

Testimony before the Senate Committee on Banking, Housing, and Urban Affairs

“Advancing National Security and Foreign Policy Through Sanctions, Export Controls, and Other Economic Tools”

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February 28, 2023

Chairman Brown, Ranking Member Scott, and other members of the Committee. Thank you for asking me to testify again. I am happy to help the Committee with its oversight role however I can. Although I am now a partner in the international trade group at Akin Gump Strauss Hauer & Feld LLP and a non-resident Senior Fellow at Georgetown University’s Center for Security and Emerging Technology, the views I express today are my own. I am not advocating for or against any potential changes to legislation or regulations on behalf of another. Rather, as requested, I am providing a description of current export control policy in historical context with recommendations for how to make export controls more effective, particularly with respect to issues involving China and Russia, and less counterproductive. My views are influenced by my 30 years of work in the area, which includes my service as the Assistant Secretary of Commerce for Export Administration during the Obama Administration.

Summary of Recommendations

My primary recommendations to the Committee for making, through legislation or oversight, export controls more effective and less counterproductive, particularly with respect to issues involving China and Russia, are the following:

1. Support Administration efforts to work with the allies to develop and articulate together a significantly expanded vision for export controls to address contemporary common strategic security and human rights issues that are outside the scopes of the existing post-Cold-War-era multilateral export control regimes.
2. To ensure that such a vision can be implemented and updated in domestic regulations and policies over the long-term, support Administration efforts to create a new multilateral export control regime to identify:
 - (i) items of classical non-proliferation and conventional military concerns that cannot be addressed by the existing regimes given Russia’s membership;
 - (ii) items outside the scopes of the existing regimes’ mandates that warrant strategic trade controls, particularly with respect to China and Russia;

- (iii) items used to commit human rights abuses anywhere in the world; and
 - (iv) unlisted items to, and activities in support of, end uses and end users of concern to enhance the effectiveness of such controls.
- 3. Support Administration efforts to work with the allies to create and announce in 2023 standards describing the legal authorities and resources necessary for an allied country's export control agencies to (i) control such items and activities, and (ii) effectively enforce such controls.
- 4. Once such standards are developed, even in draft, support Administration efforts to work with allied legislatures and executive branches to create for their export control agencies such authorities and resources to enable the quick and effective creation of plurilateral controls over items and activities to address contemporary common security and human rights issues.
- 5. Echo in a regular and bipartisan way that a new regime, the proposed new way of thinking about strategic export controls, and the creation of new legal authorities in allied countries are in the common security interests of the allies. To help overcome the current allied skepticism of these ideas, make it clear that the ideas are not part of a mercantilistic plan to advantage US companies to the economic detriment of allied country companies. To enhance this message, create incentives and benefits, such as significant reductions in unnecessary trade barriers and increased market access opportunities, for allied participants in a new regime and plurilateral strategic trade control arrangements.
- 6. Support Administration efforts to work with the allies to create formal export control-focused and dramatically better-resourced data mining, investigation, and enforcement coordination efforts, with particular attention to global distributor and re-seller networks. New rules without robust data analysis and enforcement are wildly less effective.
- 7. As part of the AUKUS initiative, Congress should support and encourage Administration efforts to radically simplify and harmonize defense and dual-use trade rules by and among the US, Australia, the United Kingdom, and, later, other very close allies.
- 8. In addition to providing the Administration with all the resources necessary to implement these recommendations, require the Administration to create within the departments of Commerce or State a senior position, with all the necessary expertise, staff, and resources, to devote their full-time and attention to doing the hard, time-consuming work with the allies necessary

to help the US export control agencies convert these recommendations into actual regulations, policies, and arrangements.

9. Similar to what the Treasury Department is doing with respect to sanctions, and to better implement section 4811(3)¹ of the Export Control Reform Act of 2018 (ECRA), Congress should fund the creation of a Commerce Department office focused on studying and regularly reporting to Congress on the effectiveness of old and new export controls, and identifying those that are counterproductive for US industry and national security and foreign policy objectives.

Most discussions about export controls are about which technologies should or should not be controlled to which countries, and which entities should or should not be sanctioned. My recommendations and comments today, however, are mainly about the structures, systems, and resources that need to be in place in the US and, more importantly, with our allies to make any such new controls both effective (i.e., actually able to deny their export to end users of concern) and not counterproductive (i.e., not harming US industry to the benefit of its foreign competitors in allied countries or their national security and foreign policy objectives). Implementing these recommendations will be hard. Success will require inspired, inspirational, and ambitious long-term, fact-based, and bipartisan US leadership. All the other alternatives are worse.

Lessons Learned from FIRRMA

With respect to my recommendations that would involve congressional mandates, a successful model for how Congress could, in part, help implement them (to the extent it agreed) is section 4565(c)(3)(B) of the Foreign Investment Risk Review and Modernization Act (FIRRMA). In that section, Congress required the Administration to exchange information to facilitate harmonization of action, which CFIUS implemented by, among other things, working with allies to encourage them to create their own foreign direct investment regimes to address common security issues. It was also a Sense of Congress, in FIRRMA section 1702(b)(6) that “the President should conduct a more robust international outreach effort to urge and help allies and partners of the United States to establish processes that are similar to the Committee on Foreign Investment in the United States to screen foreign investments for national security risks and to facilitate coordination.” The Trump and Biden Administrations abided by this mandate and over 30 countries have created or strengthened their own foreign investment review mechanisms since FIRRMA passed. In particular, in 2017, 11 EU

¹ “The national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors, including foundational technology that is essential to innovation. Such leadership requires that United States persons are competitive in global markets. The impact of the implementation of [ECRA] on such leadership and competitiveness must be evaluated on an ongoing basis and applied in imposing controls under sections 4812 and 4813 of this title to avoid negatively affecting such leadership.”

Member States had a foreign investment review mechanism, and 25 of the 27 EU Member States now have or are in the process of establishing a mechanism. If this approach could work to advance the cause of plurilateral foreign direct investment controls, it could be a good part of a congressionally mandated effort to advance the cause of plurilateral export controls and a new regime.

Background

To level set for everyone, export controls are the rules that govern:

- (i) the export, reexport, and (in-country) transfer
- (ii) by U.S. and foreign persons
- (iii) of commodities, technology, software (“items”), and, in some cases, services
- (iv) to destinations, end users, and end uses
- (v) to accomplish national security and foreign policy objectives.²

Although export controls and sanctions are blending, export controls are still organizationally and legally distinct from sanctions, which focus more on controlling activities and transactions than items.

The first rule of legislation and regulation is to clearly define the problem to be solved. The Export Control Reform Act of 2018 (ECRA), which passed with broad bipartisan support, sets out in general terms the national security and foreign policy objectives of US export controls. These include controlling the items the four multilateral export control regimes identify each year as having an inherent or clear connection to the development, production, or use of conventional weapons or weapons of mass destruction (i.e., missiles, chemical/biological weapons, or nuclear weapons). I refer to these as “classical” or “traditional” national security objectives for export controls. Classical foreign policy-based controls are largely unilateral and include those specific to addressing human rights concerns (e.g., controlling instruments of torture) and supporting US sanctions programs against, for example, Iran, Cuba, North Korea, and Syria.

In passing ECRA, a bipartisan Congress and the Trump Administration were clear that national security threats facing the United States that could be addressed through export controls are broader than they were when the current, post-Cold War-era non-

² The bookend to export control “keep away” strategies involving commercial items is the industrial policy “run faster” strategy, which has evolved considerably in recent years and days, and is not addressed in these remarks. I am also leaving sanctions-focused recommendations to be discussed by others on the panel, Daleep Singh and Clay Lowrey. Thus, I am primarily commenting on the Export Administration Regulations (EAR) the Department of Commerce’s Bureau of Industry and Security (BIS) administers. With one exception, I am also not including content about the defense trade controls in the International Traffic in Arms Regulations (ITAR) that the State Department’s Directorate of Defense Trade Controls (DDTC) administers.

proliferation-focused multilateral regime system was established in the 1990's, particularly with respect to China. I agree, and was a public proponent of ECRA's and FIRRMA's passage. That is, because the post-Cold-War-era export control system focused³ on WMD and conventional military proliferation issues, it was not designed to address broader, contemporary national security and foreign policy issues, such as those pertaining to:

- (i) strategic competition issues;
- (ii) military-civil fusion policies;
- (iii) human rights abuses using commercial technologies;
- (iv) supply chain security; and
- (v) the need to promote democracy over authoritarianism.

The rise of military-civil fusion policies is particularly significant because the classical "dual-use" system was premised on the regular ability to distinguish between clearly civil and clearly military applications for the same items. Also, when the essence of the current export control system was built in the 1990's, critical foundational technologies necessary to develop advanced weapons were less likely to come from the commercial sector and were more likely to be developed by traditional defense contractors.

Congress Did Not Define What the National Security Objectives are for Non-Classical Export Controls

When passing ECRA, Congress did not define what the national security objectives should be with respect to items that are outside the classical mandates of the four multilateral regimes. Rather, ECRA requires the Commerce Department's Bureau of Industry and Security (BIS) to lead a "regular, ongoing interagency process to identify emerging and foundational technologies that are essential to the national security of the United States," but that are outside the scope of classical controls the regimes had identified. ECRA also gives the Executive Branch, and thus BIS, broad general authorities to identify the items, end uses, and end users that warrant control to achieve national security and foreign policy objectives, however defined.

Although the Trump Administration took a series of individual classical and novel unilateral export control actions under its ECRA authorities, and asked the public for comments on how to define "emerging" and "foundational" technologies, it did not set

³ I realize that there were occasional unilateral uses of post-Cold-War-era strategic trade controls, particularly with respect to those against commercial satellite-related exports. My broader historical point, however, remains correct.

out a unified, coherent, Administration-wide definition of what non-classical national security objectives of export controls should be. During its first year, the Biden Administration did not either. Throughout this time (and continuing), there has been robust public discussion about how export controls should or should not be expanded to control commercial items destined to China and Russia. As a long-time practitioner and policymaker in an area that, until recently, was considered an “obscure backwater” of policy, I find the spirited and thoughtful public debate about the role and scope of export controls to be terrific. With all the smart people from diverse backgrounds and perspectives -- doves, hawks, and owls -- thinking through the issues, I am confident that it will result in more effective and less counterproductive export controls.

Types of Items and Activities Already Controlled

I refer to “commercial” items here because all items of any sort or sophistication that are designed or modified in any way for military or space applications have been embargoed to China for decades and, more recently, Russia. Foreign-made military or satellite items that are the direct product of US technology or equipment, or that contain any amount of controlled content, are also subject to US export controls and have been embargoed for China, Russia, and other countries for a long time. Similarly, listed dual-use items destined to, or at risk of diversion to, military or intelligence end uses in China are routinely denied or, more likely, do not end up being the subject of a license application at all because of the exporter’s awareness that a license would not be granted. With respect to Russia, any listed “dual-use” item of any type is essentially embargoed.

The EAR have also contained since the early 1990’s “catch-all” prohibitions on the export of unlisted items to, and US person support for, the development or production in China, Russia, and other countries of missiles (including UAVs), chemical/biological weapons, and nuclear applications. The Bush Administration created, and the Trump Administration updated, the prohibitions on exports to China of otherwise uncontrolled but unilaterally listed commercial items if for a military end use or a military end user. The Obama Administration expanded these military end use/user controls to Russia and Venezuela. The Biden Administration significantly expanded these catch-all controls against Russia and other countries. Thus, in a very general way, the only things and activities that remain uncontrolled for China, Russia, and many other countries of concern not subject to comprehensive embargoes are purely civil items for apparently civil end uses or other commercial items that really are “dual-use,” but just have not been identified as such. The EAR define a “dual-use” item as “one that has civil applications as well as terrorism and military or WMD-related applications.” The multilateral regimes, and the export control laws of our allies, have similar definitions.

What the Public Discussion Over Export Controls is Largely About

Thus, at its core, the public discussion about export controls is largely about what the national security objectives should be with respect to controlling exports of inherently civil or widely available commercially items to specific countries, end uses, and end users. A related discussion is about which commercial items, end uses, and end users warrant controls to address contemporary human rights issues.

Another way of framing the public discussion is that it is about which items and activities that are one or more layers removed in the supply chain from the end item of concern should be controlled because they are critical to the development or production of that end item. Should only the item that is directly used to develop, produce, or operate the military item be controlled? Should the items used to develop or produce those items be controlled? Should the items that are used to develop or produce those items one layer back be controlled? How far back in the supply chain and the development and production process should one go when deciding which items warrant control? When you move beyond the items of direct relevance to the item of military significance, one is discussing inherently commercial items.

A highly generalized definition of a “classical” “dual-use” export control is that it applies to items that are more directly related to the development, production, or use of the end item of concern. A highly generalized definition of a “strategic” export control is that it is about all the items throughout the supply chain necessary to develop or produce in a specific country such items that are eventually directly related to end items or indigenous capabilities of concern. Discussions about strategic controls naturally lead to questions about the extent to which economic or competition issues rise to the level of national security issues warranting control. During the Cold War, one of the national security objectives of the US and its allies was to contain the Soviet Union and its allies to achieve broad strategic and economic objectives. Under post-Cold War classical national security export controls, however, the focus has been, with occasional exceptions, on items that had inherent proliferation- or conventional-military related applications. The controls did not have economic or competition objectives. “Export controls do not pick economic winners or losers,” was the mantra of most.

A common response to this position is that “economic security is national security.” The phrase, however, has contradictory meanings depending upon the speaker’s point of view. Some view it as allowing as many exports as possible that are not clearly and directly related to WMD or conventional military applications so that the income from international sales can fund the R&D of domestic manufacturers to use to out-innovate their foreign competition. Others have used the phrase to mean that export controls should be used as a tool of trade protectionism to economically advantage US companies generally or domestic manufacturing generally. Others have used it to mean controls that are necessary to protect industry from itself, i.e., enjoying short-term profits from sales to the detriment of their long-term ability to compete with the foreign customers. Others view the phrase and the need for new controls through the lens of

“strategic competition” against China in specific, critical areas. There are many other variations on these themes. I am not criticizing the motives of anyone who uses the phrase, only counseling that one should be sure to dig beneath any such comments to determine what the implications would be for determining which items would be controlled to where to accomplish what objective.

To be clear, I am not advocating for the creation of a lawyerly, limited definition of “national security” or “foreign policy” as such. In this context, such definitions are impossible because novel threats and issues evolve quickly. Policymakers also have a logical fear of being limited in responding to such threats by a too-precise definition. I have, however, been advocating for clear definitions of the national security and foreign policy *objectives* that controls on the movement of items should achieve. Without such definitions, agency staff will flounder in making recommendations for and implementing new regulations. Without such definitions, it will not be possible to convince the allies why a new way of thinking about export controls is in our common interest. The example I have in mind as an analogy to this point is the speech Secretary of Defense Gates gave early in the Obama Administration that set out the vision for and the national security objectives of the Export Control Reform effort. It guided our efforts and mission for the next seven years. When in doubt as to whether an effort was on the right track in the context of Export Control Reform (which is very different than the current issue), we referred back to the principles in the speech and the follow-on instructions.

The Biden Administration is Using Export Controls to Achieve Strategic Objectives Regarding Russia and China

The absence of a coherent, administration-wide official and public definition of what the national security objectives should be for non-classical controls changed with the US and allied country responses in March 2022 to Russia’s continued invasion of Ukraine. The strategic intent of these controls, as the Administration has described in multiple settings, is to degrade Russia’s ability to wage its unjust war against Ukraine and prevent Russia from projecting military force beyond its borders. The goal of the sanctions and export controls is to have significant and long-term impacts on Russia’s defense industrial base, which relies extensively on foreign-sourced items. By restricting Russia’s access to broad categories of commodities, software, technology, and services -- including commercial semiconductors and civil aircraft parts -- the US and its allies have and will continue to degrade the Russian defense industry’s ability to replace weapons destroyed in the war. The strategic intent of the controls is not, however, to impose undue harm on the Russian people for universally needed items. This is why exports of food, medicine, and most non-luxury consumer goods are not within the scope of the controls. Indeed, one of the reasons the controls are complex and need regular tweaking is that it is quite difficult to identify and control the otherwise commercial items the Russian defense industrial base needs to produce and repair its military equipment without also capturing basic consumer items of importance to the

civilian population.

In September 2022, National Security Advisor Jake Sullivan further refined the need to expand the role of export controls to address strategic objectives when he stated that “computing-related technologies, biotech, and clean tech are truly ‘force multipliers’ through the tech ecosystem. And leadership in each of these is a national security imperative.” With respect to export controls, he said that “we have to revisit the longstanding premise of maintaining ‘relative’ advantages over competitors in certain key technologies. We previously maintained a ‘sliding scale’ approach that said we need to stay only a couple of generations ahead. That is not the strategic environment we are in today. Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible.”

Not surprisingly, these themes are repeated in the Biden Administration’s October 2022 National Security Strategy.

- “Around the world, the need for American leadership is as great as it has ever been. We are in the midst of a strategic competition to shape the future of the international order.”
- “We face two strategic challenges. The first is that the post-Cold War era is definitively over and a competition is underway between the major powers to shape what comes next. No nation is better positioned to succeed in this competition than the United States, as long as we work in common cause with those who share our vision of a world that is free, open, secure, and prosperous.”
- “And we are countering intellectual property theft, forced technology transfer, and other attempts to degrade our technological advantages by enhancing investment screening, export controls, and counterintelligence resources. Just as we seek to pool technical expertise and complementary industrial capacity with our allies and partners, we are also enhancing our collective capacity to withstand attempts to degrade our shared technology advantages, including through investment screening and export controls, and the development of new regimes where gaps persist.”
- “And we will ensure multilateral export control regimes are equipped to address destabilizing emerging technologies and to align export policies in likeminded states toward countries of concern.”
- “We must ensure strategic competitors cannot exploit foundational American and allied technologies, know-how, or data to undermine American and allied security. We are therefore modernizing and strengthening our export control and investment screening mechanisms, and also pursuing targeted new approaches, such as screening of outbound investment, to prevent strategic competitors from exploiting investments and expertise in ways that threaten our national security,

while also protecting the integrity of allied technological ecosystems and markets.”

The first regulatory implementation of this policy vision was in the October 2022 unilateral export controls designed to limit the development and production in China of (i) advanced node semiconductors; (ii) semiconductor production equipment; (iii) advanced computing items, which are of significance to artificial intelligence applications; and (iv) supercomputers. The Biden Administration determined that the existence of indigenous capabilities to develop and produce such items in China is a per se national security threat. The stated policy bases for the new controls reflect the administration’s significant concerns about China’s development and production of WMD and conventional military items, and the use of these technologies to enable human rights abuses.

BIS did not rely on ECRA’s emerging and foundational technology provisions when publishing this rule so that it would not need to seek public comments before publishing it. (Whether the rule should have been published as proposed warrants a separate discussion.) Regardless of the ECRA authorities used to publish the new controls, their substance and purpose are precisely the kind of controls discussed during the FIRRMA/ECRA discussions in 2017 and 2018. That is, they are new types of controls on emerging and foundational technologies (e.g., advanced node semiconductors and advanced compute capabilities) that go beyond the classical export control systems to address China-specific national security concerns. I know BIS has received criticism from some that it was not moving fast enough on implementing this authority. I would hope that the October 2022 actions would put concerns that BIS is not working hard enough to rest for a while (although there is clearly much more to be done).

Although addressing WMD-related concerns are classical policy bases for export controls, the October 2022 rule differs in scope from most previous export controls because they are unilateral (i.e., U.S. only), targeted at one country (China), designed to achieve strategic objectives regarding the ability of the Chinese economy to function in these areas, and applied to essentially commercial items that are several stages earlier in the development and production supply chain than the types of items traditionally subject to export controls. In other words, for example, they apply to (i) the advanced computers needed to design the items needed to modernize a military; (ii) the semiconductors needed to produce the advanced computers and the military items; (iii) the production equipment needed to produce the advanced semiconductors; (iv) the items needed to produce the production equipment; and (v) the assistance by US persons in developing, producing, and repairing the production equipment. The controls are directed at the entire supply chain and use a combination of controls over specific items (both US-made and foreign-made), specific end uses, specific end users, and activities by US persons and corporations.

Once an Administration Decides on the Strategic or Other Policy Objectives of Export Controls, What is Needed to Make Them Both Effective and Not Counterproductive?

If the first rule of export control regulation is to define clearly the problem to be solved (e.g., the definition of the national security objective), the second, with some exceptions, is to ensure that the rule is both effective and not counterproductive. By “effective,” I mean that the rule actually stops or hinders the end users of concern from getting the items at issue from any source. My reference to “not counterproductive” means to ensure that foreign competitors of US companies do not get the income from sales US companies are prohibited from receiving that will allow the foreign competitor to out-innovate, out-compete, or even displace entirely the US company. The exceptions pertain to situations where the US should impose a unilateral control to (i) express objection to and not otherwise support human rights violations; and (ii) move quickly when the issue to be addressed with the control is urgent, particularly if there is a threat to the warfighter. In both cases, the point nonetheless remains that the eventual adoption of such controls as multilateral or plurilateral controls will make them more effective.

These are not just my personal views. ECRA’s core statement of policy, in section 4811(5) states, in essence, that unilateral controls (i.e., US-only) are usually eventually ineffective and counterproductive. Section 4811(6) states, in essence, that multilateral controls (i) are generally more effective at denying controlled items to countries of concern and (ii) create a more level playing field for US industry against their foreign competitors in allied countries.

It is rare that the US will have, or could keep long, a monopoly over a commercial technology. Thus, the obvious answer to ensuring that controls the US imposes are as effective as possible and not counterproductive is for our allies to impose the same controls and licensing policies over:

- (i) commodities, software, and technologies on the multilateral regime lists and on lists created outside the regime process;
- (ii) activities of their citizens involving unlisted items and unlisted end users, and
- (iii) exports of unlisted items to specific end users of concern.

My short-hand expression for this topic is that export controls have three legs -- (i) list-based controls; (ii) end-use-based controls; and (iii) end-user-based controls. When controls on the export of specific items will not achieve the policy objective (because, for example, they are widely available), then regulators should consider using a combination of end-use- or end-user-based controls.

The first example of this point is the plurilateral controls the US and more than 30 other countries began imposing in March 2022 in response to Russia's continued invasion of Ukraine. The rules reflect an extraordinary amount of export control and sanctions cooperation and coordination among close allies and partners that has not been seen since the end of the Cold War. Because the allies and other countries are imposing controls under their laws of the same items (albeit generally under their sanctions authorities because their export control laws are so limited), the controls are more effective. The issue now is ensuring compliance with them. Success here will be a function of using all available US investigation and enforcement resources, and ensuring that there is well-staffed international and intra-country coordination of allied enforcement resources.

The second example of this point is the reported near-final trilateral deal among the US, Dutch, and Japanese governments to impose controls over specific types of semiconductor production equipment destined to China. Although the details are not public, it will likely nonetheless be a significant accomplishment because, I think, it is the first time since the end of the Cold War not involving an invasion of another country that allies have come together to impose export controls over specific items against a specific country outside the multilateral regime system. (I know countries have aligned on sanctions together, such as against Iran, but I am referring to export controls here.) The whole nearly daily media coverage of the topic involving three countries and five or so companies has also been a good education in the basic point that unilateral controls are eventually usually ineffective and counterproductive, and that plurilateral/multilateral controls tend to be more effective, and less counterproductive.

Although an eventual victory for the Biden Administration and proof that the plurilateral concept can work, it will still not be completely effective or create a level playing field for US industry because, apparently, the deal does not apply to the other elements of the October 2022 rule. That is, it will apparently not include controls on activities of Dutch or Japanese citizens in support of advanced node manufacturing in China. (The new BIS rules prohibit US persons from providing support, even involving uncontrolled foreign-made items, to the development or production of advanced node semiconductors in China.) It will not involve any ally imposing end-user controls such as those related to the EAR's Entity List. It will also not have controls specific to the supercomputers or the production of semiconductor production equipment in China. Thus, Japanese and Dutch companies will still be able to export to China items and services that US competitor companies cannot. But, again, the deal is apparently just a start of an ongoing process, I expect and hope. This is a key issue for Committee oversight.

“Ay, There’s the Rub” -- The Authorities in the Allied Export Control Systems Are Far More Limited Than ECRA’s

This is the point in discussing how to make new export controls effective and not counterproductive where knowing the history of the classical non-proliferation-focused policy objectives of export controls and the mandates of the four multilateral regimes becomes important. This is because, with rare and complex exceptions, the allied export control systems are limited to controlling the export of (i) items on one of the four multilateral regime lists and (ii) activities of their citizens involving unlisted items only if they are specifically for the development or production of a WMD. In other words, the allied export control systems generally do not have the legal authorities, policies, bureaucratic cultures, or systems to impose controls over:

- (i) commodities, software, and technology not on a list created by a multilateral regime;
- (ii) activities of their citizens and companies involving unlisted items in support of activities that are not directly related to the development or production of WMD, such as for a conventional military end use; or
- (iii) exports to specific end users of concern involving unlisted items.

Moreover, the mandates of the regimes that govern the export control systems of our allies essentially state the policy bases for adding items to the control lists must be country-agnostic and entity-agnostic. The mandates do not allow for consideration of economic, strategic competition, or supply chain security issues. None of the regimes’ mandates include human rights as policy bases for controlling items or activities. In other words, there is little like the strategic competition policy objectives in the October 2022 National Security Strategy or the September 2022 NSA Sullivan speech within the mandates of any of the regimes and, thus, the export control laws of our allies.

Moreover, changes to the regimes’ mandates and the lists of items to be controlled by the participating states also require consensus. This means that each participating state has a veto over any proposed change to the regime’s scope. China is a member of the Australia Group, but not the other three regimes. Russia is a member of all but the Australia Group. Thus, Russia can block any efforts to have it removed from the Wassenaar Arrangement even though it continues a brutal invasion of another regime member. As evidenced by the very few changes the Wassenaar Arrangement members agreed to in 2022, Russia appears to be blocking most allied efforts to update the regime’s lists of dual-use and munitions items.

Also, only a few allies have articulated publicly the need for strategic export controls to address China’s indigenous semiconductor and related capabilities the way the US has in the October 2022 rule. To be blunt, based on my interactions at conferences and similar events, most allied country export control policymakers are not yet convinced of

the need to change their thinking about the role and scope of export controls. They are also generally quite skeptical of the true motives behind US efforts and calls to expand the scope of export controls. Another way of making this point is that, with rare exceptions, the allied export control systems are basically time capsules of systems that were designed to address the national security issues of 1996. Their definitions of the “national security” objectives for export controls are thus far narrower in scope than the meaning of the term in the United States, particularly with respect to China. Finally, even in the best of times and when there is general agreement to impose multilateral controls, the regime process is notoriously slow.

The Medium- and Long-Term Solution -- A New, 5th Multilateral Export Control Regime Is Needed To Address Contemporary National Security and Human Rights Issues

A year ago, my CSET colleague Emily Weinstein and I wrote in an article we called “COCOM’s Daughter” that the significant response by the US, its allies, and partner countries to Russia’s continued invasion of Ukraine created an opportunity for a core group of allies to create a new multilateral export control regime. The need for an additional regime, we argued, is urgent due to the four primary multilateral export control regimes’ inability to manage the contemporary national security, economic security, and human rights issues that can be addressed through coordinated export controls. Although the Russia-specific cooperation among allies is a plurilateral arrangement, the spirit, effectiveness, and urgency of the ad hoc effort risks fading away if not somehow locked into the laws, policies, schedules, and export control cultures of the allies. The opportunity, we noted, exists because, for the first time since the Cold War, US allies and partners have collectively responded to a broad-based threat from an authoritarian major power by amending their export control laws (albeit under sanctions authorities) to achieve strategic objectives beyond those of the four primary export control regimes. The allies have proven that that they are willing to enter into plurilateral arrangements, if the mission and the common security threats to be addressed are clear.

I encourage you to read the article. It contains many more details on issues associated with creating a new regime. In essence, the mandate of the new regime -- which would be in addition to the existing regimes, not as a replacement for the Wassenaar Arrangement -- would be to:

- (i) advance classical export control objectives of an existing regime that cannot be advanced but for the disruptive memberships of Russia and its allies; and
- (ii) address together the contemporary non-traditional national security, economic security (however defined), and human rights issues that could be addressed through coordinated export controls.

Since we published the article, we have received general support for the idea in the policy community. Others are making similar points. In particular, Jim Lewis, one of the architects of the Wassenaar Arrangement, published a good list of requirements for how to create a new export control regime. Most of the informal and polite responses we have received, however, are about why efforts to create a new regime would be too difficult or are not necessary. The primary comments we get (with our responses to each one in turn) are:

- (i) **No resources.** The US and the allied export control officials and staff are too stretched already in dealing with existing issues and the Russia-specific plurilateral arrangement. No one has time or resources to do the hard work to get consensus on the structure or mandate of a new regime.

Our response: True, but the agencies should ask their legislatures for authority to hire more subject matter experts. All transitions to a new way of policy thinking are difficult. The benefits to greater allied coordination in the face of common security and human rights issues far outweigh the costs of new staff to handle such issues. More importantly, all alternatives are worse, and eventually more expensive. The regimes will never be able to reform so long as Russia has a veto. Unilateral and extraterritorial controls will eventually generally be ineffective and counterproductive, and create unnecessary friction among allies. Also, merely because something is hard to accomplish does not mean it should not be attempted.⁴

- (ii) **No clear vision.** No one country has a clear vision as to the types of technologies that would be within the scope of a new regime or the countries that would be the charter members.

Our response: Well, then create and announce together a vision. NSA Sullivan set out a clear, new vision for the role of export controls to address contemporary issues. Work from that as a start. Also, there are not that many core enabling technologies in the key sectors produced outside a relatively small group of close allies and partners.

- (iii) **PRC talking points.** Work on creating a new regime would give the Chinese government an easy (albeit false) talking point to use with non-aligned countries that an elite group of countries is trying to horde

⁴ “We choose to go to the Moon in this decade and do the other things, not because they are easy, but because they are hard; because that goal will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one we intend to win, and the others, too.” —John F. Kennedy. “Dark times lie ahead of us and there will be a time when we must choose between what is easy and what is right.” —Albus Dumbledore.

advanced technology to the economic and developmental detriment of other countries. These talking points would be used to drive wedges between the US and its other allies and partners.

Our response: That talking point will be used in any event, and it does not change the merits of the proposal. The false talking point should nonetheless be kept in mind when the US creates its message to the allies that the new control efforts are for the common security and human rights-focused interests of the allies and are not being proposed to economically advantage US companies. It is a fair point that there is, even among close allies, some suspicions of the US motives -- i.e., that the effort is really just a US-focused protectionist effort. This concern can, however, easily be addressed in the US messaging of the proposal and outreach to allies.

- (iv) **Harm arms control.** Working to develop a new regime would harm the arms control efforts of existing regimes.

Our response: The US Government can handle more than one issue at a time. We are also not advocating for a reduction of any traditional arms control efforts.

- (v) **No incentives.** There is no incentive for any country to join because it would only result in more controls and thus economic harm to its domestic industry. It is best (say foreign commentators) to let the US impose unilateral controls against its companies to create economic opportunities for their non-US competitors.

Our response: This is not a principled response. In any event, our proposal would result in the creation of incentives for allies to join in, such as reductions of unnecessary controls in controlled trade by and among the member countries, and opportunities for more market access. On this issue, a criticism of the Biden Administration approach I have is that there are not public discussions of such “carrots” for the allies in joining on to a new way of thinking about export controls.

- (vi) **Consensus fades.** Consensus on general principles do not last. Common security interests evolve quickly. Thus, it is best to use ad hoc plurilateral arrangements on technology-by-technology and country-by-country bases.

Our response: Plurilateral arrangements in the near term are indeed the solution, as discussed below. The new regime’s mandate, however, would be to address all the classical and contemporary security issues the existing regimes cannot. The allies have already agreed to these objectives in their systems. Also, as with all voluntary arrangements, the

scope and mandate will naturally evolve as allies work together more in a coherent, regular structure.

- (vii) **PRC retaliation.** Countries that are more economically exposed to China will not want to join out of concerns for retaliation against their companies by the Chinese government.

Our response: Yes, this is a legitimate issue for such countries and should be accorded respect and consideration. The common security and human rights issues are, however, inherently and intrinsically issues to be addressed, and to be addressed together among like-minded countries. In any event, all export controls have economic costs. That is their natural impact on exporters, but countries nonetheless implement them to address higher principles.

- (viii) **Naming and shaming.** Allied country political and staff-level export control officials are generally averse to “naming and shaming” particular countries or end users, and thus prefer to continue the country- and end-user-agnostic structure of the existing regimes.

Our response: It is no longer 1996, the year the Wassenaar Arrangement was created. The common security and human rights issues to be addressed have evolved. The technologies at issue are often widely available and the only logical way to address them is through end-use and end-user controls. In any event, UN Resolution 1540 (paragraph 3(d)) requires member states to create end-user export controls, which none other than the United States has done.

- (ix) **Reform Wassenaar.** For all these reasons, the better use of time would be in reforming the regimes, particularly, the Wassenaar Arrangement.

Our response: Although Wassenaar is very important and has continuing value as part of the foundation for allied export control authorities, “Wassenaar” is very difficult to spell. Also, Russia has used, and is certain to continue using, its veto power not to allow material reform of the regime’s mandate since it and its allies would be the target of such changes. Without reform, the regime cannot address the broader-than-classical common security and human rights issues that warrant being addressed.

The Need for Standards -- At a Minimum, the Allies Should Ensure that They Have Sufficient Legal Authorities and Resources to Impose List-Based, End-Use, and End-User Controls When There is a Plurilateral Agreement to Do So

Whether (i) the US or an allied country takes the lead on creating a new export control regime or (ii) the allies, for any reason, prefer to continue with plurilateral arrangements, the allies will, at a minimum, need to have sufficient legal authorities, resources, and mandates to implement plurilateral controls. I do not think most people in the policy community calling for more controls realize how far behind the (well-intentioned and dedicated) allies are to the US system with respect to (i) authorities to impose new controls, (ii) resources to conduct policy analyses, and (iii) investigative and enforcement capabilities.

Indeed, for example, the European and most of the other allies had to shoehorn their new export controls against Russia into their sanctions authorities because they generally do not have the legal authorities to impose unilateral or plurilateral export controls, even in response to an invasion of another country. The allies need new authorities regardless of whether (i) the status quo remains in place with respect to China and other countries of concern, or (ii) there needs to be a dramatic increase in China-specific controls to respond, for example, to hostile action against Taiwan or another country, or the provision of lethal support to Russia. Benefiting from lessons learned in the lead-up and implementation of the allied response to Russia's continuing invasion of Ukraine, the allied systems need to be ready now and much nimbler.

A precursor step to ensuring such nimble systems are created that I and colleagues have recommended to the Japanese and US governments is that they use the 2023 G7 Trade Ministers' Meetings as an opportunity to develop and announce standards identifying the authorities, resources, and mandates an allied country's export control agency should have to implement plurilateral controls that are effective and not counterproductive. Specifically, the ten standards that we suggest the G7 and other allies adopt are the following:

- Standard 1 Export control agencies should have sufficient legal authorities, resources, and mandates to effectively address and enforce through coordinated plurilateral action both (i) classical export control issues that cannot be addressed through the existing multilateral regime process; and (ii) contemporary common security and human rights issues outside the scope of the regimes' mandates. These legal authorities should include both civil and criminal penalties for violations, which are critical to deterrence and motivating compliance.
- Standard 2 To implement Standard 1, export control agencies must take whatever actions necessary to ensure that they have clear and broad legal authorities to create and impose quickly plurilateral controls outside the multilateral regime process:

- (i) over commodities, software, and technology not identified on any existing multilateral regime list;
- (ii) against end uses and related activities by their citizens and companies, even if not directly related to the production or development of WMD;
- (iii) against specific end users and entities;
- (iv) that are country-specific; and
- (v) that address strategic objectives of common security and human-rights interests, not just objectives focused on inherent capabilities of specific items.

Standard 3 Export control agencies should have sufficient resources to effectively implement the policy objectives in Standard 1 and the controls in Standard 2.

Standard 4 Export control licensing officials in G7 and other participating allied countries will create systems to coordinate, to the extent possible, licensing policies for plurilateral controls. In particular, this must include some mechanism to share de-classified versions of relevant classified information.

Standard 5 Export control enforcement officials in G7 and other participating allied countries will create systems to coordinate, to the extent possible, the sharing of enforcement-related information and intelligence.

Standard 6 Intra-governmental coordination between export control policy officials and export control enforcement officials should be seamless.

Standard 7 Export control agencies will do all the work necessary to reduce unnecessary regulatory burdens on controlled trade by and among G7 members and other allied countries that adopt the same standards.

Standard 8 G7 and other allies that are standards adherents will not use export controls to achieve purely trade protectionist or mercantilistic policy objectives.

Standard 9 Export control agencies will work with all relevant subject matter experts in industry, government, and academia to ensure that any new controls are clearly written, technically accurate, and effective given the complexity of technology, supply chain, and foreign availability issues.

Standard 10 Export control agencies will provide resources and incentives for companies to create and enhance their internal compliance programs, particularly those affected by the new controls.

Commentary on the Recommended Standards All Allied Export Control Agencies Should Meet

Standard 1 is a succinct statement of my main point that a new way of thinking about export controls is necessary given the limitations of the existing regime-based controls and non-classical issues of common concern that can be addressed through plurilateral controls. The allied adoption of this standard would make clear that common security interests are no longer limited just to those that existed at the end of the Cold War. It also reflects the main point that the allied export control systems are not sufficiently resourced or have nimble enough regulatory authorities to make changes quickly to address such issues. Most countries will therefore need additional appropriations and legal authorities from their legislatures to allow for such new controls to be created and imposed quickly.

Standard 2 reflects the reality that, other than the United States, the export control authorities of the allied countries' export control agencies are largely limited to implementing controls over lists of regime-identified items and end uses directly related to the proliferation of WMD. The imposition of new controls to achieve the other objectives generally require new statutory authorities. Evidence of this limitation was made clear when most of the allies needed to rely on broad sanctions authorities to impose export control measures against Russia with respect to items that are not identified on the multilateral regime lists. For the G7 and other governments to properly address both classical and contemporary common security issues, their export control agencies need to have more nimble, broad, and available legal authorities.

With respect to **Standard 2.i.**, the ability of an agency to impose controls over items not on the regime lists is particularly important with respect to items that cannot be controlled because of Russia's membership in the regimes. It is also important with respect to the need to identify emerging technologies outside the scope of the regime systems that warrant control.

Having broad authorities to impose the end use controls referred to in **Standard 2.ii.** is critical for at least three reasons. First, end use controls are vital to the success of any new controls to address human rights issues. Most such issues involve the use of widely available commercial items that are not generally controllable. The policy concern is generally how an item is being used rather than the nature of item itself. Second, as discussed above, BIS recently imposed controls on end uses specific to the development or production of advanced node semiconductors, advanced computer applications necessary for artificial intelligence applications, and supercomputers

necessary to develop modern weapons. End use controls were necessary because the items used for such applications are widely available. For there to be any opportunity to make such controls more effective and to level the playing field among competitors in the G7 and other participating countries, the same authorities must exist to even consider harmonization of novel end use controls such as these or others to be developed in the future. Third, end use authorities are needed to allow for the harmonization of military end use controls in G7 and other countries. Such controls generally do not exist in most countries. Indeed, if I were asked which of the proposed authorities should be a priority for G7 and other allies to create, I would suggest the creation of all the authorities needed to impose common, harmonized military end use catch-all controls directed at countries subject to arms embargoes.

Controls over unlisted items against specific end users or other entities referred to in **Comment 2.iii.** are necessary when the entity is engaging in acts contrary to common security or human rights interests. The primary example of such end user controls is the U.S. Government's Entity List. This comment is not suggesting that the US would not continue to have the authority to impose unilateral Entity List controls. Rather, it is advocating that the allies give themselves the same authorities to impose end user controls to gradually start making controls more effective over time and without creating unlevel playing fields for US companies. The US is the only country that has such a list. This means that foreign competitors of US companies are able to export uncontrolled items not subject to the EAR from outside the United States to listed entities that companies in the US cannot. This status is usually eventually ineffective and counterproductive.

The authority for country-specific controls in **Standard 2.iv.** is necessary because regime-based controls are all country agnostic. Not all countries use all items of concern equally. Some countries have strategic objectives involving commercial items that are a common security threat that other countries do not. Thus, for controls to be properly tailored and not counterproductive, G7 members and other allied countries must have clear authority to impose only those controls necessary against specific countries if that country is the one causing the common security concern. Even with the availability of license exceptions for allies, not all controls need to be imposed worldwide.

The need for the authority to impose controls based on broader strategic objectives in **Standard 2.v.** reflects the contemporary reality that common security issues are much broader than those that existed in the 1990's when the current system was created. It is no longer the case that security issues arise merely from an item's inherent properties. As the coordinated allied response to Russia's unjust and continued invasion of Ukraine proves well, the imposition of strategic controls beyond the scope of particular items of concern are warranted.

Standard 3 should be self-evident to the allied export control officials. Their agencies were staffed and resourced to handle a relatively stable policy and licensing objective

established in the 1990's. Export control issues are much more complicated now, which requires more trained staff. The technologies are more complicated. The broader strategic considerations are more complicated. Enforcement agencies are under-resourced. The need to coordinate on policy and enforcement with other allies will require much more effort than is now the case. Export control agencies will need to be bold and aggressive in asking their authorizing departments and legislatures for budget increases that are many orders of magnitude greater than the status quo. The agencies will also need to streamline their hiring practices to encourage people with contemporary, non-traditional skills to want to work for their government's export control agencies. In particular, the US and allied export control agencies need more policy experts and technical experts in emerging technologies.

For plurilateral controls to be effective and to not create unlevel playing fields, the same licensing decision should generally result, all other facts being equal. **Standard 4** would not require any COCOM-like formal clearance process for individual licenses. It would not remove the general principle of "national discretion" with respect to decisions to approve, grant, or condition any particular license. Rather, to the extent possible, this recommendation would result in regular discussions and information sharing -- including of de-classified intelligence -- so that there would be common licensing policies that each G7 and other participating allied country would work toward when making individual decisions. Such an approach should effectively prevent backfilling without creating the appearance that one country has legal control over another country's decisions.

Standard 5 is necessary because there is not any formal or significant informal arrangement among allied export control enforcement officials to share information that would facilitate each country's enforcement efforts. There are certainly ad hoc and informal arrangements. There is, however, nothing close to the degree of coordination that exists among allied policy officials, particularly with respect to the coordinated allied response against Russia. There should be the same degree of coordination on the enforcement side of the effort as there is or would be on the licensing and policy side of the effort. The limiter of "to the extent possible" reflects the reality that there will be situations where domestic laws limit the sharing of specific types of law enforcement sensitive information.

Export control regulations are only as good as their implementation and enforcement. Export controls are sufficiently complex and evolving that export control enforcement personnel in the governments need to be regularly in contact with licensing and policy officials. Unlike at BIS, there is not a significant history with most allied countries of strong coordination between their licensing and enforcement officials. Creating and implementing **Standard 6** will also help direct priorities for investigation and prosecution to achieve the goals of the controls. Relevant and robust enforcement will also send a message to exporters regarding the need to take all the actions necessary to ensure compliance.

Standard 7 refers to the fact that, as a result of history and different legal systems and cultures, there are unnecessary burdens on non-sensitive trade by and among G7 countries and other close allies. “Unnecessary,” in this context, means trade frictions that are unintentional and do not exist to achieve a policy objective. If a country adopts and implements the recommended standards, the concern for diversion of controlled items out of such countries would be significantly reduced. Thus, as an incentive for being a standards adherent and to level the playing fields among competitors in allied countries, G7 and other members could make changes to their domestic export control systems to facilitate a long list of practitioner-focused changes. Examples include the need to align (i) license exceptions and general authorizations; (ii) encryption controls; (iii) definitions of control parameters (such as “specially designed”); (iv) classification and rating determinations; (v) deemed export rules; (vi) software as a service rules; (vii) cloud storage rules; (viii) cyber-surveillance controls; (ix) arms embargo controls; and (x) military end use/user rules.

With respect to **Standard 8**, I realize that it will be difficult to draw a clear line walling off controls for mercantilistic reasons since many of the new controls that are likely to develop will involve inherently commercial items widely used in purely civil applications. That is, they will be somewhat different in type than classical “dual-use” items that the multilateral regimes identified for control that have more of a direct and clear relationship to the development, production, or use of WMD or conventional weapons. Nonetheless, it is important for the G7 and other allies to announce this standard to ensure that there are clear common security and human rights-focused objectives for the new controls. Such a standard is also important for forcing discussions and public announcements about what the specific common security and human rights-focused objectives were to be addressed through the new control. Such public discussions should also clearly explain why the objective of any new controls is not a purely trade protectionist or mercantilistic policy objective. Such clear statements will be important to deflect the inevitable criticism of those affected by the controls that the motive for the control is something other than the one stated.

Standard 9 reflects the reality that the scope and content of most new and future export controls are going to be more complicated than previous controls. To help ensure that any such new controls are both effective and not counterproductive, standards adherents would need to have formal procedures to ensure that they get the best input possible from those potentially affected or who are subject matter experts.

Standard 10 reflects the reality that exporters are on the front line of export control compliance. Governments cannot do it alone. Companies not normally subject to or affected by traditional export controls will need to develop and update their existing compliance programs to account for the new controls and obligations. Governments will need to work with such companies more to assist in and guide such changes. It is not possible to staple a compliance agent to every export and email with technical data in it.

A Significant Benefit of More Allied Export Control Authorities Is that There Will Be Less Need to Rely on Broad Extraterritorial Jurisdictional Hooks that Usually Eventually Lose their Effectiveness

For decades, the EAR have regulated foreign-made items if they contain more than a de minimis amount of controlled content or are Wassenaar-controlled “national security” items produced directly from US-origin technology that is also controlled for the same reasons. These rules are complicated. With the transfer of less sensitive military items and commercial satellite items to the EAR during the Obama Administration, the foreign direct product rule was expanded to apply to all foreign-made military- or satellite-related items produced directly from US technology, software, or equipment, or that contained any amount of controlled U.S. origin content. In August 2020, the Trump Administration created another foreign direct product rule that controls foreign-made items not otherwise subject to controls if they are produced directly from certain US technology or software or produced by certain types of equipment made from US technology. In March 2022, the Biden Administration created Russia-specific foreign direct product rules, but exempted their applicability to foreign-made items shipped from countries that had adopted comparable controls. In October 2022, the Biden Administration created additional foreign direct product rules over foreign-made items destined to listed companies in China that support the AI or supercomputer ecosystem. It also created additional foreign direct product rules over foreign-made items for use with advanced computing or supercomputer applications. Last Friday, BIS created a new foreign direct product rule to control specific foreign-made components, including integrated circuits, produced with US technology, software, or equipment if shipped from outside the US to Iran for use in producing components for UAVs. There are now essentially ten (10) foreign direct product rules!

The common denominator of all the foreign direct product rules is that the foreign-made item is produced from certain types of US-controlled technology, software, or equipment. The foreign direct product rule tools become ineffective if and when foreign companies outside the US swap out the US-controlled software, technology, or equipment they were using that “tainted” their foreign-produced products for foreign-origin software, technology, and equipment. Thus, the US needs to be judicious in using the tool. It is and can be effective for some number of years, of course, for items where the US dominates key inputs. But, for most foreign-made items, it will have a short shelf-life -- and, by definition, create structural incentives for foreign producers to design out US-controlled content in favor of that produced by their foreign competitors. Also, there are some types of critical topics where extraterritorial controls will not work well. How, for example, can the US create a foreign direct product rule for artificial intelligence software, data sets, or algorithms where there is no US chokepoint? This means that the Administration, with as much Congressional support as possible, needs to do what it can to ensure that the allies in the producer nations impose the same controls to enhance their effectiveness and to level the unlevel playing field for US industry.

ECRA Authorizes the Tools in the EAR to be Used to Further US Foreign Policy, Including Human Rights, Objectives

Most of my comments pertain to national security issues. ECRA, however, specifically authorizes the EAR to be used as a tool to “carry out the foreign policy of the United States, including the protection of human rights and the promotion of democracy.” The EAR also contain an extensive list of foreign policy controls. Items controlled under such policies include crime control and detection equipment, restraints, stun guns, instruments of torture, equipment for executions, and shotguns. Following the 1989 military assault on demonstrators by the Chinese government in Tiananmen Square, the U.S. Government imposed controls on many such items.

To their credits, both the Trump and Biden administrations expanded export control tools to address human rights issues. The primary tool has been to add to the Entity List those that have engaged, or believed to have engaged, in human rights abuses associated with the Chinese government’s brutal repression of the Uyghurs and other ethnic minorities in the Xinjiang region. Also to the Trump Administration’s credit, it amended the EAR so that human rights considerations are applied to the review of essentially all license applications, even when the items to be exported are not controlled for human rights-related (i.e., “Crime Control”) reasons. All license applications BIS receives to export such and other types of items, including firearms, are reviewed by BIS foreign policy experts and also referred to the State Department for its assessment of the foreign policy and human rights implications. (State can choose to delegate such authorities in particular cases, such as those involving gun exports to Ukraine.) Because, however, the nature of most items involved in acts contrary to this ECRA provision are common or do not lend themselves to technical descriptions on control lists, a combination of the EAR’s other end-use- and end-user-based tools could be effective in furthering its objectives.

In December 2022, Congress recognized this fact and amended ECRA to give BIS the authority to regulate services or other activities of US persons, wherever located, when in support of foreign “military, security, or intelligence services” -- even if no commodities, software, or technologies subject to the EAR are involved. The House and Senate sponsors of the one-sentence amendment stated that its purpose is “to prevent Americans from working with or aiding foreign policy and intelligence agencies that spy on dissidents, on journalists, and on American citizens . . . and represents the largest expansion of presidential export control authority in years.” Although an expansion, they would still be unilateral controls because there is not a multilateral export control regime to address human rights issues and no other ally has such broad statutory authorities for end-use controls.

BIS has not announced how it plans to use its new authority. Thus, this will be a significant area for Committee oversight. Although I am personally a supporter of this new authority, particularly with respect to helping to advance the objectives of the

Summit for Democracy, I caution that end-use controls are difficult to enforce and be understood by exporters if not implemented clearly and carefully. This is so because they do not involve items on a list or entities on a list, which exporters can look to and determine quickly whether an export requires a license. In any event, the new authority can be a terrific opportunity for the US to use as part of its appeal to the shared values of the allies for why new authorities for plurilateral or new 5th regime controls are needed.

Don't Forget the Basics -- Which Requires a Lot More Resources for BIS and the Other Export Control Agencies

Without taking away from the seriousness of the China- and Russia-specific issues, Congress and the Administration should remember to give adequate attention and resources to all other traditional export control issues, such as (i) running an efficient licensing system, (ii) controlling and enforcing the export of dual-use items that have proliferation-related uses elsewhere in the world, and (iii) reducing unnecessary barriers on controlled trade with close allies. In particular, the agencies need the time, resources, and expertise in all technology areas to develop proposals to keep the lists of controlled items up to date. Since leaving government service, I see up close how quickly the control lists become out of date at the speed of technology evolution.

Without a regular, reliable, timely, and predictable licensing system, US exporters cannot be reliable, timely, and predictable partners with respect to items that should be approved for export based on the applicable policies. Although you have access to data I do not, I suspect that license and other processing times have ballooned. This is not a criticism of BIS and the other export control agency personnel. They are being asked to attend more interagency meetings involving unusually novel issues, respond to more data calls and inquiries, write more policy memos on complex issues, and respond to more daily brush fires than the system was built for. In other words, from the outside, there is indirect evidence that the bright lights of all the very serious and difficult topics of the day are taking resources away from all the less-front-page aspects of running the export control system.

Moreover, BIS is taking on responsibility for administering the Information and Communications Technology and Services Supply Chain (ICTS) system and rules. To implement these new authorities effectively and without discouraging benign activities will require a massive amount of resources, sophistication, and expertise.

These are not just my views as a compliance attorney and a former assistant secretary in charge of export administration. The final three core policy objectives in ECRA section 4811 for US export controls are the following:

- (7) The effective administration of export controls requires a clear understanding both inside and outside the United States Government of

which items are controlled and an efficient process should be created to regularly update the controls, such as by adding or removing such items.

(8) The export control system must ensure that it is transparent, predictable, and timely, has the flexibility to be adapted to address new threats in the future, and allows seamless access to and sharing of export control information among all relevant United States national security and foreign policy agencies.

(9) Implementation and enforcement of United States export controls require robust capabilities in monitoring, intelligence, and investigation, appropriate penalties for violations, and the ability to swiftly interdict unapproved transfers.

Also, ECRA section 4816 requires BIS to provide exporters, particularly small- and medium-size enterprises, with assistance in complying with the regulations. ECRA section 4825(b)(2) states that the export control agencies “should regularly work to reduce complexity in the system, including complexity caused merely by the existence of structural, definitional, and other non-policy-based differences between and among different export control and sanctions systems.” The system has gotten significantly more complex since ECRA passed. We are also at the point where complexity is having an impact on policy and enforcement objectives. Some avoid otherwise benign exports because of uncertainty about the rules. Exporters make inadvertent mistakes because they cannot understand the rules. Prosecutors might be reluctant to bring cases because they think juries will not understand the rules.

Also, ECRA section 4814(c) states that the licensing process “should be consistent with the procedures relating to export license applications described in Executive Order 12981.” This Executive Order requires, and is the legal authority (as amended) for, the interagency review and appeal process, and the timelines for such efforts, that are set out in the EAR. For example, responses to classification requests should be completed within 14 days. Responses to advisory opinion requests should occur within 30 days. Referral agencies are required to give BIS their votes within 30 days. All license applications should be resolved within 90 days. I realize all these goals have not been met for a long time, including some when I was in government. Merely setting and achieving, however, these simple, regulatory-required goals for BIS and its fellow export control agencies would be an amazing and good government accomplishment.

For these and other reasons, Congress and the Administration should also devote substantially more oversight attention to, and resources and personnel for, the export control agencies, namely BIS, the Defense Technology Security Administration (DTSA), the Bureau of International Security and Nonproliferation (ISN), the Directorate of Defense Trade Controls (DDTC), and the National Nuclear Security Administration (NNSA). (Eventually, the export control agencies should be combined into a single licensing agency and the rules should be combined into a single set of export control

regulations with one list of controlled items, but that is a subject for another day.)

The increase in resources should include the relevant agencies in the Intelligence Community, so that they can better share their collections and assessments with the relevant offices with export control responsibilities in a more robust and regular way than is the case currently. This is not to suggest that there is not now Intelligence Community support for BIS compliance and licensing efforts. In 2013, BIS created the interagency Information Triage Unit, which works with ODNI and other agencies to assemble and properly disseminate classified and unclassified intelligence information to help the agency make better decisions on proposed exports and other export control issues. Rather, I am saying the resources for and interagency participation in such efforts should be, through appropriations, made significantly more robust given the rise in the complexity of issues and the responsibilities of BIS.

Similarly, I would encourage more resources be devoted to export control-focused enforcement, particularly by the subject matter experts and 150 or so special agents at BIS's Office of Export Enforcement (OEE). This will not only advance the national security and foreign policy objectives of the controls, but also help keep the playing field level for those companies that do the hard work necessary to comply with the regulations. Part of this funding should also be focused on capacity building for the enforcement agencies of our allies and better coordination with countries that are diversion hubs. This is particularly important since one of the biggest compliance issues associated with the Russia-specific controls is the diversion of components through re-sellers and middlemen. On a related policy note, BIS could consider creating a Country Group C to impose controls on diversion risk hubs. This could create more visibility into diversion issues, and thus increase the effectiveness of controls. It would also create greater incentives for the governments of such countries to significantly improve their diversion risk screening and interdiction efforts.

In addition to capacity building, OEE requires more advanced technical resources -- as well as an accompanying technical workforce -- to meet today's enforcement needs. More data, in addition to data science expertise, would help give BIS enforcement analysts the resources they need to more effectively enforce export controls. This does not need to be an overly expensive feat. A CSIS estimate claims that "an appropriation of \$25 million annually for the next five years will help significantly enhance immediate enforcement capabilities and also improve the speed and accuracy of export licensing." A universe of commercially available datasets exist that could, in conjunction with classified and internal US government data resources, massively lessen the burden on enforcement analysts. Companies such as Panjiva and Altana AI provide bill of lading and shipping data that can illuminate illicit shipments of goods to problematic places or entities. SEMI, Yole Group, TechInsights, and others deliver in-depth supply chain and market size reporting on almost all aspects of the global semiconductor industry. Business intelligence and financial datasets such as Crunchbase, PitchBook, ZoomInfo, and more can help analysts better understand the relationship between corporate entities around the world. Translation programs such as DeepL use novel neural

network methodology to improve the quality of foreign language-to-English translations.

Databases alone will not be enough to help BIS's enforcement capabilities. Data scientists, software engineers, and data visualization specialists will be required to transform these commercial and proprietary datasets into useful tools for BIS and interagency analysts and policymakers. Without this expertise in-house, a massive influx in datasets will only increase the burden on the already-burdened enforcement team. Experts with these data-relevant backgrounds can help to translate complicated databases to non-technical audiences. They can also work to combine datasets and create in-house user-friendly platforms that will likely increase OEE's efficiency and capabilities.

Finally, there should be more resources dedicated to enhanced DDTC/BIS compliance coordination. This would help with investigations involving items subject to both the ITAR and the EAR. It is also weird that OEE and DDTC's compliance team do not regularly coordinate and share resources since they have the same ultimate mission.

Why US and Allied Country Industry Should Support the Ideas in This Testimony

Why is a lawyer who provides legal advice to exporters advocating for more controls and more enforcement of those controls? First, it is the right thing to do. I am a true believer in the ability of export controls to advance common national security and foreign policy objectives. Second, more plurilateral and multilateral controls will level the playing field for US industry and allow for benefits to allied country industries that are important to US interests. Third, more enforcement resources will level the playing field for the companies that spend the time and resources to ensure compliance with the rules relative to their competitors that do not. Fourth, new controls are going to happen anyway. It is no longer 1996. It is thus best for industry and other subject matter experts in the US and allied countries to work with government to ensure that the new controls necessary to address contemporary common security and other issues are technically accurate, clear, enforceable, effective, and not counterproductive.

Responding to a Few Misunderstandings About BIS

BIS does not have the authority to issue licenses without cooperation of the other export control agencies at the departments of Defense, State, and Energy. That is, BIS administers an interagency licensing process consistent with the requirements and standards in the Export Administration Regulations. It is indeed the case that in a small percentage of the total cases the first layer of staff at each of the agencies disagree, sometimes strongly, on whether particular types of licenses should be granted. When there is disagreement among the agencies, the regulations authorize an agency to escalate the decision to more senior career staff for review at the Operating Committee. Its purpose is to resolve the interagency disagreements based on a better

understanding of the facts at issue, and regulatory standards in the EAR and precedent for when a license should be denied, granted, or conditioned.

If an agency does not agree with the determination of the Operating Committee chair, then it has the authority to escalate the case to the Advisory Committee on Export Policy (ACEP), which consists of Assistant Secretary-level (or designees) from the departments of Commerce, State, Energy, and Defense. Each agency has one vote. Even still, an agency has the authority to escalate any licensing decision of the ACEP to a cabinet-level Export Administration Review Board (EARB). Appeals to the EARB are rare. Thus, it is correct to say that all licenses issued by BIS were agreed to, or not escalated, by the departments of Defense, Energy, and State. (EARB decisions can be appealed to the President, but that has not happened for decades, I suspect.)

To put this process and the numbers in context, according to the 2021 annual report, in FYI 2021, BIS processed 41,446 licenses. 568 of those applications were escalated to the Operating Committee for review. 80 of those cases were escalated to the ACEP for resolution. Although the data are not public on the process thereafter, I would suspect that only a very small fraction were resolved at the ACEP with interagency difficulty. When I chaired the ACEP from 2010 to 2017, almost all decisions on licenses (to approve or to deny) were unanimous.

In any event, it is healthy for there to be disagreements among the agencies, each of which is staffed with people with diverse backgrounds, expertise, and equities. The interagency review ultimately results in a better understanding of the facts, regulations, and concerns so that final decisions can be consistent with administration policy, the law, and, of course, national security and foreign policy objectives. Under the current system set up in the 1990's, if any one agency ever were to be inappropriately influenced by outside pressure, the checks and balances of the other agencies' involvement would prevent any applicable license from being issued. This is yet another reason why the process would be harmed if any one agency had a veto or the authority to issue a license over the objections of the other agencies.

Also, the EAR contain many different licensing policies for different types of exports. Some policies require denial. Some require case-by-case consideration. Some state that applications are presumptively approved. The EAR's licensing policies contain many other variations depending upon the item, the destination, the end use, and the end user. My point is that decisions about whether to approve or deny a license are based on regulatory standards that govern BIS's and the other agency's decisions. If someone does not like that BIS issues, after the interagency review, any particular license, then the attack should not generally be on the bureau's (and its interagency colleagues') individual decision (assuming there was a correct and complete understanding of the facts). Rather, attention should be paid to the licensing policy in the regulation describing which exports to which destinations, end uses, and end users should or should not be approved. If the policy does not properly address a current national security or foreign policy issue, then the applicable licensing policy in the

regulations should be changed in a transparent way.

In addition, license approval percentages will always be high because companies generally do not apply for licenses they suspect will be denied. That is, exporters rarely apply for licenses they know or suspect will be denied based on a review of the licensing policies in the regulations or statements from BIS. They generally make such decisions to avoid the cost and burden of preparing applications that are not likely to be granted. This means that the numerator in any approval statistic will be based on applications where the exporter generally believed that the license would likely be approved based on the licensing policies in the regulations. For example, applicants rarely, if ever, apply for licenses to export to China items that are military-related, satellite-related, would involve a known human-rights abuse, or are for a military end use or end user. Such applications will be denied under long-standing licensing policies, and are thus not included in any numerator. This result is not unique to BIS. DDTC has a high approval rate for licenses it issues authorizing the export of defense articles for the same reason.

Another comment I hear is that the issuance of a license is a “waiver” of controls. This is not correct. The issuance of a license is, to the contrary, evidence that the export is consistent with US policy, not an exception to it. If one does not like a particular policy, then the focus should be on the standard in the regulations for when such licenses should be issued or denied. That is, of course, fair game for a policy discussion. But the issuance of an individual license is not evidence of a “waiver” from or an exception to a prohibition against exports. To get a license, a company must submit an application to the government explaining why approval would be consistent with the regulations and administration policy. The application must describe the items, end uses, end users, destinations, and other facts involved. A license application is thus evidence of compliance, not evasion. Indeed, BIS trains people how to submit such applications as part of its formal compliance outreach and education efforts.

As Part of the AUKUS Initiative, Congress Should Support and Encourage Administration Efforts to Radically Simplify and Harmonize Dual-Use and Defense Trade Rules By and Among the US, Australia, the United Kingdom, Canada, and, Perhaps, Other Very Close Allies

The 2023 Conventional Arms Transfer policy states that “United States foreign policy and national security objectives are best advanced by facilitating arms transfers to trusted actors who will use them responsibly and who share United States interests.” The 2022 National Defense Strategy calls for an integrated deterrence strategy to work with close allies and partners to integrate all tools of national power across all domains and types of conflict. For purposes of this comment, it calls for doing what can be done now to deepen integration with allies so that we are collectively ready for any conflicts later.

In that spirit, the US, Australia, and the UK are working through the details of the AUKUS security partnership, which is meant to be a paradigm shift in defense trade and other cooperation among the countries to enhance common security objectives in the Indo-Pacific region. A good summary of the objectives is in the statements of the bipartisan AUKUS caucus: “Australia, the UK, and the US share a common history and a common destiny. Our alliances are grounded in our shared values and play an increasingly vital role in advancing global prosperity and peace. . . . Under the AUKUS framework, we will become more capable and better allies through expanded defense collaboration in areas such as undersea warfare, long-range fires, artificial intelligence, and more.” It is possible that support for AUKUS and any changes necessary to enhanced defense trade and dual-use cooperation among the countries will be in the recommendations made by the Select Committee on Strategic Competition Between the United States and the Chinese Communist Party.

Arms Export Control Act (AECA) section 38(j) (22 USC § 2778(j)) does not permit the State Department to create country-specific exceptions in the ITAR or Foreign Military Sales authorizations other than for Canada absent a treaty. In response, the Bush Administration led the effort to create and get adopted the Defense Trade Cooperation Treaties with Australia and the UK to accomplish similar objectives. As significant as these treaties were, they did not go far enough at reducing unnecessary regulatory burden of defense trade by and among close allies. This was part of the policy foundation for the Export Control Reform initiative to advance the same objectives, but more simply and broadly. The US defense trade and dual-use export controls specific to Australia, the UK, and Canada are still, however, significantly different for each country, unnecessarily burdensome, and unnecessarily complex. To its credit, the State Department is attempting to address some of these issues with pilot Open General Licenses.

These efforts are not enough, however. There is a significant (albeit sometimes unnecessary) fear of US export controls in Australia, the UK, and Canada. The Bush, Obama, and Biden administration efforts to address the issue have not yet succeeded at the ultimate objective of creating a presumption of sharing among these allies. The concerns lead to unnecessary efforts to design out or avoid US-origin content and services of US persons. The differences in the rules among the three countries create unnecessary delays and burdens, even with DDTC’s expedited licensing procedures. Although nearly all licenses for the UK and Australia are approved, based on industry experience, that approval process routinely take months. In addition, approvals are often burdened by dozens of restrictive or conflicting provisos. This makes unnecessarily difficult efforts for companies and the governments to collaborate on defense programs for the countries.

Consistent with the purpose of this hearing to discuss how to advance national security and foreign policy through export controls and other tools, I suggest that the committees, staff, and members interested ask why the authority for the State Department to regulate defense trade for Australia and the UK should be stricter than

and different than the rules governing exports to Canada. If there is no policy reason for the difference, then why not amend section 2778(j)(1)(B) to authorize the State Department to develop harmonized and radically simpler and more permissive country-group exceptions for Australia, Canada, and the UK as part of Congressional support for AUKUS efforts? Only four words would need to be added to the section to effect the significant change -- "Australia" and "the United Kingdom." In exchange, the US could work with Canada, Australia, and the UK to ensure that they each had sufficient enforcement resources and domestic licensing policies for shipments to third countries so that they would be on par with those of the United States. The US would also work with these allies to ensure that their internal controls on releases to dual- and third-country nationals were common and addressed common security issues and threats.

If such a simple statutory change to the AECA is not possible, why not ask the State Department and the Defense Department to coordinate on using the existing authority in ITAR sections 126.4(a)(2) and 126.4(b)(2)? Under this authority, Defense would identify AUKUS as an expansive covered cooperative program authorized as an arrangement with international partners under Title 10 or Title 22 National Defense Authorization provisions. This would create a general authorization under the section for exports among the countries for a list either (i) of specific programs or (ii) all but a common, smaller, core group of particularly sensitive defense articles that would still require individual authorizations for all allies. A reference to this cooperative program authorization could then be inserted as a standard clause in all letters of authorizations and other foreign military sales agreements. This would ensure that there would be no difference in treatment for items exported as a direct commercial sale or a foreign military sale. If there were a desire to make this harmonized foreign military sales authority retroactive, Executive Order 13637 could be amended to delegate to Commerce the authority to regulate items originally exported under a foreign military sales agreement and not described on the USML. This issue would solve the problem of sorting out and controlling differently in warehouses the identical item based solely on whether it was originally shipped via direct commercial sale or foreign military sale.

The governments would then each exchange diplomatic notes that set out common standards and rules. These notes would be published in each of the countries' export control regulations. Under this authority, the ITAR's Canadian exemption and reexport requirements would be updated and amended so that their scopes were identical for exports to and reexports among Canada, Australia, and the UK. To address long-standing fears of the ITAR's see-through jurisdictional issues, the authority in section 120.11(c) would be used to create additional carve-outs to the jurisdictional taint of Canadian-, Australian-, and UK-produced items incorporating ITAR-controlled content. The ITAR's provisions that impose extraterritorial jurisdiction over foreign-produced defense articles developed or produced in the three countries from US-origin defense services or technical data would be amended to remove the jurisdictional taint for the covered programs or items not within the core list.

For items shipped under foreign military sales, State's blanket retransfer authorizations

among the countries would be updated so that they aligned perfectly with authorizations for items shipped as direct commercial sales. The Defense Department would also provide written direction to all the industry partners involved in the cooperative programs. This direction would also count as a general authorization for any items subject to the EAR under the government (GOV) license exception provision in EAR section 740.11(b)(2)(iv). (ECRA does not prohibit the use of license exceptions for items controlled for missile technology or any other reasons.)

This does not mean that congressional notification -- and congressional oversight responsibilities -- for contracts above a certain, high amount would go away. But it would mean that Congress and the Administration would be doing as much as possible to significantly enhance and simplify defense and dual-use trade by and among these close allies, and potentially others later, to advance common security objectives in the Indo-Pacific region. I realize the implementation details and decisions about the core, common list of items and programs that would still require individual authorizations is more complicated. I can get into these details later. Nonetheless, I wanted to put a marker down with the Committee to see if it and its colleagues in other committees of jurisdiction would be interested.

Conclusion

As with all export control topics, I have a three-minute, a thirty-minute, a three-hour, and a three-day version. So, with this, I'll stop here and be happy to answer whatever questions you have.