (i.e., illegal shipments of controlled items) or because such items have not been multilaterally controlled by COCOM at the time of acquisition. Through diversions or time lags, the multilateral system of export controls coordinated through COCOM, therefore, has not always met the challenge posed by the extensive efforts of the Soviet Union and the Warsaw Pact to obtain militarily sensitive equipment and

technologies. The Soviet efforts to obtain Western technology continue unabated as evidenced by the recent arrest in Germany of a Soviet trade official who is charged with trying to illegally gain Western, controlled electronic information.

Current Negotiations

The Administration has undertaken extensive efforts to deal with this serious problem. President Reagan raised the problem of Western technology transfer to the Soviet Union at the Ottawa summit in July 1981. These discussions culminated in a high-level meeting in Paris in January 1982, the first ministerial-level meeting in that organization since the late 1950s. We were greatly encouraged by the results of that meeting. The member governments confirmed the importance of the organization for their common security interests and agreed on a number of measures for improving its effectiveness. They agreed to strengthen and update the existing embargo lists, to explore harmonizing the licensing practices of the national governments, and to strengthen their enforcement operations.

During the past year, we have been working with our COCOM allies to follow up on these important agreements. I have already mentioned the current COCOM list review. For this exercise the United States has submitted over 100 proposals, most of which contain elements for strengthening the embargo. However, we are also proposing the deletion of noncritical equipment and technologies from the lists. This is in line with another recommendation of the high-level meeting. Since early October, the national delegations have been negotiating, on a near daily basis, on the technical details of these proposals. Although the confidentiality of the proceedings does not permit me to go into details in this open session, I can indicate that we have already obtained committee agreement to a number of key U.S. proposals and are very close to full accord on a number of others. However, many months of technical negotiations lie ahead, and it is likely that the list review will not be fully completed until the end of this year.

Perfecting an export control system is a long and difficult task. This is also evident from our continuing efforts to follow up on the harmonization of national licensing practices and enforcement activities. We are dealing with the

national administration of controls by 15 individual and sovereign nations, each with its own laws, regulations, and procedures. Our initiatives on harmonization reflect our concern that the differences in national licensing practices at times penalize U.S. firms competitively and can cause loopholes in the common embargo.

At U.S. initiative, last May a meeting of the COCOM Subcommittee on Export Controls was held to review a number of U.S. proposals for strengthening national enforcement activities and harmonizing licensing procedures. This advisory body, composed of national licensing and enforcement officials, agreed to a large number of recommendations which, if implemented by the national authorities, could result in significant improvements in the enforcement activities and a narrowing of the licensing differences of the individual governments. In the full COCOM, the United States is urging the other governments to follow up on a number of these recommendations concerning harmonization of licensing documentation. Furthermore, during this week we have two interagency teams in Europe holding bilateral discussions with our European allies on enforcement and harmonization issues.

One of the more serious problems COCOM faces in improving its effectiveness is the difficulty of controlling the export or reexport of commodities from non-COCOM countries to the Communist states. COCOM countries unfortunately do not constitute a monopoly in the market for all high-technology items. The Soviet Union and the other Warsaw Pact countries are aware of this and are occasionally able to obtain some equivalent high-technology products from non-COCOM sources. There is also a risk of the diversion of COCOM-controlled, COCOM-origin equipment and technologies through such third countries. The United States attempts to deal with this diversion problem in part by requiring licenses for reexports of the U.S.-origin embargoed products from third countries—a so-called extraterritorial action that has been the subject of some criticism. Our COCOM allies cite legal and administrative reasons for not having similar reexport licensing requirements. Nevertheless we have been urging them to institute other effective measures to deal with the problem of diversions from third countries. Furthermore the United States maintains a

dialogue with certain non-COCOM industrialized countries on the export control and diversions problems. I cannot go into details in this open hearing, but I am happy to report that during the past year, we have made considerable progress with several non-COCOM countries to deal with the problem of the diversion of U.S.-controlled commodities.

Before leaving the subject of COCOM, I would like to call your attention to the consensus we have reached with our major allies on the need to review together the security implications of various aspects of East-West economic relations. Two important elements of this review are to be carried out in COCOM. There is first the strengthening of COCOM itself. As I have outlined above, we have been working with our allies on this during the past year, and we hope to see further positive steps taken in the months ahead. Secondly, a review of other high technologies, including those with oil and gas applications which may have security implications for the West, is being initiated. In order for COCOM member nations to give timely policy-level guidance to their COCOM delegations in both of these broad areas of activity, we have proposed the scheduling of a second high-level COCOM meeting this spring.

Responsibilities Under the Export Administration Act

Let me move on to the Department of State's responsibilities under the Export Administration Act and other related laws and regulations. The Department's role and responsibilities in the export control area are based in part on the general responsibility of the Department for advising the President on the conduct of foreign policy and in part on specific legislative and executive directives, including the Export Administration Act of 1979, the Arms Export Control Act of 1976, and Executive Order 11958. They are also based on the fundamental relationship between export controls and our overall policy toward other nations.

The State Department plays a major role in the administration of three distinct types of export controls: (1) munitions, administered by State; (2) nuclear materials, administered by the Nuclear Regulatory Commission and the Department of Energy; and (3) other items administered by Commerce under

the provisions of the Export Administration Act of 1979. I will limit my remarks to the third category since this is the subject of your hearing today.

National Security Controls

The Department of State participates actively in the formulation of U.S. national security export control policy and decisionmaking on the various interagency committees set up for this purpose. These include the Advisory Committee on Export Policy (ACEP) chaired by the Department of Commerce at the assistant secretary level, its working-level group—the operating committee—and its cabinet level body—the Export Administration Review Board. When policy issues go beyond the cabinet level review board, the Department of State participates in the National Security Council or whatever other White House review procedures may be involved.

Section 5(k) of the Export Administration Act of 1979 places the responsibility for conducting negotiations with other governments regarding security export control matters on the Secretary of State, who acts in consultation with the Secretary of Defense, the Secretary of Commerce, and the heads of other agencies. While State thus has the lead role in conducting negotiations in COCOM, I would like to emphasize that this is clearly an interagency activity. The conduct of our activities on COCOM and on other multilateral export control matters is coordinated primarily within the Economic Defense Advisory Committee (EDAC) structure.

EDAC is chaired by the Assistant Secretary of State for Economic and Business Affairs under the authority delegated to him by the Secretary of State. Its membership includes all agencies concerned with the administration of our export control program. Various interagency working groups within the EDAC structure are responsible for preparing U.S. positions for negotiating in COCOM and for reviewing the export cases submitted to that organization by the other COCOM member governments.

The broad interagency basis of our activities in COCOM is illustrated by our preparations for and the support of our list review negotiations. Under EDAC's general guidance, 11 technical task

groups composed of more than 100 technicians from many agencies, intelligence organizations, and military technical commands developed the U.S. list review proposals. Interagency teams are now in Paris working for Committee approval of those proposals. Another EDAC working group also coordinates the interagency review of information on alleged diversions of COCOM-controlled items and initiates diplomatic approaches to other governments on specific diversion cases.

During the past year, we have also established another interagency group to provide policy guidance and coordination in the field of technology transfer. This is the senior interagency group on the transfer of strategic technology, which I have the pleasure of chairing. In this group we attempt to provide a forum for policy determination to coordinate the ongoing work of the agencies and interagency organizations. One of the important functions of the group, as it has developed over the past 9 months, is the identification of problems and the tasking of activities to deal with them. For example, the senior group has commissioned a public awareness program and a number of intelligence assessments of technology diversion problems in specific areas and has encouraged increased attention to the improvement of U.S. extradition and legal assistance treaties with other countries to strengthen export control enforcement. It also initiated bilateral discussions with specific non-COCOM governments and a review of the training of U.S. officials involved in export control matters. I believe that this senior interagency group will continue to play an important role in our efforts to deal with the problem of the transfer of sensitive technologies to the Soviet Union and the Warsaw Pact.

Other Export Control Functions

Under the provisions of the Export Administration Act, the State Department also participates in a consultative capacity with regard to short supply export controls. The State Department's role

here is primarily to insure that adequate consideration is given to foreign policy factors as well as to our bilateral relations with other states.

Section 6 of the Export Administration Act of 1979 also gives the State Department a major consultative role with regard to foreign policy export controls. While export license issuance authority is with the Department of Commerce, the Secretary of State is provided the right to review any relevant export license application. The Department's role with regard to these foreign policy controls is highlighted by criteria described in the act, such as:

- "The probability that such controls will achieve the intended foreign policy purpose;"
- "The compatibility of the proposed controls with the foreign policy objectives of the United States, including the effort to counter international terrorism, and with overall United States policy toward the country which is the proposed target for the controls;"
- "The reaction of other countries to the imposition or expansion of such export controls by the United States;" and
- "The foreign policy consequences of not imposing controls."

In closing I would like to add that the Department of State personnel in U.S. Foreign Service posts abroad also provide operational assistance to other elements of the export control community in carrying out the purposes of the Export Administration Act. This includes providing information on overseas consignees and checking out the use to be made of exports from the United States and doing postlicensing checks as a precaution against diversions.

I hope that my brief remarks have given some insight into the many aspects of the Department's involvement in this complex area of export control.

The complete transcript of the hearings will be published by the committee and will be available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. ■