

ARTICLES

EXPORT CONTROLS AND AMERICA'S COMPETITIVE CHALLENGE

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I. INTRODUCTION: ECONOMIC PROSPERITY, INDUSTRIAL COMPETITIVENESS, AND EXPORT CONTROLS

America's challenge today and for the future is to create new and satisfying jobs to employ our growing work force and to increase the standard of living for all Americans. The key to meeting this challenge is industrial competitiveness—our ability to develop and produce high quality goods and services at prices that are attractive to both foreign and domestic consumers.

Our country has entered an era of prosperity that has not been experienced in two decades. Crippling inflation and unprecedented high interest rates have been reduced.¹ Employment in the United States has reached record highs while job creation in many other industrialized countries has stagnated.² In addition, growth in investment and research and development expenditures by U.S. industry has reached rates not experienced in three decades.³

Despite these positive signs, some U.S. industries have been outpaced by more efficient foreign competitors. The growing problem of lagging U.S. industrial competitiveness is illustrated by the following trade trends:

- The United States' share of total world exports has steadily declined from 21% in 1960 to 15% in 1985;

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1. COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 24, 33 (Feb. 1985).

2. The number of jobs in the U.S has increased about 18% since 1977 while employment in Western Europe has been flat. *No Jobs for the Lads*, *ECONOMIST*, Sept. 28, 1985, at 68 (citing Organization of Economic Cooperation and Development statistics).

3. BUREAU OF CENSUS, DEPARTMENT OF COMMERCE, UNITED STATES STATISTICAL ABSTRACT 577, 578 (105th ed. 1985).

- The U.S. trade deficit for 1985 was \$150 billion, and trade balance in manufactured goods has plunged from a surplus of \$11 billion in 1981 to a deficit of \$108 billion in 1985—an unprecedented deficit equal to 10% of the value of our manufacturing output;
- The volume of U.S. exports in manufacture in 1985 was 15% below the 1981 level, and has remained virtually unchanged since the 1981-82 recession.⁴

Since every \$1 billion in industrial output creates approximately 25,000 jobs,⁵ many more Americans could be working if United States industries were more competitive.

Some suggest that the solution to saving American jobs is for our government to erect protectionist “fences” to limit foreign imports into the United States. I disagree. Protectionist solutions would cause far more harm than good to our economy.⁶ Foreign imports are not themselves the problem—they always rise with U.S. economic growth⁷—but are only a symptom. We must treat the *real* problem, and the problem is a lack of both domestic sales and exports for American companies when compared to foreign competitors. The solution is for America’s workers and industries to rise up to meet the competitive challenge with increased productivity and efficiency. America can increase jobs and

4. Office of Trade and Investment Analysis, International Trade Administration, Department of Commerce (internal 1985 DOC statistics obtained by telephone, Mar. 31, 1986). For statistics through 1983 and 1984, see BUREAU OF CENSUS, *supra* note 3, at 759, 762.

5. *U.S. Trade Deficit: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 2d Sess. 226 (1984) [hereinafter cited as *Trade Deficit Hearings*] (statement of Paul Volker, Chairman, Federal Reserve Board).

6. It is literally textbook economics that protectionism is bad for any market economy, except in certain limited circumstances such as minimizing dependence on foreign sources of strategic supplies. See, e.g., C. MCCONNELL, *ECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES* 757-59 (9th ed. 1984). Some “new wave” economists argue for a slightly more expansive instrumental use of protectionism than traditional theorists, but they explicitly reject the kind of sweeping measures that are the stuff of current political rhetoric. See Kristof, “New Wave” View Of Protectionism, *N.Y. Times*, Sept. 9, 1985, at D1, col. 1.

In addition to the economic arguments against protectionism, there is also an important normative issue. I believe that protectionism simply is not a fair way of dealing with the rest of the free world. We have encouraged our allies and developing countries to adopt market economies as a means to economic independence and political freedom. If we respond to the robust economies of our putative friends with trade barriers instead of competing with them “fair and square” in an open market, we renege on an implicit promise of prosperity through cooperation and competition. And, like any sound normative argument, this position makes pragmatic sense as well: we must maintain close and cooperative ties with all free world countries to counter the international threat of communist and Marxist expansionism.

7. See C. MCCONNELL, *supra* note 6, at 369-71.

exports but it can only do so by increasing marketshare at home and abroad. In other words, American industry must become more competitive.

The proper role for government in the effort to increase our nation's competitiveness is to remove the disincentives to innovation and productivity that exist in statutes and regulations. U.S. leadership in technology and its applications has been a primary reason for increases in productivity, exports and new jobs in the past. Direct government intervention into the market usually creates more problems than it solves, so our government should focus on reducing statutory and regulatory obstacles and create an economic environment in this country in which innovation, new ideas, and new companies can flourish and mature industries can modernize. Making sure that such an environment exists is the best way government can help America maintain its leadership in technology and industrial competitiveness.

One simple and important way to increase American industrial competitiveness in foreign markets is to make export controls more efficient. Controlling the export of militarily critical technologies and material is crucial to maintaining national security.⁸ However, export controls impose significant costs because they limit the ability of American firms to compete on a wide variety of controlled items and they also push up the price of legal American exports. These costs take the form of both the actual outlay (in manpower and fees) for procuring export licenses, and the more subtle but perhaps more significant costs of uncertainty and delay.⁹

Most of the debate about export controls of high technology is based on a classic "zero-sum" premise: if we ease export controls, then we help our economy but harm national security. If we tighten controls, then the converse will occur.¹⁰ The question is thus reduced to what I

8. The Department of Defense estimates that had the Department of Commerce not denied certain technology export applications in 1983 and 1984, the Soviet Union would have saved between \$6.6 and \$13.3 billion by exploiting U.S. technology. OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR POLICY, DEPT OF DEFENSE, ASSESSING THE EFFECT OF TECHNOLOGY TRANSFER ON U.S./WESTERN SECURITY E-5 (Feb. 1985) [hereinafter cited as ASSESSING TECHNOLOGY TRANSFER]. Conversely, these export application denials have saved the U.S. between \$7.3 and \$14.6 billion in future defense spending to counter Soviet advances, *id.* at E-8, not to mention helping to diminish the strategic threat of a more capable Soviet military.

9. See *infra* text accompanying notes 62-64.

10. See e.g., Overly, *Regulation of Critical Technologies Under the Export Administration Act of 1979 and Proposed Export Administration Amendments of 1983: American Business Versus National Security*, 10 N.C.J. INT'L L. & COM. REG. 423, 425 (1985) (discussing "the inherent conflict between protecting national security and promoting exports").

would call a pure political question—a question of either subjective value-choices or some kind of utilitarian groping for the “best” level of trade-offs.

I reject the zero-sum premise that lies behind much of the policy debate over export controls. One important part of the economic cost of export controls is *transaction costs*.¹¹ Transaction costs are those costs that result not from our substantive export policy but rather from inefficiencies in the system. Transaction costs include unnecessary paperwork and delays for exporters and the misallocation of scarce regulatory resources toward routine export transactions. If we reduce transactions costs, we can maintain present levels of national security protections and still reduce the net cost of exporting. And I believe that we *can* reduce the costs of export controls by making both our licensing process and the international export control structure more efficient.

In this paper I will look at the history of export controls and examine the most recent Congressional attempt to deal with them, while identifying certain recurring problems in export policy. I will then suggest some solutions to these recurring problems that would increase U.S. industrial competitiveness without diminishing our national security.

II. NATIONAL SECURITY, ECONOMIC PROSPERITY AND EXPORTS: THE EXPORT ADMINISTRATION ACT

In the 98th Congress (1983-84) “high technology” was a hot issue on Capitol Hill. Interest was high because many members of Congress perceived the expansion of high technology industries as a simple solution to unemployment and other economic problems. The economy was gaining momentum early in 1983, and it was already apparent that the economic recovery was somewhat uneven. High technology “sunrise” companies were flourishing while mature “smokestack” firms were experiencing little growth.¹² In the first few months of the 98th Congress, over 100 bills were introduced aimed at spurring growth in America’s technology industries. The most important issue affecting technology and trade was reauthorization of the Export Administration Act of 1979.¹³

11. I use the term “transactions costs” in its broadest sense, i.e., systemic inefficiency. This includes both out-of-pocket transaction costs to exporters and the systemic costs of the inefficient allocation of regulatory resources.

12. See *Trade Deficit Hearings*, *supra* note 5, at 146-47 (statement of Edson W. Spencer, Chairman and Chief Executive Officer, Honeywell, Inc.; Member, Business Roundtable Task Force on Trade and Investment).

13. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. §§ 2401-2420 (1982)).

The Export Administration Act ("EAA") contains the authority for the Department of Commerce to administer a system of export controls in order to protect our national security, advance U.S. foreign policy goals, and restrict exports of resources in short supply domestically.¹⁴ The Department of Commerce ("DOC") designates the goods and technologies that are to be controlled for those reasons and reviews applications for licenses that authorize permission to export these controlled products and technologies by U.S. companies.¹⁵ In the case of national security controls, the export license system attempts to strike a balance between preventing the transfer of militarily critical technologies to potential adversaries and facilitating other U.S. exports.¹⁶

Implementation of this balance has had mixed results. Licensing requirements and the burden of controls have continued to grow for both government and the exporting community. When Congress began to consider the reauthorization of the EAA in 1983, it was evident that American exporters were suffering from the increased costs of licensing and lost sales due to licensing delays. U.S. firms were characterized by their customers as unreliable suppliers because of the unpredictable and often arbitrary nature of export control decisions, especially in the area of foreign policy controls such as the Russian grain embargo or the equipment for the Soviet pipeline in Europe.¹⁷ Imposition of unilateral controls and attempts to extend U.S. law and control decisions extraterritorially and retroactively caused heightened tensions between this country and our allies in Europe and Japan.¹⁸

Finally, in spite of all these costs of the licensing system, sensitive technologies were still finding their way to the Soviet Union and the Eastern Bloc. According to testimony by Deputy Assistant Secretary Stephen Bryen before a Senate subcommittee, the Soviets were able to build a major semiconductor plant in the late 1970s only because they were able to acquire U.S. equipment and know-how.¹⁹ The Western export control system "was full of holes, it was porous, it was easy for them to get and they got it."²⁰ The semiconductor plant "has enabled

14. 50 U.S.C. app. §§ 2404-2406.

15. 50 U.S.C. app. § 2403; 15 C.F.R. §§ 370-399 (1985).

16. See 50 U.S.C. app. § 2402(1),(2)(A); see also *The Export Administration Act: Hearings Before the Subcommittee on International Economic Policy of the Senate Committee on Foreign Relations*, 98th Cong., 1st Sess. 1 (1983).

17. H.R. REP. NO. 257, 98th Cong., 2d Sess. 6-7 (1984).

18. *Id.* at 7.

19. *Transfer of High Technology to the Soviet Union and Soviet Bloc Nations; Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Affairs*, 97th Cong., 2d Sess. 259 (1982) (statement of Dr. Stephen D. Bryen, Deputy Assistant Secretary of Defense) [hereinafter cited as Statement of Dr. Bryen].

20. *Id.*

the Soviets to upgrade their military equipment."²¹ Such acquisitions have enabled the Soviets to narrow the microelectronics gap from ten to twelve years a decade ago to about four to six years today.

A. Previous Export Control Systems

Early U.S. export control policy emphasized national security considerations. Prior to 1969, and particularly during the Cold War period of the 1950s, economic gains from exporting were viewed as considerably less important than the need to protect national security.²² The first comprehensive export control system, established by the Export Control Act of 1949 ("ECA"),²³ resulted in a near total embargo of trade with Eastern Bloc nations. The Mutual Defense Assistance Control Act of 1951²⁴ stressed that exporting was a privilege which must be exercised within the boundaries imposed by defense considerations.

Soon after the enactment of the ECA, America began what I regard as an essential aspect of effective export control policy²⁵ — a multilateral process to coordinate export control decisions among the United States and its allies. The instrument of the multilateral process to coordinate export control decisions among the United States and its allies was then, and remains today, an inter-governmental apparatus called COCOM — Coordinating Committee on Export Controls. COCOM is an informal coordination effort, involving our NATO allies (except Iceland and Spain) and Japan, designed to control exports to protect the mutual security of the member nations.²⁶

The Mutual Defense Assistance Control Act,²⁷ also known as the Battle Act, was designed to back up the informal COCOM process with

21. *Id.*

22. See Overly, *supra* note 10, at 426-27.

23. Export Control Act of 1949, ch. 11, 63 Stat. 7.

24. Mutual Defense Assistance Control Act of 1951, ch. 575, 65 Stat. 644.

25. See *infra* text accompanying notes 112-17.

26. The origin of COCOM is veiled in secrecy, as is much of its present operation. It is not really even an organization in the sense of a body or institution separate from its member governments, but it does maintain a small permanent staff in Paris where member nations coordinate policy regarding controlled or potentially controlled goods and technologies. COCOM delegates meet regularly to decide individual requests from exporters in the member countries desiring to export controlled items to the Eastern Bloc and the People's Republic of China. Unless COCOM approval of a license request is granted, the export is prohibited. See generally Hunt, *Multilateral Cooperation in Export Controls—the Role of COCOM*, 14 TOLEDO L. REV. 1285 (1983). But the COCOM process includes no devices for monitoring compliance by member nations and no sanctions even when a member nation appears to be acting in bad faith. See Bingham & Johnson, *A Rational Approach to Export Controls*, 57 FOREIGN AFF. 894, 904-05 (1979) (describing use of COCOM controls by a member nation to gain an unfair export advantage).

27. Mutual Defense Assistance Control Act of 1951, ch. 575, 65 Stat. 644.

unilateral sanctions. Any country that allowed strategic materials to be shipped to a communist country was denied all U.S. aid.²⁸ Given the Marshall Plan and other massive U.S. aid programs, the economic hegemony of the United States over the free world was sufficient to make this provision effective for a number of years.

During the 1960s, especially late in that decade, export control policy underwent a significant moderation as closer relations developed with Soviet bloc countries. More importantly, recognition of the growing importance of trade to the U.S. economy led to a significant new emphasis on promoting exports. At the same time, the U.S. had lost much of the economic leverage that was essential for the Battle Act's comprehensive controls to be effective. The resurgent economies of Japan and our West European allies were beginning to rival the United States in product development and export markets. Because of geographic proximity, the natural tendency of these nations was to engage in trade with the East. This increased the strain on the international system of comprehensive restrictions. Moreover, a growing number U.S. firms were clamoring for relaxation of the barriers to export trading. Reacting to these new circumstances, the Congress moved in 1969 to revise U.S. export control policy.

B. Post Cold-War Policy: the Export Administration Act

The Export Administration Act of 1969²⁹ symbolized an attempt to achieve a new balance in export control policy—away from a restrictive and strategic embargo to the East toward a careful expansion of exports in the West. This policy was praised by the business community as being more realistic in light of the changing economic situation in Japan and Western Europe.

In order to implement this new policy, the Secretary of Commerce was authorized to undertake the organizational and procedural changes necessary to revise export control regulations and shorten the Commodity Control List³⁰ by removing items of purely economic or marginal military use; only goods and technologies that would make a significant military contribution to potential adversaries were to be subject to con-

28. *Id.* at § 103(b), 65 Stat. at 645.

29. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841.

30. In 1965 Commerce had integrated a number of disparate lists of controlled items into a comprehensive Commodity Control List ("CCL"). Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, 820 (1967). This was an important early step toward increasing the efficiency of the export licensing process without changing underlying policy. The CCL is now codified at 15 C.F.R. § 399.1 (1985).

trols.³¹ This was an important departure from past policy which had held trade hostage to so-called "economic warfare" objectives. Also, the EAA of 1969 included the first statutory provisions requiring that foreign availability be taken into account in national security decisions.³²

In addition to these changes that freed large categories of items for trade, Congress also authorized several measures to "open up" the licensing system and make the environment more conducive to exporting. Exporters were given the right to obtain information on the criteria used in reviewing license applications, to learn the reason for denials or delays in granting licenses, and to present evidence to support their applications in regulatory proceedings.³³ Finally, the administrative agencies responsible for export control were required to consult among themselves and with affected industries to obtain information and advice on the revision of the Commodity Control List.³⁴ Over the next decade, Congress made a number of important incremental changes to the EAA of 1969.

1. 1972 Amendments

The 1972 Equal Export Opportunity Act ("EEOA")³⁵ extended the reforms made in 1969 by focusing attention on the emerging factor of foreign availability. Obviously, if a good or technology is easily available to the Eastern Bloc from countries not in COCOM, export controls are ineffective. The foreign availability provisions of the EEOA were designed to allow U.S. exporters to compete with non-COCOM suppliers for the business of Eastern Bloc buyers of goods or technologies whose sale would otherwise be restricted. The provisions maintained the 1969 Act's exception for national security reasons.³⁶

31. Export Administration Act of 1969, Pub. L. No. 91-184, § 3(1), 83 Stat. 841, 841. In this Article I follow the convention of speaking of various items as "controlled" or "decontrolled." Actually, almost every good or technology is controlled in the sense that it is illegal to export without an export license. However, there are two general types of export licenses: validated and general. A general license is a broad permit to export certain kinds of products to certain locations; it is basically self-policing. A validated license, on the other hand, is usually reviewed carefully by the Office of Export Administration in the Commerce Department. Critical technologies normally require a validated license. Items or technologies that are said to be "controlled" are those that require validated licenses; "decontrolled" items are those requiring only a general license.

32. *Id.* at § 2(1), 4(b), 83 Stat. at 841, 842-43.

33. *Id.* at § 9, 83 Stat. at 846.

34. *Id.* at § 5(a), 83 Stat. at 843.

35. Equal Export Opportunity Act of 1972, Pub. L. No. 92-412, 86 Stat. 644.

36. Export Administration Act of 1969, Pub. L. No. 91-184, § 4(b), 83 Stat. 841, 842.

The EEOA also provided an aid to assessing foreign availability by the creation of various Technological Advisory Committees ("TACs") composed of representatives from relevant businesses.³⁷ The TACs were intended to enable the government to draw on and use the technical and commercial knowledge of private sector experts.

2. 1974 Amendments

Coming in the wake of the Arab oil embargo, the 1974 amendments³⁸ to the Export Administration Act dealt in large part with foreign policy rather than national security issues. Specifically, the changes in the 1974 Act established explicit Presidential authority for implementing export controls in response to foreign embargoes, either as retaliation for attempts at influencing U.S. policy, or in instances of short domestic supply.³⁹ The intent of Congress was to give the President authority to respond to foreign "economic warfare" in kind, to ensure an adequate supply of important commodities within the U.S., and to protect the domestic economy from the inflationary effects of excessive foreign demand.⁴⁰

The 1974 Act also signaled a growing awareness of the importance of restricting the export of militarily critical technologies. It provided the Department of Defense ("DOD") with statutory authority to review export license applications for exports to certain "controlled countries."⁴¹ Additionally, the so-called Jackson amendment formally extended to the DOD the right to review all exports to countries subject to economic sanctions for national security reasons.⁴² However, this measure only codified a practice which, for the most part, had already existed.

3. 1977 Amendments

Reauthorization of the EAA was undertaken again in 1977,⁴³ and a set of amendments was also enacted that year.⁴⁴ The emphasis on

37. Equal Export Opportunity Act of 1972, Pub. L. No. 92-412, § 105, 86 Stat. 644, 645.

38. Export Administration Amendments of 1974, Pub. L. No. 93-500, 88 Stat. 1552.

39. *Id.* at § 11, 88 Stat. at 1556.

40. S. REP. NO. 1024, 93d Cong., 2d Sess. 2, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6234, 6235.

41. Export Administration Amendments of 1974, Pub. L. No. 93-500, § 9, 88 Stat. 1552, 1555; S. REP. NO. 1024, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6234, 6241-42.

42. Export Administration Amendments of 1974, Pub. L. No. 93-500, § 9, 88 Stat. 1552, 1555.

43. Act of Dec. 28, 1977, Pub. L. No. 95-223, tit. III, 91 Stat. 1625, 1629.

44. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235.

expanding trade continued and an attempt was made to shift the review process away from its distinctly anti-communist bias and toward a more subtle standard based on the status of existing political relations. To implement this policy, a matrix of countries and products was created based upon a particular nation's perceived relationship to the United States rather than on the communist or non-communist nature of its government.⁴⁵ Under this system, for example, Yugoslavia was allowed to receive more technologically advanced products and information than were other East European countries because of its greater independence from Soviet influence and less adversarial stance toward the United States. In 1981, China was also permitted to receive more sophisticated exports under this provision.

Further revision of short supply control authority was also made during the 1977 EAA review. In an attempt to provide greater energy security and protection for consumers, Congress adopted an amendment introduced by Congressman Stewart McKinney (R.-Conn.). This provision established specific criteria that had to be met before Alaskan North Slope oil could be exported.⁴⁶ Also, for the first time, companies engaging in the transfer of technological data were required to report their activities to the Department of Commerce.⁴⁷ More attention was given to the problem of foreign availability. Congress mandated that restrictions be removed from items which were readily available from foreign sources.⁴⁸

However, the escape clause for instances in which the absence of controls could prove detrimental to national security once again undermined the attempts to deal effectively with this issue.⁴⁹ Likewise,

45. The Export Administration Amendments of 1977 amended the Export Administration Act of 1969 to read:

In administering export controls for national security purposes . . . 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 to the United States, its present and potential relationship to countries friendly or hostile to the United States, its ability and willingness to control re-transfers of United States exports in accordance with United States policy, and such other factors as the President may deem appropriate.

Export Administration Amendments of 1977, Pub. L. No. 95-52, § 103(a)(3), 91 Stat. 235, 236 (amending 50 U.S.C. app. § 2403(b)(2)(A)).

46. Export Administration Amendments of 1977, Pub. L. No. 95-52, § 108, 91 Stat. 235, 239. The McKinney amendment signaled an intention to safeguard crucial domestic supplies for American use, and set a precedent for statutorily mandated export controls on specific products in time of short supply. This was a significant new addition to the limitations that had already been placed on Presidential discretion.

47. Export Administration Amendments of 1977, Pub. L. No. 95-52, § 103(a)(3), 91 Stat. 235, 236.

48. *Id.*

49. See Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L. REV. 739, 777-94 (1981).

attempts to streamline the licensing process and cut down on processing time were largely unsuccessful.⁵⁰ The control list grew as new technologies developed, but older items were not removed from the list.

C. The Export Administration Act of 1979: The Advent of the Critical Technologies Approach to Export Control

The Export Administration Act of 1979⁵¹ continued the emphasis on promoting trade. The Act declared that export controls should only be imposed "to the extent necessary . . . to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States."⁵²

The EAA of 1979 introduced the concept of "critical technologies" into the law for the first time. The critical technologies approach, which grew out of the famous Bucy Report of 1976,⁵³ focuses on controlling the export of dual-use technologies rather than end products.⁵⁴ The EAA of 1979 required that a Militarily Critical Technologies List ("MCTL") be developed by DOD and used by Commerce in the export control process.⁵⁵ The MCTL was partially published in 1980,⁵⁶ but was never

50. H.R. REP. NO. 200, 96th Cong., 1st Sess. 3-4 (1979). The number of export license applications received by the Department of Commerce has been increasing at the rate of about 20% per year—from 54,000 in 1977, to 65,000 in 1978, and to a rate of 77,000 in 1979. Meanwhile, the number of applications requiring more time to process than the 90 days envisioned in the law was growing faster: from 689 in 1976 to 1,032 in 1977, a 50% increase; and to 1,988 in 1978, nearly a 100% increase. Less than one-half of one percent of all applications received in 1978 were rejected. *Id.* at 4.

51. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. §§ 2401-2420 (1982)).

52. *See id.*, 50 U.S.C. app. § 2402(2) (1982).

53. DEFENSE SCIENCE BOARD TASK FORCE ON EXPORT OF U.S. TECHNOLOGY, ANALYSIS OF EXPORT CONTROL OF U.S. TECHNOLOGY — A DOD PERSPECTIVE (1976) reprinted in *Transfer of Technology and the Dresser Industries Export Licensing Actions: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 33-89 (1978) (the task force was chaired by J. Fred Bucy of Texas Instruments, Inc.).

54. There are significant advantages to the critical technologies approach. Commerce must focus on the the export of technological ability itself—so-called "know-how"—rather than merely goods that result from American know-how. Exporting products benefits our economy, while exporting know-how is the sale of future production capability. Product sales make the buyer more dependent on the exporter; sales of technology give the buyer the ability to make the products for itself. For dual-use products and technologies, the critical technologies approach is an important way to emphasize exports while protecting our national security. *See Overly, supra* note 10, at 426-33; *see also Note, National Security Protection: The Critical Technologies Approach to U.S. Export Control of High-Level Technology*, 15 J. INT'L L. & ECON. 575, 583-88 (1981).

55. *See* 50 U.S.C. app. § 2404(d).

56. 45 Fed. Reg. 65,015 (1980).

integrated into the Commodity Control List as directed by the 1979 Act.⁵⁷

Also, in an attempt to increase the significance of the foreign availability concept, Congress mandated that items which were determined to be available in comparable quality and sufficient quantity from foreign sources be removed from unilateral control lists unless the President determined that such decontrol would prove detrimental to American foreign policy.⁵⁸ Earlier foreign availability provisions applied only to controls implemented for national security reasons.⁵⁹ This measure reaffirmed the desire of Congress for a policy based on more multilateral cooperation and fewer unilateral restrictions. Also, national security exceptions to determinations of foreign availability were limited.⁶⁰ However, this provision in practice did not result in fewer unilateral controls because the loophole of waiving the decontrol requirement on security grounds was used liberally. The foreign availability problem remained.

D. Reauthorization of the 1979 EAA in the 98th Congress

1. *Export Control Issues Facing Congress*

In 1983, there was a clear consensus in Congress to strengthen U.S. defense and to maintain U.S. leadership in international high technology markets. Since export policy is to some extent made up of calculated trade-offs between these two relatively uncontroversial goals, the problem of deciding the correct level of trade-off dominated the debate as the review and revision of the EAA began in the 98th Congress.

By the early 1980s, it was clear that the United States had become a nation among equals in producing advanced technology.⁶¹ The new reality of global competition meant that U.S. companies had to find new and better ways to sell abroad. Many fingers pointed at Washington and national security controls as an unnecessarily heavy burden on U.S. exporters. One element of this disadvantage that was documented by Bain & Company for the President's Commission on Industrial Competitiveness ("PCIC") summed up the problem of American high technology

57. The Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 106(a)(2), 99 Stat. 120, 128-29 (amending 50 U.S.C. app. § 2404(d)), amended the procedures for integrating the two lists. The Act requires that a foreign availability test be applied to items restricted by the MCTL before it is integrated into the CCL. As of this writing, parts of the MCTL remain classified, and the lists still have not been integrated.

58. 50 U.S.C. app. § 2403(c).

59. For an analysis of the 1979 EAA's recognition of the distinction between national security and foreign policy goals, see Abbot, *supra* note 49, at 858-62.

60. 50 U.S.C. app. § 2404(f).

61. See OFFICE OF TECHNOLOGY ASSESSMENT, INTERNATIONAL COMPETITIVENESS IN ELECTRONICS 5, 55 (Nov. 1983).

companies. The study found that applications for controlled exports to other free world countries from France, the United Kingdom, Canada, Japan, Switzerland and Austria were processed by those governments in about one week. The average processing time in the United States took four weeks.⁶² Cases exceeding four weeks were not uncommon, and several cases brought to my attention had exceeded four months in processing time.⁶³ U.S. companies were losing sales because of the export licensing delays even when the American products were superior in price and quality. The PCIC estimated that the delays cost U.S. companies \$7.6 billion annually,⁶⁴ which translates into 190,000 jobs.⁶⁵

Despite this enormous cost to our economy, the export control system was not adequately protecting national security. Technological advance in Western market economies has significantly exceeded that of the Soviet Union. In response, the Soviet Union has developed a technology acquisition strategy that is coordinated at the highest levels of government.⁶⁶ In an unclassified report the Central Intelligence Agency claims that the Soviet Union is pursuing a "massive, well-planned, well-managed" campaign to obtain U.S. technology.⁶⁷ Soviet military decisionmakers work to acquire such technology for military purposes through legal and illegal channels.⁶⁸ The Soviet Union and its Warsaw pact allies "have obtained vast amounts of militarily significant Western technology and equipment."⁶⁹ Defense Department officials have warned that the U.S. now risks "losing the quality edge on which our structure of national defense and alliance depends" as a result of technology transfers.⁷⁰ A recent DOD report indicates that successful exploitation of Western technology can save Warsaw Pact nations billions of

62. 1 PRESIDENT'S COMMISSION ON INDUSTRIAL COMPETITIVENESS, GLOBAL COMPETITION: THE NEW REALITY 40 (Jan. 1985).

63. It would be inappropriate for me to give specific examples of the problem since casework conducted by my office on behalf of constituents is confidential. However, during 1983 and 1984, at any one time my office was usually pursuing 10 or more active cases with the Department of Commerce and the Department of Defense involving inordinate delays in export license application processing.

64. PRESIDENT'S COMMISSION ON INDUSTRIAL COMPETITIVENESS, *supra* note 62, at 40.

65. *See supra* note 5 and accompanying text.

66. *See* ASSESSING TECHNOLOGY TRANSFER, *supra* note 8, at E-1.

67. *See* CENTRAL INTELLIGENCE AGENCY REPORT, SOVIET ACQUISITION OF WESTERN TECHNOLOGY 1 (Apr. 1982), reprinted in *Transfer of United States High Technology to the Soviet Union and the Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 7-23 (1982)* [hereinafter cited as CIA REPORT].

68. *Id.* *See generally* Note, *Soviet Diversion of United States Technology: The Circumvention of COCOM and United States Reexport Controls, and Proposed Solutions*, 7 FORDHAM INT'L L.J. 561, 561-67 (1984).

69. CIA REPORT, *supra* note 67, at 1.

70. Statement of Dr. Bryen, *supra* note 19, at 260.

dollars on weapons, drastically reduce weapon development times, increase their defense industrial productivity, and allow quicker responses to Western weapons and tactics.⁷¹

2. *Policy Approaches of the 98th Congress*

Mindful of both the economic and national security costs of an inefficient export control system, both the House and the Senate began comprehensive revisions of the EAA in early 1983. As a participant on the House side, I argued that the objectives of achieving greater security and expanding exports were not necessarily in conflict as the conventional wisdom had assumed. Instead, I suggested that we focus export controls on truly militarily critical technology and streamline the licensing procedures to eliminate needless review and delay; this would allow the U.S. to both control better and export better. For example, by not requiring validated licenses for routinely approved applications, licensing officials could process the remaining applications faster and devote more attention and care to examining them.

It soon became clear that the EAA debate in 1983-84 would center on three questions about export control policy: (1) should special expedited procedures be given for exports to our allies, particularly COCOM member countries?; (2) what was the best mechanism for making realistic foreign availability determinations and decontrolling products that were found to be available?; and (3) what should be the role of the Department of Defense in reviewing export license applications?

3. *House and Senate Versions of EAA Reauthorizations*

Committee action on the EAA reauthorization began shortly after the 98th Congress convened. The Senate Committee on Banking, Housing, and Urban Affairs reported S. 979 in May of 1983 and the House Foreign Affairs Committee reported its version H.R. 3231 soon after.

The two bills differed significantly in philosophy and objectives. The Senate bill generally followed the recommendations of the Department of Defense. In particular, it expanded the control list to include the Militarily Critical Technologies List—a list of controlled technologies that the 1979 Act required the DOD to develop.⁷² In addition, the authority given to the Defense Department under section 10(g) of the Act⁷³ was expanded to permit for the first time DOD review of applications for licenses to export to free world destinations. DOD review authority

71. See generally *ASSESSING TECHNOLOGY TRANSFER*, *supra* note 8.

72. See 50 U.S.C. app. § 2404(d); see *supra* notes 55-57 and accompanying text.

73. 50 U.S.C. app. § 2409(g).

provided by the 1979 Act had been interpreted for operational purposes to allow Defense to review only applications to the Eastern Bloc. However, DOD officials had argued that the intent of the provision also included authority to review proposed exports to the free world. DOD sought and received in the Senate bill explicit authority to review free world license applications.⁷⁴

The House bill took the approach of streamlining the procedures. For example, the House bill proposed lifting export controls to COCOM countries, except for exports to end-users suspected of diverting technology to the Eastern Bloc.⁷⁵ This proposal was based on the fact that 99.9% of the license applications for COCOM shipments in fiscal year 1982 were routinely approved. Licenses that were disapproved were usually for shipments to customers suspected of diversion.⁷⁶ Therefore, this provision would have had the effect of eliminating needless licensing while retaining controls when needed.

In the case of exports to non-COCOM countries, the House bill provided that a product or technology would be decontrolled if the U.S. government found that such a product or technology was available to the Eastern Bloc in "significant quality and sufficient quantity so as to render the controls ineffective in achieving their purposes." A six month "window," which could be extended to eighteen months, was included to permit our government to try to eliminate the foreign availability by negotiating with the government of the country from which the availability originated.⁷⁷ This provision recognized that it makes little sense to try to control technology when the same technology is already available to the Eastern Bloc.⁷⁸

A major change to the bill was proposed on the House floor when the bill was being considered on October 18, 1983. Representatives Toby Roth (R.-Wis.) and Earl Hutto (D.-Fla.) offered an amendment to strike the provision that lifted all controls from exports to COCOM countries and replace it with language lifting controls for only "low

74. See S. 979, 98th Cong., 1st Sess., § 8(5), 130 CONG. REC. 2252, 2255 (daily ed. Mar. 2, 1983).

75. See H.R. 3231, 98th Cong., 1st Sess., § 106(b), 129 CONG. REC. H7698, H7699 (daily ed. Sept. 29, 1983).

76. Letter to author from Hon. Lionel Olmer, Undersecretary of Commerce for International Trade (July 19, 1983) (copy on file at *High Technology Law Journal*).

77. See H.R. 3231, 98th Cong., 1st Sess., § 108(a), 129 CONG. REC. H7698, H7700 (daily ed. Sept. 29, 1983).

78. In some limited circumstances foreign policy controls have important symbolic value and are worth imposing despite foreign availability. Current sanctions against South Africa are an example. See Abbot, *supra* note 49, at 822-26, for a collection of past examples of symbolic controls and citations to Congressional approval of such symbolic actions.

level" technology but for all free world countries rather than just COCOM members.⁷⁹ Congressman Roth argued that his amendment would shrink the number of export license applications by U.S. exporters by one-third, which would be an excellent result. However, it was my judgment that the original provision to decontrol all exports to reliable COCOM destinations would place the House in a better position to negotiate with the Senate over its provision to tighten export controls.

Although the Roth amendment passed by a vote of 239-171,⁸⁰ it was defeated 223-188 on a revote.⁸¹ Fifty one House Members changed their vote, thus restoring the original language decontrolling all exports to reliable COCOM destinations. I believe that this reversal was a critical factor in giving the House a strong negotiating hand in conference with the Senate. The House passed H.R. 3231 on October 27,⁸² and the Senate finally passed its version of the EAA amendments in March, 1984.⁸³

4. *EAA Reauthorization in the Waning Days of the 98th Congress: The House-Senate Conference*

The House-Senate conference to reconcile the two versions began on April 12, 1984. Usually, House-Senate conferences are completed in one or two meetings over the course of a few days. In this case, however, the conference consisted of fourteen days of formal meetings and dozens of informal meetings over the course of six months.

The conference saw several hard-fought battles over the provisions in the Senate bill amending section 10(g), the House amendment to section 5 regarding foreign availability, and the provisions decontrolling most exports to COCOM countries. In addition, an unrelated provision dealing with sanctions against South Africa, added to the House bill on the floor,⁸⁴ became a source of considerable debate for the House-Senate conference.

The Senate conferees argued very effectively for tighter controls and greater DOD involvement in the licensing process. On several occasions, a majority of conferees on the House side seemed ready to accept a compromise change to section 10(g) which would have given the DOD more authority than under current law. I opposed the compromise and

79. See 129 CONG. REC. H8259-62 (daily ed. Oct. 18, 1983).

80. *Id.* at H8282.

81. 129 CONG. REC. H8764 (daily ed. Oct. 27, 1983).

82. *Id.* at H8766.

83. See S. 979, 98th Cong., 1st Sess., 130 CONG. REC. S2143 (daily ed. Mar. 1, 1984). The text of the bill is printed at 130 CONG. REC. S2252 (daily ed. Mar. 2, 1984).

84. 129 CONG. REC. H8739, H8759 (daily ed. Oct. 27, 1983).

argued that any increase in statutory authority for the Department of Defense would be a major step backward both for exporters and national security. It was my strong belief that DOD's involvement in licensing decisions had not improved the quality of those decisions but had increased the licensing delays.⁸⁵

As the 98th Congress worked toward adjournment, the conferees faced increasing pressure to reach a compromise in order to get a bill passed in both Houses and sent to the President. By late September, private sector lobbyists and pressure from technology companies in Members' districts had stiffened the resolve among the House conferees to resist the section 10(g) amendments. The consensus on the House side was that no bill at all was better than a bill giving greater authority to the Defense Department.

The Senate conferees, in an effort to work out a suitable compromise, accepted a bill containing no new authority for DOD in section 10(g) so long as the House provisions concerning South Africa⁸⁶ were also deleted. In addition, the compromise proposal retained the House foreign availability provision and a modified Roth/Hutto amendment decontrolling "low technology" exports to COCOM member countries.⁸⁷ Also, a provision was added requiring that a COCOM export license be approved or denied with fifteen working days.⁸⁸ In exchange for Senate acceptance of these provisions, the House conferees accepted a Senate provision shifting enforcement authority from the Commerce Department to the Customs Service.⁸⁹ Commerce strongly objected to this change, but it had little effect on export license application processing.

Although the Conference Report with these provisions was accepted by the Senate,⁹⁰ it was rejected on the House floor because of the removal of sanctions against South Africa.⁹¹ As a result, no final bill emerged as the 98th Congress adjourned.

E. EAA Reauthorization in the 99th Congress

After spending nearly two years working on a complex and controversial piece of legislation, Members of the 99th Congress were not eager again to start from scratch on EAA reauthorization. Instead, the leadership on the House and Senate committees decided that provisions

85. See *infra* text accompanying notes 97-102.

86. *Supra* note 84 and accompanying text.

87. See 130 CONG. REC. S14,077 (daily ed. Oct. 10, 1984).

88. *Id.*

89. H.R. 4230, 98th Cong., 2d Sess. § 123(2)(A), 130 CONG. REC. H12,126 (daily ed. Oct. 11, 1984).

90. 130 CONG. REC. S14,083 (daily ed. Oct. 10, 1984).

91. 130 CONG. REC. H12,169 (daily ed. Oct. 11, 1984).

relating to South Africa would be considered in separate legislation, thus permitting the version of the bill that had otherwise been acceptable in October 1984 to be considered again.

Virtually identical bills passed each House with little debate in committee or in the House and Senate chambers. The Senate passed S. 883 on April 3⁹² and the House passed H.R. 1786 on April 16, 1985.⁹³ House-Senate conferees reached a compromise on technical differences between the bills, and the resulting bill passed each House on June 27, 1985.⁹⁴ The bill was presented to the President on July 2, 1985, and signed into law on July 12, 1985.⁹⁵

III. BEYOND THE EXPORT ADMINISTRATION AMENDMENTS ACT OF 1985: SOME RECOMMENDATIONS

While the issues of foreign availability, licenses for exports to COCOM member nations, and the role of the Department of Defense were once again formally resolved in the new law, these issues are far from settled. Much more needs to be done to improve the statutory framework of the export control system.⁹⁶ I believe we can build an even better system based on more realistic foreign availability determinations and greater emphasis on multilateral international export controls. Also, we must take a more realistic look at the performance of DOD in this area.

92. S. 883, 99th Cong., 1st Sess., 131 CONG. REC. S3996 (daily ed. Apr. 3, 1985).

93. H.R. 1786, 99th Cong., 1st Sess., 131 CONG. REC. H1991, H2016 (daily ed. Apr. 16, 1985).

94. See 131 CONG. REC. H5063, S8927 (daily ed. June 27, 1985).

95. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120.

96. While the 1985 Act makes some improvements in the export licensing process, *infra* text accompanying notes 105-06, administrative changes in the Departments of Commerce and Defense have had a much more beneficial impact on exports than the amendments to the statute. Some of the administrative improvements include a complete reorganization of DOC's Office of Export Administration ("OEA"), improvements in automating the licensing system, and the creation of a China Team Center in the OEA to process export applications to the People's Republic of China.

As a result, processing times for free world license applications have been greatly reduced. In the second quarter of fiscal 1984, only 20% of such cases were approved within 20 days. In the fourth quarter of fiscal year 1985, the figure increased to 78%! The average processing time of East-West export applications at the Department of Defense has decreased from 52 days to 16 days over the past two years. Statement of William T. Archey, Acting Assistant Secretary for Trade Administration during a hearing before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 99th Cong., 1st Sess. (Oct. 10, 1985) [hereinafter cited as Statement of William Archey].

A. Defense Department Participation in Export Regulation

The basic assumption behind the idea that DOD should jointly review certain applications with Commerce is that DOD has expert personnel and intelligence information that gives Defense greater insight into potential diversion problems. Although that assumption makes sense in theory, we need to make sure it holds in practice. DOD should have review authority only if it can be demonstrated that the analysis of license applications by DOD results in denial of applications that Commerce would have otherwise approved. Based on evidence gathered by the House Subcommittee on International Economic Policy and Trade and my own investigations, I believe that it has not been demonstrated that DOD review of exports to free world destinations adds to our nation's security.

Between 1979 and 1985, the Department of Defense reviewed 1,500 to 2,500 applications per year for proposed exports to the Eastern Bloc and the People's Republic of China. Under an informal arrangement with the Commerce Department, Defense was also reviewing applications for exports of very high speed computers destined for free world countries. During the debate over the 1985 Amendments, my own investigation of past licensing practice failed to turn up any examples of applications that had been approved by Commerce but rejected by Defense. Although DOD involvement did not appear to improve the quality of decisions, it certainly affected their timing. For example, licenses referred to Defense for review in 1983 were delayed an average of fifty two days.⁹⁷

While no changes were made in the 1985 Act regarding the authority given to Defense, the President has directed DOD by executive order to share responsibilities with the Commerce Department for reviewing applications for certain exports to up to fifteen free world countries.⁹⁸ Again, the assumption behind the directive was the same one that the Senate relied on in insisting upon a greater role for DOD: its personnel and intelligence gathering capability could identify potential sources of diversion that Commerce would overlook.

Since the new procedures took effect, hearings have been held before the House Subcommittee on International Economic Policy and

97. Statement of Dr. Stephen Bryen, Deputy Undersecretary of Defense, during a hearing before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 99th Cong., 1st Sess. (Nov. 6, 1985).

98. In March 1985, the President issued an order spelling out the responsibility of the two agencies. The order is classified, but its existence was made public. White House Press Release, Mar. 23, 1985.

Trade to determine how effective the DOD-DOC arrangement is.⁹⁹ At an April 1985 hearing, representatives of both agencies indicated that Defense had by then reviewed about 2,500 applications under the new system for free world exports.¹⁰⁰ I questioned the witnesses about whether any case had been found in which Defense had identified a potential diversion that caused an application to be denied that otherwise would have been approved. Both representatives said no.¹⁰¹ Later, in October 1985, a second hearing was held with a Commerce Department representative testifying. I questioned him about this issue again. He stated that by then DOD had reviewed over 10,000 applications and in only one case did Defense provide information to Commerce that caused a denial of a license that might otherwise have been granted. Interestingly, he also stated that during the same period DOD had recommended approval of forty five license applications that Commerce subsequently denied.¹⁰²

Clearly, the role of the Department of Defense in reviewing applications for exports to the free world is almost completely redundant. However, exporters pay the price of licensing delays, as the DOD review can add as much as four weeks to processing time. Therefore, Congress is still confronted with weighing the impact of delays on the competitive position of U.S. exporters against the value of DOD review that provides the same result as the Commerce Department in over 99.99% of the free world applications. I believe that DOD participation in export licensing should be limited to reviewing applications for proposed exports to Soviet-bloc countries.

B. Foreign Availability: The Reality of World Markets

The export controls do not safeguard national security if a foreign country can obtain comparable goods or technology from a country other than the U.S. When the U.S. restricts the export of goods and technology freely available from foreign sources, the export restrictions simply transfer economic opportunity and jobs from the U.S. to other countries without achieving any national security objectives.¹⁰³

99. The Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs has held hearings on the Defense-Commerce arrangement on April 23, October 10, and November 6, 1985, and April 10, 1986.

100. See statements of William T. Archey, Acting Assistant Secretary for Trade Administration, and Dr. Stephen Bryen, Deputy Undersecretary of Defense, during a hearing before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 99th Cong., 1st Sess. (Apr. 23, 1985).

101. *Id.*

102. Statement of William Archey, *supra* note 96.

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

Therefore, it is crucial that the United States government make fast and realistic foreign availability determinations so that the availability can be eliminated or the good or technology decontrolled.

The Export Administration Amendments Act of 1985 is only the latest part of a long process increasing the importance of the foreign availability concept.¹⁰⁴ The 1985 Act made some progress towards speeding up the process by shortening some time limits¹⁰⁵ and establishing the Office of Foreign Availability,¹⁰⁶ but Congress must do more to guide and limit the President's wide discretion in making and vetoing foreign availability determinations. Presidential discretion is necessary only when responding to unusual events on the international scene.

The structure of the EAA¹⁰⁷ allows the President and the Secretary of Commerce wide discretion to determine and act on foreign availability.¹⁰⁸ The standard that governs the determination of foreign availability by Commerce is whether the good or technology is available from foreign sources in "sufficient quantity and comparable quality."¹⁰⁹ Not only is this "standard" extremely vague, it does not even assign the significant risks of uncertainty by burdens of proof or persuasion. When uncertainty is as high as in foreign availability determinations, the result is that the decisionmaker has wide discretion. For example, if Commerce requires a high degree of proof of foreign availability for certain

104. See *supra* text accompanying notes 32, 35-37, 48-49, 58-60.

105. See, e.g., Export Administration Amendments Act of 1985, Pub. L. No. 99-64, §§ 107(b), 111(a), 99 Stat. 120, 129, 142 (amending 50 U.S.C. app. §§ 2404(f)(3), 2409).

106. *Id.* at § 107(d), 99 Stat. at 130 (amending 50 U.S.C. app. § 2404(f)(5)).

107. The EAA requires foreign availability determinations to proceed in two stages. First, it requires a thorough assessment of foreign availability of comparable goods and technologies by DOC in consultation with DOD and the appropriate Technical Advisory Committee. See 50 U.S.C. app. § 2404(f)(1). If the Secretary of Commerce determines that the good or technology is available from sources outside the U.S. in "sufficient quantity and comparable quality" such that a validated license would be ineffective in stopping an unfriendly nation from obtaining the restricted item, a validated license cannot be required for the item. See *id.* Second, the President may override the DOC's determination and require a validated license if he or she determines that decontrolling the good or technology would be detrimental to national security. See *id.* If the President authorizes export controls despite foreign availability based on a "finding" of detriment to national security, he or she must initiate negotiations with foreign governments to eliminate such availability. See 50 U.S.C. app. § 2404(f)(4). If after six months the foreign availability has not been eliminated, the validated license requirement must be suspended unless the President certifies to Congress that negotiations are progressing and that the absence of export controls would be detrimental to national security. See *id.*

108. See Note, *The Regulation of Technical Data Under the Arms Export Control Act of 1976 and The Export Administration Act of 1979: A Matter of Executive Discretion*, 6 B.C. INT'L & COMP. L. REV. 169, 193-96 (1983) (analyzing tremendous amount of Presidential discretion in export control statutes).

109. 50 U.S.C. app. § 2404(f)(1).

controlled items, few findings of foreign availability will be reached. On the other hand, if Commerce uses a lower standard in other cases, more licenses will be granted. This kind of discretion tends to weaken the idea of foreign availability as a factual question. Instead, foreign availability "findings" are inevitably imbued with tacit policy decisions.

In addition, the President has discretion to impose restrictions on exports for national security reasons *even if* Commerce has determined that the good or technology is available from foreign sources.¹¹⁰ In the face of rapidly changing international events the President's "veto" power may be necessary to protect national security, but in run-of-the-mill foreign availability cases it undermines the fact-based determinations required by the Act. When the President has exercised his discretion to implement export controls on several occasions to safeguard national security the effects of such actions on U.S. business have been overlooked entirely or regarded as insignificant. We need to create a statutory framework that grants discretion to the President to override the fact of foreign availability only in unusual circumstances.

The EAA as a whole may be too optimistic about our ability to deprive an adversary of technologies and goods, even when those goods or technologies are not widely available.¹¹¹ When critical items are difficult to obtain from other sources and the national security stakes are high, however, the chance of success is enough to justify strict controls. But when goods or technologies are widely available, the invocation of "national security" as the grounds for denying U.S. exports has a hollow ring. If the items really are available from other sources, "national security" limitations do nothing for our security while making our exporters and our entire economy pay the price. That is why it is critical that we find a way to limit Presidential discretion in this realm and turn toward a regime of *factual* determinations of foreign availability.

C. Decontrol to COCOM Countries: Linking Export Controls to International Agreements

The 1985 amendments decontrol "low technology" exports to the COCOM countries.¹¹² This is a significant step forward in U.S. export policy toward low technology products, but more important, it represents an important underlying trend in export policy.

110. See 50 U.S.C. app. § 2404(f)(4).

111. See Abbott, *supra* note 49, at 800-19 (analysis of unilateral and even multilateral trade embargoes (e.g., international embargo of Rhodesia) shows that such embargoes have been substantially ineffective).

112. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 105(b)(2), 99 Stat. 120, 124 (amending 50 U.S.C. app. 2404(b)).

Prior to 1985, the U.S. relied primarily on the burdensome validated license system to prevent diversion of sensitive goods from COCOM countries to communist countries by unscrupulous buyers. Under the new law, the U.S. will rely more on a system of export controls administered by our COCOM allies to prevent diversion. The decontrol of these products was made feasible by an accord reached with the COCOM countries which requires them to tighten their export controls on such "low" technology products as personal computers and minicomputers. U.S. exporters can sell to COCOM buyers without concern for diversion because COCOM buyers will not be able to export the goods to the Eastern Bloc without the scrutiny of the host COCOM country.

I believe that the U.S. should expand the role of international cooperation in regulating the flow of technology. Our objective should be to create a Western free-trade community where no export controls exist between agreeing countries but extremely rigorous controls are placed on products exported out of the community. We can begin by negotiating new agreements with the COCOM countries which require them to tighten their export controls on other products. Then, we should expand this process to include negotiations with non-COCOM countries so that exports to these countries may also be decontrolled.¹¹³ The U.S. can expedite this process by providing inducements to our allies in the form of concessions on other trade issues.¹¹⁴

Coordination with our allies will also provide superior protection against diversion by making it more difficult to circumvent our export controls. Without a coordinated system, unscrupulous buyers in friendly countries that receive controlled items because they are not *suspected* of diversion can still divert without violating the export laws of the host country. U.S. trade regulators are a long way, both spatially and temporally, from future diversions. Cooperative international regulations make every shipment of equipment across international borders subject to on-the-spot review and decision by local authorities instead of depending on hard-to-enforce domestic re-export controls. Cooperative international export controls also help eliminate the tensions caused by extraterritorial applications of U.S. export laws.¹¹⁵

113. The 1985 amendments provide that all exports to countries agreeing to maintain export restrictions comparable to the COCOM countries will receive similar export treatment. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 105(h)(2), 99 Stat. 120, 126-27 (amending 50 U.S.C. app. § 2404(k)).

114. For example, in cases where the U.S. proposes higher export controls than our allies currently impose, we may induce them to raise their export controls by agreeing to lower our import duties on selected products or provide specific foreign aid or accept more NATO costs.

115. See *supra* note 18 and accompanying text.

This approach is not without potential problems. The COCOM countries may not agree to implement the strict export controls which we propose because they may oppose our foreign policy goals (the Siberian pipeline fiasco comes to mind). Also, they may not agree with our determination of the proper level of export controls necessary to maintain Western security. The current COCOM control list, for instance, has far fewer controlled items than our Control List. Furthermore, if we institute a policy of relaxing export controls only in response to increased controls by our allies, our allies might be tempted to shield their economies from our exports by refusing to impose stricter controls. This would force increased costs and delays on U.S. manufacturers, thereby making our exporters less competitive.

Despite the potential for these kinds of complex problems, I believe that our best hope for increased economic prosperity and enhanced national security lies in international cooperation. At present, the U.S. enjoys only a small qualitative lead over foreign producers of some types of computer software and microprocessors.¹¹⁶ In other products Western Europe and Japan are capable of producing technology equal to or better than American technology. Recent Japanese advances in the development of super computers have ended a U.S. monopoly in high performance computers.¹¹⁷ These facts make it crucial that we increase cooperation with our allies in order to stem the flow of strategically important technologies to the Eastern Bloc. We must face and overcome international coordination problems by creating a free-trade community within the free world.

IV. CONCLUSION

Enforcement of national security controls on the export of U.S. technology will remain an important and necessary obligation of the government. Problems will arise in the effective implementation of controls, but no one can question the need for controls to prevent the Soviet bloc from obtaining critical technology. The EAA as amended in 1985 has settled many policy questions and provided an improved export control system that benefits both export-oriented businesses in the United States and our national security.

Nevertheless, we need to continue to critically examine current export policy. There are still many ways to improve on the system; I have outlined several above. We can increase our nation's industrial competitiveness in free world markets without decreasing national security by

116. INT'L TRADE ADMIN., U.S. DEPT OF COMMERCE, AN ASSESSMENT OF U.S. COMPETITIVENESS IN HIGH TECHNOLOGY INDUSTRIES 29 (1983).

117. *Big Japanese Gain in Computers Seen*, N.Y. Times, Feb. 13, 1984, at A1, col. 1.

diminishing the role of the Department of Defense in the licensing process and by making and accepting more realistic foreign availability determinations. And we can improve both our exporting ability and our national security by developing closer coordination of export regulations with all our free world allies.

In the long term, international coordination is necessary for maintaining export controls that really work. But more important, international cooperation in itself is the best way to maintain our national security. The threat of Soviet expansionism will diminish only when the free world stands together in economic strength and political freedom, ready to welcome all the peoples of the world oppressed by poverty and totalitarian regimes.

