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The Export Administration Act of 1979: An Examination of Foreign Availability of Controlled Goods and Technologies

The Export Administration Act of 1979¹ amended thirty years of legislative controls over the export of advanced technology² to the Soviet Union and other non-market economy countries.³ Since first enacted, these post-World War II export controls attempted to reconcile the conflicting objectives of protecting national security while promoting United States international trade.⁴ Nonetheless, the increasing availability of advanced goods and technologies from foreign sources to communist nations has undermined both these objectives.⁵ By the

¹ Pub. L. No. 96-72, 93 Stat. 503 (1979) (amending 50 U.S.C. app. §§ 2401-2413 (1976)).

² National security controls restrict the export of "dual use" items, that is, goods and technologies with both civilian and military uses. See Bingham & Johnson, *A Rational Approach to Export Controls*, 57 FOREIGN AFF. 894, 899 (1979), reprinted in *U.S. Export Control Policy and Extension of the Export Administration Act, Part III: Oversight to Review U.S. Export Control Policy and Proposals to Extend and Revise the Export Administration Act of 1969, as amended: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 49 (1979).

³ The Export Administration Amendments of 1977 eliminate the communist status of a country as the exclusive basis for imposing export controls as follows:

In administering export controls for national security purposes as prescribed in section 3(2)(C) of this Act, United States policy toward individual countries shall not be determined exclusively on the basis of a country's Communist or non-Communist status but shall take into account such factors as the country's present and potential relationship in the United States, its present and potential relationship to countries friendly or hostile to the United States, its ability and willingness to control retransfers of United States exports in accordance with United States policy, and such other factors as the President may deem appropriate.

50 U.S.C. app. § 2403(b)(2)(A) (1976 & Supp. I 1977) (current version at Pub. L. No. 96-72 § 5(b), 93 Stat. 503, 507 (1979)). The 1979 Act similarly defines countries subject to national security controls.

The 1979 Act focuses on three major issues: national security controls, foreign policy purposes and short supply. This comment will focus solely on national security controls. See *Extension and Revision of the Export Administration Act of 1969: Hearings and Markup before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 89 (statement of Stanley J. Marcuss, Senior Deputy Ass't Sec'y for Industry and Trade, Dep't of Commerce) [hereinafter cited as *House Hearings*].

⁴ For a discussion of these issues, see AMERICAN ENTERPRISE INSTITUTE, LEGISLATIVE ANALYSIS, PROPOSAL FOR REFORM OF EXPORT CONTROLS FOR ADVANCED TECHNOLOGY (1979) [hereinafter cited as AEI].

⁵ As the Senate Committee on Banking, Housing and Urban Affairs reported: "Obviously, the usefulness of export controls in national security cases is substantially vitiated to the extent the

late 1970's, Congress was confronted with alarming military and technological developments by communist countries, particularly the Soviet Union,⁶ and substantial U. S. trade deficits.⁷

More than any of its predecessors, the 1979 Act recognizes the impact of foreign availability on United States export control in two primary ways. First, it requires a more thorough assessment of the foreign availability of comparable goods and technologies during the licensing process.⁸ Second, it authorizes both mandatory and discretionary negotiations with foreign countries toward the control and reduction of foreign availability.⁹

The eventual reduction of unwarranted export controls requires that foreign availability be realistically appraised. Toward this objective, the 1979 Act provides for more centralized and comprehensive foreign availability determinations within the licensing process than that afforded by previous legislation. The Act further authorizes the Secretary of Commerce to develop procedures and criteria for the continual review of the foreign availability of controlled goods.¹⁰ Nonetheless, the strict legislative standards and procedures for assessing foreign availability may realistically translate into only limited benefits to United States international trade.

Ultimately, the control and reduction of foreign availability through negotiations with foreign governments and within multilateral forums will determine the effectiveness of national security controls. Particularly, the statute authorizes the United States to enter negotiations with members of the Coordinating Committee of the Consultative Group on Export Controls (COCOM) to reduce export controls and develop effective enforcement procedures.¹¹ The success of COCOM negotiations and the continued vitality of the COCOM forum require

country in question can obtain comparable goods or technologies from a country other than the United States." S. REP. NO. 169, 96th Cong., 1st Sess. 9 (1979).

⁶ See *House Hearings*, *supra* note 3, at 46 (statement of Marshall I. Goldman, Professor of Economics, Wellesley College, and Associate Director, Russian Research Center, Harvard University).

⁷ The United States has an annual commodities foreign trade deficit of \$30 billion. *Id.* at 7 (statement of Hon. Dean Rusk, Professor of International Law, University of Georgia School of Law, and former Secretary of State).

⁸ See text accompanying notes 45-62 *infra*.

⁹ See text accompanying notes 63-67 *infra*.

¹⁰ Pub. L. No. 96-72, § 5(f)(1), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404).

¹¹ Pub. L. No. 96-72, § 5(i), 93 Stat. 503, 512 (1979) (to be codified in 50 U.S.C. app. § 2404). COCOM is an informal multilateral organization established to regulate the export of advanced goods and technologies to communist countries. For a more comprehensive discussion, see text accompanying notes 35-44, 68-87 *infra*.

the United States to adopt international trade policies and internal licensing procedures suitable to the COCOM framework. The 1979 Act specifically fails to develop adequate internal licensing procedures necessary to assure continued cooperative multilateral export controls.

This comment will first delineate the legislative history of the original Export Control Act of 1949 and subsequent legislation in order to trace the development of foreign availability concerns in export control legislation. Second, it will examine the concurrent development of COCOM as an instrumentality for effectuating multilateral export controls. Next, this comment will describe the new statutory scheme for determining foreign availability in the export licensing process. Fourth, it will examine the 1979 provisions authorizing bilateral and multilateral negotiations aimed at controlling and reducing foreign availability. Fifth, it will describe current COCOM efforts to multilaterally control the exportation of goods and technologies and the deficiencies in United States and member countries' participation. Finally, this comment will assess the effects and implications of the new legislation on United States international trade and United States efforts to both unilaterally and multilaterally control the exportation of goods and technologies.

LEGISLATIVE HISTORY OF THE EXPORT CONTROL ACT OF 1949 AND SUBSEQUENT AMENDMENTS

Prior to World War II, the United States government limited export controls to wartime or other emergency circumstances.¹² These controls were primarily intended to protect scarce resources and restrict the export of war-related matériel and other products to non-allies.¹³

During the years 1945-47, the government continued to control exports on a yearly basis despite the relaxation of other wartime controls.¹⁴ Export controls were continued for three primary reasons. First, the United States faced critical supply shortages. The lack of controls would have both exhausted goods and inflated their prices.¹⁵

¹² For a discussion of the history of wartime export controls, see Berman & Garson, *United States Export Controls—Past, Present and Future*, 67 COLUM. L. REV. 791 (1967).

¹³ See *Id.* at 791-92; AEI, *supra* note 4, at 4.

¹⁴ Section 6 of the Act of July 2, 1940, ch. 508, 54 Stat. 712, as amended by the Act of June 30, 1942, ch. 461, 56 Stat. 463, was extended to June 30, 1946 (Act of June 30, 1945, ch. 205, 59 Stat. 270), June 30, 1947 (Act of May 23, 1946, ch. 269, 60 Stat. 215), and July 15, 1947 (S.J. Res. 139, ch. 184, 61 Stat. 214 (1947)). See also Berman & Garson, *supra* note 12, at 791-92.

¹⁵ Berman & Garson, *supra* note 12, at 794. The Senate Committee on Banking and Currency reported: "Export controls were retained after the war to reduce the inflationary effect of abnormal foreign demands on our supplies." S. REP. NO. 31, 81st Cong., 1st Sess. 2 (1949).

Second, United States postwar aid to European countries required the establishment of priorities in exporting particular goods to particular countries.¹⁶ Finally, United States security required restraint in exporting industrial materials which might have military significance to the Soviet Union and other communist countries.¹⁷

By 1948, postwar production eliminated most shortages. In light of the perceived military threat of the Soviet Union, the protection of national security became the primary purpose of export controls.¹⁸ In March 1948, the Commerce Department placed most exports to the Soviet Union and Eastern Europe under mandatory licensing.¹⁹ Congress also amended the pending Marshall Plan bill, restricting the export of items to be delivered by participating to nonparticipating countries based on national security grounds.²⁰

In 1949, Congress enacted the Export Control Act.²¹ The Act declared that the control of goods was necessary to protect the domestic economy from the drain of scarce materials and the inflationary impact of foreign demand, to further foreign policy, and to protect national security.²² To effectuate these policies, the Act granted the President the authority to prohibit or curtail exportation of any goods and technologies by establishing rules and regulations to delegate such power and discretion to government departments "as he may deem appropriate."²³

¹⁶ Berman & Garson, *supra* note 12, at 795.

¹⁷ *Id.*

¹⁸ In 1969, Rep. Thomas Ashley stated:

At that time Western Europe, still economically weak from the ravages of the Second World War, appeared to the Congress to be in realistic danger of attack from the monolithic Sino-Soviet bloc under the leadership of Stalin, and it was further believed, comparing our industrial might with both Eastern and Western Europe at that time, that goods withheld from the Soviets by means of controls on American commodities could not elsewhere be obtained.

H.R. REP. NO. 524, 91st Cong., 1st Sess. 9 (1969). See also S. REP. NO. 31, 81st Cong., 1st Sess. 3 (1949); AEI, *supra* note 4, at 4; Berman & Garson, *supra* note 12, at 795.

¹⁹ 13 Fed. Reg. 1120 (1948).

²⁰ Economic Cooperation Act of 1948, ch. 169 § 117(d), 62 Stat. 137, 154 (1948).

²¹ Export Control Act of 1949, ch. 11, 63 Stat. 7 (1949) (current version at Pub. L. No. 96-72, 93 Stat. 503-36 (1979) (to be codified at 50 U.S.C. app. §§ 2401-2419)).

²² Export Control Act of 1949, ch. 11, § 2, 63 Stat. 7 (1949) (current version at Pub. L. No. 96-72 § 3, 93 Stat. 503, 504-05 (1979) (to be codified at 50 U.S.C. app. § 2402)).

²³ Export Control Act of 1949, ch. 11, §§ 3(a), 3(b), 63 Stat. 7 (1949) (current version at Pub. L. No. 96-72, § 4(e), 93 Stat. 503, 506 (1979) (to be codified at 50 U.S.C. app. § 2403)).

The Act was originally intended as a temporary measure. It was renewed in 1951, 1953, 1960, 1962, and in 1965, when it was amended and extended for an additional four years. Joint Resolution of May 16, 1951, ch. 83, 65 Stat. 43; Act of June 16, 1953, ch. 116, 67 Stat. 62; Act of June 29, 1956, ch. 473, § 1, 70 Stat. 407; Act of June 25, 1958, Pub. L. No. 85-466, 72 Stat. 220; Act of May 13, 1960, Pub. L. No. 80-464, 74 Stat. 130; Act of July 1, 1962, Pub. L. No. 87-515 § 1, 76 Stat. 172; Act of June 30, 1965, Pub. L. No. 89-63, 79 Stat. 209. See also, Berman & Garson, *supra* note

Twenty years later, Congress enacted the Export Administration Act of 1969,²⁴ which liberalized United States trade policies. Congress recognized that unwarranted restrictions on United States and allied trade in light of Soviet technological and military development harmed both United States exporting and international relations.²⁵ The expressed policies of the 1969 Act included: (1) encouraging trade with countries that shared diplomatic and trade relations with the United States; (2) restricting the exports of goods and technologies which would significantly contribute to military potential of any other nation and threaten national security;²⁶ (3) formulating and applying any necessary controls to the maximum extent possible in cooperation with all nations; and (4) formulating a unified, multilateral trade control policy.²⁷

The 1969 Act continued to grant the President broad and ultimate discretion in regulating exports.²⁸ The Act authorized the President to prohibit the exportation of goods and technologies that were detrimental to United States security, "*regardless of their availability*" from nations threatening the national security of the United States.²⁹

It was not until 1977 that the President's broad discretion to regulate exports was theoretically limited by foreign availability concerns.³⁰ The 1977 Amendments prohibited the President from imposing export controls on goods and technologies available without restriction and in

12, at 792; H.R. REP. NO. 524, 91st Cong., 1st Sess. 9 (1969) (statement of Rep. Thomas L. Ashley).

²⁴ 50 U.S.C. §§ 2401-2413 (1976) (current version at Pub. L. No. 96-72, 93 Stat. 503-36 (1979) (to be codified at 50 U.S.C. app. §§ 2401-2419)).

²⁵ Rep. Thomas Ashley stated:

From the standpoint of our national security and the conduct of our foreign affairs, which, of course, remain paramount in our consideration of export controls, as well as from the vantage point of domestic economic considerations, we have moved into a period into which the Congress should maintain a close, in-depth review of our export control laws with a view to reshaping them in light of potential, economic and technological changes taking place in Western Europe, Japan, and the Communist countries of Eastern Europe.

H. R. REP. NO. 524, 91st Cong., 1st Sess. 9 (1969).

²⁶ 50 U.S.C. § 2402(1) (1976) (current version at Pub. L. No. 96-72, § 3, 93 Stat. 503, 504-05 (1979) (to be codified at 50 U.S.C. app. § 2402)).

²⁷ *Id.* at § 2402(3).

²⁸ See Berman & Garson, *supra* note 12, at 792. See also Note, *Export Controls—A National Security Standard*, 12 VA. J. OF INT'L L. 92, 93-94 (1971) [hereinafter cited as VA. Note].

²⁹ 50 U.S.C. § 2403(b)(1) (1976) (current version at Pub. L. No. 96-72, § 5(f)(2), 93 Stat. 503, 509 (1979) (to be codified at 50 U.S.C. app. § 2404)) (emphasis supplied).

³⁰ Export Administration Amendments of 1977, 50 U.S.C. app. §§ 2401-2413 (1976 & Supp. I 1977) (current version at Pub. L. No. 96-72, 93 Stat. 503 (1979) (to be codified at 50 U.S.C. app. §§ 2401-2419)). Failure to adequately consider foreign availability in prior legislation was regarded as "one of the most serious flaws" in the export licensing process. H.R. REP. NO. 190, 95th Cong., 2d Sess. 8 (1977).

comparable quantities and qualities from foreign countries, unless he determined that the absence of controls would be detrimental to national security.³¹ When export controls were imposed notwithstanding foreign availability, the Amendments authorized the President to initiate negotiations with appropriate foreign countries to eliminate such availability.³² The Amendments further required the President to submit a special report to Congress assessing the effectiveness of multilateral controls, specifically the COCOM forum, and to formulate specific proposals to increase the effectiveness of such controls.³³ Finally, the Amendments authorized the Secretary of Commerce to review goods subject to unilateral and multilateral controls in light of several factors including foreign availability.³⁴

THE HISTORY AND DEVELOPMENT OF COCOM

United States export control policy was initially premised upon multilateral controls to restrict both the export of goods and technologies from foreign sources and the transshipment of American goods.³⁵ The United States recognized that the effective inhibition of Soviet military and technological development required other major industrialized countries to adopt similar export controls.³⁶

In November 1949, the United States and six major allies established a multinational Consultative Group on Export Controls to curtail Soviet development.³⁷ The coordinating committee, COCOM, established in 1950, eventually assumed full responsibility for coordi-

³¹ 50 U.S.C. app. § 2402 (1976 & Supp. I 1977) (current version at Pub. L. No. 96-72, § 5(f)(1), 93 Stat. 503, 509 (1979) (to be codified at 50 U.S.C. app. § 2404)).

³² 50 U.S.C. app. § 2402 (1976 & Supp. I 1977) (current version at Pub. L. No. 96-72, § 5(f)(4), 93 Stat. 503, 510 (1979)).

³³ 50 U.S.C. app. § 2409 (1976 & Supp. I 1977) (current version at Pub. L. No. 96-72, § 14, 93 Stat. 503, 532-33 (1979)).

³⁴ 50 U.S.C. app. § 2403(c) (1976 & Supp. I 1977) (current version at Pub. L. No. 96-72, § 4, 93 Stat. 503-05 (1979)). The 1972 amendments also had authorized the President to remove unilateral controls from goods which he determined to be "available without restriction from sources outside the United States in significant quantity and comparable in quality" unless he determined that the absence of controls would prove detrimental to national security. Pub. L. No. 92-412, § 104(a)(2), 86 Stat. 644 (1972).

³⁵ See AEI, *supra* note 4, at 4; Berman & Garson, *supra* note 12, at 834.

³⁶ COMPTROLLER GENERAL, REPORT TO CONGRESS OF THE UNITED STATES, EXPORT CONTROLS: NEED TO CLARIFY POLICY AND SIMPLIFY ADMINISTRATION 7 (1979) [hereinafter cited as EXPORT CONTROLS].

³⁷ See AEI, *supra* note 4, at 4; Berman & Garson, *supra* note 12, at 834-35. The six allies included the United Kingdom, France, Italy, the Netherlands, Belgium, and Luxembourg. In 1952 and 1953, the membership expanded to include Norway, Denmark, Canada, and the Federal Republic of Germany, and subsequently, Portugal, Greece, Turkey, and Japan. The fifteen member organization now includes Japan and all the NATO countries, except Iceland.

nating multilateral export controls.³⁸

The Consultative Group established four secret lists of controls.³⁹ In 1954 and 1958, major reductions were made in the lists, and, by 1958, two sublists were maintained by COCOM: items embargoed and items under surveillance.⁴⁰ The current COCOM embargo list contains 105 item categories.⁴¹ The United States unilaterally controls exports of an additional thirty-eight industrial item categories.⁴²

COCOM members have agreed to embargo goods and technologies in three categories: (1) those principally used for the development, production, or use of arms; (2) those from which technology of military significance may be extracted; and (3) those of military significance in which the intended destinations have deficient supply.⁴³ The purpose of the COCOM embargo is to restrict the exports of goods and technologies which increase the military capabilities of the communist countries, thereby threatening the security of member countries.⁴⁴

THE EXPORT ADMINISTRATION ACT OF 1979 AND THE DETERMINATION OF FOREIGN AVAILABILITY

The effectiveness of United States export controls for national security purposes is limited by the free availability of comparable goods and technologies from foreign sources.⁴⁵ The 1979 Act more effectively

³⁸ The Consultative Group created two committees: (1) the Coordinating Committee (COCOM), established in 1950, which dealt with trade with Eastern Europe; and (2) the China Committee (CHINCOM), established in 1952, which dealt with trade with Communist China. In 1957, CHINCOM was disbanded and COCOM controls were extended to Communist China, North Korea, and North Vietnam. Following France's military withdrawal from NATO, and the refusal to appoint a new chairman, the Consultative Group ceased its existence. COCOM, therefore, subsequently assumed full responsibility for coordinating multilateral export controls. See EXPORT CONTROLS, *supra* note 36, at 7; Berman & Garson, *supra* note 12, at 834-35.

Information on COCOM is limited because of the secrecy which surrounds COCOM and COCOM agreements. See text accompanying note 104 *infra*.

³⁹ The four secret lists were: (1) items totally embargoed; (2) items granted quotas; (3) items under surveillance; and (4) items to be denied to China and North Korea. See Berman & Garson, *supra* note 12, at 835. See also 2 S. METZGER, LAW OF INTERNATIONAL TRADE 1063-66 (1966).

⁴⁰ *Special Report on Multilateral Export Controls, submitted by the President Pursuant to Section 117 of the Export Administration Amendments of 1977 in Export Administration Act: Agenda for Reform: Hearings before the Subcomm. on International Policy and Trade of the House Comm. on International Relations, 95th Cong., 2d Sess. 53 (1978) [hereinafter cited as Special Report].* See also Berman & Garson, *supra* note 12, at 835-36. By 1958, less than 200 items were listed by COCOM, comprising 10% of all items involved in international trade. VA. Note, *supra* note 28, at 102 n. 66.

⁴¹ EXPORT CONTROLS, *supra* note 36, at iii.

⁴² *Id.*

⁴³ Bingham & Johnson, *supra* note 2, at 904.

⁴⁴ *Special Report, supra* note 40, at 52.

⁴⁵ Bingham & Johnson, *supra* note 2, at 903.

incorporates the assessment of foreign availability into the export licensing process than any prior legislation.⁴⁶ Basically, the Act provides that the President shall not impose export controls for national security purposes on goods or technology which he determines are available without restriction from foreign sources in significant quantity and comparable in quality to those produced in the United States, unless he determines that adequate evidence demonstrates that the absence of controls would prove detrimental to national security.⁴⁷ Furthermore, the President may delegate his power and authority to government departments or agencies as he deems appropriate, except as such delegations act to overrule or modify recommendations or decisions made by the Secretaries of Commerce, Defense, or State, pursuant to the Act.⁴⁸

The Act specifically authorizes the Secretary of Commerce, in consultation with the Secretary of Defense and other departments, to exercise national security controls.⁴⁹ Under the Act, the Secretary of Commerce may require any of four types of export licenses for the exportation of goods and technologies to controlled countries: (1) a validated license, authorizing a specific export, issued pursuant to an application by the exporter; (2) a qualified general license, authorizing multiple exports, issued pursuant to an application by the exporter; (3) a general license, authorizing exports without application by the exporter; and (4) such other licenses as may be effective in implementing the Act.⁵⁰

The 1979 Act requires the Secretary, in consultation with appropriate government agencies and technological advisory committees, to review on a continuing basis the foreign availability of goods and technologies subject to validated license controls.⁵¹ Section 5(f)(1) ex-

⁴⁶ Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503-36 (1979) (amending 50 U.S.C. app. §§ 2401-2413 (1976)).

⁴⁷ Pub. L. No. 96-72, § 4(c), 93 Stat. 503, 506 (1979) (to be codified in 50 U.S.C. app. § 2403).

⁴⁸ *Id.* at § 4(e).

⁴⁹ Pub. L. No. 96-72, § 5(a), 93 Stat. 503, 506 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁵⁰ Pub. L. No. 96-72, § 4(a), 93 Stat. 503, 505-06 (1979) (to be codified in 50 U.S.C. app. § 2403).

⁵¹ Pub. L. No. 96-72, § 5(f)(1), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404).

Under § 5(e)(2), the Secretary shall require a validated license if:

(A) the export of such goods or technology is restricted pursuant to a multilateral agreement, formal or informal, to which the United States is a party and, under the terms of such multilateral agreement, such exports require the specific approval of the parties to such multilateral agreement;

(B) with respect to such goods or technology, other nations do not possess capabilities comparable to those possessed by the United States;

(C) the United States is seeking the agreement of other suppliers to apply comparable controls to such goods or technology and, in the judgment of the Secretary, United States export

pressly authorizes the Secretary to establish by regulation the procedures and *criteria* by which foreign availability is to be determined.⁵² If the Secretary determines that the goods or technology "are available in fact . . . in sufficient quantity and of sufficient quality" to render validated licenses ineffective, he may not require such controls unless the President determines that their absence will be detrimental to national security.⁵³ When the President determines that export controls shall be maintained, notwithstanding foreign availability, the Secretary is required to publish the basis of the determination and the estimated economic impact of the decision.⁵⁴

The legislation also authorizes the Secretary to approve any application for a validated license which meets all other requirements if the goods or technologies will be available in fact and in sufficient quantity and of sufficient quality from foreign sources.⁵⁵ When the Secretary determines that such goods or technologies are available from foreign sources he must also determine whether an additional determination of foreign availability to remove validated controls pursuant to section 5 (f)(1) is warranted.⁵⁶

Furthermore, section 5(f)(3) requires that any determination of foreign availability which is the basis of a decision to grant a license or remove validated controls on the export of goods or technologies shall be made in writing and supported by reliable evidence, including scientific or physical examination and expert opinion based upon adequate factual or intelligence information.⁵⁷ The Act precludes the use of uncorroborated and self-serving representations by applicants as the sole basis for approving or denying a license.⁵⁸

In order to gather foreign availability information, section 5(f)(5) authorizes the Secretary to establish within the Office of Export Administration of the Department of Commerce, "a capability to monitor

controls on such goods or technology, by means of such license, are necessary pending the conclusion of such agreement.

Pub. L. No. 96-72, § 5(e)(2), 93 Stat. 503, 508-09 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁵² Pub. L. No. 96-72, § 5(f)(1), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404). For a discussion of Department of Defense procedures in assessing foreign availability for the update of export control lists, see *House Hearings, supra* note 3, at 166 (statement of Ellen J. Frost, Deputy Ass't Sec'y of Int'l Economic Affairs, Dep't of Defense).

⁵³ Pub. L. No. 96-72, § 5 (f)(1), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at § 5 (f)(2).

⁵⁷ Pub. L. No. 96-72, § 5(f)(3), 93 Stat. 503, 509-10 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁵⁸ *Id.*

and gather information" on the foreign availability of goods and technologies subject to control.⁵⁹ Section 5(f)(6) orders each government department, subject to the protection of intelligence sources and procedures, to furnish information on foreign availability to the Office of Export Administration and permits the Office to furnish appropriate foreign availability information to various departments.⁶⁰ Finally, section 5(h) authorizes the Secretary, upon written request of industry representatives, to appoint technical advisory committees comprised of industry and government representatives to evaluate technical matters on specified goods and technologies, including foreign availability.⁶¹ Specifically, section 5(h)(6) provides that whenever a technical advisory committee documents that foreign availability, in fact, has rendered validated license controls ineffective, the Secretary shall investigate such availability. If foreign availability is verified, the Secretary shall remove validated controls unless the President determines that their absence would be detrimental to national security.⁶²

STATUTORY PROVISIONS DESIGNED TO CONTROL AND REDUCE FOREIGN AVAILABILITY

The United States capability to inhibit technological and military development of communist countries is severely limited by the availability of comparable goods and technologies from foreign sources. Indeed, the House Committee Report on Foreign Affairs noted that "[w]ith the increasing ability of other high technology producers to compete with the United States in the world market, the ability of the United States unilaterally to deny goods and technologies to the communist countries is increasingly being eroded."⁶³

Effective national security controls require, at the least, a legislative scheme to control and reduce the foreign availability of advanced technologies. The 1979 Act provides for both mandatory and discretionary negotiations by the President with governments of foreign countries. Section 5(f)(4) directs the President to initiate negotiations with appropriate foreign governments to reduce foreign availability in any case in which United States export controls are imposed notwith-

⁵⁹ Pub. L. No. 96-72, § 5(f)(5), 93 Stat. 503, 510 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁶⁰ *Id.* at § 5(f)(6).

⁶¹ Pub. L. No. 96-72, § 5(h), 93 Stat. 503, 510-11 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁶² Pub. L. No. 96-72, § 5(h)(6), 93 Stat. 503, 511 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁶³ H.R. REP. NO. 200, 96th Cong., 1st Sess. 9-10 (1979).

standing foreign availability.⁶⁴ The President must initiate negotiations whenever he has reason to believe that goods or technologies may become available from foreign sources and that availability can be prevented with negotiations.⁶⁵ The latter provision authorizes presidential discretion both in the assessment of foreign availability and in the perceived effectiveness of negotiations.⁶⁶

The 1979 Act also specifically mandates the President to enter into negotiations with COCOM members to accomplish four major objectives: (1) publication of the list of items controlled for export by agreement of COCOM, together with all notes, understandings, and changes to the agreement; (2) holding of periodic meetings with high level representatives of COCOM countries' governments to discuss and develop

⁶⁴ Pub. L. No. 96-72, § 5(f)(4), 93 Stat. 503, 510 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁶⁵ *Id.*

⁶⁶ Proponents of tighter export controls have advocated reducing the President's discretion to initiate negotiations. See 125 CONG. REC. H7661 (daily ed. Sept. 11, 1979) (remarks of Rep. Wolff). In addition, a Senate amendment, sponsored by Senators Stevenson and Heinz, would have required the President to recommend to Congress appropriate measures for the elimination of foreign availability when negotiations failed. 125 CONG. REC. S10,154-55 (daily ed. July 21, 1979). In deleting this provision, the conference committee noted that the President may still invoke his existing authority when negotiations fail. H.R. REP. NO. 482, 96th Cong., 1st Sess. 47 (1979).

In addition, trade and other economic sanctions were proposed against foreign countries which failed to curb the availability of goods. 125 CONG. REC. S10,151-52 (daily ed. July 21, 1979). Such sanctions, however, would aid foreign competitors and, more specifically, jeopardize U.S. relations with cooperative countries, particularly COCOM members. See 125 CONG. REC. S10,173 (daily ed. July 21, 1979) (remarks of Sen. Kennedy).

It is further doubtful that economic sanctions against United States allies would be effective. In 1951, Congress passed the Mutual Defense Assistance Control Act (Battle Act) in order to induce greater cooperation in the export of arms from friendly countries. 22 U.S.C. §§ 1611-13d (1976). The Act primarily restricted the granting of military, economic, or financial assistance to free countries that exported implements of war to any nation threatening the security of the United States. These sanctions were effective only as long as U.S. assistance was more important and profitable to these countries than was trade with the East. This is no longer true today. Berman & Garson, *supra* note 12, at 838; Bingham & Johnson, *supra* note 2, at 903. See also note 104 *infra*.

The Battle Act administrator was responsible for cooperating and negotiating with COCOM countries; COCOM provided the principal means of implementing the Battle Act. The Export Administration Act of 1979, however, superseded the Battle Act. Pub. L. No. 96-72, § 17(e), 93 Stat. 503, 534 (1979) (to be codified in 50 U.S.C. app. § 2416). Section 5(k) provides that the Secretary of State, in consultation with other appropriate departments and agencies, shall be responsible for conducting negotiations with other countries. Pub. L. No. 96-72, § 5(k), 93 Stat. 503, 512 (1979) (to be codified in 50 U.S.C. app. § 2404). This section grants the Secretary of State the authority to act as administrator for U.S. participation in COCOM. S. REP. NO. 169, 96th Cong., 1st Sess. 15-16 (1979). This provision is also directed toward countries outside COCOM. There are indications, however, that technologically advanced countries such as Sweden, Switzerland, and Israel follow COCOM guidelines although they do not participate in COCOM. AVIATION WEEK & SPACE TECH., Sept. 10, 1979, at 26.

export control policy; (3) reduction of the scope of export controls to a level acceptable to and enforceable by all member governments; and (4) development of more effective enforcement procedures.⁶⁷

MULTILATERAL EFFORTS TO CONTROL AND REDUCE FOREIGN AVAILABILITY

COCOM methods of export control include: detailed embargo lists, procedures for reviewing individual exceptions to the embargo, and procedures for multilateral review of these lists.⁶⁸ Under COCOM, a member government may petition other members to exempt one-time sales by a domestic exporter from multilateral restrictions. Requests are reviewed by members who recommend full or partial approval or denial to COCOM, which then issues an advisory opinion to the submitting government.⁶⁹ COCOM rules provide for a decision to be made within eighteen days after it is submitted to COCOM, with an automatic two-week extension if no decision has been reached in the initial period. Additional weekly extensions are available at the discretion of the submitting government.

The United States has adhered to the COCOM deadlines for processing exception requests less frequently than any other member.⁷⁰ The administration of exception requests within United States government agencies, substantially identical to that for export license applications, is ill-suited to meet COCOM deadlines.⁷¹ United States officials have contended, however, that other countries rely on the United States to perform thorough reviews. This reliance increases U.S. response time and complicates U.S. trade relations.⁷²

Section 10(h) of the 1979 Act introduces a new scheme for processing domestic exception requests that are required to be submitted for

⁶⁷ Pub. L. No. 96-72, § 5(i), 93 Stat. 503, 512 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁶⁸ *Special Report*, *supra* note 40, at 52.

⁶⁹ About 1,000 exception requests are reviewed annually by COCOM. COCOM disapproves approximately 2 to 4% of the requests, 3 to 5% are withdrawn, and many more are revised based upon recommendations during the review process. *Id.* at 53.

⁷⁰ During the first six months of 1977, the United States decided only 41 of the 202 requests by the first deadline and an additional 31 within the two week extension. The United States reserved opinion on more requests and did so for longer periods of time than any other COCOM member. EXPORT CONTROLS, *supra* note 36, at 11-12.

⁷¹ As stated in the Comptroller General's report: "The elaborate U.S. review process isn't designed to provide a response within the required timeframe; . . . some U.S. export control officials are not aware of these deadlines." *Id.* at 11.

⁷² In some cases, however, U.S. licensing officials claimed that the initial requests contained insufficient data and that submitting countries were slow to respond to U.S. requests for additional information. *Id.* at 12.

multilateral review.⁷³ If multilateral review is not completed within sixty days, the Secretary must grant a license unless he determines that issuance would prove detrimental to national security. The Secretary must notify the applicant and Congress of the status of the application following each additional sixty-day delay. The statute, therefore, only specifies a target period and provides a loophole for continued delay. Furthermore, the Act fails to include the entire House provision which also proposed a sixty-day framework for U.S. review of other countries' licensing exceptions required to be submitted for multilateral review.⁷⁴

⁷³ Section 10(h) states:

(h) MULTILATERAL CONTROLS—In any case in which an application, which has been finally approved under subsection (c), (f), or (g) of this section, is required to be submitted to a multilateral review process, pursuant to a multilateral agreement, formal or informal, to which the United States is a party, the license shall not be issued as prescribed in such subsections, but the Secretary shall notify the applicant of the approval of the application (and the date of such approval) by the Secretary subject to such multilateral review. The license shall be issued upon approval of the application under such multilateral review. If such multilateral review has not resulted in a determination with respect to the application within 60 days after such date, the Secretary's approval of the license shall be final and the license shall be issued, unless the Secretary determines that issuance of the license would prove detrimental to the national security of the United States. At the time at which the Secretary makes such a determination, the Secretary shall notify the applicant of the determination and shall notify the Congress of the determination, the reasons for the determination, the reasons for which the multilateral review could not be concluded within such 60-day period, and the actions planned or being taken by the United States Government to secure conclusion of the multilateral review. At the end of every 60-day period after such notification to Congress, the Secretary shall advise the applicant and the Congress of the status of the application, and shall report to Congress in detail on the reasons for the further delay and any further actions being taken by the United States Government to secure conclusion of the multilateral review. In addition, at the time at which the Secretary issues or denies the license upon conclusion of the multilateral review, the Secretary shall notify the Congress of such issuance or denial and of the total time required for the multilateral review.

Pub. L. No. 96-72 § 10(h), 93 Stat. 503, 529(1979)(to be codified in 50 U.S.C. app. § 2410).

⁷⁴ H.R. 4034, sponsored by Rep. Bingham, required that multilateral review of U.S. goods be completed within sixty days or a license be issued. Furthermore, H.R. 4034 specifically provided for U.S. review of other countries' exception requests within sixty days, as follows:

In any case in which the approval of the United States Government is sought by a foreign government for the export of goods or technology pursuant to a multilateral agreement, formal or informal, to which the United States is a party, the Secretary of State, after consulting with other appropriate United States Government agencies, shall, within sixty days after the date on which the request for such approval is made, make a determination with respect to the request for approval. Any such other agency which does not submit a recommendation to the Secretary of State before the end of such sixty-day period shall be deemed by the Secretary of State to have no objection to the request for United States Government approval. The Secretary of State may not delegate the authority to disapprove a request for United States Government approval under this paragraph to any official of the Department of State holding a rank lower than Deputy Assistant Secretary.

H.R. 4034, 96th Cong., 1st Sess., 125 CONG. REC. H3048 (daily ed. May 10, 1979) (emphasis added).

The conference committee stated that it agreed to accept the House provision, which authorized a sixty-day time limit for multilateral review of U.S. licensing cases and for *U.S. review of other countries' licensing cases*, with an amendment providing a national security waiver for the sixty-day period and a notification period if a waiver is used. H. R. REP. NO. 482, 96th Cong., 1st Sess. 50 (1979). Nonetheless, the 1979 Act explicitly omits any provisions concerning the U.S. review of other countries' licensing cases.

Many COCOM exception requests submitted by other members include goods or technologies subject to U.S. re-export licensing.⁷⁵ The United States is the only COCOM country to require that any U.S. good or technology be relicensed each time it is further exported. This review has created substantial delays in COCOM decisions.⁷⁶ Furthermore, it damages U.S. exporting because foreign firms are seeking or developing substitutes for U.S. components as a means of avoiding these delays.⁷⁷

The 1979 Act, however, fails to expressly eliminate the relicensing procedure or provide specific procedural safeguards to meet COCOM deadlines for processing exception requests.⁷⁸ Rather, the Act requires that a license be issued or denied within ninety days of when the Secre-

⁷⁵ More than one fourth of the COCOM exception requests in 1977 submitted by other members included goods or technologies subject to U.S. re-export licensing. EXPORT CONTROLS, *supra* note 36, at 14; *U.S. Export Control Policy and Extension of the Export Administration Act, Part I: Oversight to Review U.S. Export Control Policy and Proposals to Extend and Revise the Export Administration Act of 1969, as amended: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 9 (1979) (statement of Elmer B. Staats, Comptroller General) [hereinafter cited as *Export Control Oversight*]. Applications for re-export are thus reviewed twice: first, as a re-export licensing case, and second, as an exception request. See *House Hearings*, *supra* note 3, at 261-62 (statement of Kenneth Fasick, Director, Int'l Div., GAO), 1046 (recommendations of the Emergency Committee for American Trade).

⁷⁶ EXPORT CONTROLS, *supra* note 36, at 14-15; *Export Control Oversight*, *supra* note 75, at 10 (statement of Elmer B. Staats, Comptroller General).

⁷⁷ EXPORT CONTROLS, *supra* note 36, at 15.

⁷⁸ The Senate Committee on Banking, Housing and Urban Affairs rejected an amendment to Senate bill S. 737 that would have prohibited controls on the re-export of U.S. goods and technology from COCOM countries that control such exports in fact and to the same extent as the United States. The Department of Defense objected to the removal of re-export controls:

First, it will be difficult to define exactly what "in fact" and "to the same extent" mean in practice. Second, the export control practice of another country may not remain constant. Yet under the proposed legislation we would have no legal remedy to respond to any lessening of such controls until exports damaging to our national security had already taken place.

S. REP. NO. 169, 96th Cong., 1st Sess. 11 (1979).

Furthermore, U.S. re-export controls imply distrust of COCOM members. *Export Controls Oversight*, *supra* note 75, at 10 (statement of Elmer B. Staats, Comptroller General). In addition, the Department of State proposed to substitute the exception request review for the re-export licensing process. *Id.*

The 1979 Act does not mention the re-export licensing process. Section 5(e)(3), for example, states that to the maximum extent practicable, the Secretary shall require a qualified general license authorizing multiple exports, in lieu of a validated license, if the export of such good is restricted pursuant to a multilateral agreement and does not require the specific approval of the parties. Pub. L. No. 96-72, § 5(e)(3), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404). This provision, however, fails to eliminate re-export licensing of goods subject to approval by COCOM members. In fact, § 5(e)(2) states that the Secretary shall require a validated license, authorizing a specific export, if such good is restricted pursuant to a multilateral agreement and requires the specific approval of the parties. *Id.* at § 5(e)(2)(A).

tary determines that referral to another agency is unnecessary.⁷⁹ When the Secretary determines that such referral is necessary, a license must be issued or denied within an additional ninety-day period.⁸⁰ The Secretary must resolve any conflicting recommendations during the additional period.⁸¹ This scheme thus sets a 180-day maximum time limit for processing export applications.

COCOM members revise the international control list every two to three years, with the most recent revision having been completed in 1976. Preparation of a new list began in June 1978, and was scheduled for completion in the fall of 1979.⁸²

The success of the latest revision ultimately may depend upon the degree to which the new list and member countries incorporate the crit-

⁷⁹ Pub. L. No. 96-72, § 10(c), 93 Stat. 503, 525 (1979) (to be codified in 50 U.S.C. app. § 2409).

The 1977 amendments required the Secretary to grant a license that was not acted upon within ninety days, unless a finding was made that additional time was necessary. 50 U.S.C. app. § 2403(g)(1) (1976 & Supp. I 1977). The applicant thus had to be notified in writing of the specific reasons for the delay and the estimated time of decision. Form letters, notifying applicants of the post-ninety-day delay had been increasingly used, perhaps violating the spirit, but not the letter of the law. Juanita Kreps, former Secretary of Commerce, testified that, in 1978, approximately 3.3% of the total applications processes required more than ninety days. *Export Controls Oversight*, *supra* note 75, at 34 (statement of Juanita Kreps). In 1977, of 57,850 applications filed, 1,032 exceeded the ninety-day limit. In 1978, of 63,476 applications filed, 1,988 exceeded the ninety-day limit. During 1979, the total number of applications was expected to reach 77,000. *AVIATION WEEK & SPACE TECH.*, Apr. 30, 1979, at 67.

⁸⁰ Pub. L. No. 96-72 §§ 10(d), 10(f), 93 Stat. 503, 526-27 (1979) (to be codified in 50 U.S.C. app. § 2409).

⁸¹ Pub. L. No. 96-72, § 10(f)(1), 93 Stat. 503, 526 (1979) (to be codified in 50 U.S.C. app. § 2409).

⁸² Initial proposals to revise the list were to be submitted by June 2, 1978, and counter proposals by August 18, 1978. Formal negotiations began on October 2, 1978, and were scheduled to be completed by August 2, 1979. The new control list was scheduled to become effective in the fall of 1979, although some predictions estimate that completion of the list may take two years. *AVIATION WEEK & SPACE TECH.*, Oct. 9, 1978, at 57. The status of the list revision had not been publicized as of the date of publication.

United States proposals seek both to tighten, particularly with regard to computers, and to liberalize controls. *Id.* Japan is seeking to relax restrictions on 53 of 150 Japanese-made products, mainly electronics goods. The U.S. and Great Britain are seeking liberalization of 50 items each, but also are calling for tighter controls on others. France and West Germany are seeking relaxation on more than 15 items. Some estimates place the number of goods controlled by COCOM as high as 200. *Wall St. J.*, Nov. 15, 1978, at 15, col. 1; *BUS. WEEK*, June 18, 1979, at 75.

The United States submitted original proposals covering 79 items, including 16 proposals for new entries. *Export Licensing: COCOM List Review Proposals of the United States: Hearing Before the Subcomm. On International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 2d Sess. 92 (1978). For a discussion of U.S. House procedures for submitting proposals and the difficulties encountered, see *id.* at 75-76, 84-91. See also *Export Controls*, *supra* note 36, at 23-27; *House Hearings*, *supra* note 3, at 1137-42 (Report by the Dep't of Commerce, Review of Unilateral and Multilateral Export Control Lists, pursuant to § 118 of the Export Administration Amendments of 1977).

ical technologies approach adopted in the 1979 Act. The critical technologies approach, developed in 1976 by the Task Force on Export of U.S. Technology, shifts the attention from products to technological "know-how."⁸³ In accordance with these recommendations, the 1979 Act delegates the primary responsibility for developing a list of militarily critical technologies to the Secretary of Defense.⁸⁴ Incorporation in the COCOM list could not be expected to occur until future list revisions ensue.⁸⁵

EFFECTS AND IMPLICATIONS OF THE 1979 ACT

More than any of its predecessors, the 1979 Act recognizes the impact of foreign availability upon United States export control. The Act requires a more thorough appraisal of the foreign availability of comparable goods and technologies in the export licensing process and the initiation of negotiations with foreign governments for the control and reduction of such availability.

First, the Act more clearly delineates the role of the different government agencies and the President with regard to foreign availability determinations within the export licensing process. Despite contrary proposals, Congress specifically places the authority to exercise national security controls, including foreign availability determinations, within the Department of Commerce.⁸⁶ Thus, except where otherwise provided by the Act, the Secretaries of Defense and State and other appropriate government officials are limited to a consultative and advisory capacity.⁸⁷

⁸³ DEP'T OF DEFENSE, AN ANALYSIS OF EXPORT CONTROL OF U.S. TECHNOLOGY—A DOD PERSPECTIVE, A REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON EXPORT OF U.S. TECHNOLOGY (1976); *Dep't of Defense Policy Statement on Export Control of United States Technology: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 4-5 (1977) (statement of Ellen J. Frost, Deputy Ass't Sec'y of Int'l Economic Affairs).

⁸⁴ Pub. L. No. 96-72, § 5(d)(2), 93 Stat. 503, 508 (1979) (to be codified in 50 U.S.C. app. § 2404). This list is intended to place primary emphasis on: arrays of design and manufacturing know-how; keystone manufacturing, inspection, and test equipment; and goods accompanied by sophisticated operation, application, or maintenance know-how. *Id.* at § 5(d)(2)(A). *See also House Hearings*, *supra* note 3, at 401-15 (statement of Ruth M. Davis, Deputy Under Sec'y for Research and Advanced Technology, Dep't of Defense).

⁸⁵ Elmer B. Staats, the Comptroller General, stated: "The credibility of the export control program may very well hinge on whether or not a revised list truly reflects the complete relationship between products, technology and calculation of their military significance." *Export Control Oversight*, *supra* note 75, at 9. *See also House Hearings*, *supra* note 3, at 156 (statement of Ellen J. Frost, Deputy Ass't Sec'y for Int'l Economic Affairs, Dep't of Defense).

⁸⁶ *See* H.R. 3216, 96th Cong., 1st Sess., 125 CONG. REC. H1643 (daily ed. Mar. 22, 1979).

⁸⁷ Section 5(d), for example, grants the Secretary of Defense primary responsibility for developing a list of militarily critical technologies. Pub. L. No. 96-72, § 5(d), 93 Stat. 503, 508 (1979) (to

Furthermore, the 1979 Act, at least minimally, limits Presidential authority by prohibiting the President from transferring his authority to other governmental entities in order to overrule or modify any recommendations or decisions made by the Secretaries of Commerce, Defense, or State pursuant to the Act.⁸⁸ The President, however, retains the final authority to impose export controls, regardless of foreign availability, based upon national security concerns.⁸⁹ Arguably, the presidential veto power under the guise of national security impairs, if not nullifies, the effectiveness of foreign availability determinations required by the new Act. Nonetheless, presidential flexibility may be necessary to protect national security in light of rapidly changing international events.

In addition, the Act authorizes one entity, the Office of Export Administration in the Department of Commerce, to monitor foreign availability.⁹⁰ This centralization of authority may eliminate case by case evaluations,⁹¹ provide greater consistency in determinations, and reduce duplication by different agencies.⁹² Furthermore, centralized administration of technical advisory committee investigations, verifiable by the Secretary, may enhance the thoroughness of foreign availability determinations.

The 1979 Act requires a thorough factual determination of foreign availability in order to eliminate export controls,⁹³ although comparable foreign availability is often difficult to factually determine even through COCOM mechanisms.⁹⁴ The Act, however, expressly authorizes the Secretary to establish procedure and *criteria* by which foreign availability is to be determined.⁹⁵ Thus, the Secretary's development and interpretation of the criteria and his assessment of the reliability

be codified in 50 U.S.C. app. § 2404). Also, § 5(k) authorizes the Secretary of State to conduct negotiations with countries with which the United States has defense treaty commitments to restrict exports of goods and technologies. Pub. L. No. 96-72, § 5(k), 93 Stat. 503, 512 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁸⁸ Pub. L. No. 96-72, § 4(e), 93 Stat. 503, 506 (1979) (to be codified in 50 U.S.C. app. § 2403).

⁸⁹ Pub. L. No. 96-72, § 5(f)(1), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁹⁰ Pub. L. No. 96-72, § 5(f)(5), 93 Stat. 503, 510 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁹¹ H.R. REP. NO. 200, 96th Cong., 1st Sess. 10 (1979).

⁹² S. REP. NO. 169, 96th Cong., 1st Sess. 9 (1979).

⁹³ Pub. L. No. 96-72, § 5(f)(1), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁹⁴ See *House Hearings*, *supra* note 3, at 623 (statement of Frank A. Weil, Ass't Sec'y for Industry and Trade, Dep't of Commerce). See also note 105 *infra* (discussion of Cyril Bath Company stretch forming presses).

⁹⁵ Pub. L. No. 96-72, § 5(f)(1), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404).

and sufficiency of the evidence may determine the impact of foreign availability concerns within the export licensing process. If availability and comparability are strictly construed, fewer findings of foreign availability will be reached and fewer additional licenses will be granted to United States businesses. If these standards are loosely construed and more licenses are granted, national security objectives may be undermined.⁹⁶ Furthermore, the Act requires an additional determination of foreign availability to eliminate validated controls following an initial determination in response to a particular export license application.⁹⁷ Thus, the strict and thorough assessments required for foreign availability determinations, particularly in light of the difficulties in ascertaining foreign availability, are unlikely to translate into substantial economic gains for United States business in international trade.

Ultimately, the control and reduction of foreign availability through negotiations with appropriate foreign governments will determine the effectiveness of United States export control. Toward these objectives, the 1979 Act directs the President to initiate negotiations with appropriate foreign countries when United States export controls are imposed notwithstanding foreign availability.⁹⁸ Nonetheless, the Act premises negotiations to reduce future foreign availability upon presidential perception of their success.⁹⁹ The Act thereby falls short of assuring steps toward the control of foreign availability before United States business is unduly restricted.

Finally, by directing the President to enter into negotiations with COCOM member countries, the 1979 Act recognizes the need to achieve greater consensus in a multilateral forum. The success of these negotiations, however, largely will be determined by the member countries' willingness to participate in negotiations and to implement any resultant agreements. COCOM decisions are not binding on its member countries; moreover, COCOM lacks a formal agreement and has no enforcement powers. COCOM participation by other countries is frequently informal and, in some cases, not officially recognized, primarily due to domestic political considerations.¹⁰⁰ COCOM actions,

⁹⁶ See *Export Controls*, *supra* note 36, at 5. See also AVIATION WEEK & SPACE TECH., Dec. 10, 1979, at 65.

⁹⁷ Pub. L. No. 96-72, § 5(f)(2), 93 Stat. 503, 509 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁹⁸ Pub. L. No. 96-72, § 5(f)(4), 93 Stat. 503, 510 (1979) (to be codified in 50 U.S.C. app. § 2404).

⁹⁹ *Id.*

¹⁰⁰ Bingham & Johnson, *supra* note 2, at 904.

therefore, are effective only to the extent that they are executed by member governments through their national export control programs.¹⁰¹

In addition, the secrecy surrounding COCOM and the COCOM agreements may inhibit the success of any negotiations. COCOM embargo lists and procedures for their development are secret. This secrecy is designed both to protect national security interests and to prevent political repercussions within participating countries.¹⁰² It is unlikely, therefore, that COCOM members will agree to publish COCOM agreements.

Furthermore, the success of COCOM and the negotiations will depend upon how United States participation is perceived and to what extent it is desired by COCOM members. The United States continually has imposed its desire for stricter controls on COCOM countries, thus preventing them from subordinating United States security to their own international trade interests. COCOM countries have criticized the United States for being insensitive to their political and economic needs.¹⁰³ These countries lack large domestic markets and tend to view trade "as part of their national security and not something apart from it."¹⁰⁴ In addition, the United States has unduly relied on COCOM to control foreign availability, to the detriment of United States business.¹⁰⁵

¹⁰¹ EXPORT CONTROLS, *supra* note 36, at 9.

¹⁰² Commentators have noted: "Some European governments are sensitive to criticism from the Left for participating with the United States in anti-communist trade controls, and our own government is sensitive to charges that it quietly acquiesces in loose European and Japanese enforcement of controls." Bingham & Johnson, *supra* note 2, at 904.

¹⁰³ EXPORT CONTROLS, *supra* note 36, at 9.

¹⁰⁴ *Id.* COCOM countries, unrestricted by extensive lists, have become major suppliers of advanced technology to the Soviet Union and Eastern Europe. Between 1963 and 1968, alone, Western European countries signed contracts for delivery of an estimated 100 complete industrial plants, including installation and training, to the Soviet Union. VA. Note, *supra* note 28, at 102-03. By 1976, COCOM trade in manufactured goods with communist countries reached about \$19.6 billion, \$2.9 billion more than these countries had received during the Marshall Plan years. EXPORT CONTROLS, *supra* note 36, at 8. Japan and European NATO countries have exported advanced electronics, communications and transport equipment, and other items still embargoed for export to communist nations by the United States. HOUSE COMM. ON INTERNATIONAL RELATIONS, 95TH CONG., 1ST SESS., SCIENCE, TECHNOLOGY, AND AMERICAN DIPLOMACY 578 (Comm. Print 1977).

The United States was the predominant source of advanced technology in the West when export controls were first applied. The capabilities of Western European nations to export technology and goods have increased dramatically. As a result, these nations have exerted pressure to reduce the international embargo list and generally, have reduced their control of these goods. See GIFFIN, THE LEGAL AND PRACTICAL ASPECTS OF TRADE WITH THE SOVIET UNION 91-94 (rev. ed. 1971).

¹⁰⁵ United States companies have contended that they are being denied permission to export to

The United States, therefore, must reconcile its international trade policy with the political and economic needs of COCOM members to assure greater multilateral cooperation. First, the United States must continuously appraise foreign availability with the goal of reducing controls on available goods and technologies. Second, the stated objectives of the COCOM negotiations, including the reduction of export controls to an internationally acceptable level and the development of effective enforcement procedures, must be achieved at the very least to maintain a viable multilateral framework. Efforts to formalize COCOM through the establishment of a treaty may threaten already strained relations between the United States and other COCOM countries.¹⁰⁶

The 1979 Act, however, fails to adopt United States licensing procedures suitable to COCOM participation. The establishment of a 180-day maximum time limit for processing export applications will benefit U.S. trade only to the extent that the goods are not subject to the delays of United States re-export licensing procedures. By failing to eliminate re-export licensing, the Act continues to disadvantage United States trade vis-à-vis foreign competitors.

Furthermore, the sixty-day time limit for processing exception re-

communist countries advanced technology that is freely available from other foreign sources and, frequently, COCOM members. A classic case history involves the Cyril Bath Company stretch forming presses. In 1976, Cyril, a U.S. manufacturer of machine tools specializing in metal forming machinery, sought to export stretch forming presses, generally used to manufacture aircraft bodies, to the Soviet Union. Despite proof that a French manufacturer had exported, and had a contract to continue exporting, stretch forming presses to the Soviet Union, the U.S. denied Cyril's export license, based on the COCOM agreement. The French government, however, had denied any knowledge of past or present shipments of stretch forming presses to the Soviet Union. Following congressional hearings, the United States reversed its position based on foreign availability of the machinery from France. The United States submitted the case to COCOM as an exception request.

The French government has since admitted that they manufacture the machinery for automotive and aeronautical uses. Furthermore, there are indications that the French machines have been shipped without COCOM review. Nonetheless, COCOM has refused to accede to the U.S. request as long as the French government denies shipping comparable machinery. For a discussion of the Cyril Bath Company stretch forming presses case, see *Export Licensing: Foreign Availability of Stretch Forming Presses: Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, Part I*, 95th Cong., 1st Sess. (1977).

Furthermore, the United States continues to rely upon COCOM countries to enforce export controls. Rauer H. Meyer, Director, Office of Export Administration, Dep't of Commerce, stated: "As a matter of practice, if comparable equipment is produced in COCOM countries and the equipment is subject to COCOM embargo controls, then we conclude that equipment is not available in an unrestricted way." *Id.* at 31. See also Bingham & Johnson, *supra* note 2, at 905-07.

¹⁰⁶ See *House Hearings, supra* note 3, at 647 (statement of William A. Root, Director, Office of East-West Trade, Dep't of State). For a contrary view, see *id.* at 222 (statement of James Gray, President, National Machine Tool Builders' Association).

quests results in further delays for those domestic producers who are also required to submit to multilateral review. This, once again, adversely affects domestic exporters by imposing delays that are not incurred by their foreign competitors and not adaptable to COCOM review deadlines. Moreover, domestic exporters may be subject to additional sixty-day delay periods if the executive branch rules that the desired exports, if allowed, are likely to jeopardize national security.

Even more important, however, is the fact that the new Act fails to include any provision for expeditious review of the other countries' exception requests that are subject to multilateral review. Therefore, even with a new comprehensive export act, the United States has failed to provide a system for review of domestic and foreign exports that meets COCOM deadlines for processing exception requests.

CONCLUSION

Since the enactment of postwar export controls over advanced goods and technologies to non-allied nations, Congress has attempted to reconcile the conflicting objectives of protecting national security and promoting United States international trade. The increasing availability of comparable goods and technologies from foreign sources to communist countries undermined both these objectives. Furthermore, prior legislation inadequately appraised the impact of foreign availability on national security controls, thus unduly restricting United States trade.

The Export Administration Act of 1979 more effectively recognizes the impact of foreign availability on national security controls. First, the Act provides for more centralized and comprehensive determinations of foreign availability within the export licensing process. Second, and more importantly, the Act takes significant steps toward controlling and reducing foreign availability through negotiations with foreign countries, particularly within the COCOM forum. Nonetheless, the Act fails to effectively reconcile United States international trade policies and, more specifically, United States licensing procedures with COCOM objectives and methods of control. Until the United States improves its participation within the COCOM forum, effective multilateral controls cannot be attained.

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