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Reform the Export Administration Regulations by Removing Burdensome and Pointless Requirements that U.S. Exporters Obtain an "Import Certificate"

The Department of Commerce Export Administration Regulations (EAR) impose a requirement that an "International Import Certificate" or a comparable document (IC) be obtained from the importer's government before a wide range of exports may be licensed. The case for lifting this burden
from U.S. exporters was made in my November 14, 2011 statement to the President's Export Council Subcommittee on Export Administration, a copy of which is attached to this submission.

The main points are these:

1. The IC is a relic of a post-World War II trade control cooperation mechanism that no longer exists. Former partners of the United States no longer require their exporters to obtain an IC.

2. The IC does not provide information or rights needed to enforce export controls.

3. The EAR requirement that a signed original of the foreign government certificate be obtained demands time-consuming mail exchanges among the exporter, importer and government authorities.

4. Where the EAR do not require an IC, they often require an end-user statement (EUS) containing

representations and commitments from the customer with respect to the use and disposition of controlled goods. An EUS, which does not involve the foreign government, could replace the IC.

Attachment

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Memorandum to: The President's Export Council
Subcommittee on Export Administration

From: Cecil Hunt, Wiltshire & Grannis LLP, Washington, D.C.

THE INTERNATIONAL IMPORT CERTIFICATE – A BURDENSOME RELIC

Exporters and importers often bear the burden of obtaining an "international import certificate," (commonly abbreviated as "IC") or some variant of such a document. This document had its origin in measures taken by the United States and other Western nations soon after World War II to limit trade to the East. I believe that the IC has little, if any, usefulness in the existing international trade environment and that other measures can better serve trade control needs. U.S. government agencies should assess the need for ICs and work with other governments to eliminate or reform this red-tape relic. The need for alternative documentation should also be studied.

The IC basics are these: The exporter's government may require the exporter to obtain an IC certified by authorities in a cooperating importing country; the guts of the document is a representation by the importer that it is importing described commodities and will not reexport them without approval of the importer's government; the importer's government certifies on the IC that this representation has been made to it. The IC is then used by the exporter to obtain an export license.

The IC system originated in the 1940s when Western governments established a cooperative East-West trade arrangement that included a "Coordinating Committee" ("CoCom") to administer a common control list and to coordinate permitted exceptions to trade restrictions. The precise rationale for the IC system is now murky. It does appear to have been designed to give the country of origin confidence that the commodities would not improperly move beyond the cooperating importing country, but to impart that confidence in a way that would not require the importer's government to limit its discretion or to acknowledge extraterritorial jurisdiction of the exporter's government. The IC system also provided for issuance of a "delivery verification" ("DV") upon request from the exporter's authorities.

CoCom no longer exists, but at least some of its former member governments continue to administer vestiges of the IC system, even if they do not require their exporters to obtain an IC. The Department of Commerce still requires U.S exporters to obtain an IC for many exports to these countries, and the United States has established IC-type arrangements with several additional countries, including India and the Peoples Republic of China.

Consider what a U.S. company goes through if an intended export is one that requires an IC. The Department of Commerce regulations require that the exporter receive a signed original of the IC before licensed goods can be shipped. A facsimile is not acceptable, so electronic communication will not get the job done. The process entails much back and forth. The customer must obtain and complete the blank form prescribed by its authorities and insert product data supplied by the exporter in the terms required by the export licensing agency. An authorized importer official must sign the importer representation. The importer must submit the form (by mail) to its authorities for a certifying signature and return (by mail) so that the IC can be sent (after translation, if not in English) to the exporter (by international mail), who must have the signed original IC in hand before exportation. A 2010 Paperwork Reduction Act filing for renewal of OMB authorization for use of the IC estimated "time per response" as sixteen minutes! It might well take less time than that for the customer to decide to buy from a non-U.S. source!

There is another type of export control documentation that is more widely used than the IC/DV system. Export control authorities in the United States and many other countries often require some form of representations and assurances from end-users with respect to the use and disposition of items to be authorized for export. Such documentation can make a significant contribution to the authority and ability of the exporter's government to take legal action against diversion of controlled items. Department of Commerce regulations accept such end-user statements for many exports to countries that do not participate with the U.S. in a form of IC system. The Commerce regulations call this document the "statement by ultimate consignee and purchaser", but the abbreviated term "end-user statement" (EUS) will be used here to refer to any such export control document that, unlike the IC, does not have to be acted upon by the customer's government.

The Department of State has long used the IC in its control of Munitions List items. To its credit, State's Directorate of Defense Trade Controls has published notice of a proposed end to its use of the IC as "duplicative and unnecessary" (76 FR 41438, July 14, 2011). There has been no indication that the Department of Commerce is considering a similar move. This is a good time for a comprehensive consideration of eliminating or streamlining the IC/DV system.

The following are among the questions that should be addressed. Has the IC any control or enforcement advantage over the end-user statement? For example, has an IC ever been essential to a successful enforcement action or been invoked to obtain a foreign government's cooperation in dealing with an actual or threatened diversion? How many governments that respond to U.S. requests for an IC require their own exporters to obtain an IC or a comparable document for exportation? Even if the IC system is not to be completely eliminated, what changes could be made to it and to other export control documentation provisions to speed the process through use of electronic means of communication and authentication of documents? If selective requirement of an EUS can serve control objectives, why exclude its use in the

exportation of controlled software and intangible technology? What justification is there for broadly excluding destinations in the Americas from EUS requirements?

Standard customs entry documentation should provide the importer's authorities with information they can use if they wish to cooperate to achieve trade control objectives shared with the exporter's government. Such documentation is not selectively applicable to U.S.-origin trade, and it can be provided at the port of entry upon the completion of the transaction, rather than requiring that the customer make a special submission at the outset to a possibly distant ministry office.

Intergovernmental consultation will be in order, given the origin of the IC system in multilateral and bilateral governmental arrangements. These consultations could well provide an opportunity to strengthen procedures for the exchange of information by authorities as needed, but without imposing unnecessary documentation requirements on business.

It would be very helpful if this Subcommittee were to examine these trade documentation issues and, if it sees fit, report its findings to the President's Export Council. If the agencies involved decide to overhaul the IC system and related requirements, the exporting community would doubtless share its experience and concerns. Many export control reforms are currently underway; this should be added to the list.