



Center for Strategic & International Studies
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Dr. John J. Hamre
President and CEO
Center for Strategic and International Studies
Washington, D. C.

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Establishing An Effective, Modern Framework For Export Controls

Mr. Chairman, members of the Committee, thank you for inviting me to testify this morning before this distinguished group. Let me commend you at the outset for holding this series of hearings, and for your willingness to tackle this critical issue. While many of our days are filled with small and sometimes trivial activities, this is momentous legislation. This is precisely what the United States Congress is supposed to do—weigh the pressing matters of our day, assess the positive and negative implications of current policy and design a new approach for the future. Only the United States Congress can handle such large and important issues facing the country, and I congratulate you for your leadership.

Summary

Let me state the essence of my testimony in summary form at the outset. America needs effective export controls to protect its national security. Our current system of export controls fails that test --- fails badly. It provides inadequate security where it is most needed, and it imposes counterproductive procedures that I believe are now causing security problems. America's security rests not just with blocking the export of important technology to potentially dangerous adversaries. It ultimately is grounded in a dynamic and innovative economy, a creative society and an inventive and industrious citizenry. Our times are characterized by international economic and scientific activity and collaboration. Government activities that block these natural and developing patterns of science and commerce will ultimately imperil our security. We should have such impediments only where they contribute to genuine and immediate security threats. Hence, it is the task of this Committee to develop a new framework for export controls that protects America from the loss of critical technology, but promotes the economic vitality and growth of our economy.

America Needs Effective Export Controls

Mr. Chairman, at the dawn of the Cold War when it was apparent we faced a large, ominous and growing threat, America crafted a long-term national strategy. We could not and chose not to match the military might of our opponent tank for tank, soldier for soldier. Instead, we sought to match the quantitative might of the Warsaw Pact with the qualitative superiority of American armaments. Export controls played a critical role in our strategy. We needed to insure that our side in the global struggle had superior technology for the vitality of our economy and the sophistication of our forces. We invested in high technology and we sought to block its loss to our opponents through a multilateral system of export controls.

While it was arguably an inefficient strategy, it worked. We never fully blocked the loss of technology to our opponents, but we slowed its loss to stay ahead in the long-term race. Two

dimensions to the policy were critical—a steady investment in new technology and a systematic method for monitoring its export to limit its transmission to our opponents.

During the last 20 years, export controls were expanded to include a number of so-called "rogue" nations that sought to develop and field dangerous new weapons of mass destruction. Joining with other countries, the United States established a multilateral framework to block the proliferation of technology and equipment that would facilitate the construction of dangerous arsenals in these nations. While this too has not prevented proliferation, it has, I believe, slowed down the dispersal of dangerous technology to irresponsible nations. That remains a security concern to this day.

Export Controls Become More Complex and Pervasive

During the 1980s and the 1990s, export controls became a major new dimension for America's foreign and security policy. The growing complexity of products and commodities required ever more elaborate rules and regulations. The collapse of the Warsaw Pact and the rise of rogue nations greatly expanded the use of export controls as a major element of foreign and security policy. And frankly, it often became easy to legislate restrictions on trade as a means to express our policy concerns and frustrations.

Export Controls have now become a Security Problem

Three factors have combined, however, to make export controls a serious problem, and increasingly a counterproductive solution to national security.

First, the nature of industry and business has changed dramatically over the past twenty years. Twenty years back, most advanced equipment was manufactured in geographic proximity. Design engineers had to be relatively close to the production facilities, at least in the initial phases of production, in order to work out problems that developed during production. Today, modern design tools permit design teams to be located around the world and never near the production location or locations. Our export control system was designed at a time when design and manufacturing was local. Today the design and manufacturing process is international.

Second, we are living in a time of business partnering in complex enterprises. We see the rise of international alliances, designed either to reduce the risk associated with the development of new products or to insure easier access to global markets. These international partnerships are good for American business in that they utilize the comparative advantage of others where it exists and help to insure market access for American products. Yet export controls are now undermining such partnerships for American firms because companies in other countries cannot count on and plan with confidence that licenses will be approved on a timely basis.

Third, where the United States had an overwhelming technology advantage twenty and thirty years ago, we now find comparable capabilities around the world. Increasingly American goods are competitive, but not necessarily superior to foreign-produced goods. Blocking American exports does not necessarily prevent other countries from gaining access to high technology.

The export control system has tried to stay current with these growing complexities by developing ever more elaborate and complex regulations. This has occurred at the same time that the American public has demanded streamlined processes and more efficient government. As such, too much of our export control resources are devoted to licensing relatively benign transactions, diverting resources away from far more important and dangerous transactions. In demanding to put a stamp on every export transaction, then ultimately approving 99.4% of the requests, we are not really protecting our security. In fact, we're diverting resources from protecting the most important technology and products.

More important, these factors in combination have undermined desirable collaboration between American companies and companies located in allied countries. I believe we should be trying to

encourage greater collaboration with allies in order to further knit together our economies and our interests. Instead, our export control procedures are driving a wedge between the United States and our friends and allies. Our export controls also increasingly shelter a market for our commercial competitors to exploit. Indeed, I believe for some important sectors, the satellite industry being a good example of this, we are effectively creating incentives for foreign companies to develop their own technology solutions and avoid collaboration with the United States.

A New Framework for Export Controls

Mr. Chairman, as I said at the outset, I strongly believe that America needs effective export controls for our national security. But we need export controls that meet two important tests. First, export controls must recognize and complement modern business practices. Because high-technology business today is international, we need export control procedures that recognize trans-national business models.

Second, effective international export controls require a consensus on the threat we face together. We have an international consensus in important areas. Internationally we maintain controls over nuclear-related technology. Frankly, these controls are so important that they should be strengthened. There are effective multi-lateral controls on the export of precursor products for chemical weapons. There is a consensus on export controls on missile-related technology. Effective export controls must begin first with a shared consensus on threats. Too often the United States has attempted unilaterally to impose its policy concerns on the rest of the world through unilateral export controls. History shows that this is largely ineffective and counterproductive. America fails to prevent our would-be opponents from acquiring the technology and we block American companies from the business.

You have been working on a new approach to the Export Administration Act for some time. I realize it is a complex process to balance the competing perspectives of all affected parties and to strike a balance. I suspect that no one will completely agree with your approach. That is to be expected, and that is precisely what the constitutional framers anticipated when they created the United States Congress which is uniquely suited to hearing and balancing the conflicting perspectives of all affected parties.

Therefore, I don't think it is helpful for me to give you a precise formula. Instead, let me outline the broad features of a new framework that I think are needed to meet the challenges outlined above. This framework would, in large measure, work for both military items on the so-called "munitions list" and dual use items regulated by the State Department.

Three Partnerships

I believe an effective new framework for export controls must be grounded on three partnerships—a partnership between the U.S. government and its business community, partnerships between the U.S. government and the governments of allies and friends, and third, a partnership inside the federal government between national security, intelligence, commerce and law enforcement departments. Let me briefly outline each of these three partnerships.

The first critical partnership is between the government and industry. The current system is adversarial. Tens of thousands of export officers in companies are preparing forms to try to get licenses past a few hundred government reviewers. The first goal of a new system should be to convert those thousands of company export administration employees into extended enforcers of a system.

I believe the best way to accomplish this is to convert from a transaction-based licensing system to a process-based licensing approach. In essence, rather than require companies to submit licenses for each individual sale, instead the government should license the export control procedures of a company. If a company had acceptable internal controls in place, it would be free

to export controlled commodities without individual licenses. The government would shift its focus to monitoring and approving internal control procedures and spot-checking the functioning of those internal controls. Under this approach, the thousands of export administration employees in private companies become the extended security element for our export control system.

At the same time we need to fundamentally reassess what it is we are trying to control. By far the bulk of things we try to control do not represent critical threats to the United States if they fall into the hands of opponents. These things should come off the control lists now. We need a more objective and explicit process for determining what needs to be controlled. Government should provide an explicit explanation of why a technology should be controlled, from whom and for how long. I also believe we need a dynamic assessment process for determining risk. When I was in the government we attempted to establish such a process for computer products, looking ahead to insure that we did not block computers that effectively became commodities in the market place.

Third, the export controls need to be designed so that senior officials bear the obligation and the responsibility for deciding the policy. When I was the Deputy Secretary of Defense, I found often that policy decisions were being made on a defacto basis by lower-level government officials who in good faith were trying to extend their understanding of previous policy on new products and services. Yet I felt that was my job. I felt I had the responsibility for deciding new policy directions, yet too often I didn't even know a license was pending or rejected until some extraordinary appeal action was mounted by a company or a concern. We need a more explicit process where new developments that require new policy determinations are made by senior officials, not by lower-level employees, extending through inertia the policies of the past.

The second partnership is between governments. As business becomes transnational in scope, the regulatory framework needs to similarly become transnational. If we want to encourage American partnering with trusted friends and allies in order to foster closer collaboration for national security reasons, we must extend closer working collaboration government-to-government. At present the picture is mixed. I find very good collaboration among customs agencies, for example, when they collectively try to stop the flow of precursor chemicals. There is far less collaboration, however, where there is no shared policy consensus on the underlying risk we face and the goals of export controls.

The Defense Department has pioneered a framework for government-to-government partnerships for arms exports through the so-called "Declaration of Principles" between the U.S. Department of Defense and the U.K. Ministry of Defense. Following these principles, the governments of the United States and the United Kingdom will police a shared industrial base perimeter, permitting relatively unregulated transactions in munitions between these two countries. This is modeled after the U.S.-Canadian export control exemption that has been in place for twenty-five years. This approach to defense industrial partnering should be extended to other countries, but only where the partner country commits to serious and extensive collaboration with the United States. This does not solve all military export control problems, but it will go a long way toward facilitating more efficient operations.

Let me say at this point that the absence of such an agreement between the United States and another country does not preclude collaboration between companies in these respective countries. But it does mean that transactions between the United States and non-declaration of principle countries would require ongoing licensing for arms exports. We also need to be careful that the bureaucrats do not make requirements for reaching such an agreement so convoluted that there is no prospect for moving forward. This framework should promote defense cooperation, not block it.

The third partnership is inside the United States federal government between the agencies of government. Currently the interagency process is more turf-prone than consensus prone. It is inevitable that we will have conflict among agencies. That is to be expected and indeed can be healthy. But the turf wars too often block the flow of information and impose added burdens on

American companies. We should work to a common government-wide integrated database for licenses. The government also needs to develop more effective ways for integrating other data bases so that questionable transactions can be identified by cross-correlating information that is already being collected by the government for other purposes.

We can adopt much of this approach to the dual use exports that would be regulated by an Export Administration Act. We need to build the partnership between government and industry, by focusing on a company's processes and procedures rather than on licensing each transaction. We need to remove commercially available items off the control lists, and we need to make senior officials bear responsibility for decisions. Improving partnership among the many export control agencies is also essential.

However, this needs to be done in the context of an international climate where, for dual-use items not controlled for reasons of nonproliferation, there is little agreement on prospective threats and little prospect for consensus. These controls fall under the mandate of the Wassenaar Arrangement. Its lists are too long and its aims too outmoded to contribute effectively to international security. I applaud the Committee for its work in this bill to modernize our national export controls and I hope the new administration will seek to do the same with a multinational controls in the Wassenaar Arrangement.

Conclusion

Mr. Chairman, I know that the Committee has worked long and very hard on its legislation to amend the Export Administration Act. This is very important work and I commend the committee for it. Only the United States Congress is capable of this reform. It is critical and you must be successful. The long-term security of this country rests in your hands.

Thank you for the opportunity to testify before you today. I would be pleased to answer any questions that you might have.