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Controlling Diversion: How Can We Convert the Toshiba-Kongsberg Controversy into a Victory for the West?

Jere W. Morehead *

I. INTRODUCTION

Since the revelations last year that a Toshiba Corporation subsidiary illegally sold the Soviet Union tools to make superquiet submarine propellers, the United States government has struggled to develop an appropriate response for punishing the Japanese company.¹ Unfortunately, the proposals advanced by the United States have not been directed at using this episode to advance meaningful reforms in both domestic and multi-lateral export controls. This Perspective will examine the Toshiba-Kongsberg case, summarize the current state of export controls, and suggest a strategy to improve upon the poor record of the West in controlling the diversion of strategic technology to the Soviet Union and other communist bloc countries.

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¹ Members of the House-Senate Conference Committee on H.R. 3, the bill which would become the Omnibus Trade & Competitiveness Act of 1988 ("H.R. 3" or "the Bill"), struggled to fashion a legislative response to the revelations in the face of conflicting arguments involving national defense and foreign and domestic economic policy considerations. 45 CONG. Q. 2813 (Nov. 14, 1987). The bill ultimately passed both Houses of Congress in April 1988, before falling victim to a presidential veto later sustained by the Senate. 134 CONG. REC. 7385 (June 8, 1988). The House revived the bill and passed it with the mandatory sanctions in place. Langley, *House Approves Huge Trade Bill by Overwhelming 376-45 Majority*, Wall St. J., July 14, 1988, at 3 col. 1. On August 23, 1988, H.R. 3 became law. Pub. L. No. 100-418, 1988 U.S. Code Cong. and Admin. News (102 Stat.) 1107 [hereinafter Omnibus Trade Act]. The Act contains mandatory sanctions against COCOM violators. See *infra* notes 56-66 and accompanying text.

II. THE TOSHIBA-KONGSBERG CASE

During the past two decades, Toshiba Machine Co. ("Toshiba")² has manufactured and sold propeller milling machines.³ Strategic goods and technology, such as sophisticated milling machinery, are controlled for export to communist bloc countries by COCOM,⁴ Japan,⁵ and the United States⁶ export controls. These export controls seek to protect Western security interests by impeding the acquisition of highly advanced technology by communist bloc countries.⁷

Toshiba embarked upon its journey down the slippery slope of illegal export practices as early as 1974 when it lost a large Soviet order to a French competitor after complying with the aforementioned export con-

² In this Perspective, "Toshiba" refers to Toshiba Machine Co., an entity in which Toshiba Corporation maintains controlling interest.

Toshiba Machine Co. is one of the largest manufacturers of machine tools in the world. . . . In 1986, its annual sales amounted to approximately seven hundred million dollars of which approximately one hundred twenty-two million resulted from sales to North American countries, including the United States, and thirty-four million resulted from sales to communist bloc countries.

LAW FIRM OF MUDGE, ROSE, GUTHRIE, ALEXANDER & FERDON, INVESTIGATION INTO SALES OF PROPELLER MILLING MACHINES TO THE SOVIET UNION BY TOSHIBA MACHINE CO., LTD.: REPORT TO THE PRESIDENT AND DIRECTORS OF TOSHIBA CORPORATION, 5 (1987) [hereinafter Report] (available in the offices of NW. J. INT'L L. & BUS.).

³ Report, *supra* note 2, at 9.

⁴ COCOM stands for the Coordinating Committee for Multilateral Export Controls. It is an organization created in 1949 by the major Western nations (Japan and NATO, with the exception of Iceland) to limit the flow of sensitive exports to prohibited nations. Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, 834-35 (1967). See *Transfer of United States High Technology to the Soviet Union and Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d sess., 95-929, at 157 (1982) [hereinafter *Transfer of Technology Hearings*] (statement of James L. Buckley, Under Secretary of State for Security Assistance).

⁵ Japanese export regulations, reflecting COCOM controls, prohibit the export, without an approved export license, of any milling machine having more than three axes capable of simultaneous numerical control. Machines with up to three axes capable of simultaneous control may be exported as long as they are operated by numerical controllers not capable of controlling more than two axes simultaneously. Report, *supra* note 2, at 11. Numerical controllers are devices which control the movements of the milling heads. Receiving their instructions from perforated paper tape, the controller directs the movements of each axis. *Id.* at 9.

⁶ See 15 C.F.R. § 399.1 (1987).

⁷ "The vigor of science and technology in the Western democracies and the greater economic vitality of these nations in comparison to the Soviet bloc are sources of strength for the West in its continuing effort to maintain its military security. The Soviet Union lacks these advantages; it seeks to compensate for them by directing a substantial portion of its gross national product to the development and production of military equipment and by making aggressive attempts to acquire and apply Western technology to its military programs." NAT'L ACADEMY OF SCIENCES, NAT'L ACADEMY OF ENGINEERING, INST. OF MEDICINE, *BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION* 2 (1987) [hereinafter NAT'L ACADEMY].

trols.⁸ Since France is also under COCOM restrictions, Toshiba personnel concluded that export controls were more rigorously enforced in Japan than elsewhere. Loss of that Soviet order led Toshiba officials to deduce that violating COCOM prescriptions was the only available method to compete successfully for Soviet business.⁹

A. The First Sale

When Toshiba officials were approached by the Soviets again, in late 1979, Toshiba decided to enter into serious negotiations with the Soviets.¹⁰ The Soviets expressed interest in Toshiba's MBP 110 nine-axis propeller milling machines during a January 1980 meeting in Moscow, between a Toshiba salesman and representatives of Wako Koeki, a small Japanese trading company, and Techmashimport, a Soviet import agency.¹¹

Toshiba initially responded by informing the Soviets that the MBP 110 could not be exported to a communist bloc country.¹² Nonetheless, Toshiba began investigating the possibility of temporarily modifying the MBP 110 to evade the export restrictions and subsequently reconverting the machines after shipment to the Soviet Union.¹³ The Soviets suggested that Kongsberg Vaapenfabrik ("Kongsberg"),¹⁴ a Norwegian company, might be able to handle the reconversion and otherwise assist Toshiba in the illegal transaction.¹⁵ Toshiba's President and its Director of Overseas Sales subsequently joined their sales team in Moscow and

⁸ At that time, Toshiba received a query from the Soviets on the purchase of advanced propeller milling machines. Having already sold the Soviets two propeller milling machines, with two-axis simultaneous control, Toshiba offered additional machines of that capability and reminded the Soviets that export controls precluded the sale of "milling machines with more than two-axis simultaneous control. The Soviets, however, insisted that they required more 'sophisticated' machinery" than Toshiba offered. Report, *supra* note 2, at 12. Toshiba personnel subsequently discovered that the Soviets were able to obtain the more sophisticated equipment from a French company, Forest Line, which sold them ten multi-axis propeller milling machines. During the installation of the Toshiba nine-axis machines at a Baltic factory in Leningrad in 1983 and 1984, several Toshiba technicians eyed a Forest Line multiple axis propeller milling machine on the factory floor. *Id.* at 13.

⁹ See Report, *supra* note 2, at 12-13.

¹⁰ *Id.* at 14.

¹¹ *Id.*

¹² *Id.* at 15. "[A Toshiba salesman] explained that since the MBP 110 has too many simultaneously controllable axes, export to Russia would be contrary to Japanese export control regulations. He explained to the Russians that only machines with no more than two simultaneously controlled axes could be exported pursuant to the regulations." *Id.*

¹³ *Id.*

¹⁴ Kongsberg Vaapenfabrik ("Kongsberg") is a Norwegian company which manufactures numerical controllers, including those that ultimately were used for the operation of the machines in this case. Report, *supra* note 2, at i.

¹⁵ *Id.*

were briefed about these developments.¹⁶

A few months later, in March 1980, Toshiba's President met with the company's export sales manager who updated him on the status of the negotiations with the Soviets. He warned the President that, in order to close the sale, COCOM regulations would have to be violated.¹⁷ At that time, the President issued an order "to do what had to be done to get the business."¹⁸ Entering into an elaborate scheme with Kongsberg, which involved violations of COCOM, Norwegian and Japanese export regulations, Toshiba began planning the illegal Soviet export.¹⁹ Toshiba and Kongsberg knew the entire transaction was illegal and, in fact, the transaction took place despite the objection of some employees.²⁰

In order to circumvent Norwegian export regulations, Kongsberg agreed to ship numerical controllers to Japan, falsely describing their true capabilities. The plan called for Toshiba to reexport them to the Soviet Union along with the milling machines.²¹ Under the scheme, Kongsberg would alter the equipment subsequently in the Soviet Union.²²

Since the formal contract had to be included as an exhibit to the export license application presented to the Japanese government,²³ the parties entered into two distinct agreements: (1) a formal contract setting out the sale of milling equipment permitted by COCOM restrictions, and (2) a protocol setting forth the actual illegal arrangements designed to provide the Soviets with the COCOM controlled equipment.²⁴

The export license application submitted to the Japanese government contained a number of false statements, including representations that the exports were not being sold exclusively to communist bloc countries²⁵ and that the milling machines would not be used in manufacturing defense-related products.²⁶ Toshiba even submitted a document, under

¹⁶ *Id.*

¹⁷ *Id.* at 16.

¹⁸ *Id.*

¹⁹ *Id.* at 16-28.

²⁰ A lower level "technical design section chief" opposed the illegal export as early as 1980. When he protested the project, he was told that "it was his job to make sure the factory manufactured the machines. . . . The employee concluded that he had no alternative but to follow orders." *Id.* at 17.

²¹ *Id.* at 20.

²² *Id.* at 16.

²³ *Id.* at 21.

²⁴ *Id.* at 24. "[The protocol] was so worded as not to identify the contracting parties by name or to describe the formal contract, so that if anyone were to examine the Protocol he would not be able to identify what matter it referred to." *Id.*

²⁵ *Id.* at 25.

²⁶ *Id.*

its President's seal, falsely detailing the interrelation of the machines and the export regulations and certifying that the exports were appropriate under the regulations.²⁷

Based upon this false and incomplete information, the Japanese government gave its approval for the exports.²⁸ Toshiba began production of the propeller milling machines shortly thereafter, with a contract price of \$17,435,000 for the four machines.²⁹ They were exported in 1983 and 1984 and were fully operational by late 1984.³⁰

B. The Second Sale

The aforementioned illegal transaction was not the end of Toshiba's business with the Soviet Union. While that affair was underway, Toshiba personnel were approached again by the Soviets concerning the acquisition of additional propeller milling machines.³¹ This time the overture came from Prommashimport, another Soviet import agency,³² and the Soviets now were interested in a different milling machine known as the MF model. Toshiba personnel also understood that exporting this model to the Soviet Union was illegal.³³

Once again, Toshiba negotiated with the Soviets and eventually signed a contract and a separate protocol in the amount of \$10,720,000 for the purchase of four MF Model machines. The pattern was the same. The machines were falsely described and temporarily modified. Based upon the false information submitted to the Japanese government, an export license was issued for the machinery. Subsequently, the machines were installed in the Soviet Union in contravention of Japanese export control regulations.³⁴ Although the second transaction did not involve the use of Kongsberg, it otherwise bore striking similarities to the earlier sale.³⁵

²⁷ *Id.* at 26.

²⁸ *Id.*

²⁹ *Id.* at 24. The orders were entered deceptively to avoid attracting attention when Toshiba's sales statistics were reported to the Japan Machine Tool Builders Association. *Id.* at 26.

³⁰ *Id.* at 28.

³¹ This overture occurred while they were in Moscow on business related to the first transaction. *Id.* at 29.

³² The inquiry actually came from the same people who previously had been with Techmashimport. *Id.*

³³ *Id.* The MF model has five axes simultaneously controlled which is in excess of the two controllable axes allowed for export to communist bloc countries. *Id.*

³⁴ *Id.* at 31-32. Based upon the false information submitted to the Japanese government, an export license again was issued for the machinery. *Id.* at 31.

³⁵ *Id.* at 29-32. Toshiba decided this time to falsely describe the machines as "DFC 2022" machines in an effort to reduce suspicions by Japanese export officials. *Id.* at 30.

C. Coverup and Exposure of Illicit Sales

The sale of such highly sensitive, controlled technology to the Soviets might never have been uncovered but for the disclosures of a disgruntled employee and the thoroughness of the United States press.³⁶ In April 1985, an employee of Wako Koeki (the small Japanese trading company Toshiba had used in the Soviet business deals) resigned his position and disclosed the first illegal sale to COCOM.³⁷ His action prompted an investigation by the Japanese government.³⁸ During the course of the probe, many of Toshiba's top executives, including its President, engaged in a measured coverup of the facts which involved the destruction of documents and the dissemination of false and misleading information to the authorities.³⁹ This scheme led the Japanese government to conclude its initial investigation by accepting Toshiba's false claims as true and finding that no export violation had transpired.⁴⁰

The situation changed dramatically in March 1987, however, when a story broke in the Washington Times that Toshiba had illegally shipped its machinery to the Soviet Union.⁴¹ Once again Toshiba attempted to conceal the truth from the authorities and generated memoranda bearing the President's seal that contained false and deceptive information.⁴² In the face of public scrutiny, the Japanese government filed charges against Toshiba. The Japanese government executed search warrants at Toshiba's business offices and at the homes of several Toshiba employees and also conducted exhaustive interrogations of its employees. Following this investigation, Toshiba's accounts about the first sale dis-

³⁶ *Id.* at 33-35.

³⁷ *Id.* at 33.

³⁸ *Id.*

³⁹ *Id.* at 33-34. "The top management team, consisting of the President, a Managing Director and the Senior Managing Director, was informed during the course of the investigation about its progress and the group's explanation to MITI [Japanese Ministry of International Trade and Industry]. One of these three, the then President, was clearly in a position to assess the accuracy of these explanations and had to know that the explanations to MITI were fundamentally untrue. He did not, however, instruct the individuals involved to admit the truth to MITI." *Id.*

⁴⁰ *Id.* at 34.

⁴¹ *Id.*

⁴² *Id.* "The memoranda contain[ed] a series of false and misleading statements, including: (1) that the software Toshiba Machine Co. shipped in June 1984 had been Soviet software which Toshiba Machine Co. was simply checking, in fact it was Toshiba Machine's software; (2) that the machines had been installed in a factory of Electrosila, a heavy electric apparatus company, in fact the installation was at a propeller milling plant in a Baltic factory; (3) that the April 17, 1981 protocol set forth guaranty arrangements for machines with two-axis simultaneous control, in fact the protocol guaranteed that the machines would function on nine axis simultaneous control; and (4) that it would be difficult to adjust the Kongsberg NC to provide for nine-axis simultaneous control, in fact the adjustment had already been made and tested." *Id.*

integrated, and the second transaction was discovered.⁴³

D. Implications for United States National Security

These exports, coupled with previously acquired information and technology,⁴⁴ enable the Soviet Union to outfit its submarines with noiseless propeller blades and its aircraft carriers with faster propellers.⁴⁵ As a consequence, the Soviet Union can improve the speed of its aircraft carriers,⁴⁶ as well as make its submarines less susceptible to detection.⁴⁷ Knowledgeable sources contend that the exports have permitted the Soviet Union to make technological advances they would have been unable to achieve legitimately.⁴⁸ Moreover, the pecuniary cost to the United States to regain the edge in submarine technology may reach many billions of dollars.⁴⁹

The Central Intelligence Agency contends that the Soviets gain Western technology primarily for military aims and thereby save untold resources in research and development costs to modernize their weaponry.⁵⁰ Since maintaining a technological advantage over the Soviets is critical to the security interests of the United States,⁵¹ the Toshiba-

⁴³ *Id.* at 43-44.

⁴⁴ Defense Department sources believe that the Soviets obtained information about the listening frequency of U.S. submarine detectors from the Walker spy family and then sought out Western technology for the machine tools required to produce quieter submarine propellers. Peterson, *Toshiba Aided Soviets with Sub Technology*, Detroit News, April 28, 1987, reprinted in 133 CONG. REC. S8991 (daily ed. June 30, 1987).

⁴⁵ 133 CONG. REC. S8995 (statement of Senator Jake Garn)(daily ed. June 30, 1987).

⁴⁶ *Id.*

⁴⁷ "Representative Duncan Hunter (R-Calif.), a member of the House Armed Services Committee, says the new propellers could allow the Soviet submarines to get so close to American shores that their missiles could reach the U.S. within 10 minutes." *A Leak That Could Sink the U.S. Lead in Submarines*, BUS. WK., May 18, 1987, reprinted in 133 CONG. REC. S8991 (daily ed. June 30, 1987).

⁴⁸ 133 CONG. REC. S8992 (statement of Senator Richard Shelby)(daily ed. June 30, 1987). "It has been no secret in this city and across the country—indeed, in the world—that the Soviets wanted desperately to start closing that research gap on submarine warfare. They knew that gap existed but had not the technology to do anything about it." *Id.* at S9000 (statement of Senator Dale Bumpers).

⁴⁹ *Toshiba-Kongsberg Technology Diversion Case: Hearing Before the Subcomm. on Int'l Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 100-182, at 10 (1987)(statement of Senator Alan J. Dixon)[hereinafter *Toshiba-Kongsberg Hearing*]. "Defense Department officials have estimated the initial costs to replace equipment compromised by the sales to the Soviet Union at \$1 billion to \$5 billion, with billions more needed to develop countertechnology." Crossette, *2 Leaders of Toshiba Resign*, N.Y. Times, July 2, 1987, at D3, col. 2.

⁵⁰ CENTRAL INTELLIGENCE AGENCY, SOVIET ACQUISITION OF WESTERN TECHNOLOGY (1982) reprinted in *Transfer of Technology Hearings*, *supra* note 4, at 7-23 (1982).

⁵¹ "The United States and its Allies traditionally have relied on the technological superiority of their weapons to preserve a credible counterforce to the quantitative superiority of the Warsaw Pact. But that technical superiority is eroding as the Soviet Union and its Allies introduce more and more

Kongsberg case presents troubling implications for the United States. The United States is now forced to redouble its research efforts in order to recover the lost advantage at a time when the United States feels increasing pressure to match the Soviets' military advances in other areas.⁵²

III. RESPONSES TO THE ILLEGAL SALES

A. United States Reaction

In light of the impact the sales have had on national security, the United States reacted to the disclosures with expected outrage.⁵³ Almost immediately, Congress began investigating the matter and considering possible legislative responses.⁵⁴ One early draft went so far as proposing a permanent ban on imports from Toshiba, its parent Toshiba Corporation, and Kongsberg into the United States.⁵⁵

After months of debate, a presidential veto,⁵⁶ and more revisions, the Congress finally passed the Omnibus Trade and Competitiveness Act of 1988 (the "Act") on August 23, 1988.⁵⁷ In this Act, Congress passed mandatory sanctions against the violators⁵⁸ and comprehensive penalties aimed at punishing present and future COCOM violators⁵⁹ to ensure compliance by foreign companies with COCOM controls.⁶⁰

The sanctions prohibit United States government contracting and procurement with Toshiba and Kongsberg Trading Co. for three years.⁶¹ During that period, the importation into the United States of all products

sophisticated weaponry—weapons that all too often are manufactured with the direct help of Western technology." CENTRAL INTELLIGENCE AGENCY, *supra* note 50, at 9.

⁵² For instance, the Soviets' military space program continues to overshadow that of the United States. Carrington & Walcott, *Pentagon Lags in Race to Match the Soviets in Rocket Launchers*, Wall St. J., July 12, 1988, at 1, col. 1. Serious doubt has been cast on the ability of the United States to catch the Soviets even if it invests significant financial resources in the space program. *Id.* at 18, col. 1.

⁵³ Perhaps the most visible display of ire occurred when ten members of the House of Representatives went out on the lawn of the capitol and shattered Toshiba radios with sledgehammers. *When Japan-Bashing Goes Too Far*, Wall St. J., July 2, 1988, at 30, col. 1.

⁵⁴ *Toshiba-Kongsberg Hearing*, *supra* note 49.

⁵⁵ Omnibus Trade Act, Amend. No. 355, 100th Cong., 1st Sess., 133 CONG. REC. S8989 (daily ed. June 30, 1987).

⁵⁶ Langley, *supra* note 1.

⁵⁷ 1988 U.S. Code Cong. and Admin. News (102 Stat.) at 1107. Although the President originally vetoed H.R. 3 on other grounds, the Reagan administration has expressed opposition in the past to the Toshiba-Kongsberg sanctions. Fuerbringer, *Senate Backs Import Ban in Soviet Trade Deal*, N.Y. Times, July 1, 1987, at A1, col. 2.

⁵⁸ Omnibus Trade Act, 1988 U.S. Code Cong. and Admin. News (102 Stat.) at 1107.

⁵⁹ *Id.* 1365-69.

⁶⁰ *Id.* at 1364.

⁶¹ *Id.* at 1365.

produced by Toshiba and Kongsberg Trading also is forbidden.⁶² The sanctions against the parent firms, Toshiba Corporation and Kongsberg Vaapenfabrik, are less harsh. They are limited to proscribing only government contracting and procurement for three years, but do not affect the importation of their merchandise into the United States.⁶³

The sanctions also reach beyond the Toshiba-Kongsberg case and impose penalties on future violators of COCOM controls. They require penalties for two to five years against any foreign entity that violates COCOM strictures and thereby adversely influences the strategic balance of power between the East and West.⁶⁴ However, the President is authorized to waive the sanctions for the parent, affiliate, or subsidiary entity of the violator, if (1) they are without fault and (2) their government has an effective export control system.⁶⁵ The Act also permits the Attorney General to sue a COCOM violator for damages equal to the amount necessary to restore the military readiness of the United States.⁶⁶

B. Japanese-Norwegian Rejoinder

The Japanese and Norwegian governments initially responded to the Toshiba-Kongsberg controversy by engaging in a number of highly publicized actions. Both nations promised to review their internal export control mechanisms to improve their capacity to uncover COCOM abusers.⁶⁷ Japan also formed a strategic goods export council to examine export licenses for sensitive articles to communist bloc countries.⁶⁸

Shortly thereafter, Japan also offered to double the size of its export licensing personnel and to increase its previously negligible financial contribution to COCOM.⁶⁹ Japan previously had only forty employees in its MITI's Security Export Control Office to review some 200,000 export license applications per year.⁷⁰ The Japanese also invited export control officials from the United States to help them develop more effective inter-

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1366-69.

⁶⁵ *Id.* at 1367. Nevertheless, these sanctions "theoretically could ban McDonnell Douglas Corp. from buying parts of the Harrier II jet from British Aerospace PLC if one of British Aerospace's subsidiaries violates export laws." Lachica, *White House Fights Congress on Trade Ban*, Wall St. J., April 15, 1988, at 25, col. 4.

⁶⁶ Omnibus Trade Act, 1988 U.S. Code Cong. and Admin. News (102 Stat.) at 1107.

⁶⁷ *Toshiba-Kongsberg Hearing*, *supra* note 49, at 6-9 (statement by E. Allan Wendt, U.S. Dept. of State).

⁶⁸ *Id.* at 6.

⁶⁹ Lachica & Mossberg, *Japanese Move to Appease U.S. in Toshiba Case*, Wall St. J., July 17, 1987, at 16, col. 1. Japan has been long criticized for its paltry contribution to COCOM, estimated as low as \$40,000. The United States pays about 25 percent of COCOM's budget. *Id.*

⁷⁰ *Id.*

nal controls.⁷¹ A few months later, Japan joined the United States in promising "to work toward a major revitalization of COCOM, based on improved public understanding of its objectives."⁷² At the same time, Japan also announced additional steps to tighten its internal export controls.⁷³

Japan's strategy was directed at blunting criticism in the United States and avoiding harsh sanctions against Toshiba Corporation.⁷⁴ That plan also involved the indictment of Toshiba and its senior company officials, bans on Toshiba exports to Soviet bloc countries, and prohibitions on exports by third parties that aided Toshiba.⁷⁵ Norway also took similar punitive action against Kongsberg Trading Company.⁷⁶

For its part, Toshiba Corporation engaged in a comprehensive public relations campaign to assuage the United States public as well. Toshiba Corporation's President and Board Chairman resigned, along with the subsidiary's President and several other Board members and officers.⁷⁷ Toshiba Corporation ran advertisements in several major newspapers, including the New York Times, Washington Post and the Wall Street Journal, apologizing for the actions of its subsidiary.⁷⁸ The corporation also commissioned a comprehensive investigation and report on the incident, prepared by a large United States law firm,⁷⁹ and developed an internal quality control program to comply "with both the letter and the spirit of the laws and regulations restricting the sale of strategic products produced by Toshiba, its subsidiaries and affiliates."⁸⁰

The campaign seems to have worked for Toshiba Corporation. The sanctions in the Act were watered down ultimately and the company's consolidated earnings have risen significantly.⁸¹ Moreover, the zeal of

⁷¹ *Id.* That offer may be akin to the blind leading the blind considering the problems the United States has failed to solve with its own controls. See Morehead, *Export Controls: Who's Policing the Enforcers*, 13 N.C.J. INT'L LAW & COM. REG. 307 (Spring 1988).

⁷² U.S., *Japan Plan Revitalization of Watchdog Agency to Monitor Strategic Exports*, Atlanta Const., Oct. 8, 1987, at 20, col. 1.

⁷³ *Id.*

⁷⁴ Lachica & Mossberg, *supra* note 69.

⁷⁵ *Toshiba-Kongsberg Hearing*, *supra* note 49, at 7-8.

⁷⁶ *Id.* at 8.

⁷⁷ Crossette, *supra* note 49, at D1, col 6; Kanabayashi, *Toshiba Corp.'s 2 Top Officials Quit Their Posts*, Wall St. J., July 2, 1987, at 3, col. 1.

⁷⁸ See Phillips, *Toshiba Apologizes*, ADVERTISING AGE, July 27, 1987, at 63.

⁷⁹ Report, *supra* note 2.

⁸⁰ TOSHIBA CORP., TOSHIBA STRATEGIC PRODUCTS CONTROL PROGRAM, Sept. 9, 1987 (available in the offices of NW. J. OF INT'L L. & BUS.).

⁸¹ Armstrong, *No Tears for Toshiba*, BUS. WK., June 6, 1988, at 52. "Although its exports to the U.S. fell 12% in the fiscal year ended last March, its consolidated earnings rose an estimated 60%, to \$440 million, on \$28.5 billion in sales." *Id.*

the Japanese to discipline Toshiba has dissipated. Although a Japanese court found Toshiba and two of its former executives guilty, the government imposed only a light fine on the company and suspended sentences on the individuals.⁸²

IV. CURRENT STATUS OF MULTILATERAL EXPORT CONTROLS

The Toshiba-Kongsberg case unmistakably demonstrates that there are serious problems with the efficacy of multilateral export controls implemented by COCOM. As easy as it was for violators in this case to evade COCOM controls, one can only guess how many other illegal exports to communist bloc countries have escaped detection. A panel of experts at the National Academy of Sciences recently concluded that Soviet acquisitions of Western technology are "massive, well financed, and frequently effective."⁸³ An estimated 70% of the items the Soviets target and eventually acquire in the West are subject to some form of national security export control.⁸⁴

Furthermore, this case has reminded the United States that protecting its national security depends not only upon the success of its own unilateral controls, but also upon the effectiveness of COCOM controls.⁸⁵ Since the United States is no longer the only developed nation capable of producing sophisticated articles,⁸⁶ it must depend upon COCOM and its member nations to prevent leakage of technology to the communist bloc. Unfortunately, COCOM is not currently equipped to shoulder this responsibility.

A. The Structure and Function of COCOM

COCOM was established to improve control over the acquisition of strategic goods and technology by communist bloc nations,⁸⁷ while en-

⁸² Haberman, *Japan Fines Toshiba Unit for Sales to Soviet*, N.Y. Times, March 23, 1988, at D14, col. 4.

⁸³ NAT'L ACADEMY, *supra* note 7, at 41.

⁸⁴ *Id.* at 42.

⁸⁵ *Id.* at 135.

⁸⁶ Note, *National Security Protection: The Critical Technologies Approach to U.S. Export Control of High-Level Technology*, 15 J. INT'L LAW & ECON. 575, 579 (1981). The Commerce Department estimates that by 1994 the United States' control, of the world's significant technologies will have dropped from a previous high of 70% to only 30%. Richey, *Controlling U.S. High-Tech Exports*, Christian Sci. Monitor, May 16, 1984, at 16.

⁸⁷ COCOM controls are applied to the Soviet Union, Eastern European countries, North Korea, Vietnam and the People's Republic of China. Hunt, *Multilateral Cooperation in Export Controls—The Role of COCOM*, 14 U. TOLEDO L. REV. 1285, 1289 n.19 (1983).

hancing trade among member nations.⁸⁸ Multilateral export controls seek to ensure that Western lead-time in technology, which provides qualitative military superiority, is sufficient to offset the East's quantitative advantage on the battlefield.⁸⁹ COCOM carries out its function by developing strategic standards for controls, drawing up lists of controlled items, considering individual exceptions from the controls, and coordinating enforcement efforts between member nations.⁹⁰

Most of COCOM's activity centers on the International List which the organization uses to catalogue the dual-use items. Dual-use items are items which have both civilian and military applications.⁹¹ Although the list is not published, it is the cornerstone of the controls dispensed by member nations.⁹² Controlled items may only be exported to an embargoed end user if the risk is deemed acceptable by COCOM.⁹³

B. Deficiencies in COCOM Controls

COCOM operates as an informal and voluntary accord between its member nations.⁹⁴ Each nation is under no treaty obligations and has the right to operate consistently with its own legal, administrative, and policy determinations.⁹⁵ Moreover, agreements on any issue must be reached by unanimous consent.⁹⁶

With such a loose framework, it is not surprising to find that individual members have contrasting approaches to COCOM which create severe impediments to the effectiveness of the controls.⁹⁷ For instance, the United States disseminates data to the public about COCOM and its duties; the French barely acknowledge the existence of COCOM in their governmental reports.⁹⁸ The Europeans and the Japanese view East-

⁸⁸ Berman & Garson, *supra* note 4, at 834-44; Note, *Failures in the Interagency Administration of National Security Export Controls*, 19 LAW & POL'Y IN INT'L BUS. 537, 548-49 (1987).

⁸⁹ *Export Controls: Hearings Before the Subcomm. on Int'l Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 100-107, at 144 (1987)(statement of Lawrence Brady, Former Asst. Sec. of Commerce of Export Administration).

⁹⁰ Note, *supra* note 88, at 548; *Transfer of Technology Hearings*, *supra* note 4, at 157.

⁹¹ Note, *supra* note 88, at 548-49. There also are two other lists: the International Atomic Energy List and the International Munitions List. Hunt, *supra* note 87, at 1288.

⁹² *Transfer of Technology Hearings*, *supra* note 4, at 157.

⁹³ Hunt, *supra* note 87, at 1291. "Such a determination can be based upon a verifiable dedication of the item to civilian use, or upon a judgment that no strategically significant transfer of technology will occur through access to embargoed equipment." *Id.*

⁹⁴ Hunt, *supra* note 87, at 1287.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Aeppel, *The Evolution of Multilateral Export Controls: A Critical Study of the COCOM Regime*, 9 FLETCHER F. 105, 111 (1985).

⁹⁸ *Id.*

West trade as economically essential, while the United States believes such trade often impairs national security.⁹⁹

Approaching East-West trade more circumspectly, the United States describes strategic technology broadly, ties political and business relationships together,¹⁰⁰ and uses export controls to achieve foreign policy objectives.¹⁰¹ In contrast, the other COCOM members, heavily influenced by European and Japanese business leaders,¹⁰² argue that national security also depends upon economic power.¹⁰³ They are skeptical of the political motives of the United States in pressing for harsher export controls and point to the high number of exceptions the United States regularly seeks to COCOM controls for its own industries.¹⁰⁴

This debate, at times, seems endless. The United States claims that it is acting more honestly than other COCOM members by securing the requisite exceptions.¹⁰⁵ Indeed that argument is supported not only by statistical data,¹⁰⁶ but also by the Toshiba-Kongsberg case and similar examples where parties either bypassed COCOM procedures or became involved in diversions or transshipments of goods through third party countries.¹⁰⁷

Not only is there no consensus on what constitutes acceptable technology transfer to the East, but also COCOM's limited infrastructure prevents effective enforcement of any rules agreed upon by the members.

⁹⁹ *Id.* at 112-13. The United States outlook is summarized in an excerpt from a 1983 RAND Report: "The danger is not so much the possibility of sudden and disastrous give-aways, but rather that high-technology trade may help the Soviets to upgrade over the longer term the traditionally neglected civilian industries that will provide broad, infrastructural support for new weapons systems tomorrow." *Id.* at 113, (quoting T. GUSTAFSON, *SELLING THE RUSSIANS THE ROPE* vi (1981).

¹⁰⁰ Aeppel, *supra* note 97, at 115. "The American style has been to distinguish not only between the Soviets and the Chinese, but also among the various Eastern European states. In general, the Romanians and Hungarians are treated better than other Soviet bloc states by the U.S. because of their relative independence from the Soviet Union in economic and foreign policy." *Id.*

¹⁰¹ A. STENT, *TECHNOLOGY TRANSFER TO THE SOVIET UNION* 83 (1983).

¹⁰² "European and Japanese business leaders command much more political clout than their American counterparts. As a result, firms in Japan and Europe have had much more influence over the crafting of export controls." Aeppel, *supra* note 97, at 115.

¹⁰³ A. STENT, *supra* note 101, at 98. "Technology transfer to the East, so this goes, is a factor for stability to be balanced against the potentially destabilizing economic effects of a continued complementary trade structure between East and West." *Id.*

¹⁰⁴ The United States has been responsible for approximately 50% of the exception applications in the past. Aeppel, *supra* note 97, at 120.

¹⁰⁵ *Id.*

¹⁰⁶ "According to this view, the fact that the U.S. lodged 50 percent of the exception requests in the late 1970s, while accounting for a mere 15 percent of the end products destined for the East, suggests that a good deal of East-West trade originating in Europe or Japan is simply circumventing the COCOM mechanism." *Id.*

¹⁰⁷ *Id.* at 121.

COCOM lacks investigative resources or law enforcement authority and depends upon each member to enforce export controls.¹⁰⁸ It possesses an inadequate staff to manage its multilateral administrative functions.¹⁰⁹

Even though the United States recently succeeded in obtaining unspecified commitments from other members to bolster COCOM's enforcement mechanism and increase its inspection personnel,¹¹⁰ no sustained effort has been made to use the Toshiba-Kongsberg case as a basis for transforming COCOM into a formal entity with enforcement authority. Enforcement problems continue to be exacerbated by the almost nonchalant attitude many COCOM countries have toward export controls.¹¹¹ The quality of individual national enforcement is uneven, with only the United States, the United Kingdom, West Germany, and France showing serious interest in the enforcement of controls and increasing multilateral cooperation.¹¹²

The development of a cohesive multilateral policy is inhibited by the resentment many European countries have toward unilateral reexport controls imposed by the United States on its products and technology. They believe this is an improper expansion of its domestic laws to other nations¹¹³ and suspect that the United States uses export controls to protect and enhance commercial profits for United States firms.¹¹⁴ The other COCOM nations also argue that there should be a presumption in favor of exports.¹¹⁵ They criticize the size and reach of both the United States' unilateral controls¹¹⁶ and the COCOM controls.¹¹⁷ These countries maintain that the list of controlled goods and technology surpasses the practical ability of COCOM and its member states to monitor, and this list reduces trustworthiness in and causes careless disregard for ex-

¹⁰⁸ Hunt, *supra* note 87, at 1294.

¹⁰⁹ *Id.* at 1287. "The organization operates on a virtual shoe-string budget, with annual allotments of less than \$500,000 and under 14,000 square feet of office space." Aeppel, *supra* note 97, at 116, quoting U.S. DEPT. OF DEFENSE, THE TECHNOLOGY TRANSFER CONTROL PROGRAM: A REPORT TO THE 98TH CONG., 2D SESS., 1984, 52 (1984).

¹¹⁰ Markham, *Revised Curbs on East-Bloc Trade*, N.Y. Times, Jan. 29, 1988, at D1, col. 1; Lachica & Browning, *West Tightens Technology-Export Rules But Shortens List of Controlled Products*, Wall St. J., Jan. 29, 1988, at 18, col. 2.

¹¹¹ See NAT'L ACADEMY, *supra* note 7, at 190.

¹¹² *Id.*

¹¹³ *Id.* at 184-92. To prevent transshipment to an unauthorized end user, approval must be obtained from the Commerce Department to reexport from one country to another American goods or technology which have previously been exported pursuant to a validated license. 15 C.F.R. § 374.1-9 (1987).

¹¹⁴ NAT'L ACADEMY, *supra* note 7, at 186.

¹¹⁵ *Id.* at 184.

¹¹⁶ The items subject to U.S. controls are listed in 15 C.F.R. § 399.1 (1987).

¹¹⁷ NAT'L ACADEMY, *supra* note 7, at 192.

port controls.¹¹⁸

V. STRATEGIES FOR UPGRADING MULTILATERAL CONTROLS

Despite its short-term damage to United States national security, the Toshiba-Kongsberg case, if properly utilized, may provide the impetus for major reforms in multilateral export controls. Certainly some positive steps already have been taken.¹¹⁹ Nevertheless, if the West is to successfully impede the Soviet Union and other communist bloc countries in their quest for strategic technology, fundamental changes must be made in the structure and function of COCOM and in the member nations' views about export controls.

Obtaining an agreement on a common approach to East-West trade policy will turn on the capability and drive of COCOM members to convert the Toshiba-Kongsberg case into a rallying point for systemic changes in the existing export control regime. The need for a newly defined consensus in the West that supports both military security and economic prosperity never has been greater. As the European community moves closer to the 1992 deadline for a unified economic market,¹²⁰ so must the West agree upon a common approach to export controls.

A. Unilateral Reprisal Counterproductive

For success to be realized, the United States must move beyond unilateral retaliation in the Toshiba-Kongsberg case and toward multilateral cooperation.¹²¹ Unfortunately, despite some limited achievement,¹²² the overall reaction of the United States to this controversy has been counterproductive to improved multilateral cooperation. The unilateral sanctions mandated by the Act and now in effect for present and future COCOM violations have met with objection from both Japan¹²³ and the European community.¹²⁴

Several COCOM countries have characterized the sanctions as an inappropriate, "extraterritorial" application of United States law to for-

¹¹⁸ *Id.* at 139.

¹¹⁹ See *supra* notes 67-76, 110, and accompanying text.

¹²⁰ Riemer, *Laying the Foundation for a Great Wall of Europe*, BUS. WK., Aug. 1, 1988, at 40-41.

¹²¹ Some aspects of the Omnibus Trade Act sought to do this, such as the policy recommendations for improving multilateral cooperation contained in § 2446. 1988 U.S. Code Cong. and Admin. News (102 Stat.) at 1350-51.

¹²² See *supra* notes 67-76, 110, and accompanying text.

¹²³ *First Reagan-Takeshita Summit Meeting Yields Some Progress on Trade Dispute*, 5 INT'L TRADE REP. (BNA) 58, 59 (Jan. 20, 1988).

¹²⁴ *European Community, Member States Object to Senate's Toshiba-Kongsberg Sanctions*, 5 INT'L TRADE REP. 136-37 (Feb. 3, 1988)[hereinafter *European Community Objects*].

eign violators¹²⁵ that operate in an inequitable fashion outside the framework of internationally accepted trading rules.¹²⁶ Seven European countries, the United Kingdom, France, Italy, West Germany, Belgium, the Netherlands, and Portugal, also have objected to the sanctions on security grounds.¹²⁷ In particular, the British and French believe unilateral action by the United States will weaken COCOM cooperation, thereby reducing the sharing of information and joint enforcement action by member states.¹²⁸

B. Gaining a Consensus for Meaningful Multilateral Reforms

Obviously, the foregoing arguments have some merit. The time has come for all COCOM members to begin appreciating the need for a coherent and cohesive East-West trade policy that balances the twin goals of protecting strategic goods and technology from the Soviet Union, and opening new economic markets in the East. The United States surely will not move beyond unilateral controls and sanctions unless other COCOM members agree on meaningful reforms aimed at improving multilateral controls.

Despite natural tendencies in international politics to delay resolution of difficult and controversial subjects, the Toshiba-Kongsberg case presents compelling evidence that the time for action has arrived. The following reforms appear to the author to offer solutions worthy of consideration.

1. Restructuring of COCOM

The organization of COCOM must be formalized and the participating states have to relinquish their right to act independently in matters of export control. COCOM's structure should be boosted to a level where it is capable of making export control decisions as a governing body rather than through its member governments. Of course, that means each member will have to recognize COCOM's existence formally and provide

¹²⁵ Other nations have criticized the United States penchant for expanding its export laws beyond the borders before. Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983); Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970's and 1980's*, 65 MINN. L. REV. 739, 839-43 (1981).

¹²⁶ *European Community Objects*, *supra* note 124, at 137.

¹²⁷ *Id.*

¹²⁸ *Id.* They argue that other countries will be reluctant to cooperate with COCOM or the United States out of fear that their own companies will be subject to indiscriminate sanctions. They contend consensus multilateral action against violators is the preferred method. *Id.*

sufficient financial resources to create a licensing and enforcement staff capable of monitoring export controls.

While national programs should continue to be upgraded and shoulder primary responsibility for implementing multilateral regulations, COCOM must have the staff capable of reviewing strategic export control applications to the East. That includes the means to assess the accuracy of end users and the information about specific exports. COCOM also needs an enforcement apparatus, with investigative agents, to oversee the movement of strategic goods and technology.

2. Elimination of Unilateral Controls

The National Academy of Sciences study¹²⁹ found that the United States has reacted to COCOM's inadequacies by "going it alone."¹³⁰ The United States, in order to hasten the rise of COCOM unity, must promise to eliminate export and reexport controls on end users in COCOM countries¹³¹ and to stop imposing unilateral controls on exports to communist bloc countries. The United States' present approach fails because it falsely assumes that indirect United States controls are more effective than direct host government controls and that equally sophisticated technology does not exist outside the United States.¹³² Unilateral controls will become increasingly ineffective when other COCOM nations match the United States in technological skill and the "national origin of a product" becomes increasingly impossible to determine.¹³³ Thus, export controls are doomed to failure unless fully endorsed by COCOM.¹³⁴

Moving toward a meaningful multilateral program of export controls does not necessarily preclude unilateral action by the United States on rare occasions. Foreign policy controls¹³⁵ may be appropriate in cir-

¹²⁹ NAT'L ACADEMY, *supra* note 7.

¹³⁰ *Id.* at 139.

¹³¹ The Act significantly reduced the reexport controls placed on COCOM countries by the Export Administration Act, 50 U.S.C. app. § 2404. See Omnibus Trade Act, 1988 U.S. Code Cong. and Admin. News (102 Stat.) at 1347.

¹³² NAT'L ACADEMY, *supra* note 7, at 139.

¹³³ Blumenthal, *The World Economy and Technological Change*, 66 FOREIGN AFFAIRS 529, 537 (1988). "As a smaller number of large players are able to organize their operations on a world-wide scale, their products cease to be truly American or German or Japanese. Parts, components, sub-systems, products and services are intermingled and exchanged in ways that render debates as to the final product's national origin not much to the point." *Id.*

¹³⁴ Even if the United States arguably has the best technology, second best technology will be available to the Soviets in other COCOM nations. Therefore, unless our technology is vastly superior in a particular area, the Soviets still gain a strategic advantage even if forced to use alternative COCOM sources.

¹³⁵ The Export Administration Act, 50 U.S.C. § 2405, permits the imposition of export controls for political reasons. For a thorough examination of the political, economic, and cultural conse-

cumstances where the United States perceives a major international issue to be very important. Nevertheless, the United States must learn to differentiate between such controls which by definition may succeed if imposed unilaterally¹³⁶ and those aimed at preventing the dissemination of critical technology to the East.¹³⁷ The United States can expect cooperation by COCOM only for the latter type of controls.

3. *Reduction of the International List*

If a unified Western policy on export controls is to evolve, every COCOM member must make concessions and reach a consensus on what goods and technology should be controlled. The COCOM partners must individually and collectively contribute to the development of a reasonable control list equally supported and enforced by every member.¹³⁸ The United States and other COCOM members must agree to develop a list of controls based solely upon the ability of the item or technology to affect the East-West balance of power.¹³⁹

To successfully negotiate a control list within these parameters will require concessions both in style and substance by the United States and other COCOM members. The United States must engage in flexible talks rather than high pressure tactics with its allies.¹⁴⁰ It must argue for placing multilateral controls on an item or technology only on the ground that United States or Western security is at issue; the United States must avoid injecting foreign policy matters into the debate. Restrictions on strategic goods and technology will be accepted by COCOM partners only if they are based upon documented information linking the controls with Soviet military deficiencies.¹⁴¹

quences of such controls, see deKieffer, *Foreign Policy Export Controls: A Proposal for Reform*, 11 N.C.J. INT'L L. & COM. REG. 39 (1986).

¹³⁶ "For example, unilateral U.S. controls on items used to commit gross violations of internationally recognized human rights or to support acts of international terrorism disassociate the United States from offending governments. And Washington can achieve such a goal even if other supplier countries provide those items that the United States denies." Root, *Trade Controls That Work*, 56 FOREIGN POL'Y 61, 73 (1984).

¹³⁷ "[T]he COCOM controls are intended to focus only on national security quite narrowly defined. The United States has taken a much more expansive view of what types of goods and technology pose a military risk and has sought to use COCOM to punish Soviet behavior for essentially foreign policy reasons." NAT'L ACADEMY, *supra* note 7, at 144-45.

¹³⁸ *Id.* at 141.

¹³⁹ The Act sets forth procedures for reviewing the International Control List in order to remove items which no longer need to be listed. 1988 U.S. Code Cong. and Admin. News (102 Stat.) at 1350-51.

¹⁴⁰ See Root, *supra* note 136, at 76.

¹⁴¹ The National Academy of Sciences study also contended that the effectiveness of the multilateral process would improve if each nation's delegation to COCOM had balanced representation from both the economic and defense communities. While the United States' delegation has a large defense

At the same time, while differing positions on whether particular items should be placed on the control list may create healthy debate, all COCOM members must share a consistent philosophy about export controls. In a viable multilateral control program there is no room for those COCOM countries that give only lip service to export controls. Every member state must rededicate itself to developing and enforcing a list of controls on strategic goods and technology that have military significance to the Soviet Union. The best opportunity for effective controls rests with shared responsibility in a common mission.

V. CONCLUSION

As we move toward a global economy, where nations grow more economically interdependent on each other, foreign trade will play an increasingly vital part in the equation for Western security. On the other hand, the West must take steps to deny the Soviet Union and the communist bloc strategic products and technology that influence the balance of power. Only by approaching this aspect of East-West trade at a multilateral level can the West expect to develop export controls that achieve an effective compromise between the dual objectives of Western security and economic vitality.

contingent, the other COCOM members primarily are represented by trade and economic experts. NAT'L ACADEMY, *supra* note 7, at 159. If agreement is to be reached on controlling exports, the delegations must be represented by advocates of trade and defense.