

The Proposed Export Facilitation Act of 1990:  
Striking a New Balance for United States  
Business While Safeguarding National Security  
by Providing High Technology to the Emerging  
Democracies of Eastern Europe

I. INTRODUCTION

Since the beginning of the Cold War, the United States has restricted the export of high technology goods, both commercial<sup>1</sup> and military.<sup>2</sup> The purpose of the controls has been to limit the transfer of "dual use" technology to the Soviet Union and other Warsaw Pact nations,<sup>3</sup> who could potentially use the technology to their military advantage.<sup>4</sup> Historically, in formulating U.S. export control legislation

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1. This note will only be concerned with the first of three types of export controls. The first type governs "dual use" technologies which have commercial and potential military uses such as computer chips.

The first type regulates exports of high technology items in the commercial sector. Export Control Act of 1949, Ch. 11, 63 Stat. 7 (codified as amended at 50 U.S.C. app. §§ 2021-2032 (1964)(expired 1969)); Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (codified as amended at 50 U.S.C. app. §§ 2401-2413 (1976)(expired 1979)); Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. §§ 2401-2420 (1979)); amended by Export Administration Amendments Act of 1982, Pub. L. 97-145, 95 Stat. 1727; amended by Export Administration Amendments Act of 1985, Pub. L. 99-64, 99 Stat. 120; amended by Omnibus Trade and Competiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107.

2. The second type of export control regulates the export of arms and military technology. *See* Neutrality Act of 1939, Pub. L. 54-2, 54 Stat. 4, codified at 22 U.S.C. §§ 441- 457 (1939)(partially repealed 1954); Mutual Security Act of 1954, Chap. 937, 68 Stat. 832 (1954)(partially repealed in 1976); Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified as amended at 22 U.S.C. §§ 2751-2796 (1982)).

The third type of export control allows the President to exercise broad authority over U.S. exports during times of national emergency. *See* International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. at 1626 (1977)(codified at 50 U.S.C. §§ 1701-1702 (1982)).

3. *See generally* Murphy & Downey, *National Security, Foreign Policy and Individual Rights: The Quandary of U.S. Export Controls*, 30 INT'L & COMP. L.Q. 791, 792 (1981).

4. *See generally* Comment, *The Export Administration Act of 1979: Refining United States Export Control Machinery*, 4 B.C. INT'L & COMP. L. REV. 77 (1983). *See also* Murphy & Downey, *supra* note 3, at 792.

the Congress and the President have used a two part balancing test: national security concerns versus U.S. business interests.<sup>5</sup> The balance for over 40 years has been in favor of national security and to the detriment of U.S. business.

This balance has been shifting with the appearance of two new factors. First, a phenomenon known as foreign availability has been gradually eroding U.S. export controls. Goods that were previously only available from the U.S.,<sup>6</sup> are now available from other worldwide

5. The two part test is:

1. To increase exports from U.S. companies in order to provide jobs for Americans and reduce the trade deficit,

2. To protect U.S. security, particularly in technological areas, and to achieve certain foreign policy objectives.

In the past, the U.S. could more easily achieve both goals, because the U.S. was the undoubted technological leader in many fields. Although the U.S. still has the lead in some areas, the competition from Western Europe and Japan has equalled or surpassed the U.S. in a number of technologies. As a practical matter the United States frequently sacrifices the first objective yet fails to achieve the second one; it penalizes them from exporting goods or technology when the same or equivalent goods or technology are available from others.

Blair, *Export Controls on Nonmilitary Goods and Technology: Are We Penalizing the Soviets or Ourselves?*, 21 TEXAS INT'L L.J. 363, 367 (1986).

This paper will focus on national security controls. There are, however, four primary forms of export regulations under the EAA: (1) national security controls; (2) foreign policy controls; (3) short supply controls; (4) foreign boycott controls.

(1) 50 U.S.C. app. § 2404(a)(1)(1990)(the Export Administration Act [hereinafter EAA] empowers the President to forbid "the export of any goods or technology in the interests of national security"); Evrard, *The Export Administration Act of 1979: Analysis of its Major Provisions and Potential Impact on United States Exporters*, 12 CAL. W. INT'L L.J. 1, 28 (1982).

(2) 50 U.S.C. app. § 2405 (1990)(Foreign Policy Controls serve three purposes:

(a) They influence a nation to change behavior that the United States finds objectionable by imposing economic costs on the target of the controls; (b) punish a nation for such behavior by imposing costs; and (c) symbolically demonstrate displeasure with, or distance the United States from, a specific country or behavior by restricting U.S. exports); See Abbott, *Linking Trade to Political Goals: Foreign Export Controls in the 1970's and 1980's*, 65 MINN. L. REV. 739 (1981).

(3) 50 U.S.C. app. § 2406 (1990)(to avoid "excessive drain" of domestic goods and to reduce inflation caused by foreign demand).

(4) 50 U.S.C. app. § 2407 (1990) bars any U.S. person from joining boycotts against a friendly nation.

6. Blair, *supra* note 5, at 367.

sources helping to supplant a burgeoning U.S. trade deficit.<sup>7</sup> Thus, denial of export licenses by the Department of Commerce does not keep the technology out of the hands of the Soviet Union.<sup>8</sup> U.S. business, however, does lose a potential sale to foreign competitors, mainly Japanese and Western European, who have less stringent export regulations.

Second, the recent dramatic changes in Eastern Europe make a persuasive case for easing export restrictions to the Eastern Bloc.<sup>9</sup> The Soviet military threat has been reduced due to the movement of Poland, Hungary and Czechoslovakia towards democracy and market economies, the destruction of the Berlin Wall, and Soviet glasnost and perestroika.<sup>10</sup> Moreover, these emerging Eastern European democracies cannot succeed as stable, prosperous, market democracies without access to the technology that increasingly drives advanced Western countries.<sup>11</sup>

Because of recent changes in Eastern Europe and the advent of foreign availability, it is now necessary for Congress and the President to consider four factors rather than two when reformulating export control legislation that expired on September 30, 1990.<sup>12</sup> This note suggests that the four factors are the needs of: (1) the emerging Eastern

7. 136 CONG. REC. H3270 (daily ed. June 6, 1990)(statement of Rep. Slaughter)("trade deficit last year was \$108 billion, 95 percent of which was attributable to the manufacturing sector.")

8. Blair, *supra* note 5, at 367.

9. Besides providing high technology there is a tremendous need in Eastern Europe for hard currency. To keep these countries from falling back into Communist control the United States is providing financial aid. *See* Support for East European Democracy Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298-1324 (codified at 22 U.S.C. §§ 5401-5495 (1990)).

10. Changes in the Soviet Union and Eastern Europe over the past year—reduced military expenditures, military-to-civilian production conversion programs, the renunciation of the Brezhnev Doctrine, East-West arms control agreements, a reduced Soviet military presence overseas, the weakening or overthrow of communist rule, and the undermining of the Warsaw Treaty Organization as a cohesive military force indicate a diminution of the military threat posed by the Soviet Union to the West.

*The Reauthorization of the Export Administration Act: Hearings and Markup on H.R. 4653 Before the Subcomm. on Arms Control, International Security and Science, and International Economic Policy and Trade of the House Foreign Affairs Comm.*, 101st Cong., 2d. Sess., 106 (1990) (statement of Gary K. Bertsch and Martin J. Hillenbrand, Center for East-West Trade Policy, University of Georgia) [hereinafter *Reauthorization Hearings*].

11. 136 CONG. REC. H3283 (daily ed. June 6, 1990)(statement of Rep. Dicks).

12. 8 Int'l. Trade Rep. (BNA) 234 February 13, 1991. Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503 (1979) codified at 50 U.S.C. app. §§ 2401-2419 (1979); amended by Pub. L. 97-145, 95 Stat. 1727; amended by Pub. L. 99-64, 99 Stat. 120; amended by Pub. L. 100-418, 102 Stat. 1107.

European democracies for American technology; (2) American technology firms for new markets in Eastern Europe; (3) the United States not to be left far-behind as the West Europeans and Japanese sell technology with almost no restriction; and (4) the United States to defend itself against present and future adversaries.<sup>13</sup> However, under the present export control system these four needs can not be meet.

The present export control system consists of two types of controls: unilateral and multilateral. First, unilateral controls are controls imposed by the Department of Commerce upon U.S. business; these controls determine whether a U.S. company is allowed to ship their high technology products abroad. These regulations are in a complex statutory framework, embodied in the Export Administration Act of 1979 ("the Act or EAA of 1979"). Problems intentionally exist in the EAA that make it difficult, if not impossible, for U.S. exporters to export their high technology abroad.

Perhaps, the fundamental problem is jurisdiction over export controls. Under the EAA, jurisdiction is divided among the Department of Commerce and the Department of Defense. The conflicting goals of the two departments are at the heart of the debate over U.S. unilateral export controls. The Department of Defense raises concerns about the risks of having U.S. technology freely available on the world market while the Department of Commerce points out the adverse effects on U.S. business by denying them free access to world markets. Moreover, the Departments of Commerce, Defense and State have simultaneous jurisdiction<sup>14</sup> over the commodities, and often differ on whether the commodity to be exported poses a national security threat.<sup>15</sup> Thus, long delays are common even when licenses are granted.<sup>16</sup>

Second, multilateral controls were created when the U.S. and its allies formed the Coordinating Committee on Multilateral Controls

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13. Heritage Foundation Backgrounder, Controls Still Needed on High Technology Exports to the U.S.S.R., August 2, 1990. [hereinafter Heritage Foundation Backgrounder].

14. 50 U.S.C. app. § 2404(d)(1990).

15. 136 CONG. REC. H3275 (daily ed. June 6, 1990)(statement of Rep. Gejdenson)(he estimates that \$10-\$50 billion in export sales are lost due to "bureaucratic wrangling, infighting, and the inefficiencies . . . between the Department of Commerce, State Department, and Department of Defense [that] have created a three-headed monster that has put a stranglehold on American industry.")

16. 136 CONG. REC. H3272 (daily ed. June 6, 1990)(statement of Rep. Gejdenson)("It has taken 2 1/2 years, in one instance, just for the Department of State and the Department of Commerce to decide who was supposed to look at a license, never mind issuing one. At the same time, our competitors, the Germans and the Japanese do it in 4 days.")

(COCOM). COCOM members agree to impose controls, by unanimous vote, over exports to simultaneously deny the Soviet Union technology. This group is, however, on the verge of collapse. U.S. leadership has eroded by insistence on strict controls. COCOM member countries have been denied business opportunities because non-COCOM member countries have supplied the "dual use" item. Moreover, most COCOM members have consistently supported business interests over national security. Thus, most are in favor of loosening controls, with the U.S. being the sole opponent of looser controls. Because COCOM requires unanimous vote, the U.S. has been successful in keeping COCOM controls relatively tight. If COCOM collapses U.S. national security will be affected because the Soviet Union will have virtually free access to all "dual use" technology.

There is consensus among the Bush Administration, Congress and COCOM that the export control system needs to be loosened. The question is whether to loosen U.S. unilateral restrictions, COCOM multilateral restrictions or both. This question can be answered by analyzing the structure of the U.S. unilateral and COCOM multilateral controls in light of the previously suggested four-part balancing test.

Under the present system, if a U.S. company wants to export a "dual use" high technology product to the Eastern Bloc they must go through a three step licensing procedure. First, the license is sent to the Department of Commerce to determine commodity jurisdiction. Second, the Department of Commerce applies the U.S. Commodity Control List (the "Control List") and country group classification to determine licensing requirements. The Control List is a list of the regulatory status and procedures for export of particular commodities to specific groups of countries. Finally, the license application is sent to COCOM for approval.

The Bush Administration and Congress have two different schools of thought on how to satisfy the suggested four part balancing test within the structure of the EAA and COCOM. The Bush Administration prefers gradual decontrol of the U.S. unilateral export control system that has been in place for over 40 years.<sup>17</sup> Bush Administration proposals<sup>18</sup> to COCOM would modify only the third step in the licensing

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17. *Reauthorization Hearings, supra* note 10 at 534-35 (letter from Brent Scowcroft). See also *Reauthorization Hearings, supra* note 10, at 7. (statement of Richard Perle, President Fellow, American Enterprise Institute). It is argued that the export control system has contributed significantly to the collapse of the Soviet empire in Eastern Europe.

18. The White House, Office of the Press Secretary, Fact Sheet, Comprehensive U.S. Proposal for Modernizing COCOM, May 2, 1990.

process. This would occur through negotiation with our allies in COCOM<sup>19</sup> to reduce the number of commodities on COCOM Industrial Control List (the "Industrial List").<sup>20</sup> Commodities to be decontrolled would include "priority list" items such as computers, machine tools and telecommunications equipment. Thus, the Eastern European countries would probably be able to purchase the technology they require. The Bush Administration, prefers to leave the U.S. unilateral system intact, and therefore, seeks to extend the EAA for another year until COCOM negotiations are complete.<sup>21</sup>

Congress, however, is concerned that multilateral negotiations with COCOM will be extremely slow and complex due to the unanimous vote requirement, previous delays in reaching COCOM agreement and general COCOM reluctance to conservative U.S. proposals. Therefore, Congress has proposed changes to reauthorize the EAA which expired on September 30, 1990, entitled the Export Facilitation Act ("the Export Bill") of 1990.<sup>22</sup> The Export Bill would go further than the Bush Administration by modifying all three steps in the licensing process.<sup>23</sup> Congress believes that even if changes are approved by COCOM they will be virtually meaningless to the American business community without corresponding changes in the EAA, because without change to

19. The seventeen allies of COCOM are Australia, Belgium, Canada, Denmark, France, West Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom and the United States.

20. COCOM now regulates Western exports through three embargo lists: (1) the International Atomic Energy List, (2) the International Munitions List and (3) the International List. Sherzer & Yesner, *Export Controls Over Direct Commercial Sales of Military and Strategic Goods and Technologies: Who's in Charge?*, 7 B.C. INT'L & COMP. L. REV. 303, 312 (1984). While the first two regulate the export of commodities and technologies of direct military application, the latter regulates the export of dual use commodities which could aid both the civilian and military sectors of Communist countries.

The U.S. Department of Commerce also maintains a Control List which is set forth at 15 C.F.R. § 799.1 (1989).

21. 7 Int'l. Trade Rep. (BNA) 985 (July 4, 1990).

22. Export Facilitation Act, H.R. 4653, 101st Cong., 2d. Sess. (1990) *reprinted in* 136 CONG. REC. H3284-3290 (daily ed. June 6, 1990) and *reprinted in Reauthorization Hearings*, supra note 10, at 540-79. The EFA is not a complete structural overhaul of the EAA. It does, however, make major modifications to national security controls and regulations.

23. 136 CONG. REC. H3277 (daily ed. June 6, 1990)(statement of Rep. Miller) "Our competitors say 'Don't buy American, their rules are too complex, their restrictions are too tight and their bureaucracy is too slow.'" The Bush Administration proposal would loosen restrictions only. The EFA would correct all three problems: simplify the rules, loosen restrictions, and speed up the bureaucracy.

the EAA the complex statutory maze will still be intact.<sup>24</sup> The U.S. also stands to gain consensus in COCOM negotiations if the member countries are aware that the U.S. is in the midst of changing its rigid unilateral control structure. Fundamentally, the Bush Administration places a higher priority on national security concerns. The Bush Administration proposals almost ignore the needs of U.S. business.

This note analyzes the Export Bill and whether it adequately satisfies the previously suggested four part balancing test. Section II is a summary of the history of U.S. export controls from 1949-1977 to illuminate the changing goals of the export system. Section III lays out the administrative and substantive provisions of the Act of 1979 including the classification of country groups, the use of the Control List, the various types of export licenses (general and validated), controls on re-exports, enforcement and foreign availability. Section IV reviews Bush Administration proposals to COCOM for change in multilateral controls. Section V analyzes why Congress is dissatisfied with the Bush Administration proposals and how the various provisions of the Export Bill of 1990 would modify the existing EAA. Section VI presents arguments for why the Export Bill, and not the Bush Administration proposals to COCOM, better meet the suggested four prong balancing test. Finally, this note argues that even if the Export Bill is not passed, during the 101st Congress, it has served its purpose by putting pressure on the Bush Administration, has stabilized a precarious COCOM consensus and laid some of the groundwork for future changes to the EAA.

## II. HISTORY OF THE USE OF EXPORT CONTROLS IN UNITED STATES NATIONAL SECURITY POLICY TO THE EASTERN BLOC

### A. *History and Origin*

Until 1949, United States export controls were only used in times of war or during emergency situations.<sup>25</sup> "After World War II, Congress enacted the Export Control Act of 1949, which was 'the first comprehensive system of export controls ever adopted by the United States

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24. Congress has been trying to get sweeping reforms through on the EAA since 1985. The EAA expires every three years. Yet up to this point Congress has been unsuccessful.

25. *See, e.g.*, Trading with the Enemy Act of 1917, chap. 106, 40 Stat. 411, 50 U.S.C. app. §§ 1-44 (1985); Berman & Garson, *United States Export Controls-Past Present and Future*, 67 COLUM. L. REV. 791 (1967).

in peacetime.”<sup>26</sup> Under the Export Control Act, the President was provided broad discretionary power to regulate exports.<sup>27</sup> The President delegated his power under the Export Control Act to the Commerce department. Vigorous enforcement resulted in a “‘virtual embargo’ on all United States industrial and military technologies to communist countries.”<sup>28</sup> The previous reasons for stringent export controls had disappeared by 1949 and were replaced by reasons dictated by the Cold War.<sup>29</sup> The underlying reason for export controls after 1949 was to deny Communist countries access to United States military technology.<sup>30</sup>

To further the goal of restricting high technology exports the United States and six of its allies informally joined together to form the Coordinating Committee on Export Controls (COCOM).<sup>31</sup> COCOM is responsible for coordinating the efforts of member countries to prevent the export of high technology to communist countries. The Mutual Defense Assistance Act of 1951,<sup>32</sup> commonly called the Battle Act, both codified United States participation in COCOM and authorized restrictions on U.S. foreign assistance to countries exporting commodities “‘designated by the State Department as strategic commodities.’”<sup>33</sup>

COCOM has three responsibilities. First, it requires each member country to establish national “control lists of equipment that cannot be legally exported to the Soviet Union and its allies.”<sup>34</sup> Second, member

26. Note, *National Security Export Controls: Congress Adopts an All for One and One for All Approach*, 14 BROOKLYN J. INT'L L. 573, 575 (1988)[hereinafter *National Security Export Controls*].

27. Note, *Export Administration Amendments Act*, 19 VAND. J. TRANSNAT'L L. 812, 816 (1986)[hereinafter *Export Administration Amendments Act*].

28. *Export Administration Amendments Act*, *supra* note 27, at 816.

29. “[T]wo of the original reasons for stringent controls preventing shortages of goods vitally needed at home and channeling specific, critically needed items abroad on a priority basis had disappeared.” *Export Administration Amendments Act*, *supra* note 27, at 816.

30. Overly, *Regulation of Critical Technologies Under the Export Administration Act of 1979 and the Proposed Export Administration Amendments of 1983: American Business Versus National Security*, 10 N.C.J. INT'L L. & COM. REC. 423, 427 (1985).

31. See, e.g., Mastranduno, “The Management of Alliance Export Control Policy,” in Bertsch, ed., *Controlling East-West Trade and Technology Transfer* (Duke University Press, 1988); See also Hunt, *Multilateral Cooperation in Export Controls-The Role of COCOM*, 14 U. TOL. L. REV. 1285 (1983); Comment, *COCOM: Limitations on the Effectiveness of Multilateral Export Controls*, 1983 WIS. INT'L L.J. 106 (1983).

32. Mutual Defense Assistance Control Program of 1951, Pub. L. 82-213, 65 Stat. 645 (1951)(codified at 22 U.S.C. §§ 1611-1613(d) (1976)(superseded 1979)).

33. Overly, *supra* note 30, at 428.

34. DANIELS, *COCOM, WORLD COMPETITION AND TECHNOLOGY CONTROL: A NATIONAL SECURITY STRATEGY, IN TECHNOLOGY CONTROL, COMPETITION AND NATIONAL SECURITY: CONFLICT AND CONSENSUS* 199 (B. Seward ed. 1985).



governments of COCOM are required to review exports of most industrial commodities to prevent their diversion from their purported destination.<sup>35</sup> In the United States this is done primarily by the Commerce department, which grants export licenses for goods that utilize modern technology. Third, COCOM coordinates the licensing practices for member governments.<sup>36</sup>

Congress strengthened the national security controls of the Export Control Act by passing the Export Controls Amendments Act of 1962.<sup>37</sup> It required the President to deny an export license for any commodity that "makes a significant contribution to the military or economic potential of such nations which would prove detrimental to the national security and welfare of the United States."<sup>38</sup> Congress reasoned, *inter alia*, that development of the Soviet economy, both commercial and military, "would be detrimental to national security and welfare of the United States."<sup>39</sup>

The Export Control Act worked well in the 1950's but required philosophical change in the late 1960's. As the economies of our trading partners strengthened, they sought greater trade opportunities with Eastern Europe and the rest of the Communist world.<sup>40</sup> The Export Administration Act of 1969 (the Act of 1969) was a liberalization of U.S. policy in East-West trade.<sup>41</sup> Under the Act of 1969, trade was viewed as beneficial to the U.S., even trade to Communist countries.<sup>42</sup> A major modification from the Export Control Act was that in the EAA Congress had a more active role in overseeing the executive branches implementation of export controls.<sup>43</sup> It was becoming apparent to Congress, however, that tight U.S. unilateral controls were having an adverse effect on U.S. business without a corresponding gain in national security.<sup>44</sup>

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35. *Id.* at 200.

36. *Id.*

37. Export Control Amendments of 1962, Pub. L. 87-515, 76 Stat. 127 (1962)(codified at 50 U.S.C. app. § 2023 (1962)(repealed 1969); *See also* Overly, *supra* note 30, at 429.

38. 50 U.S.C. app. § 2023 (1962)(repealed 1965).

39. Berman & Garson, *supra* note 25, at 801.

40. *See* Murphy & Downey, *supra* note 3, at 792.

41. Export Administration Act of 1969, Pub. L. 91-184, 83 Stat. 841 (codified at 50 U.S.C. app. §§ 2401-2413 (1976)); amended by the Export Administration Act of 1979 codified at 50 U.S.C. app. §§ 2401-20 (1979).

42. *See* Murphy & Downey, *supra* note 3, at 792.

43. *See* Overly, *supra* note 30, at 429.

44. *National Security Export Controls*, *supra* note 26, at 577.

The 1970's marked yet a new problem for export controls. With the development and astonishing drop in price of computer chips, manufacturers could incorporate potential military hardware into commercial products. Export restrictions began to be concerned with "dual use" technology.<sup>45</sup> The restriction on computer technology did not present a problem to U.S. business until similar technology started to become available abroad. The Act of 1969 was amended in 1977<sup>46</sup> to restrict executive authority to impose export controls on goods and commodities that were available in "sufficient quantity and of sufficient quality"<sup>47</sup> to U.S. products.<sup>48</sup>

### B. *The Export Administration Act of 1979*

The Export Administration Act of 1979 (the Act of 1979) superseded the Act of 1969. It attempted to strike a better balance between business interests and national security.<sup>49</sup> Listed under the general provisions of the act were the responsibilities of the Department of Commerce, which has primary control over the export of high technology. The Secretary of the Department of Commerce was required to issue licenses, maintain the Control List and make determinations of foreign availability. However, the act stated that no person or corporation has a "right" to export. Nor does the executive branch have to give consideration to the needs of exporters.<sup>50</sup> Thus, national security concerns were safeguarded under the act of 1979.

The major change of the Act of 1979 over the Act of 1969 was the incorporation of the critical technology approach to export control.<sup>51</sup>

45. *Id.* at 582. See also Gonzalez, *How to Increase Technology Exports Without Risking National Security-An In-Depth Look at the Export Administration Amendments Act of 1985*, 8 *LOY. L.A. INT'L & COMP. L.J.* 399 (1986).

46. Export Administration Act of 1969, Pub. L. No. 95-52, 91 Stat. 235 (codified at 50 U.S.C. app. §§ 2402-2407, 2409- 2410)(1977)).

47. 50 U.S.C. app. § 2404(f)(1)(1977).

48. *National Security Export Controls*, *supra* note 26, at 594.

49. Business could air their concerns under 50 U.S.C. app. § 2403(f) (1990) which states:

The Secretary shall keep the public fully apprised of changes in export control policy and procedures instituted in conformity with this Act with a view to encouraging trade. The Secretary shall meet regularly with representatives of the business sector to obtain their views on export control policy and the foreign availability of goods and technology.

50. See Evrard, *supra* note 5, at 17; 50 U.S.C. app. § 2403(d) (1990); See also Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 *COLUM. J. TRANSNAT'L L.* 255 (1981).

51. Overly, *supra* note 30, at 431.

Under this approach the United States maintains a Control List which is designed to restrict exports only if it would make "a significant contribution to the military potential"<sup>52</sup> of the Soviet Union. While this approach is not controversial, the implementation of it is. Under the Act of 1979 the Department of Defense was given concurrent jurisdiction over the Control List with the Department of Commerce. The degree of control over a particular commodity depends upon a variety of factors including: the analysis of the kinds and quantities of commodities or technologies, their military uses, their availability abroad, their country of destination, their ultimate end users and their intended end uses.<sup>53</sup> Since 1979, the Export Administration Amendments Act<sup>54</sup> (EAAA)<sup>55</sup> of 1985 and the Omnibus Trade and Competiveness Act<sup>56</sup> (OTCA) of 1988 have been passed. Both have gradually loosened export restrictions.

### III. AN OVERVIEW OF THE EXPORT REGULATIONS UNDER THE EXPORT ADMINISTRATION ACT OF 1979

#### A. Administration of the EAA

The Department of Commerce<sup>57</sup> is the primary agency responsible for issuing export licenses for high technology commodities.<sup>58</sup> An export license application must first be filed with the Department of Commerce. The Department of Commerce then conducts its own review of the application and, within its discretion, may send a copy of the application to the other agencies for review and approval.<sup>59</sup> The State Department has the right to review applications for foreign policy controls.<sup>60</sup> The

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52. 50 U.S.C. app. § 2401(2) (1976).

53. 15 C.F.R. § 385.2(a)(2)(1985).

54. The Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120-59 codified at 50 U.S.C. app. §§ 2401-2419.

55. See generally Hentzen, *United States Export Restrictions for Foreign Policy and National Security Purposes: The 1985 Amendments to the Export Administration Act and Beyond*, 26 COLUM. J. TRANSNAT'L L. 103 (1987).

56. Omnibus Trade and Competiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

57. Export controls are administered through the Office of Export Administration (OEA) within the Department of Commerce. Note, *Export Administration Act of 1979: Continued Liberalization of Export Policies*, 3 DET. C.L. REV. 885, 893 (1983) [hereinafter *Liberalization of Export Policies*].

58. *Id.*

59. 50 U.S.C. app. § 2409(d)(1988).

60. 50 U.S.C. app. § 2405(a)(5)(1988).

Department of Defense has the right to review applications for export of dual use items.<sup>61</sup> Additionally, the Department of Defense can review export applications for certain dual use products, including some types of computers and semiconductors, to certain Western countries.<sup>62</sup> If there is disagreement regarding an export application it is resolved at the Cabinet level and ultimately by the President.<sup>63</sup>

## B. *Various Principal Provisions of the EAA*

### 1. *Foreign Availability*

Foreign availability was determined under the Act of 1979 if the goods or technology was available "in sufficient quantity and sufficient quality."<sup>64</sup> The President retained a right to deny foreign availability for national security reasons.<sup>65</sup>

The EAAA made changes by loosening the requirements in the area of foreign availability determinations. Under the EAAA foreign availability is determined if the goods or technology be available "in sufficient quantity and comparable quality." The operative wording that changed, is comparable quality rather than sufficient quality. Sufficient quality is a subjective determination, that would typically be construed against the exporter. Comparable quality, by contrast, is a more objective determination that would typically be construed in favor of the exporter.

61. 50 U.S.C. app. § 2404(d)(1988).

62. Overman, *Reauthorization of the Export Administration Act: Balancing Trade with National Security*, 17 L. & POL'Y. INT'L BUS. 325, 334 (1985).

63. 50 U.S.C. app. § 2404(c)(Supp. III 1979).

64. 50 U.S.C. app. § 2404(f)(1)(Supp. III 1979) provides as follows:

The Secretary, in consultation with appropriate Government agencies and with appropriate technical advisory committees . . . , shall review, on a continuing basis, the availability, to which exports are controlled . . . , from sources outside the United States, including countries which participate with the United States in multilateral export controls, of any goods or technology the export of which requires a validated license under this section.

65. 50 U.S.C. app. § 2404(f)(Supp. III 1979) provides as follows:

(1) [U]nless the President determines that approving the license application would prove detrimental to the security of the United States.

(2) The Secretary shall approve any application for a validated license which is required under this section for the export of any goods or technology to a particular country [other than a controlled country] and which meets all other requirements for such an application, if the Secretary determines that such goods or technology will be available from foreign sources . . . ,

Under the EAAA of 1985 a rebuttable presumption was created in favor of the exporter.<sup>66</sup> For determinations of foreign availability under the Act of 1979, the exporter was required to make a showing of foreign availability to the Department of Commerce "in writing and . . . supported by reliable evidence."<sup>67</sup> The EAAA required the Department of Commerce to "accept the representations of applicants made in writing and supported by reasonable evidence, unless such representations are contradicted by reliable evidence."<sup>68</sup> Under the OTCA the entire burden for showing foreign availability is shifted to the Department of Commerce. Unilateral controls are to be lifted, unless the Department of Commerce determines that the commodities are not available from foreign sources.<sup>69</sup>

## 2. *Country Groups*

Under the Act of 1979 the United States maintained a greater degree of control of high technology exports to countries that were considered a security threat than to those countries that were allies. These controls take the form of different export licenses required, and different levels of technology allowed to be exported depending upon the country group.<sup>70</sup> These classifications are determined by the United States government's approval or disapproval of economic and political events taking place in that country.<sup>71</sup>

66. EAAA of 1985 codified at 50 U.S.C. app. § 2404(f)(3)(1985).

67. 50 U.S.C. app. § 2404(f)(3)(1982)(Additionally, this provision stated that "[i]n assessing foreign availability with respect to license applications, uncorroborated representations by applicants shall not be deemed sufficient evidence of foreign availability.")

68. *Id.*

69. 50 U.S.C. app. § 2404(f)(3)(A)(1988).

70. For example most commodities can be exported to Canada without a license, thus creating a license free zone between the U.S. and Canada. 15 C.F.R. § 770, Supp. No. 1 (1990).

71. Countries are grouped into seven categories according to symbols "P", "Q", "S", "T", "V", "W", "Y", and "Z".

Country group "Q": Rumania

Country group "S": Libya

Country group "T": Includes most Central and South American countries plus Greenland

Country group "V": Includes all countries not included in any other country group (except Canada)

Country group "W": Hungary and Poland

Country group "Y": Includes the Soviet Union and most the Soviet Bloc countries

Country group "Z": North Korea, Vietnam, Cambodia, Cuba. *Id.*

Licensing requirements for a specific country and commodity can be determined by referring to a country's classification together with reference to the Control List. For example, by referring to country groups, the exact same computer would require a less stringent license if headed to France than if headed to Cuba. Similarly, by referring to the Control List, a powerful computer might be able to be exported to France but not to Cuba.

### 3. *Commodity Control List (Control List)*

The Control List is maintained by the Department of Commerce. It is the master list of all commercial commodities and technologies under the control of the Office of Export Administration.<sup>72</sup> However, the Department of Defense has input to the Control List by compiling the "military critical technologies (MCT)" list which is incorporated into the Control List.<sup>73</sup> Thus, "dual use" items are on both the Control List and MCT.<sup>74</sup> Previously, the Department of Commerce had been solely responsible for determining the military significance of particular goods and technology. The Act of 1979 marked the first attempt to include the Department of Defense in the compilation of the Control List.<sup>75</sup> The MCT list could only be included with the concurrence of the Department of Commerce.<sup>76</sup> Thus, the Department of Defense was given greater participation in the determination of national security.<sup>77</sup>

### 4. *Licensing*

The licensing process is extremely complex and beyond the scope of this paper. A few things need to be mentioned for the reader to understand the delays encountered by U.S. business attempting to export high technology.<sup>78</sup>

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72. The Control List appears at 15 C.F.R. § 799.1 (1989).

73. 50 U.S.C. app. § 2404(d)(2)(1990).

74. 50 U.S.C. app. § 2404(d)(3)(1990).

75. *Liberalization of Export Policies*, *supra* note 57, at 893. It was argued that the Department of Commerce had been unable to reconcile its dual function of promoting trade on the one hand, and regulating trade on the other. The Department of Commerce is unable to maintain an objective posture in export decisions due to the considerable pressure from commercial interests.

76. 50 U.S.C. app. § 2404(c)(2)(1990).

77. See generally Note, *The Department of Defense's Role in Free-World Export Licensing Under the Export Administration Act*, 1988 DUKE L.J. 785 (1988).

78. For recent changes in licensing that attempt to lessen delays in the granting of export licenses see J. Griffin & M. Calabrese & J. Lindsey, *Commerce Takes Steps to Ease Export Licensing Requirements*, 24 INT'L LAW. 535 (1990).

Under the Act of 1979, almost all commodities and technical data exported from the U.S. to any destination required either a general or a validated license.<sup>79</sup> A general license is a broad license, that allows the export of a particular commodity without specific case-by-case approval from the Department of Commerce and without the issuance of a license document.<sup>80</sup> Under a general license, an exporter may export a commodity without specific approval from the Department of Commerce. In contrast, a validated license is only valid to an individual party to export a specific commodity to a particular destination.<sup>81</sup> To obtain a validated license, an exporter must file an application with the Office of Export Administration.

The Act of 1979 was amended by the Export Administration Amendments Act (EAAA) of 1985. Changes were made to national security controls in the export licensing procedure, such as: tightening deadlines for Department of Commerce approval of licenses,<sup>82</sup> eliminating controls on low-technology exports to COCOM countries,<sup>83</sup> and adopting the comprehensive operations license. These changes significantly aided U.S. exporters.<sup>84</sup>

### 5. *Reexport Controls*

The United States uses the Department of Commerce to control the reexportation from one foreign country to another<sup>85</sup> of U.S.- origin

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79. See Overman, *supra* note 62, at 333.

80. *Id.*

81. *Id.*

82. 50 U.S.C. app. § 2409(o)(Supp. III 1985); For exports to COCOM countries that still require licenses, the EAAA provides that: "if the Department of Commerce does not act on the application within 15 days it is automatically granted unless the Department of Commerce notifies the applicant that it requires more time. At any rate, the outside limit is 30 days."

83. EAAA of 1985, 50 U.S.C. app. § 2404(b)(2)(Supp. III 1985). This section provides that:

[n]o authority may be required before goods or technology are exported in the case of exports to a country which maintains export controls on such technology cooperatively with the United States pursuant to the agreement of the group known as the Coordinating Committee, if the good's technology is at such a level of performance characteristics that the export of the goods or technology to controlled countries requires only notification of the participating governments of the Coordinating Committee.

84. See Note, *Trade Regulation-Export controls-COCOM agrees on new multilateral export guidelines allowing eastern bloc to purchase low level technology legally*, 16 GA. J. INT'L & COMP. L. 197 (1986).

85. There are problems with application of U.S. law to citizens of foreign

high technology commodities through the use of reexport controls.<sup>86</sup> Particular commodities, previously exported from the U.S. to approved foreign destinations, may not be exported to a third country without a reexport authorization from the Department of Commerce. Generally, if a commodity was issued under a general license, it would not require reexport authorization. Conversely, if a validated license was required, a reexport authorization would probably be required.

#### 6. *Judicial Review*

Agency action was not subject to judicial review under the Act of 1979. Under the EAAA there are two narrow instances in which there is a limited form of judicial review. First, when the U.S. government sues for recovery of civil penalties for an alleged violation of the EAAA, the accused may ask the district court to "determine de novo all issues necessary to the establishment of liability."<sup>87</sup> Second, an exporter has access to the court for the purpose of enforcing statutory deadlines for the processing of export license applications.<sup>88</sup>

### IV. RECENT CHANGES IN EXPORT CONTROL

#### A. *Multilateral Export Controls*

It has become apparent that unilateral controls will not stop the flow of "dual use" commodities to the Soviet Union.<sup>89</sup> As the level of

countries. This problem may be solved by bilateral treaties with Eastern European countries. See e.g., Feldman, *The Restructuring of National Security Controls under the 1985 Amendments to the Export Administration Act: Multilateral Diplomacy and the Extraterritorial Application of United States Law*, 21 STAN. J. INT'L L. 235 (1985); Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983); Note, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355 (1984).

86. See Note, *High Technology Warfare: The Export Administration Act Amendments of 1985 and the Problem of Foreign Reexport*, 18 N.Y.U. J. INT'L L. & POL. 663 (1986).

87. 50 U.S.C. app. § 2410(f)(1988).

88. 50 U.S.C. app. § 2409(j)(1)(1982).

89. The best known violation of COCOM was the Toshiba-Kongsberg incident where the Soviet Union illegally obtained milling machines. Propellers could be manufactured on these machines that would allow a submarine to run quieter. See Note, *Curbing Illegal Transfers of Foreign-Developed Critical High Technology from COCOM Nations to the Soviet Union: An Analysis of the Toshiba-Kongsberg Incident*, 12 B.C. INT'L & COMP. L.R. 181 (1989); 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 (1984); Note, *Controlling the Transfer of Militarily Significant Technology: COCOM after Toshiba*, 11 FORDHAM INT'L L.J. 863 (1988); Note, *Of Ropes, Buttons and Four-By-Fours: Import Sanctions for Violations of the COCOM agreement*, 29 VA. J. INT'L L. 249 (1988).



foreign availability has increased, the effectiveness of the EAA has decreased. Thus, multilateral export controls have become increasingly important to national security. Faced with mounting pressure from COCOM, the Eastern European countries in need of high technology, U.S. business interests and Congress the administration has negotiated export control concessions with COCOM.

### 1. *Problems Within COCOM*

Restrictive U.S. unilateral controls have almost brought COCOM to the verge of collapse.<sup>90</sup> COCOM member countries have become increasingly frustrated by U.S. foreign policy export controls, extra-territorial application of U.S. law and U.S. reluctance to modify the Control List.<sup>91</sup>

COCOM members have voiced their opposition to U.S. insistence on foreign policy export controls.<sup>92</sup> These controls are used to express U.S. dissatisfaction with actions of other countries such as the Soviet invasion of Afghanistan. This was highlighted by the Soviet Pipeline sanctions of the early 1980's.<sup>93</sup> Under the Act of 1979, the Department of Commerce banned the sale of oil and gas equipment to the Soviet Union by foreign companies owned or controlled by U.S. firms. This broad assertion of U.S. law outraged European governments, which characterized the sanctions as extraterritorial application of U.S. law.<sup>94</sup>

COCOM members were further infuriated at the high level meeting in October 1989, where COCOM members voted 16-1 in favor of loosening restrictions on machine tools.<sup>95</sup> The U.S. cast the sole dissenting vote.<sup>96</sup> West Germany has also threatened to withdraw from COCOM due to conservative U.S. voting.<sup>97</sup> Moreover, COCOM member countries have openly begun to circumvent COCOM review. In 1989, Alcatel, a French telecommunications firm completed plans

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90. *Reauthorization Hearings*, *supra* note 10, at 5.

91. K. Quigley & W. Long, *Export Controls: Moving Beyond Economic Containment*, *WORLD POL'Y. J.* 165 (Winter 1990), *reprinted in Reauthorization Hearings*, *supra* note 10, at 77-99.

92. *Id.* at 78.

93. *Id.*

94. *Id.* at 87.

95. *Reauthorization Hearings*, *supra* note 10, at 25 (prepared statement of Paul Freedenberg, Former Under Secretary for Export Administration, Department of Commerce).

96. *Id.*

97. *Id.* at 18.

to sell sophisticated telephone switching equipment to the Soviet Union despite U.S. objections raised with COCOM.<sup>98</sup> Similarly, Simon-Carves, a British firm, contracted to build a \$450 million dollar factory automation plant in the Soviet Union. "Great Britain refused to submit the case" for COCOM review "alleging that it fell within national discretion."<sup>99</sup>

Meanwhile, the U.S. has been insisting on unilateral controls. The U.S. West situation is a case in point.<sup>100</sup> U.S. West was denied a license to build a fiber optic system across the Soviet Union.<sup>101</sup> The Department of Defense raised the concern that it would be more difficult for U.S. intelligence to monitor Soviet communications if the fibre optic network was installed.<sup>102</sup> Therefore, U.S. West was denied a license.<sup>103</sup> Thus, the national security concerns won the battle but lost the war.

It is critical for national security interests to restore at least an uneasy consensus within COCOM. By bargaining away low technology export controls that pose no security threat, the U.S. would probably get more cooperation on other multilateral export control issues.<sup>104</sup> The Bush Administration, facing tremendous political pressure, reluctantly agreed to loosen the COCOM Industrial List with corresponding changes to the U.S. Control List.

## 2. *Bush Administration Negotiations with COCOM*

### a. *Proposals*

On May 2, 1990, the Bush Administration submitted proposals to the Coordinating Committee for Multilateral Export Controls (COCOM) to reduce the the number and types of items on the Industrial List.<sup>105</sup> An evaluation of export controls was conducted that have both civilian and military uses.<sup>106</sup> The Bush Administration proposed a re-

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98. *Reauthorization Hearings*, *supra* note 10, at 81.

99. *Id.*

100. *The Financial Times Ltd.*; Business Law Brief, June 1990 (Lexis).

101. *Id.*

102. 136 CONG. REC. H3278 (June 6, 1990 daily ed.)(statement of Rep. Houghton).

103. *Id.*

104. *Reauthorization Hearings*, *supra* note 91, at 87.

105. *See supra* note 100.

106. This review was done by the Department of Defense. The White House, Office of the Press Secretary, Fact Sheet, Comprehensive U.S. Proposal for Modernizing COCOM, May 2, 1990.

formulation of the COCOM core list of technologies in the "priority sectors" of computers, telecommunications equipment and machine tools.<sup>107</sup> The primary beneficiaries of the changes in the core list would be the emerging democracies of Eastern Europe. In a high level meeting on June 6-7, 1990, COCOM agreed with the Bush proposal to create and implement a new list of controlled goods and technologies to supersede the existing core list.<sup>108</sup>

The new list would be built "from scratch" without explicit reference to the existing core list.<sup>109</sup> All COCOM member countries agreed to submit their proposals by the end of 1990.<sup>110</sup> Proposed implementation is January, 1991.<sup>111</sup> Once the new core list is agreed upon, the United States Control List would be modified to reflect the results of this core list approach.<sup>112</sup> COCOM also agreed to set less restrictive standards for export to Poland, Hungary and Czechoslovakia if these governments take precautions against diverting technologies to the Soviet Union.<sup>113</sup>

Furthermore, COCOM agreed to a new standard for creating the core list of controlled technologies. The previous standard for COCOM, in determining which items to restrict, was termed "strategic significance."<sup>114</sup> A commodities "strategic significance" was determined by whether the technology would increase the military effectiveness of the Soviet Union and other targeted countries.<sup>115</sup> This standard was abandoned on June 6-7 for a less rigid one. The new standard is "strategic

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107. COCOM also agreed to remove 30 out of 116 items off the control list. On July 1, COCOM agreed to remove 30 items including vacuum pumps and rolling mills. An additional eight items, including sophisticated robots and cameras will be taken off the list on August 15. The Financial Times, *supra* note 100.

108. The core list is being reduced from 10 to 8 categories. They are:

1. Electronics design, development and production;
2. Advanced materials and material processing;
3. Telecommunications;
4. Sensors and sensor systems and laser;
5. Navigation and avionics systems;
6. Marine technology;
7. Computers;
8. Propulsion systems. *Id.*

109. *See supra* note 106.

110. N. Y. Law Journal August 2, 1990, at 5, col. 1.

111. The United States Department of Commerce, The Under Secretary for Export Administration, Press Release, June 12, 1990.

112. *Id.*

113. *See supra* note 110, at 7, col. 5.

114. Heritage Foundation Backgrounder, *supra* note 13.

115. *Id.*

criticality."<sup>116</sup> This standard would consider the "inherent controllability" of a commodity. COCOM member nations would be able to argue that although an item may be useful to the Soviet military it should not be controlled because it is freely available on world markets.

b. *Agreements from the June 6-7, 1990, High Level COCOM Meeting*

The agreement calls for the immediate elimination of 30 of the 116 categories currently on the COCOM control list, with 13 others to be reduced.<sup>117</sup> In the United States this is expected to release about \$48 billion dollars in export sales.<sup>118</sup>

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116. *Id.*

117. *See supra* note 111. These items are:

1. Spin forming and flow forming machines;
2. Vacuum pump systems;
3. Electric furnaces;
4. Electric arc devices;
5. Metal rolling mills;
6. Equipment to manufacture or test printed circuit boards;
7. Equipment for the continuous coating of polyester based material magnetic tape;
8. Specially designed tooling and fixtures for the manufacture of fibre-optic connectors and couplers;
9. "Stored-programme controlled" equipment;
10. Equipment specially designed for in-service monitoring of acoustic emissions in airborne or underwater vehicles;
11. Technology for industrial gas turbine engines;
12. Floating Docks, software and technology;
13. Pulse modulators;
14. Telemetry and telecontrol devices;
15. Solid state amplifiers;
16. Cathode ray tubes;
17. Cold cathode tubes and switches;
18. Semiconductor diodes and dice wafers;
19. Transistors and dice and wafers therefor;
20. Thyristors and dice and wafers therefor;
21. Hydrogen/hydrogen isotope thyratrons of ceramic-metal construction and accessories;
22. Thermoelectric materials and devices;
23. Oscilloscopes;
24. Quartz crystals and assemblies;
25. Materials composed of crystals having spinel, hexagonal, or garnet crystal structures, thin film devices;
26. Pyrolytic deposition technology;
27. Steel alloys in crude or semi-fabricated form;
28. Low density rigid, carbon-bonded, fibrous or non-fibrous thermal

Computer products which would be decontrolled include state of the art personal computers<sup>119</sup> and mainframe systems with processing data rates of up to 275 megabytes per second.<sup>120</sup> The latter would allow for sale of large systems which could be used for sophisticated banking needs, or airline reservation networks.<sup>121</sup> There would be no differentiation between Eastern Bloc countries and the Soviet Union under the COCOM proposal.

For telecommunications, COCOM has agreed to lift restrictions on basic technologies such as cellular systems and satellite ground stations.<sup>122</sup> For advanced fiber optic equipment and microwave communications systems, COCOM has differentiated between the Soviet Union and the Eastern Bloc. This technology although denied to the Soviet Union, would be licensed to the Eastern Bloc. To qualify for this equipment, the country must adopt certain safeguards against diversion of the technology to controlled destinations and unauthorized end users.<sup>123</sup>

The greatest levels of decontrol have been effected for advanced machine tools. These relaxations, most of which are on the immediate decontrol list, will allow approximately 75 percent of the advanced machine tools produced in the U.S. to be exported without prior licensing approval.<sup>124</sup> Currently, it is estimated that 90 percent of the machine tools require a license before being cleared for export to Eastern Europe.<sup>125</sup>

### 3. *The 101st Congress*

Although Congress approves of the proposals made by the Bush Administration to COCOM it wants to go further faster. The Bush Administration seeks to extend the EAA for another year while ne-

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insulating materials;

29. Polycarbonate sheets;

30. Tantalates and niobates, except fluorotantalates.

118. *The Financial Times*, *supra* note 100.

119. This would include the previously controlled IBM-PC and Apple MacIntosh.

120. *See supra* note 111.

121. This COCOM proposal would allow computer exports at the same level as that granted to China in 1985-up to the so called "green line." The Bush proposal limits the accessibility granted to the Soviet Union. *The Financial Times Ltd.*, *supra* note 100.

122. *See supra* note 111.

123. Heritage Foundation Backgrounder, *supra* note 13.

124. *See supra* note 111.

125. *Id.*

gotiating with COCOM to reduce the number of items on the Industrial List.<sup>126</sup> Congress also seeks to remove the burdens placed upon U.S. business by the unilateral control system by reauthorizing the EAA with the Export Bill of 1990.

The Export Bill of 1990 would be a sweeping reform of the EAA.<sup>127</sup> Major modifications include commodity jurisdiction given to the Department of Commerce and a license free zone within COCOM up to the China green line. Congress is concerned that by allowing a case-by-case review, old cold war attitudes will prevail and it will be a case-by-case turn down rather than acceptance.<sup>128</sup>

On June 6, 1990, the House of Representatives overwhelmingly approved<sup>129</sup> the Export Facilitation Act of 1990 (Export Bill). The Senate

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126. *Reauthorization Hearings*, *supra* note 10, at 534-35 (letter from Brent Scowcroft on May 2, 1990 to the House Foreign Affairs Committee).

127. H.R. 4653, 101st Cong., 2d. Sess. § 2 Findings and Purpose

(a) FINDINGS-The Congress finds that-

(1) there has been an extraordinary movement toward democracy and free markets in the countries of Eastern Europe;

(2) it is in the national security and economic interests of the United States to solidify the changes that have taken place and to promote additional progress;

(3) advanced technology that is committed to civilian purposes will facilitate the economic development of those countries of Eastern Europe, and broaden lines of communication with western countries;

(4) those countries of Eastern Europe that are committed to and capable of protecting against improper diversion should receive the technology that will help foster democracy and free market economies;

(5) by requiring licenses for exports to its closest allies, the United States spends a disproportionate amount of limited resources on controlling exports to friendly countries;

(6) the export control system has been unable or unwilling to reduce the number of items controlled for national security purposes; and

(7) the export control system is mired in bureaucratic redundancy and inefficiency.

(b) PURPOSES-It is the Purpose of this Act-

(1) to improve the efficiency of the export control system of the United States;

(2) to promote democracy and free enterprise in Eastern Europe by allowing for the export of goods and technology that will facilitate or assist in their economic development; and

(3) to make Federal agencies that administer export controls accountable for their actions, and afford due process to such controls.

128. *Reauthorization Hearings*, *supra* note 10, at 47 (statement of Rep. Houghton).

129. By a vote of 312-86. 136 CONG. REC. H3355 (daily ed. June 6, 1990).

Banking, Housing and Urban Affairs Committee, which has jurisdiction over export control in the Senate, approved a companion bill on September 13th.<sup>130</sup> The Senate bill will have to be reconciled with the House bill and then be acceptable to the Bush Administration to avoid veto. Because COCOM makes decisions only by unanimous consent, a less restrictive stance by the United States would be likely to bring about harmonization of export controls within COCOM.<sup>131</sup>

The Bush Administration was opposed to the bill, because it could potentially undermine the administration's conservative stance during the high level June 6-7 COCOM negotiations.<sup>132</sup> Moreover, the Bush Administration would like to see the restrictions placed on foreign policy export controls removed from the EAA.<sup>133</sup> These restrictions require the President to make an extensive set of determinations before imposing foreign policy export controls.<sup>134</sup> Also, under the Export Bill of 1990, Congress is dictating internal Executive branch procedure by giving sole jurisdiction over the Control List to the Department of Commerce.<sup>135</sup> The Bush Administration views this part of the bill as unconstitutional, because it violates the separation of powers provision in the Constitution.<sup>136</sup>

As of this writing the Act of 1979 has expired and the Export Bill of 1990 remains deadlocked because of the budget crisis.<sup>137</sup> The Bush Administration has invoked the International Economic Emergency Powers Act (IEEPA)<sup>138</sup> which gives the President the extremely broad authority to cut off exports once a national emergency has been declared.<sup>139</sup>

130. 7 Int'l Trade Rep. (BNA) 1607 (Oct. 24, 1990).

131. Quigley & Long, *supra* note 10, at 87. See generally Dahl, *U.S. Restrictions on High Technology Transfer: Impact Abroad and Domestic Consequences*, 26 COLUM. J. TRANSNAT'L L. 27 (1987).

132. 7 Int'l Trade Rep. (BNA) 836 (June 13, 1990).

133. *Reauthorization Hearings*, *supra* note 10, at 534-535 (letter from Brent Scowcroft). See LONG, U.S. EXPORT CONTROL POLICY: EXECUTIVE AUTONOMY VERSUS CONGRESSIONAL REFORM (1989).

134. 50 U.S.C. app. § 2405(b)(1990).

135. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

136. *Reauthorization Hearings*, *supra* note 10, at 534-35 (letter from Brent Scowcroft).

137. For a review of how the OTCA was finally passed after years of debate see White, *Negotiating and the Congressional Conference Process: A Case Study of the EAA and OTCA*, 13 N.C.J. INT'L L. & COMM. REG. 333 (1988).

138. 50 U.S.C. § 1701 (Supp. I 1977).

139. 8 Int'l Trade Rep. (BNA) 234 (February 13, 1991).

#### 4. *Congressional Concerns-The Export Facilitation Act of 1990*

##### a. *Administration of the Export Bill*

The proposed Export Bill of 1990 marks a major change in jurisdiction between the Department of Commerce and Department of Defense.<sup>140</sup> Although the Department of Defense will still have an advisory capacity in the formulation of the Control List, an item may no longer be on both the Control List and the United States Munition List.<sup>141</sup> In the case of a disagreement between the Department of Commerce and the Department of Defense, if after attempting to resolve the dispute for two months,<sup>142</sup> the matter must be resolved by the President within 10 days or the exporter will be allowed to export the goods. Thus, under the Export Bill of 1990, the Department of Commerce would have exclusive control of the Control List.<sup>143</sup> National security would not be threatened because a high technology product with direct military application would appear on the United States Munitions List.<sup>144</sup>

The Department of Defense would still review items<sup>145</sup> overtly headed to the Soviet Union,<sup>146</sup> headed to countries that the Department of Commerce and Department of State determine are still in Soviet orbit<sup>147</sup> or headed to destinations where the Department of Commerce determines the product will be overtly used for military purposes.<sup>148</sup>

140. Other more radical approaches have been previously suggested. One is to create a separate agency, called the Office of Strategic Trade which has neither ties to Commerce or Defense. See Morehead, *Export Controls: Who's Policing the Enforcers?*, 13 N.C.J. INT'L L. & COMM. REG. 307 (1988).

141. EFA of 1990, § 9, amending the EAA of 1979 codified at 50 U.S.C. § 2404(c)(8) which states:

(A) Notwithstanding any other provision of law, no item may be included on both the control list and the United States Munitions List.

142. EFA of 1990, § 9, amending the EAA of 1979 codified at 50 U.S.C. § 2404(c).

143. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. § 2404(b)(F).

144. 15 C.F.R. § 771 (1989).

145. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

146. *Id.* at § (A).

147. *Id.* at § (B).

148. *Id.* at § (C).



b. *Changes to Various Principal Provisions*

i. *Foreign Availability*

The Export Bill would incorporate the proposals presented by the Bush Administration to COCOM,<sup>149</sup> for determinations of foreign availability.<sup>150</sup>

ii. *Country Groups*

Under the proposed Export Bill, Hungary, Poland and Czechoslovakia would be removed from the controlled list. They would remain on the decontrolled list and have their licenses favorably reviewed as long as:

(i) The country's policies are not adverse to the security interests of the United States or any other country participating in the Coordinating Committee.

(ii) The country does not pose a significant military risk to the United States or any other country participating in the Coordinating Committee.

(iii) The country does not pose an unreasonable threat of-

(I) diversion of the goods or technology exported from the United States or other country participating in the Coordinating Committee to an unauthorized use or assignee; or

(II) unauthorized reexport of the goods or technology to a controlled country.<sup>151</sup>

iii. *Commodity Control List (CCL)-Indexing*

As goods and technology become obsolete, they no longer pose a threat to national security.<sup>152</sup> In order to assure that requirements for licenses are periodically removed an indexing system was created.<sup>153</sup> The Export Bill provides for automatic<sup>154</sup> increases in the performance

149. See *supra* footnotes 119-126.

150. EFA of 1990, § 3, amending the EAA of 1979 codified at 50 U.S.C. app. § 2402.

151. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

152. EFA of 1990, § 12, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(g).

153. There was an indexing system under the OTCA at 50 U.S.C. app. § 2404(g)(1988).

154. EFA of 1990, § 15, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(g).

levels of goods or technology subject to any licensing requirement.<sup>155</sup>

For example, on supercomputer exports, an indexing system would be created to be commensurate with technological advances in the computer industry. As long as the destination country maintains controls pursuant to the COCOM agreement, "no security safeguard procedures may be required in connection with any export or reexport of a supercomputer with a theoretical peak performance at or below approximately 25 percent of theoretical peak performance of the average of the two most powerful supercomputers currently available commercially in the United States or elsewhere."<sup>156</sup>

To make sure that decontrol is continued after the passage of the Export Bill a sunset provision was added.<sup>157</sup> This provision would provide full decontrol of all goods and technologies by 1992 to all non controlled countries.<sup>158</sup> In addition the Export Bill provides for publishing of the COCOM Industrial List which would allow exporters to determine which goods are subject to licensing requirements.<sup>159</sup>

#### iv. *Licensing-License Free Zone*

The Export Bill would go further in decontrolling exports multilaterally than the Bush Administration proposals to COCOM. Under the Export Bill, exports to COCOM countries,<sup>160</sup> with technology below that of the China green line would not require export licenses.<sup>161</sup> This would create a license free zone within COCOM. This would coincide with EC 1992, creating a single European common market, where the

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155. See *supra* note 152.

156. EFA of 1990, § 6(B), amending the EAA of 1979 codified at 50 U.S.C. app. § 2402(a)(6).

157. EFA of 1990, § 10, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(c).

158. *Id.*

159. EFA of 1990, § 14, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404.

160. EFA of 1990, § 5, amending the EAA of 1979 codified at 50 U.S.C. app. § 2402(a)(6)(B). The EFA defines goods or technologies. The export of which, to the Peoples Republic of China, on the date of enactment of the Export Enhancement Act of 1988 would require only notification of the participating governments of the Coordinating Committee.

161. *Id.* [N]o authority or permission may be required under this section for the export or reexport of goods or technology to, or the reexport of such goods or technology cooperatively with the United States pursuant to the agreement of the group known as the Coordinating Committee.

European countries would not require licenses to ship to each other.<sup>162</sup>

Additionally, new criteria have also been proposed for determination of whether goods or technology would be used for a civil purpose. These criteria would allow for the export of technology to controlled countries if the stated end use is for civil rather than military purposes. Under the Export Bill of 1990, four criteria must be met to determine if the end use is civil. First, the civil application of the goods is well established in countries other than controlled countries.<sup>163</sup> Second, the goods are reasonable in quantity and quality for the proposed end use.<sup>164</sup> Third, the government of the end user has provided assurances that the technology will only be used for its stated end use.<sup>165</sup> Finally, the risk of diversion to an unauthorized user can be verified.<sup>166</sup> An additional safeguard is that the exporter, as a condition of his export license, would be required to monitor the goods for reexport.<sup>167</sup>

Telecommunications equipment has been included in the COCOM license free zone.<sup>168</sup> This would include telephone switching equipment, test equipment, microwave equipment and telecommunications equipment that includes lasers.<sup>169</sup>

#### v. *Reexport Controls*

The Export Bill of 1990 would significantly reduce license requirements for reexport. Licenses would not be required for reexport within the COCOM trade free zone.<sup>170</sup> Licenses would not be required for goods with less than 25 percent of the theoretical peak performance of original U.S. technology.<sup>171</sup> Licenses would not be required for goods to controlled countries if the technology being reexported would "require only notification of the participating governments of COCOM."<sup>172</sup>

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162. *Reauthorization Hearings, supra* note 10, at 327 (opening statement of Rep. Feighan).

163. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. EFA of 1990, § 8, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

169. *Id.*

170. *See supra* footnotes 160-61.

171. EFA of 1990, § 6, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

172. *Id.*

However, the Export Bill of 1990 does require assurances from the end user in his respective country. Specifically, the end user's government must allow on site verification of the use and condition of the goods and technology exported.<sup>173</sup> That government must impose and enforce controls to prevent reexport.<sup>174</sup> Finally, the government must prevent the technology from being used in an unauthorized manner.<sup>175</sup> If these requirements are met, the Secretary of State should negotiate a bilateral treaty to implement these safeguards.<sup>176</sup>

vi. *Due Process*

Under the Export Bill of 1990 judicial review would be expanded.<sup>177</sup> An exporter would have access to the courts to determine whether the Department of Commerce's administration of the export control process conforms with statutory authority.<sup>178</sup> However, no discretionary rulings may be made by the court to determine if a technology should be on the Control List for national security purposes.<sup>179</sup>

vii. *Penalties*

To provide deterrence against violations of the Export Bill, penalties have been drastically increased. For violations of the regulations fines have been raised from no more than 5 times to no more than 10 times the value of the goods to be exported.<sup>180</sup> Corporate fines have been raised from a 1 million to 2 million dollar limit.<sup>181</sup> Individual fines have been raised from a limit of \$250,000 to \$500,000.<sup>182</sup> Finally, jail terms have been doubled from 5 to 10 years maximum.<sup>183</sup>

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173. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Reauthorization Hearings, supra* note 10 at 430 (prepared statement of Grant D. Aldonas, Section of International Law and Practice, American Bar Association).

178. EFA of 1990, § 18, amending the EAA of 1979 codified at 50 U.S.C. § 2412(a).

179. EFA of 1990, § 18, amending the EAA of 1979 codified at 50 U.S.C. § 2412(a)(2)(b).

180. EFA of 1990, § 16, amending the EAA of 1979 codified at 50 U.S.C. § 2410(b)(1).

181. *Id.* at § (b)(2).

182. *Id.* at § (b)(3).

183. *Id.* at § (b)(4).

## VI. A SUGGESTED FOUR PART BALANCING TEST

Previous export control legislation used a two part balancing test to determine the level of U.S. control over exports. This two part balancing test consisted of weighing national security concerns against U.S. business interests. As can be seen from the proceeding discussion, liberalization of U.S. export controls has been occurring gradually, especially since 1979. In essence, with the advent of foreign availability, there has been a three part balancing test since 1979. This third part has been foreign availability.

Under the original two part test, national security outweighed U.S. business interests. With the advent of foreign availability the export controls swung further to the side of favoring U.S. business. The changes that are taking place in Eastern Europe have changed the balance again, helping swing the balance to the side of U.S. business interests.

This note proposes that a fourth prong be added which would consider the needs of the Eastern Europeans for western high technology. This fourth prong again swings the balance to the side of U.S. business for two reasons: (1) strengthening democracy in Eastern Europe would improve national security and (2) only by allowing for easier export of high technology goods, will the U.S. insure that the goods reach these countries rather than being tied up in a statutory maze of export controls in Washington.

The Export Bill implicitly uses a four prong balancing test which consists of: (1) the needs of the emerging Eastern European democracies for American technology; (2) the needs of American technology firms for new markets in Eastern Europe; (3) the needs of the United States not to be left far behind as the West Europeans and Japanese sell technology with almost no restriction; and (4) the needs of the United States to defend itself against present and future adversaries.<sup>184</sup>

### A. *Needs of the Emerging Eastern European Democracies for American Technology*

The United States has a huge stake in securing democracy in Eastern Europe.<sup>185</sup> These changes can be cemented in place by making sure that Eastern European economies function properly. This can only be done with modern technology.

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184. Heritage Foundation Backgrounder, *supra* note 13.

185. *Reauthorization Hearings*, *supra* note 10, at 5 (statement of Rep. Wyden).

The Eastern European countries need to modernize their inefficient economies.<sup>186</sup> Political democratization could fail if their economies falter.<sup>187</sup> There is little debate either within COCOM or the U.S. that the need is real. The Bush Administration, Congress and COCOM are essentially in agreement in deciding what technology would help the Eastern European countries.

Communication, and improved communication equipment, is perhaps the most critical element. Both the Bush proposal to COCOM and the Export Bill of 1990 dramatically increase the level of communications technology that can be exported to Eastern Europe. Increased civilian communications both within and outside Eastern Europe would only serve to further liberalize the political climate there and make it more difficult to reverse the current trend toward a more pluralistic and open society.<sup>188</sup> Moreover, the value in national security terms of having Poland, Czechoslovakia and Hungary free of Soviet control cannot be overestimated.<sup>189</sup>

The counterargument is that Eastern Europe will only serve as a stopping off point for technology bound for the Soviet Union. Moreover, it would be naive to think that all ties with the Soviet Union and the KGB are broken after many years of Soviet domination. In fact, if these countries ever fell back into the hands of the Soviets, the high technology infrastructure would already be in place.

This counterargument fails for two reasons. First, these countries want to be free of Soviet control and have great incentives to protect any technology they may import against diversion to the Soviet Union.<sup>190</sup> If they fail to protect the technology they would be barred from importing these technologies in the future.<sup>191</sup> Second, protective measures are being taken by COCOM and by Congress, under the Export Bill of 1990, which should adequately safeguard diversion.

#### B. *Needs of American Technology Firms For New Markets in Eastern Europe*

One of the most pressing problems facing the U.S. is the growing trade deficit. A large part of the reason for this growing trade deficit

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186. *Reauthorization Hearings*, *supra* note 10, at 57 (statement of Professor Angela Stent, Department of Government, Georgetown University).

187. *Id.*

188. *Reauthorization Hearings*, *supra* note 10, at 20 (statement of Paul Freedenberg, Baker and Botts, Former Under Secretary for Export Administration, Department of Commerce).

189. *Reauthorization Hearings*, *supra* note 10, at 5 (statement of Rep. Wyden).

190. *See supra* notes 173-175.

191. *Id.*

is the restrictive export control policy of the United States for high technology. As long as the U.S. requires licenses, there will be corresponding losses to U.S. business. The National Academy of Science (NAS) report<sup>192</sup> stated that 38 percent of the companies surveyed shift to other sources of supply to avoid potential problems with U.S. export controls. Thus, U.S. firms, even if allowed to export a product are at a competitive disadvantage with Japanese and Western European firms.

This restrictive export policy has resulted in a statutory maze, embodied in the EAA, which includes: restrictive country groups, a broad Control List, confusing licensing requirements, commodity jurisdiction, reexport license requirements and lack of due process for U.S. exporters. The Bush Administration and Congress fundamentally disagree on what changes are necessary to the EAA to support U.S. business.

The Bush Administration proposal to COCOM would provide relief to U.S. business in only two areas: Poland, Czechoslovakia and Hungary would be removed from the controlled country groups and the U.S. Control List and COCOM's Industrial List would be modified to provide Poland, Czechoslovakia and Hungary the high technology products they require. These changes would provide some relief to U.S. business but not nearly enough.

By contrast, the Export Bill of 1990 would provide relief in virtually all areas. First, Poland, Czechoslovakia and Hungary would be removed from the list of controlled countries. Second, the U.S. Control List would be modified to allow high technology products to be exported to Eastern Europe. The major difference between the Bush administration and the Export Bill is in regards to subsequent reformulation of the Control List. The Export Bill would statutorily mandate that the U.S. Control List remain the same as that of COCOM. Under the Bush proposal, the Department of Commerce would still have the authority to unilaterally change the U.S. Control List to be more restrictive than COCOM's. Thus, the Bush proposal to COCOM might be illusory because if history is any indication, the U.S. Control List will become more restrictive than COCOM's.

The next four areas are where the major differences lie: licensing requirements, commodity jurisdiction, reexport license requirements and lack of due process for U.S. exporters. In these four areas only

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192. COMM. ON SCIENCE, ENG'G., AND PUB. POLICY, NAT'L. ACADEMY OF SCIENCES, NAT'L. ACADEMY OF ENG'G., INST. OF MEDICINE, BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION 11 (1987) [hereinafer NAS report].

the Export bill has spoken. The Bush Administration proposals do not suggest any changes to these four critical areas.

The first area is licensing requirements. The Export Bill would create a license free zone within COCOM. This would dramatically ease problems for U.S. business and bring U.S. business on a level playing field with our COCOM allies.<sup>193</sup> It would also free up \$8-\$10 billion dollars in export business that the U.S. is losing just because of stringent licensing requirements. Moreover, it would help to shore up the precarious COCOM consensus.

The second area is commodity jurisdiction. The Export Bill would eliminate the Department of Defense from the licensing process and formulation of the Control List. Major reports for years, have indicated that this approach would expedite the licensing process without jeopardizing national security. In 1986, the General Accounting Office (GAO) published a report questioning whether the Department of Defense should be involved in free world licensing.<sup>194</sup> In 1987, the National Academy of Science (NAS) conducted a study which criticized the Department of Defense stating "industry has become confused and alarmed . . . , and allies have become annoyed . . ."<sup>195</sup> The NAS report noted that five percent of all applications take 100 days or more causing huge losses to U.S. exporters.<sup>196</sup>

The third area is reexport license requirements. Reexport controls would be eliminated, under the Export Bill for non-controlled countries. In place of reexport controls are assurances that the country will take precautions to insure that the technology is not diverted to the Soviet Union. This approach is correct for two reasons. First, it would reduce the licensing load on U.S. business and help to create a level playing field with foreign competition. Second, elimination of reexport licensing would help shore up the shaky COCOM consensus that is infuriated with extraterritorial application of U.S. law. Moreover, with EC 1992, member European countries will no longer be requiring reexport licenses.

The fourth area is due process for U.S. exporters. Under the Export bill, U.S. exporters would have access to judicial review of Department of Commerce decisions. Under the EAA the Department of Commerce was not held accountable for agency inaction or deviation

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193. *Reauthorization Hearings*, *supra* note 10, at 358. Out of 75,400 licenses processed in 1989, 27,500 were for COCOM destinations. Only 10 were denied.

194. GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, EXPORT LICENSING: COMMERCE-DEFENSE REVIEW OF APPLICATIONS TO CERTAIN FREE WORLD NATIONS (1986).

195. NAS report, *supra* note 192, at 161.

196. *Id.* at 13.



from the statutory requirements. Under the Export Bill the Department of Commerce would be held accountable for its actions. Providing judicial review, will give an element of fairness, which has been sorely lacking in previous legislation.

The Bush proposals to COCOM will probably be effective in getting the needed technology to Eastern Europe. They will not be effective in creating a level playing field for U.S. business because four problem areas were not addressed. Nor will they provide incentives to other COCOM members to negotiate in the future. Under the Bush proposals, COCOM negotiations will probably falter with no corresponding gain for U.S. national security.

The Export Bill of 1990 goes further towards helping U.S. business. The Export Bill would remove the burden of licensing requirements, clarify commodity jurisdiction, eliminate reexport licensing and allow due process. These changes should make the system more responsive to the needs of U.S. business.

C. *The Needs of the United States Not to be Left Far-Behind as the West Europeans and Japanese Sell Technology With Almost no Restriction*

Problems with determinations of foreign availability are recognized by the Bush Administration, COCOM and Congress. From the June 6-7 meeting, COCOM agreed to change the manner in which determinations of foreign availability are made. By shifting to "strategic criticality" from "strategic significance", COCOM would incorporate findings of foreign availability directly into the COCOM Industrial List. In theory, this approach would appear acceptable.

However, U.S. business needs may not be met because the speed at which COCOM changes are implemented might be slow. In fact, the COCOM members will not be submitting proposals for a new COCOM Industrial List until the end of 1990. Moreover, the Bush Administration would still be free to change the U.S. Control List to be more restrictive than that of COCOM which would eliminate any advantages gained by U.S. business from the current COCOM negotiations.

The Export Bill would go further towards recognizing and dealing with U.S. business concerns. The Export Bill would statutorily mandate that the U.S. Control List stay the same as COCOM's and create an indexing system for removal of technologically obsolete items from the Control List.

The Bush proposals to COCOM do not give U.S. business any guarantees regarding the future status of the U.S. Control List. Nor

would it appear that future COCOM negotiations would be rapid to remove items that are technologically obsolete from the COCOM Industrial List. The Bush proposals would, for the time being at least, improve the situation for U.S. export of high technology.

However, high technology is a rapidly advancing field. The Export Bill recognizes the rapid pace of technological growth and the corresponding slow pace of COCOM negotiations by including indexing provisions. Therefore, the Export Bill proposals will provide assurances to U.S. businessmen and to overseas customers that the U.S. export control system will change with technological change. Moreover, COCOM consensus would be improved because it is likely that as technological advances are made, the U.S. would be, without the Export Bill, the sole dissenter for removing obsolete technology from the COCOM Industrial List.

D. *The Need of the United States to Defend Itself Against Present and Future Adversaries*

Perhaps the best way that the U.S. can defend itself against the use of high technology obtained illegally is to strengthen COCOM. COCOM is on the verge of collapse due primarily to U.S. insistence on strict controls. Yet it is apparent that U.S. national security controls are no more effective than the cooperation the U.S. is able to gain from other producers and exporters of high technology. U.S. national security interests would be better served by building higher fences around fewer products.<sup>197</sup>

By shoring up COCOM consensus more countries might join. A goal of COCOM should be to bring newly industrializing countries such as Taiwan, Korea and Singapore into the COCOM multilateral control framework. This might be possible by reducing the main complaints of COCOM members with the U.S., namely elimination of U.S. unilateral controls and extraterritorial application of U.S. law. The Export Bill addresses these issues which are a problem within COCOM.

Less stringent controls will also generate new technology for U.S. military interests.<sup>198</sup> The strict controls have proved to be a deterrence

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197. N.Y. Times, June 8, 1990, § A, at 6, col. 5 (statement of Allen Wendt, Special Representative for Strategic Technical Policy at the State Department).

198. *Reauthorization Hearings*, *supra* note 10 at 89. "Today, defense procurement is no longer the catalyst of technological advancement; instead, advances in civilian technologies often drive the development of the military sector."

to developing commercial hardware. Yet much of this technology is generated by the civilian sector.

It is going to be important, from the standpoint of U.S. national security during COCOM negotiations, to differentiate between Eastern Europe and the Soviet Union. Many COCOM members are opposed to this differentiation because it would hinder export to the Soviet Union and require COCOM to review each export to determine the final destination. Yet, this differentiation was incorporated into the Export Bill and it appears that the Bush Administration is in agreement. From the standpoint of U.S. national security it is vital that COCOM differentiate because otherwise a license free zone would be created with the Soviet Union.

Perhaps the most powerful argument against passing the Export bill is that the export control system has been very successful in denying the Soviets U.S. military technology. Some argue that the U.S. should wait and see what the outcome of new Soviet policies such as glasnost and perestroika will bring and whether they will last. This argument is persuasive when viewed in light of what recourse the U.S. has for violations of the COCOM multilateral agreement. COCOM, as a non binding multilateral agreement does not even have the power of a treaty. The only recourse, short of war, is that the U.S. can impose sanctions for violations, such as a denial of the U.S. as an import market for alleged violators. This is what occurred following the Kongsberg-Toshiba incident where the U.S. imposed a three year moratorium on the import of Toshiba products into the U.S. This has proved to be a powerful deterrent to further violations of the COCOM agreement. Finally, if COCOM export controls are not loosened, there may no longer be a COCOM. Certainly, it is better to have an arguably less stringent organization than no organization at all.

## VII. CONCLUSION

The EAA expired on September 30, 1990.<sup>199</sup> The previous balance of U.S. national security concerns over U.S. business interests is now obsolete in determining U.S. policy regarding high technology exports.<sup>200</sup> Recent historical changes in Eastern Europe and a burgeoning U.S. trade deficit are two additional factors to consider when reauthorizing the EAA.

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199. *See supra* note 12.

200. *See supra* note 5.

This note suggests four factors for Congress and the Bush Administration to consider which are: (1) the needs of the emerging Eastern European democracies for American technology; (2) the needs of American technology firms for new markets in Eastern Europe; (3) the needs of the United States not to be left far behind as the West Europeans and Japanese sell technology with almost no restriction; and (4) the needs of the United States to defend itself against present and future adversaries.<sup>201</sup> The Export Bill is deadlocked because the Bush Administration and Congress have different approaches to balancing these four factors within the present EAA unilateral, and COCOM multi-lateral, frameworks.

First, the Bush Administration and Congress are in general agreement regarding the high technology needs of Eastern Europe. It is considered imperative that for the emerging democracies to survive these countries must have high technology to modernize their economies.

Second, the Bush Administration prefers to leave the U.S. unilateral controls intact while negotiating with COCOM for change in multi-lateral controls. The Bush proposals to COCOM will probably be effective in getting the needed technology to Eastern Europe. Through modification of the U.S. Control List and COCOM's Industrial List, and the removal of Poland, Czechoslovakia and Hungary from the controlled country list, high technology products should reach Eastern Europe. It is possible that the U.S. statutory maze might still stand in the way of U.S. high technology being exported to Eastern Europe.

Still, four problem areas in U.S. unilateral controls were not addressed by the Bush Administration. These are the areas of licensing, reexport controls, commodity jurisdiction and due process. Without addressing these major issues U.S. business will not be able to compete with its worldwide competitors.

The Export Bill of 1990 goes further towards helping U.S. business by making drastic reductions in U.S. unilateral controls. The Export Bill provides solutions to the problems of licensing requirements, commodity jurisdiction, reexport licensing and due process. These changes should make the system more responsive to the needs of U.S. business.

Under the Export Bill, licensing requirements would be removed for COCOM allies. This would create a license free zone within COCOM and drastically reduce the burden on U.S. business. Commodity jurisdiction would be given solely to the Department of Commerce. This would reduce the number of items on the Control List and help

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201. *See supra* note 13.

reduce licensing time. Reexport licenses would no longer be required so long as the destination country provides assurances against diversion to the Soviet Union. This would reduce the licensing burden on U.S. business as well as reduce the conflict in COCOM regarding the extraterritorial application of U.S. law. Finally, due process would be given to U.S. exporters. This would be a further assurance to U.S. business that the system will function properly in the future.

Third, both the Bush Administration and the Export Bill would provide for less restrictive determinations of foreign availability. Under the Bush proposals to COCOM foreign availability determinations would be incorporated into the COCOM Industrial List. However, under the Bush proposal there would not be any future guarantees that the U.S. Control List and COCOM's Industrial List would remain the same.

Under the Export Bill of 1990, Congress would statutorily mandate that the U.S. Control List and COCOM's Industrial List remain the same. Moreover, an indexing feature would be provided that would automatically take obsolete technology off the Control List as the technology level increases. Under the Export Bill, U.S. business interests would benefit and the indexing feature would be more in line with general COCOM consensus. Thus, the Export Bill would go further in shoring up an uneasy COCOM consensus.

Fourth, both the Bush Administration and Congress are in agreement that multilateral controls are critical to U.S. national security. It is apparent that U.S. national security controls are no more effective than the cooperation that the U.S. is able to gain from other producers and exporters of high technology. However, it was only when COCOM was on the verge of collapse, along with pressure from Congress and U.S. business, that the Bush Administration finally gave in and agreed to loosen COCOM restrictions.

Congress has attempted to shore up the precarious COCOM consensus by proposing the Export Bill. The Bush Administration's conservative stance during the recent COCOM negotiations will only serve to make COCOM weaker, and perhaps eventually lead to its demise. Congress has attempted to make changes to the U.S. unilateral control structure that the COCOM members find the most objectionable such as strict U.S. unilateral controls, U.S. reluctance to changing the COCOM Industrial List and extraterritorial application of U.S. law.

On balance, the proposed Export Bill of 1990 fulfills each of the four different needs better than the Bush Administration proposals to COCOM. The Bush Administration proposals look only at the present needs. The proposals to COCOM would allow high technology goods

to flow to the Eastern European countries. By reducing the COCOM Industrial List, the Bush Administration has temporarily restored shaky COCOM confidence in the U.S. However, it is apparent that the COCOM members, and U.S. business, will expect more changes in the unilateral and multilateral export control system to allow for future change. Multilateral changes include a reduction in extraterritorial application of U.S. law and future negotiations towards reductions in the COCOM Industrial List. Unilateral changes include reductions in licensing requirements, elimination of reexport controls, clarification of commodity jurisdiction and due process given to exporters. All of these problems are addressed in the Export Bill of 1990.

Furthermore, the Export Bill of 1990 serves a dual purpose even if it is not passed during the 101st Congress. First, it puts pressure on the Bush Administration to negotiate with COCOM at the June 6-7 COCOM meeting. Moreover, it helped COCOM consensus by signaling to COCOM that U.S. unilateral export controls will eventually be removed. Second, it is a vehicle for change of the EAA with widespread support. Arguably, it has served both purposes well. The COCOM Industrial List is being modified with subsequent changes to the U.S. Control List. Higher fences are being built around fewer products. Most likely, the Eastern European countries will benefit from these changes.

Passage of the Export Bill is critical to U.S. business interests. Without its passage the U.S. business community will be at a competitive disadvantage with producers around the world. Although the passage of the bill is uncertain it does appear certain that the U.S. unilateral control system is in for dramatic change in the near future.

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