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IMPLEMENTATION OF THE
FOREIGN AVAILABILITY PROVISIONS
OF THE EXPORT ADMINISTRATION ACT

STATEMENT OF
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BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL ECONOMIC
POLICY AND TRADE
HOUSE COMMITTEE ON FOREIGN AFFAIRS



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Mr. Chairman and Members of the Committee:

At your request, Mr. Chairman, we are here to present the results of our work to date on the implementation of the foreign availability provisions of the Export Administration Act. Consideration of foreign availability of controlled items was made a permanent part of the law by the Export Administration Amendments of 1977. The Export Administration Act of 1979 contained additional requirements. The Export Administration Amendments Act of 1985 significantly strengthened statutory, foreign availability provisions.

The Department of Commerce is required by the Act to initiate and review claims of foreign availability on goods and technologies controlled for national security purposes. Commerce's program of foreign availability assessment is intended to lead to the elimination of those export controls that are ineffective in achieving their national security objectives. Specifically the 1985 provisions require that:

- Determinations and implementation of foreign availability be made more effectively and expeditiously.
- Commerce's foreign availability division be upgraded to an office and the Secretary issue regulations for determining foreign availability.
- Commerce annually review the goods' and technologies on the U.S. control list and assess foreign availability as

part of such review. Under the 1979 Act, these reviews were required at least every 3 years.

--When developing the list of military critical technologies, the Secretary of Defense consider the availability of controlled goods and related know how from third-country sources to controlled countries. Previously, availability had to be shown in the controlled countries.

--Commerce be more responsive to the role of technical advisory committees actions.

Perhaps no single case can better illustrate the problems in the foreign availability process than the one involving automatic wafer saw equipment. It has been over 29 months since the foreign availability study for these saws was initiated in September 1984, and decontrol is still not final. Despite a preliminary positive finding of foreign availability in June 1985 and West-West decontrol in July 1986, these saws remain controlled to the communist countries today, with full decontrol set for mid-March. A classified chronology of the key dates and events in this case is being provided under separate cover.

PRELIMINARY RESULTS

We have completed only the initial portion of our work, so the views we are expressing today are preliminary.

Our preliminary work to date shows that:

--On November 1, 1985, Commerce established the Office of Foreign Availability and on December 27, 1985, issued

final regulations on foreign availability procedures and criteria, as required by the 1985 Act.

--The 1985 amendments were driven by congressional interest in reducing the number of products and related technologies subject to export controls. This has not occurred.

--It has taken Commerce considerably longer than it originally envisioned to complete foreign availability assessments, due to difficulties in reaching agreement with Defense and developing the information to assess foreign availability.

--There are apparently various policy and coordination problems between Commerce and Defense involving the sharing of information, the evidence required to support a determination of foreign availability, and the lack of an expeditious approach to resolving differences over what the evidence means.

--There have been very few requests for foreign availability determinations from U.S. firms and technical advisory committees. Technical advisory committees, each typically including government members from a number of agencies and members of firms that are engaged in working with the technology in question, assist Commerce in administering export controls.

--U.S. multilateral control commitments need to be considered in the foreign availability process.

--There is potential for Defense to contribute to the reduction of export controls through its future efforts to implement the foreign availability provisions. Its contribution is dependent on giving increased emphasis to decontrol of goods and technologies in its control/decontrol proposals for interagency and COCOM action. If Defense follows through on its foreign capabilities studies of the more technologically advanced non-COCOM countries and adequately implements its foreign capability data information systems it will further such a contribution.

--The administration, apparently in recognition of the problems in administering the 1985 Act's foreign availability provisions, has made legislative proposals that, if adequately implemented, would address some of the primary problems now associated with the foreign availability process.

FOREIGN AVAILABILITY ACTIVITY

The Office of Foreign Availability (OFA) has completed or has in process 56 foreign availability cases which had been initiated as of December 31, 1986. These cases are initiated in several ways, on OFA's own initiative; in response to an allegation by an export license applicant; certification by one of the Secretary's technical advisory committees; or at the request of other Commerce offices or government agencies, generally as part of the control list review process. According

to Commerce regulations, foreign availability for a national security controlled item exists when the Secretary of Commerce determines that a non-U.S. origin item of comparable quality is available to proscribed countries in quantities sufficient to satisfy their needs so that U.S. exports of such item would not contribute significantly to the military potential of such countries.

Cases fall into two basic categories--reviews and assessments. A review is an in-house analysis of probability of foreign availability that is used in the U.S. control list review process for both national security and foreign policy controls. An assessment is an analysis possibly leading to decontrol or license issuance, conforming to the legal requirements of the 1985 Act, and performed in accordance with the foreign availability regulations.

OFA has completed reviews expeditiously. During the period August 1983 through February 1987, it had completed 33 reviews, 21 concluding that there was foreign availability and 12 that there was either no foreign availability or that foreign availability could not be determined. The reviews took an average of 3 months to complete, with the shortest review being completed within a month and the longest taking one year.

OFA has completed 5 assessments, 3 concluding that there was foreign availability and 2 that there was not. In its final rule promulgating the foreign availability regulations, Commerce established a 90-day standard for processing assessments. For

assessments resulting from technical advisory committee (TAC) certifications, the 1985 Act contains a 90-day processing deadline. Completed assessments took an average of about 14 months, with the shortest assessment taking 7 months and the longest 23 months. There are 18 ongoing assessments which had been initiated as of December 31, 1986. Many of these are taking considerable time; 14 have been in process more than 90-days, which exceeds Commerce's own 90-day standard. Six of these 14 assessments have been in process more than a year, with three of these in process 2 or more years.

Five of the assessments involve TAC certifications, which have a statutory 90 day deadline for completion, and none of them have been completed within 90 days. Only two have actually been completed, one taking 10 months from the certification; the other 11 months. The other three have been in process 4, 6, and 14 months since TAC certification.

Appendix I to this statement provides additional detail on processing times.

The principal reasons for the long processing times appear to be (1) a time-consuming consultation process with Defense and (2) the need for Commerce personnel to obtain and analyze foreign proprietary information on products produced in other countries where foreign availability is alleged.

COMMERCE/DEFENSE CONSULTATION

The 1985 Act requires that the Secretary review foreign availability on a continuing basis in consultation with the

Secretary of Defense and others. The consultation process has been time-consuming for two principal reasons.

1. Defense has taken considerable time to respond to a number of Commerce's draft assessments. Of the 23 assessments completed by or ongoing in Commerce, 14 have at least reached the consultation with Defense stage. In 7 of the 14 assessments which Commerce provided to Defense for consultation, Defense responded within 2 months. In an eighth case Defense responded in 3 months. In the six other cases, Defense has taken 6 months or more to respond, including three cases for which Defense has not yet provided responses. In the wafer saw case, Defense took about 7 months to respond. Commerce's assessment was sent to Defense on June 14, 1985, and Defense's initial response was dated January 28, 1986.
2. Commerce appears to be reluctant to publish a determination when there is disagreement with Defense. For example, in 4 cases, including the wafer saw case, Defense disagreed with Commerce's preliminary foreign availability determination. Except for the wafer saw case, Commerce has not yet published a foreign availability determination although from 15 to 33 months have elapsed in these three cases since Defense first responded to Commerce. In the wafer saw case, Commerce took almost 6 months to publish a determination of

foreign availability (from January 28, 1986 to July 8, 1986) although West-East decontrol is not yet complete.

While Commerce believes it has the authority to make determinations following consultation despite Defense objections, it appears to have been reluctant in fact to exercise that authority. The 1985 Act does not define the term "consultation" nor indicate what the Secretary must do to satisfy the consultation requirement. Commerce attorneys advised us that consultation involves providing notice of proposal, the opportunity to comment, and considering comments when and if they are received. To clarify its authority, however, Commerce has included language in proposed amendments to the Act that makes it clear that the Secretary does not need the approval of other agencies in making a determination.

MULTILATERAL CONTROL AND FOREIGN AVAILABILITY

The 1985 Act requires that if the Secretary determines that foreign availability exists a validated license cannot be required for the export of such good or technology unless the President invokes a national security override. The Act does not address whether the removal of the licensing requirement, which decontrols the good or technology, should be taken in conjunction with U.S. multilateral export control commitments as part of the Coordinating Committee for Multilateral Export Controls (COCOM). COCOM's purpose is to control the export of militarily significant goods and technologies to the communist countries. Its membership consists of the NATO countries (less Iceland) and

Japan. In October 1986 testimony before this Subcommittee, the State Department stressed the importance of decontrolling products for West/East trade in conjunction with our COCOM partners. Since the effectiveness of the export control system depends on multilateral cooperation, we agree with administration efforts to seek COCOM concurrence for West/East export decontrol. We do not believe it would serve national security purposes for U.S. unilateral actions to undermine this cooperative effort.

The wafer saw case highlighted the relationship between the foreign availability process and the U.S. multilateral export control commitments. Commerce published a positive foreign availability determination in the July 8, 1986, Federal Register. On July 14, 1986, it also published notice that an export license would not be required for West/West trade. In addition, it initiated action with the State Department to seek West/East decontrol through COCOM, a process which is expected to be completed this month, 8 months after it began; 2 months of this time was required to clear the necessary cables directing the U.S. delegation to initiate the COCOM process, due to differences between Commerce and Defense.

The need to decontrol products in West/East trade in conjunction with our COCOM partners can add as much as 6 months to the foreign availability process following its submittal to COCOM. Under separate cover we are providing the Subcommittee with classified information on COCOM's process for decontrolling goods and technology. This process appears to be too cumbersome

and lengthy. We plan to assess what consideration has been or should be given to seeking an expedited process for COCOM decontrol of goods and technologies that no longer serve national security purposes.

LIMITED INDUSTRY USE OF THE
FOREIGN AVAILABILITY PROCESS

The 1985 Act permitted export license applicants to make foreign availability claims which would have to be evaluated by the Secretary. Commerce's foreign availability regulations further permit any person, including a trade association, to make a foreign availability submission for decontrol. The Act already contained a provision for the TACs to certify foreign availability which would have to be evaluated by the Secretary.

Through February 1987, only three industry foreign availability submissions and five TAC certifications have been made. As our work progresses we plan to assess the reasons for such limited use. We will also consider the extent to which Commerce factors in foreign availability in its control list review and Defense in its militarily critical technologies list reviews that would potentially reduce the need for firms and TACs to submit foreign availability assessments.

Below are some probable reasons for lack of industry interest in submitting requests for foreign availability determinations.

--A perception that little progress has been made in the decontrol of goods and technologies through the use of foreign availability determinations.

--Uncertainty by potential applicants as to the burden and costs of proof they would bear in requesting foreign availability determinations. Also of concern is the potential disclosure of proprietary information.

--The focus of exporters' concerns is West/West trade and not West/East trade. Commerce licensing data indicates that 114,585 applications for export licenses were received in fiscal year 1986, totaling about \$73 billion dollars. Of these, 3,867 applications totaling about \$2.5 billion were for the Soviet bloc, while 102,241 totaling about \$66 billion were for the free world. The balance were for the People's Republic of China. Licensing data for 1985 reflects a similar pattern.

Several legislative proposals, including H.R.3, would broaden the foreign availability program to include West/West trade. The administration has also recently proposed legislation which would expedite free world licensing when there is foreign availability.

CONSIDERATION OF FOREIGN AVAILABILITY IN LIST REVIEW

The 1985 Act required that Commerce annually review the U.S. control list and assess foreign availability as part of such review. Commerce's Office of Technology and Policy Analysis takes the lead in the annual list review. Within that office, four technical centers are each responsible for specific parts of the control list. The four technical centers are for: computer systems; microcomputers and telecommunications; electronic

components and instrumentation; and capital goods and production materials.

Commerce's annual list review is part of U.S. input for COCOM list review, for which the State Department has lead responsibility. The Commerce input is provided to the Technical Task Groups (TTGs), which consider and evaluate the input from Commerce as well as other agencies. TTG recommendations go through a series of interagency reviews. The results of the process are formulation of a set of U.S. COCOM proposals, which are forwarded to the U.S. delegation in Paris for submission to COCOM.

Through February 1987, of the 33 foreign availability reviews completed by OFA, 23 were for use in the control list review process; 18 of these were for items already on the control list, and 5 were assessments of items which were being considered for control. Of the 18 reviews of items already on the control list, positive foreign availability was found in 8 reviews, 2 of which have resulted in decontrol and six are pending in COCOM. For the 5 reviews of proposed controls, multilateral controls have been imposed on one item and were not imposed on one other, while a decision to place controls on the remaining 3 is pending in COCOM.

DEFENSE IMPLEMENTATION OF THE 1985
FOREIGN AVAILABILITY PROVISIONS

The Export Administration Act as amended in 1985 clarifies certain aspects of the role of the Militarily Critical Technologies List (MCTL) and leaves unchanged the primary

responsibility of the Secretary of Defense for developing a list of militarily critical goods and technologies. The 1985 amendments also expand the foreign availability consideration from countries to which exports are controlled to third countries in which they are available. It also requires that consideration be given to a new category of keystone equipment (manufacturing, inspection or testing equipment) which would reveal or give insight into the design and manufacture of a United States military system.

The Militarily Critical Technologies List was developed and maintained by the Department of Defense and is used for several purposes.

- It provides basic guidance for structuring cooperative programs for sharing military technology with allies to support the common defense. Such guidance is intended to ensure that the provisions of exchanges contain adequate safeguards against diversion and retransfer of critical technologies.
- It contributes to the development of international and unilateral U.S. export controls and supports development of U.S. proposals for negotiation of international controls by COCOM. COCOM agreements are subsequently reflected in modifications in the U.S. Control List for goods and technologies with both civilian and military use.

The MCTL is used for such other purposes as export case licensing reviews, reviews of scientific papers for determinations on release of unclassified sensitive information, and assessment and structuring of proposed foreign military sales.

The unclassified MCTL was first published in 1984 and was revised in October 1986. It covers 20 technology areas, keystone equipment, keystone materials, and goods accompanied by sophisticated know-how.

Defense views foreign availability as including both the technical capability of a particular country and the willingness of that country to transfer such technology to the proscribed countries. Defense is currently initiating efforts which among other purposes seek to identify candidates for removal from the MCTL because of the level of foreign capability. Its preliminary findings covering several of the more technologically advanced non-COCOM countries (Australia, Israel, South Korea, Sweden, and Switzerland) indicate that they do have technological capability which equals or exceeds COCOM/MCTL levels in a number of critical elements. These critical elements are therefore candidates for further assessment with a view to possible elimination from the MCTL; a change in the control levels; or when deemed necessary for national security reasons, seeking agreements with non-COCOM countries to also control exports of certain goods and technologies to proscribed countries.

Defense is developing a foreign capability data information system. When fully developed and implemented, it is expected that this system will support analytical staff in their updating reviews of the MCTL and the U.S. and COCOM control lists for foreign availability.

There is potential for Defense to contribute to the reduction of export controls through its future efforts to implement the foreign availability provisions. Its contribution is dependent on giving increased emphasis to decontrol of goods and technologies in its control/decontrol proposals for interagency and COCOM action. If Defense follows through on its foreign capabilities studies of the more technologically advanced non-COCOM countries and adequately implements its foreign capability data information systems it will further such a contribution. Decontrol of goods and technologies resulting from such efforts is, in part, dependent on changes resulting from the continuing policy debate as to what goods and technologies have to be controlled for national security purposes.

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Mr. Chairman, this concludes my statement. I will be happy to respond to any questions.

Table I.1: Processing Time for Completed Commerce Foreign Availability Reviews Through February 28, 1987

<u>Average Processing Time</u>				
<u>Determination</u>	<u>Number of Cases</u>	<u>Average Processing Time</u> (months)		
Negative ^a	12	2.7		
Positive	<u>21</u>	3.1		
Total	33	3.0		
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<u>Distribution of Processing Time</u>				
<u>Determination</u>	<u>Number of Cases</u>	<u>3 months or less</u>	<u>4 months</u>	<u>5 months or more</u>
Negative ^a	12	8	3	1
Positive	<u>21</u>	<u>14</u>	<u>3</u>	<u>4</u>
Total	33	22	6	5
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^aFor 8 cases Commerce wasn't able to determine whether foreign availability exists, which has the same impact as negative determinations.

Source: Prepared by GAO from data provided by Commerce's Office of Foreign Availability.

Table I.2: Processing Time for Commerce Foreign Availability AssessmentsCompleted Assessments

<u>Average Processing Time</u>	
<u>Determination</u>	<u>Number of Cases</u>
Negative	2
Positive	<u>3</u>
Total	5
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<u>Distribution of Processing Time</u>				
<u>Determination</u>	<u>Number of Cases</u>	<u>7 months</u>	<u>11 months</u>	<u>16 months</u>
Negative	2	1		1
Positive	3		2	1

Incomplete Assessments^a

<u>Average Processing Time</u>	
<u>Number of Cases</u>	<u>Average Processing Time (months)</u>
18	12.5

<u>Distribution of Processing Time</u>				
<u>Number of cases</u>	<u>3 months or less</u>	<u>More than 3 and less than 6 months</u>	<u>More than 6 and less than 12 months</u>	<u>12 months or more</u>
18	4	2	6	6

^aTime measured from time of initiation through Feb. 28, 1987. Assessments initiated after Dec. 31, 1986, not included. Earliest case initiated in Aug. 1983.

Source: Prepared by GAO from data provided by Commerce's Office of Foreign Availability.