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How to Increase Technology Exports without Risking National Security—An In-Depth Look at the Export Administration Amendments Act of 1985

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I. INTRODUCTION

The shifting values of currency exchange rates now taking place in favor of the yen and Deutsche mark in terms of dollars are creating new opportunities for increased sales of United States products abroad. At the same time, the current high trade deficit in the United States has created a crucial need to increase U.S. exports. It is thus timely to examine the impact of U.S. export regulations as a major factor for encouraging or impeding the export of U.S. goods. The comprehensive study that follows will discuss the amendments adopted by the 99th Congress, in June 1985, to the Export Administration Act of 1979 as those changes impact on the ability of U.S. companies to sell technology products abroad. These amendments offer some opportunity for increasing technology exports without risking national security.

In December 1982 Dr. Paul Freedenberg[1] predicted that the "expiration of the Export Administration Act on September 30, 1983, [would be] likely to precipitate one of the major legislative battles of the 98th Congress."[2] His prediction proved accurate, for the struggle both within and between the two houses of Congress over how to revise the Export Administration Act of 1979 (the 1979 Act) was not only a great contest, but one that in fact outlived the 98th Congress. Not until June 27, 1985, was the expired Export Administration Act finally reauthorized in amended form by the 99th Congress,[3] to be signed into law on July 12, 1985,[4] as the Export Administration Amendments Act of 1985[5] (EAAA 1985).

On one side of this conflict were those who were outraged over the leakage of scientific data and sophisticated technology into the hands of the Soviets. Simply by copying our technology and ideas, available not only illegally through espionage, theft, and bribery, but legally through licensed purchases, freely available scientific and tech-

1. Dr. Freedenberg is International Finance Economist for the Subcommittee on International Finance and Monetary Policy, Senate Committee on Banking, Housing and Urban Affairs [hereinafter cited as Senate Banking Committee], the Senate Committee having jurisdiction over revision of the Export Administration Act of 1979. Freedenberg, *U.S. Export Controls: Issues for High Technology Industries*, 1982 NAT'L J. 2190.

2. *Id.*

3. 43 CONG. Q. 1302 (1985).

4. *Trade Policy: Reagan Signs Compromise Bill Reauthorizing Exporting Administration Act*, DAILY REP. EXECUTIVES (BNA) No. 135, at L-3 (July 15, 1985).

5. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 1985, *reprinted in* 1985 U.S. CODE CONG. & AD. NEWS (99 Stat.) 120 (codified at 50 U.S.C. §§ 2401-2420 (1986)) [hereinafter cited as Pub. L. No. 99-64].

nical journals, and attendance at open scientific meetings, the Soviets had been able to seriously narrow the technological advantage of the West over the East. Worried legislators urged that increased regulation of sales of technology and exchange of scientific information was needed in revising the 1979 Act, as well as stricter enforcement of export laws and harsher penalties for illegal activity.

On the other side of the conflict stood both the scientific community and U.S. industrialists, who feared that greater restrictions on their activities would threaten their survival. The scientific community asserted that this country's technological superiority depends on the open exchange of ideas among scientists at meetings and in their professional journals. United States industry, while not disputing the need to safeguard technological advancements from our enemies, argued that legitimate trade is stifled by unreasonable delays in obtaining licenses. Not only that, but directly because of the President's broad authority under the 1979 Act to block performance on existing contracts through trade sanctions, U.S. companies have gained a wide-spread reputation abroad for being unreliable suppliers. Furthermore, they argued, when the United States is not the sole supplier of certain advanced technology, a unilateral restriction on exports from this country only serves to boost the sales of foreign competitors as U.S. companies are forced to vacate markets they worked to develop.

The basic conflict of whether exports should be more highly promoted or restricted was also manifested by the controversy, not only within Congress but also within the Administration itself, as to which agency—the Commerce Department or the Treasury Department's Customs Service—should have primary responsibility for enforcing commercial export laws.

Under the 1979 Act, Commerce has principal authority over commercial exports, with the State Department (pursuant to other laws) having jurisdiction over the export of defense articles. As the only cabinet-level agency dedicated to seeking U.S. competitiveness in international trade, Commerce's preeminence in export administration has been seen by many as the surest means of ensuring the promotion of exports as the primary objective of commercial export regulation.

Many in the Senate, however, were impressed with the Customs Service's extensive experience as a traditional law enforcement agency and its recent administration of President Reagan's "Operation Exo-

dus," a campaign begun in 1981 of tougher enforcement against illegal exports.[6] These senators sought to shift export enforcement duties under the 1979 Act to Customs.[7]

Meanwhile, a similar controversy raged over the appropriate level of involvement of the Defense Department in the area of pre-export license approvals. The well-funded[8] Defense Department (DOD) sought to persuade Congress to expand DOD's role in the license review process and thereby assure attention to Defense's primary objective in export control: to deny advanced products and technical know-how to the Soviets.[9]

The contrasting goals of the Defense and Commerce Departments in export administration capsulize the two contrasting goals of the 1979 Act itself: while the DOD raises concerns about the risks of having U.S. technology freely available on the world market, the Commerce Department points out the adverse economic consequences of denying to U.S. technology free access to the world market. Nevertheless, the ongoing theme of congressional debate over reauthorization of the Export Administration Act was that a way had to be found to simultaneously further promote U.S. exports and put a stop to Soviet military exploitation of this country's technological innovations. The end result of that legislative struggle is the subject of this article, which will approach the subject by discussing each of the issues affecting technology exports, presenting first the divergent viewpoints advanced in congressional debate and then describing the

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6. Operation Exodus is discussed in detail *infra* notes 393-407 and accompanying text.

7. *See, e.g.*, Weinrod & Pilon, *Staunching the Technology Flow to Moscow*, HERITAGE FOUNDATION BACKGROUNDER, Sept. 23, 1983, *reprinted in* 130 CONG. REC. S1293-94 (daily ed. Feb. 9, 1984) (placed in the Congressional Record by Sen. Garn (R-Utah)); 130 CONG. REC. S2141 (daily ed. Mar. 1, 1984) (statement of Sen. Nunn (D-Ga.)); 130 CONG. REC. S1694 (daily ed. Feb. 27, 1984) (statement of Sen. Proxmire (D-Wis.)).

8. Congressman Bonker (D-Wash.), a member of the House Committee on Foreign Affairs, recently commented on the contrast between the resources of the Commerce Department and those of the Defense Department:

> Mr. Perle [Assistant Secretary of the Defense Department] boasted that he has increased his staff in one year from four to 77 people to handle licensing and technology transfer policy. The Commerce Department has to come before our committee to beg to put on another four or five people. With all those resources comes control. I am not talking about technology control, I am talking about institutional control—policy control, if you will.

Address by Congressman Bonker before a July 18, 1985, conference on the EAAA 1985, *reprinted in* INT'L BUS. REV., July 1985, at 4 [hereinafter cited as Address by Rep. Bonker].

9. Chase, *It's a Bruising, Three-cornered Turf Battle*, ELECTRONIC BUS., Sept. 15, 1984, at 134.

consensus reached on each such point.[10]

Before commencing a point-by-point discussion of the changes enacted by the EAAA 1985, however, this article will provide a background on the history of U.S. export regulation, including: (a) the events that led to the 1979 Act; (b) the legislative history of the EAAA 1985; (c) the perspectives influencing options for controlling exports; (d) a brief description of the operation of the 1979 Act; and finally, (e) a chart outlining the options considered by Congress in revising the 1979 Act.

II. History of Export Regulation

A. Events Leading to the 1979 Act

Until 1949 the U.S. government had used export controls only in wartime or other national emergency, but in the late forties the Cold War led to the first comprehensive, peacetime control scheme over exports, the Export Control Act of 1949.[11] It dealt with the Communist world by simply cutting it off from trade with the West. The 1949 Act was simple to administer and worked well during the fifties and early sixties when our allies shared our policy of economic containment and the United States dominated the world market in goods and technology.[12]

Also, in 1949 the United States, Japan, and most of NATO formed an informal organization known as the Coordinating Committee, or CoCom, to multilaterally control exports for security purposes.[13] Members agree to jointly control the export of embargoed items to specified countries, which for many years have included the U.S.S.R., other Warsaw Pact countries, Albania, North Korea, Viet-

10. This article will not discuss those aspects of the EAAA 1985 dealing with exports of agricultural products, nuclear technology or Alaskan crude oil, and it will deal sparingly with issues related to sanctions against South Africa.

11. Comment, *The EAA of 1979: Latest Statutory Resolution of the "Right to Export" versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255, 258 (1981).

12. 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).

13. U.S. DEPARTMENT OF COMMERCE, OVERVIEW OF THE EXPORT ADMINISTRATION PROGRAM 10 (1984) (available from ITA/DEA, Wash., D.C. 20230) [hereinafter cited as COMMERCE]. The fifteen members of CoCom are Belgium, Canada, Denmark, France, the Federal Republic of Germany (including West Berlin), Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. (NATO-members Iceland and Spain do not belong to CoCom). Members retain the right to act independently, and any agreements reached, such as which items are to be embargoed, must be unanimous. *Id.*

nam, and the People's Republic of China.[14]

During the 1960's, as the economies of our trading partners strengthened, and their need to increase their exporting markets grew, our allies sought greater trade with Eastern Europe and the rest of the Communist world.[15] The Export Administration Act of 1969 was a response to pressure from our allies to liberalize our East-West trade policy.[16] The 1969 Act took a marked departure from the superseded 1949 Act in regarding trade with all countries, Communist included, as beneficial to the U.S.[17]

In the 1970's another change began, involving technological innovations. With the development and astonishing drop in the cost of computer chips, manufacturers could afford to use microprocessors in limitless inventions. Thus, technological advancements that could, with Soviet ingenuity, be militarily significant to our enemies began pouring out of the private sector. Previously, most militarily relevant technology was developed under the direct supervision of the Pentagon, which was thus also in a position to control the transfer of that technology to other countries. More and more, those concerned with curbing our enemies' military advancement had to consider potential applications of privately developed, U.S. high technology in the wrong hands.[18]

An additional factor that should be mentioned, one that has had a significant impact on world trade in general, is the OPEC cartel's control over world oil prices throughout the 1970's. As a result of the 1973-74 and 1979-80 OPEC price hikes, the increasingly high cost of importing petroleum seriously escalated the pressure on the Europeans and Asians to find ways to make up currency exchange and balance their trade deficits.[19] No doubt this contributed to those countries' unwillingness to employ the same tight controls over ex-

14. *Id.* CoCom is discussed further *infra* notes 370-77 and accompanying text.

15. Murphy & Downey, *supra* note 12, at 792.

16. COMMERCE, *supra* note 13, at 3.

17. Murphy & Downey, *supra* note 12, at 792.

18. Johnson, *Apple IIs for Soviets? High Tech: Easing Curbs on Exports*, L.A. Times, May 21, 1984, pt. 1, at 1, col. 1.

19. Solomon, *What the Oil Shock is Doing to the World Economy*, FORTUNE, Dec. 29, 1980, at 9. *See also Oil Prices Roil Eurocurrencies*, BUS. WK., Mar. 29, 1982, at 146 (discussing large balance-of-payments deficits caused by high oil prices and effect of oil prices on foreign exchange rates); Dowling, *An Oil-shock Strategy that Paid Off*, BUS. WK., Dec. 1, 1980, at 66 (discussing success of Japan's aggressive export promotion to finance its oil deficit); *Common Market May Turn to Oil States to Finance Deficits*, Wall St. J., Oct. 21, 1980, at 38, col. 3 (discussing plan to help community members with international payments deficits caused by high oil prices).

ports of high-technology goods that the United States government favored.

Predictably, U.S. companies soon protested our government's unilateral restrictions on exports of high technology when similar products were available abroad.[20] In 1977, in response to pressure from the private sector, legislators modified the Export Administration Act of 1969 to restrict executive authority to impose export controls on goods and commodities that were available abroad in "significant quantities and comparable in quality" to U.S. products.[21]

With the 1977 amendments, however, a new type of export control was authorized under the Act—the power to restrict exports for foreign policy reasons. Under the 1977 amendments, the declared policy of the United States was to encourage trade with all countries, *except* those "with which such trade has been determined by the President to be against national interest."[22] Trade was permitted to be interrupted "to the extent necessary to further significantly the foreign policy of the United States and to fulfill its international obligations."[23] Under the 1977 amendments, Congress gave the President the authority to "implement this policy by prohibiting or curtailing exports 'under such rules and regulations as he shall prescribe.'"[24] In practice, this meant direct loss of sales for U.S. exporters.

During the 1978 and 1979 congressional hearings on the reauthorization of the Export Administration Act of 1969, due to expire in September 1979, much attention was given to the extensive use the Carter Administration had made of its authority to impose foreign policy controls.[25] Witnesses testified to the confusion it created for

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20. Comment, *supra* note 11, at 264.

21. COMMERCE, *supra* note 13, at 3, citing the 1979 Act, section 4(c), which reads as follows:

> (c) FOREIGN AVAILABILITY. —In accordance with the provisions of this Act, the President shall not impose export controls for foreign policy or national security purposes on the export from the United States, . . . unless the President determines that adequate evidence has been presented to him demonstrating that the absence of such controls would prove detrimental to the foreign policy or national security of the United States.

Export Administration Act of 1979, Pub. L. No. 96-72, § 4(c), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS (93 Stat.) 503, 506 [hereinafter cited as Pub. L. No. 96-72].

22. 50 U.S.C. § 2402(a)(A) (1977).

23. 50 U.S.C. § 2402(7) (1977).

24. 50 U.S.C. § 2403(b)(1) (1977).

25. The Carter Administration seized upon this new authority to attempt to deny the export of, for example: (1) about $400 million in trucks, aircraft, and spare parts to Libya to discourage it from aggression against other African countries, particularly Egypt; (2) a Sperry-Univac computer to Tass, the official Soviet press agency, as an expression of displeasure with

exporters and its "dampening effect on the generally declining U.S. export position."[26]

Therefore, while the 1979 Act did include most of the 1977 amendments, provisions were added to guard against the misuse of foreign policy controls. The new Act required the President to show Congress that he had considered a specified set of criteria before calling for economic sanctions against a targeted nation.[27]

The 1979 Act also sought to improve on the Export Administration Act of 1969 in: (a) its elevation of the needs of exporters;[28] (b) the provisions for greater input from the exporting community;[29] (c) heightened congressional involvement in the export process mechanisms;[30] and (d) requirements that the lists established to control ex-

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the trials of Russian dissidents and U.S. newspaper reporters; (3) technical data and equipment for a rock drill bit manufacturing facility by Dresser Industries to the Soviet Union; and (4) certain crime control and detection equipment to any country engaged in egregious violations of human rights. Murphy & Downey, *supra* note 12, at 810-11 nn.98-100. Perhaps best remembered of the foreign policy controls imposed during the Carter years were the sweeping economic sanctions declared in reaction to the Soviet invasion of Afghanistan: "an embargo on exports of grain, phosphates, high technology products, equipment for the Kama River truck plant; and goods to be used at the Olympics in Moscow. Also, the U.S. Olympic team did not participate in the games." H. MOYER, JR. & L. MABRY, EXPORT CONTROLS AS INSTRUMENTS OF FOREIGN POLICY: THE HISTORY, LEGAL ISSUES, & POLICY LESSONS OF THREE RECENT CASES (1983), *reprinted in* 15 LAW & POL'Y INT'L BUS., (June 1983), also *reprinted in* 129 CONG. REC. E2347 (daily ed. May 18, 1983) (placed in the Congressional Record by Rep. Hamilton (D-Ind.)) [hereinafter cited as MOYER-MABRY STUDY]. This study, by Homer E. Moyer, Jr., and Linda A. Mabry, goes on to assess the relative lack of success of the Afghanistan-related sanctions:

> Because not all grain producing countries cooperated, the economic impact of the grain embargo was ultimately quite limited; the Olympics boycott had substantial, symbolic effect, although fewer countries joined the boycott than we had hoped; high technology controls halted numerous U.S.-Soviet transactions but did not change the policies of other COCOM countries. The greatest short-term economic inconvenience and cost to the Soviets may have been caused by the embargo on phosphates and Kama River truck plant equipment. In total, the political statement of the sanctions was strong, but the economic impact on the Soviets quite limited. The costs to the U.S., in part hidden, were very high.

Id. at E2347.

26. Murphy & Downey, *supra* note 12, at 812.

27. Pub. L. No. 96-72, *supra* note 21, § 6(b), at 513. These criteria and the problems resulting from the fact that the 1979 Act requested, but did not enforce, executive self-restraint, are discussed *infra* notes 269-83 and accompanying text.

28. *Id.* § 3(10), at 505 ("Declaration of Policy" section).

29. *Id.* § 5(h), at 510 (national security controls section); § 6(c), at 514 (foreign policy controls section); and § 7(b), at 516 (short supply controls section).

30. *Id.* § 6(e), (i), at 514-15 (foreign policy); § 7(d)(2), at 518 (short supply); § 10(g)(4), (h), at 527-28 (licensing); § 12, at 530-31 (enforcement); and § 14, at 532-33 (annual report to Congress).

ports[31] be meticulously compiled and periodically reviewed to ensure against overcontrol.[32]

Yet despite its improvements over the 1969 Act, the 1979 Act was roundly criticized for the way it seemed almost to thwart exports and facilitate the flow of technology to the Soviets, instead of the reverse. Long before its September 30, 1983 expiration date, various interest groups began lobbying for specific changes in the replacement Act.

B. Legislative History of EAAA 1985

By the end of the first session of the 98th Congress—and by that time the 1979 Act had expired[33]—only one legislative body had even approved a bill, H.R. 3231, which passed the House on October 27, 1983.[34] The House bill placed heavy emphasis on opening trade channels for high technology.[35] Not all members of the House accorded with H.R. 3231's liberalized approach on behalf of exporters, however. Congressman Roth,[36] for example, felt that the proposed language sacrificed important safeguards to national security by eliminating the requirement that U.S. companies obtain export licenses for shipments to CoCom countries.[37]

By March 1, 1984, a Senate counterpart bill, S. 979, was approved.[38] While this version was aimed at striking a clear balance

31. The Commodity Control List established under § 5(c), *id.* at 507, and the Militarily Critical Technologies List established under § 5(d), *id.* at 508 (national security controls section).

32. *Id.* § 5(d), at 508.

33. Under section 20 of the Export Administration Act of 1979, the authority delegated to the President to control exports terminated on September 30, 1983. The law was extended on October 1, 1983, by Pub. L. No. 98-108; on December 5, 1983, by Pub. L. No. 98-207, and on February 29, 1984, by Pub. L. No. 98-222. As these extensions lapsed, the Export Administration Regulations were continued in effect by Exec. Order No. 12,444, 48 Fed. Reg. 48,215 (1983) and Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984), under authority granted to the President by the International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1985). *See also A Review of Key Provisions of the Export Administration Act of 1985*, MACHINERY & ALLIED PRODUCTS INST. MEMORANDUM No. FT-113, Aug. 2, 1985, at 1 n.1 (available from Machinery & Allied Products Institute, 1200 Eighteenth St., N.W., Wash., D.C. 20036) [hereinafter cited as MAPI].

34. 129 CONG. REC. H8766 (daily ed. Oct. 27, 1983).

35. 131 CONG. REC. H2011 (daily ed. Apr. 16, 1985) (statement of Rep. Frenzel (R-Minn.)).

36. R-Wis.

37. *See, e.g.*, 129 CONG. REC. H1814 (daily ed. Apr. 5, 1983), 129 CONG. REC. E3918 (daily ed. Aug. 2, 1983), 129 CONG. REC. H6696 (daily ed. Sept. 12, 1983), and 129 CONG. REC. E4289 (daily ed. Sept. 14, 1983) (statements of Rep. Roth).

38. 130 CONG. REC. S2143 (daily ed. Mar. 1, 1984).

between eliminating unnecessary restrictions and providing for more effective control,[39] its emphasis leaned on the side of national defense.[40]

The joint conference, which met on fifteen separate occasions between March and October 1984,[41] managed to settle nearly all the differences between the two bills. Nevertheless, on the floor, two points remained on which the legislative bodies could not agree. The House adamantly rejected the Senate's insistance on a provision that would have given the Pentagon authority to veto licenses for certain high technology items to Free World destinations.[42] Meanwhile, the Senate disliked language inserted by the House relating to trade with and investment in South Africa.[43] Unable to reach a compromise on these two points in its closing days, the 98th Congress bequeathed the job of passing a new export act to the next Congress.[44]

On the first day of the 99th Congress, Congressman Roth introduced H.R. 28.[45] The new bill simply deleted the two deadlocking issues from the bill that almost passed a few months earlier. The House's Title III measure, relating to economic sanctions on South Africa, was removed and introduced as a separate bill.[46] The controversy over the Senate's amendment to section 10(g), which would have given Defense a veto over certain Free World exports, was mooted[47] by action taken in January 1985 by President Reagan.[48]

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39. S. 979, the bill reported by the Banking Committee, is a consensus bill. The bill achieves a balance between our national security needs, that is, to restrict the flow of critical U.S. technology to the Soviet military, and our economic security needs which call on us to promote exports and export-related jobs.

130 CONG. REC. S1692 (daily ed. Feb. 27, 1984) (statement of Sen. Proxmire).

40. 131 CONG. REC. H2011 (daily ed. Apr. 16, 1985) (statement of Rep. Frenzel).

41. *Id.* at H2004 (statement of Rep. Bonker).

42. Electronic News, Oct. 15, 1984, at 2, col. 1. The measure would have amended Section 10(g) of the 1979 Act.

43. *Id.* The measure was contained in Title III of the House bill.

The original House bill (H.R. 3231) provided, among other things, for a total ban on all U.S. investment in South Africa. While conferees would have tempered the sanctions, as originally proposed, a ban on U.S. commercial bank loans to the government would have been maintained. Some Senate backers of reauthorization legislation, led by Senator Jake Garn (R-Utah), objected to a ban on bank loans, which they saw as an encroachment on the jurisdiction of the Senate Banking Committee chaired by Senator Garn. Some members of the House viewed any sanctions other than those originally proposed in the House bill as too weak.

MAPI, *supra* note 33, at 3.

44. Electronic News, *supra* note 42.

45. 131 CONG. REC. H2010 (daily ed. Apr. 16, 1985) (statement of Rep. Roth). When introduced to the House floor for a vote, H.R. 28 had been revised to become H.R. 1786.

46. *Id.* at H2004 (statement of Rep. Bonker).

47. 131 CONG. REC. S8922 (daily ed. June 27, 1985). Senator Garn explained to the 99th

The President issued a directive granting the Pentagon authority to review licenses for "West-West" trade of certain commodities to selected countries.[49] The resulting bill contained only those amendments both houses had previously agreed to, which included a new division of enforcement authority between Commerce and Customs.

By the time the bill came to the House floor for a vote, new language had been inserted that was not part of the package both houses had agreed on in the previous Congress.[50] Language insisted on by the House Judiciary Committee[51] added a new paragraph to section 12(a) of the 1979 Act, conferring authority on the Justice Department to promulgate the regulations to be followed by Commerce and Customs in exercising their police powers.[52] Although the House approved the bill on April 16,[53] the Senate balked at the new provision, and on May 3 called for a conference on the legislation.[54]

On June 25 the conferees reached a compromise on the remaining points of controversy, thereby virtually guaranteeing House and

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Congress that revision to section 10(g) was unnecessary because of the action taken by President Reagan:

> The legislation makes no change to this provision in current law, as none was considered necessary in light of the President's recent directive. The President is to be commended for his directive, bringing to an end a dispute that had hampered effective implementation of our national security controls. As legislators, our primary task is to legislate, but I am just as happy when action by the President makes legislation unnecessary.

Id.

48. Yore, *Free Trade and National Security*, CALIF. LAW., July 1985, at 47, 49.

> President Reagan finally tried to resolve the dispute through a classified memo signed in January 1985 by Robert C. McFarlane, assistant to the president for national security affairs, and sent to the secretaries of State, Defense and Commerce. This memorandum of 'understanding' gave the Pentagon veto power over high tech exports to 15 noncommunist countries of the Pentagon's choosing. While neither Defense nor Commerce Department spokesmen will confirm the countries on the list, reliable sources say the targeted nations are Hong Kong, Malaysia, India, Sweden, Austria, Liechtenstein, Spain, Libya, Iran, Iraq, Finland, Singapore, South Africa, Switzerland and Syria.

Id.

49. MAPI, *supra* note 33, at 3.

50. *Senate May Balk at Approving Export Control Bill Cleared by House Panel*, DAILY REP. EXECUTIVES (BNA) No. 69, at L-3 (Apr. 10, 1985).

51. *Id.*

52. H.R. 1786 § 113(a)(4) as found at 131 CONG. REC. H2001 (daily ed. Apr. 16, 1985).

53. Green, *House Votes to Renew Law on Export Controls*, 43 CONG. Q. 739 (1985). The House then substituted its text for the language in the Senate's bill, S. 883—a bill to extend the act through mid-June—and returned the legislation to the Senate in hopes of swift approval by the other legislative body. *Id.*

54. *Senate Calls for Conference on Export Control Bill*, DAILY REP. EXECUTIVES (BNA) No. 87, at L-6 (May 6, 1985).

Senate approval.[55] On June 27 the bill was adopted by both houses,[56] and on July 12, as expected, President Reagan signed it into law.[57]

C. Perspectives Influencing Options for Controlling Exports

The story of the competing interests represented in each of the bills developed by Congress and the compromises that were achieved is an interesting one. It reflects the way the world has changed in the past thirty years, the many-faceted role of U.S. technology in this country's economy and the world marketplace, and recent growth in technological strength among the developed Asian nations. As might be expected, the issues and the interest groups that vied for attention during the long struggle to amend the 1979 Act do not divide neatly into two homogenous camps. True, there was a side that favored stiffer controls and a side that was against stiffer controls. Yet even within the Defense Department—generally a "hardliner" group—there were military technology leaders striving to protect the scientific community from restrictions on the open exchange of ideas.[58]

Nevertheless, some synthesis of viewpoints is useful, not only to clarify the interests at stake, but also to show the give and take in the gains each interest group was able to make. A report prepared for the Senate Banking Committee provides just such a summation of the relevant perspectives. In anticipation of the congressional debates on the reauthorization of the 1979 Act in 1983, Senators Garn and Riegel[59] requested that the Office of Technology Assessment update its 1979

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55. Green, *Congress Clears Bill to Renew Main Law Regulating Exports*, 43 CONG. Q. 1302 (1985). Senate negotiators had protested that review by the Justice Department would only complicate enforcement. The compromise reached allows the Attorney General to issue guidelines for Commerce, but not for Customs. *Id.*

56. *Congress Clears for President Legislation to Reauthorize Export Controls Law*, DAILY REP. EXECUTIVES (BNA) No. 126, at L-2 (July 1, 1985).

57. *Trade Policy*, *supra* note 4, at L-3. Nevertheless, the President seemed to have mixed emotions.

> [H]e expressed regret that Congress had 'prescribed several new administrative arrangements and reporting requirements that make the export control program more difficult to manage,' but stated that the 'new law—which reflects compromise by all concerned parties—strikes an acceptable balance between enhancing our commercial interests and protecting our national security interests.'

Id.

58. Boffey, *Stemming the Flow of High Technology*, N.Y. Times, Feb. 28, 1984, § C, at 2, col. 3.

59. Chairman and Ranking Minority Member of the Senate Committee on Banking, Housing and Urban Affairs, the Senate Committee having jurisdiction over the Export Administration Act.

study, *Technology and East-West Trade*.[60]

The resulting report highlighted those provisions of the 1979 Act that had led to problems of interpretation or execution. The report then outlined the policy alternatives open to Congress in amending the Act and categorized these alternatives under four primary goals:

(1) Trade Promotion,
(2) Efficiency,
(3) Foreign Policy, and
(4) National Security.[61]

Regarding these goals the report points out:

> The debate over U.S. export administration policy centers on how to simultaneously pursue and balance four different objectives. All members of the export licensing community believe to some extent in each of these goals. They differ in their priorities, and in the past, the relative emphasis accorded these elements has shifted. A new or revised Export Administration Act will reflect congressional decisions on how best to accommodate all four [objectives] . . . .[62]

From the *trade promotion* perspective, the most important task of export administrators is to avoid hindering U.S. companies from being able to compete effectively in the world market and conduct trade in the widest possible variety of civilian goods and technologies.[63] Allied with the trade promoters are those who emphasize *efficiency* in the exporting process, with its attendant goals of (1) allowing exporters to plan ahead, make long-term commitments and gain a reputation for reliability as suppliers, (2) encouraging compliance and (3) minimizing complexity and delays in export licensing.[64]

Some provisions of the 1979 Act are designed to be utilized as instruments of *foreign policy*. Those favoring this goal desire preservation of a system whereby presidential use of trade sanctions for achieving political objectives is as easy and effective as possible.[65] Lastly, the goal of policy options focusing on *national security* is to make it as difficult as possible for the Soviets to acquire and apply

60. OFF. TECH. ASSESSMENT, CONG. OF THE U.S., TECHNOLOGY AND EAST-WEST TRADE: AN UPDATE iii, (1983) (available from the Superintendent of Documents, U.S. Government Printing Office) [hereinafter cited as OTA].
61. *Id.* at 12.
62. *Id.*
63. *Id.* at 14.
64. *Id.* at 13.
65. *Id.*

Western technology for military purposes.[66]

This article will discuss the amendments adopted in EAAA 1985 by grouping them according to the four policy goals just discussed. As one final point of background before describing the changes, however, it may be helpful to explain briefly the structure of the old law.

D. Brief Description of the Operation of the Export Administration Act of 1979

1. Export jurisdictions of the Commerce and State Departments

The administration of exports is divided between the Commerce Department and the State Department. The export of commodities and technical data that are uniquely designed for military application comes under the exclusive jurisdiction of the State Department's Office of Munitions Control (OMC). It should be noted however, that decisions by State's Office of Munitions Control are frequently based on case-by-case recommendations from the Defense Department.

Under the leadership of its Office of Export Administration (OEA), Commerce has authority over the export of nearly everything else.[67] This encompasses both those items that have a purely commercial use and the so-called "dual-purpose" items, that is, those having both a commercial and a military use.

It is important to understand that the jurisdictions of the Office of Munitions Control and Office of Export Administration are mutually exclusive. Unfortunately, in practice, these lines of mutual exclusivity do not create clearly predictable administrative processes for firms seeking export licenses. The OEA will return an application without action if it believes the OMC has authority over the proposed export, and vice versa.[68] Worse still, when the goods arrive at the U.S.

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66. *Id.* at 13.

67. The Code of Federal Regulations lists the exports controlled by other departments and agencies. Briefly, (1) the Munitions List defines the items controlled by the OMC; (2) narcotics and dangerous drugs are controlled by the Drug Enforcement Administration of the Justice Department; (3) commodities subject to the Atomic Energy Act are controlled by the U.S. Nuclear Regulatory Commission of the U.S. Department of Energy; (4) certain watercraft require export authority from the U.S. Marine Administration; (5) natural gas and electric energy are controlled by the Department of Energy; (6) tobacco is controlled by the Department of Agriculture; (7) endangered species, by the Fish and Wildlife Service of the Department of the Interior; and (8) regulations issued by the Patent and Trademark Office govern the export of unclassified technical data regarding foreign patent applications. 15 C.F.R. § 370.10 (1985).

68. A. GREEN & M. JANIK, EXPORT CONTROL RULES, BASIC PRINCIPLES AND GUIDELINES 2 (The Government Contractor, Briefing Papers No. 84-5, 1984).

port of exit, the Customs Service is authorized to detain or even seize goods if Customs officers doubt the correctness of a license, which includes the issue of whether the OMC or OEA should have jurisdiction.[69]

Thus, in dealing with the actual administration of exports, four government entities, crossing four cabinet departments, need to be satisfied: the State Department, the Defense Department, the Commerce Department, and the Customs Service of the Treasury Department. Of the four, only Commerce has a clear interest in promoting exports.

The jurisdiction of the State Department's Office of Munitions Control over military exports derives from the Arms Export Control Act of 1976.[70] The OMC's regulations are called the International Traffic in Arms Regulations (ITAR),[71] which include a generalized list of the goods and technologies subject to its regulation, known as the Munitions List. In determining whether to issue an export license, the OMC normally requests the recommendation of the Department of Defense.[72] The DOD's inquiry typically centers on whether the proposed export might provide a foreign government with an opportunity to derive new technology capabilities not available from other sources.[73]

The essential difference in the policy toward exports under the Arms Export Control Act of 1976 and the 1979 Act is that, unlike

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Determining whether your product is military, dual-use or commercial depends on the nature of your product and not on the identity of your foreign government customer. In other words, the mere fact that you contract with a foreign government's ministry of defense does not necessarily mean your product is a military commodity subject to OMC jurisdiction. For example, trucks sold to a foreign ministry of defense for transporting military personnel probably would be similar—if not identical—to trucks used in purely commercial applications. This is an example of a *dual-use commodity* which is subject to OEA jurisdiction. If your truck is specifically designed to carry ammunition, however, then the truck has a uniquely military application and, consequently, would be subject to OMC jurisdiction.

Id.

69. *Id.* at 12.

In such an event, you will need to convince the Customs Service, OEA, OEE [Operation Exodus is jointly administered by Customs and the Commerce Department's Office of Export Enforcement], and OMC that your shipment has been properly licensed. In effect, you will need to process a *commodity jurisdiction case*—which can involve DOD as well. In the meanwhile, you will not be permitted to export the item in question.

Id.

70. 22 U.S.C. § 2778 (1985).

71. 22 C.F.R. §§ 121-30 (1985).

72. A. GREEN & M. JANIK, *supra* note 68, at 5.

73. *Id.* at 6.

commercial items, military goods and technology are regulated *per se* because they are defense articles.[74] Two objectives in passing the Arms Export Control Act were (1) the encouragement of regional arms control and disarmament agreements so as to discourage arms races and (2) the reduction of international trade in arms in the world community.[75] In contrast, one of the stated aims of the 1979 Act was to "encourage trade with all countries with which the United States has diplomatic or trading relations."[76] Under the 1979 Act, the United States government may control exports "only after full consideration of the impact on the economy of the United States" and then "only to the extent necessary" to (1) avoid jeopardizing national security, (2) further a foreign policy objective or (3) protect scarce domestic resources.[77]

The discussion now returns to its focus on the Office of Export Administration's (Commerce Department) authority over commercial and dual-use exports.

2. What constitutes an export

The 1979 Act mandates the compilation of two lists. One, to be completed by the Defense Department, is the Militarily Critical Technologies List (MCTL).[78] It is intended to be a precisely defined list of all technologies whose acquisition by countries hostile to the United States would enhance their military capabilities and thus be a threat to our national security.[79] The other, to be compiled by the Commerce Department, is the Commodity Control List,[80] a catalogue of all the goods, technology and related technical data controlled for rea-

74. As stated in the Committee Comment to the House Report accompanying the Act when it was passed:

> [A]rms transfers cannot become an automatic, unregulated process. Each case must be carefully judged on its own merits, approval should come only after the application of a set of criteria designed to insure that a grant or sale of defense articles be in the national interests of the United States.

H.R. REP. No. 1144, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1388.

75. Comment, *The Regulation of Technical Data Under the Arms Export Control Act of 1976 and the Export Administration Act of 1979: A Matter of Executive Discretion* 6 B.C. INT'L & COMP. L. REV. 169, 174 (1983).

76. Pub. L. No. 96-72, *supra* note 21, § 3(1), at 504 ("except those countries with which such trade has been determined by the President to be against the national interest.")

77. *Id.* § 3(2).

78. *Id.* § 5(d)(2), at 508.

79. *Recent Developments—Export Controls: Restrictions on the Export of Critical Technologies*, 22 HARV. INT'L L.J. 411 (1981) [hereinafter cited as *Recent Developments*].

80. Pub. L. No. 96-72, *supra* note 21, § 5(c)(1), at 507.

sons of national security, foreign policy, or short supply.[81] With the concurrence of the Secretary of Commerce, items selected by the Defense Department for inclusion on the Militarily Critical Technologies List are incorporated into the Commodity Control List.[82]

Under OEA regulations, the term "technical data" means

> information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. The data may take a tangible form, such as a model, prototype, blueprint, or an operating manual; or they may take an intangible form such as technical service.[83]

Since the 1979 Act authorizes controls on technical data related to items on the Commodity Control List, an "export" is possible even in transactions taking place entirely within U.S. borders. Under Office of Export Administration regulations, an "export of technical data" means not only actual shipment (or transmission—which includes data sent over telephone lines), but also release of the data in the United States with knowledge or intent that such data be shipped or transmitted out of the country, as well as any release of such U.S.-origin data in a foreign country.[84] Furthermore, the concept of "releasing" technical data is also broader than one might expect. It includes:

> (i) Visual inspection by foreign nationals of U.S.-origin equipment and facilities;
> (ii) Oral exchanges of information in the United States or abroad; and
> (iii) The application to situations abroad of personal knowledge or

81. 15 C.F.R. § 399.1(a), (i), (n) (1985). Subsection (n) provides: "All software not expressly subject to the licensing requirements imposed under the Commodity Control List is subject to the provisions of Part 379, 'Technical Data.' However, the definitions contained in § 371.1(b) and (c) apply to all software . . . ."

82. Pub. L. No. 96-72, *supra* note 21, § (c)(2). With regard to foreign policy controls, under Section 6(k), the State Department is instructed to identify those items to be controlled for foreign policy reasons. With the concurrence of Commerce, these items are also incorporated into the CCL. In the case of interagency conflict—whether Commerce/Defense or Commerce/State, the President is to resolve the issue. *Id.* §§ 5(c)(2) at 507, 6(k) at 515.

83. 15 C.F.R. § 379.1(a) (1985).

84. *Id.* § 379.1(b)(1). Under such a definition of "export," it would be easy for U.S. travelers to unwittingly make an illegal export by simply carrying technical data (even though only for personal reading purposes) in their briefcases or baggage while bound for or traveling in foreign countries. If discovered by U.S. Customs officials, the traveler's materials would be confiscated and held until he or she produced evidence that the export was proper. (Interoffice correspondence from Thomas A. Wagner, Senior Counsel, TRW Inc., Electronics & Defense Sector in Redondo Beach, California, June 15, 1983).

technical experience acquired in the United States.[85]

3. The licensing process

a. general and validated licenses

The Office of Export Administration has established, by its Export Administration Regulations,[86] a complex system for regulating exports of commercial and dual-purpose goods and technology.[87] Under this system, some type of license is required for all exports, whether or not listed on the Commodity Control List. Most items can be exported under a general license, however, which requires no formal application to or prior approval from the OEA, so long as applicable shipping requirements are met.[88]

Those items subject to OEA jurisdiction that do not qualify for a general license require a *validated* license for export. To obtain a validated license, an exporter must submit an official Office of Export Administration application form describing the goods to be exported, the identity of the consignee, the value of the transaction, and other detailed information, including a document known as an "end-user statement," certifying that the products shipped will not be re-exported without proper authorization.[89]

The Commodity Control List (CCL) is the touchstone of the OEA's regulations for determining whether or not a validated license is required for export. It is a highly technical list with over 100,000 entries, catalogued into over 200 classifications, including, for example, a broad range of computers, computer-related equipment, lasers, aircraft and their components, electronic devices, synthetic rubber

85. 15 C.F.R. § 379.1 (b)(2) (1985).

86. 15 C.F.R. §§ 368-399.2 (1985). These include the CCL, found at Section 399.1.

87. The word "technology" as used hereafter is intended to encompass the concept of technical data, as defined in 15 C.F.R. § 399.1(n) (1985).

88. A. GREEN & M. JANIK, *supra* note 68, at 7; 15 C.F.R. § 371.2 (1985).

89. A. GREEN & M. JANIK, *supra* note 68, at 8. *See* chart at 15 C.F.R. § 375.1 (1985). There are two types of end-user statements. For exports to Austria, Belgium, Denmark, West Germany, France, Greece, Hong Kong, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey or the United Kingdom, the exporter's customer must obtain an "International Import Certificate and Delivery Verification," (IC/DV) from its government warranting that the customer's government will exercise jurisdiction over the goods. In most other cases, the foreign purchaser must sign OEA's standard form ITA-629, "Statement By Ultimate Consignee and Purchaser," agreeing that the product will not be re-exported without OEA's prior approval. The exception to the requirement for either an IC/DV or a form ITA-629 is when selling directly to foreign government agencies. *Id.* at 8-9. *See* 15 C.F.R. § 375.2-.3 (1985). Note also that a "re-export" of technical data is just as broadly conceived as an export. *Id.* § 379.1(c).

products, certain organic and inorganic chemicals, a broad range of communications-related equipment, certain camera equipment, horses and other items controlled for short-supply reasons, diesel engines, and truck assembly lines. Moreover, if a good or technology is subject to the CCL, its spare parts and prototype models are often separately made subject to the CCL. The Commodity Control List is not an easy document to decipher. Many entries are highly technical. Others are not clearly defined, thus tending to be broad in their coverage.[90]

The exporter uses the CCL by matching its product against individual entries on the list and finding the closest description, with its accompanying Export Commodity Control Number (ECCN), consisting of four digits and a letter. The type of license required for exporting a commodity is a function of both the *letter* in its ECCN and the country of ultimate destination. Export Commodity Control Numbers with the letter "A," the strictest designation, generally require a validated license to all country destinations, while those with the letter "G" usually allow shipment under a general license (meaning that no prior notification to or approval from the Office of Export Administration is required).[91]

b. licensing technical data

Often, an exporter must supply technical data along with its sale of equipment to the foreign buyer. Other times, a foreign purchaser may wish to see specifications on a product prior to ordering it from a U.S. company. As stated earlier, the "export" of technical data is defined very broadly. The transactions just described could likely require a validated license, depending on the classification of the commodity to which the technical data relates. On other occasions, the related commodity will not have any bearing on one's licensing obligations, for there could be a technical data general license applicable to the data being exported.[92]

The Office of Export Administration has authorized two types of general licenses specifically for technical data. One, the "General License-Technical Data Publically Available" (GTDA) covers *publi-*

90. Interoffice correspondence from William E. Gallas, Senior Counsel, TRW Inc., Solon, Ohio (June 11, 1984) (discussing export licensing). Even those who frequently work with the list have complained that it lacks such a simple amenity as a workable index. (Interoffice correspondence from James J. Branagan, Senior Counsel, TRW Inc., Automotive Worldwide Sector in Solon, Ohio, May 7, 1984).

91. A. GREEN & M. JANIK, *supra* note 68, at 7.

92. *Id.* at 10. *See* 15 C.F.R. § 379.2 (1985).

cally available technical data and is available to all destinations.[93] The other, the "General License-Technical Data-Restricted" (GTDR) is available for exports of certain types of data that do not qualify for a GTDA but do conform to certain specific requirements.[94] A validated license is required if neither of these general licenses apply.[95]

c. inter-agency review process and CoCom referral

The Office of Export Administration develops its regulations in consultation with other government agencies.[96] Furthermore, during its license review process, the OEA may decide that certain applications present policy problems requiring review by another agency before a license can issue.[97] Consultation may take place through the Advisory Committee for Export Policy (ACEP).[98] The ACEP conducts its reviews at five operational levels: the senior staff level, the Deputy Assistant Secretary level, the Assistant Secretary and Secretary levels, and the President, who has final authority to resolve all interagency disputes.[99] Interagency review can also take place through less formal consultation with particular agencies, as

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93. 15 C.F.R. § 379.3 (1985). This section sets out the sort of information that can be exported under a GTDA license, including: "data released orally or visually at open conferences, lectures, trade shows . . . publications that may be purchased without restrictions at a nominal cost . . . or are readily available at libraries open to the public," and scientific or educational information disseminated "by correspondence, attendance at, or participation in, meetings," or through "instruction in academic institutions and academic laboratories" so long as the information is not "directly and significantly related to design, production or utilization in industrial processes." *Id.*

94. *Id.* § 379.4. The GTDR regulations are complicated and continue for many pages. There are restrictions applying to certain countries, particularly South Africa and Namibia, special restrictions applicable to software, and written assurance requirements warranting that the technical data will not be re-exported, nor any products made from that technical data. *Id.* *See also* A. GREEN & M. JANIK, *supra* note 68, at 11.

95. 15 C.F.R. § 379.2 (1985).

96. COMMERCE, *supra* note 13, at 8.

97. *Id.*

98. *Id.*

> Members of the ACEP include representatives from the Departments of Commerce, Defense, State, Energy, Transportation, Treasury, the National Security Council, the Arms Control and Disarmament Agency, the National Aeronautics and Space Administration, the Central Intelligence Agency, and other agencies as appropriate (although not all of those listed are voting members on each issue). Other agencies may be invited to participate when matters of interest to them are under consideration.

Id.

99. *Id.*

appropriate.[100]

The Defense Department has a statutory right to review any license for export "to any country to which exports are controlled for national security purposes . . . ."[101] Under the 1979 Act, this authority does not extend to applications for exports to Free World Countries, and it will be recalled that this was one of the deadlocking issues in the 98th Congress. The Senate wanted to give Defense the right to review applications where there is a "clear risk of diversion of militarily critical goods or technology to proscribed destinations."[102] The issue was resolved when President Reagan, in effect, gave this authority to Defense.[103]

In practice, the Defense Department does not review all licenses for exports to controlled countries because it has, in consultation with the OEA, exempted itself from about two-thirds of the applications in this category.[104]

Another agency having a statutory right to review license applications is the State Department. The Secretary of State may review any license for the export of goods controlled for foreign policy reasons.[105]

If an agency recommends disapproval of the export, OEA's rejection of that assessment is highly unlikely.[106]

Under the 1979 Act, the Office of Export Administration is allowed 90 days in which to act upon a license if interagency review is not required.[107] If interagency review *is* required, then, within 30 days of initially receiving the application, Commerce must refer it to the other agency or agencies, who will then have up to 60 days to consider the application.[108] By the time Commerce gets the application back, up to three months will have elapsed since the application was initially submitted, and Commerce is allowed yet another 90 days from this point within which to take final action.[109] This may involve

100. *Id.*
101. Pub. L. No. 96-72, *supra* note 21, § 10(g)(1), at 527.
102. S. REP. NO. 170, 98th Cong., 1st Sess. 69 (1983) [hereinafter cited as S. REP. NO. 170].
103. *See supra* notes 47-49 and accompanying text.
104. COMMERCE, *supra* note 13, at 9.
105. *Id.*
106. A. GREEN & M. JANIK, *supra* note 68, at 9.
107. Pub. L. No. 96-72, *supra* note 21, § 10(c), at 525.
108. *Id.* § 10(e)(1).
109. *Id.* § 10(f)(1).

resolving interagency differences and then either granting or denying the license.

This whole process, including interagency review, can thus take up to six months, from the time the application is filed until the license is approved or rejected. Exporters should also take into account the time required to get the consignee's (customer's) signature (or that of the consignee's government) on the *end-user statement*,[110] which must be submitted when first applying for the validated license.[111]

Even after an exporter has obtained final U.S. approval for a license, it may not be permitted to ship the goods yet. The proposed export may be subject to CoCom review, requiring that the export be held back for as much as 60 days or more, while awaiting CoCom approval. In the event that CoCom review is not concluded within 60 days, however, the 1979 Act requires that the U.S. export license be granted, unless the OEA determines that the "issuance of the license would prove detrimental to the national security of the United States." Then the exporter could be required to wait until whenever CoCom concluded its review.[112]

E. Options for U.S. Policy

As discussed earlier in Section C,[113] the policy alternatives that were available to Congress in amending the Export Administration Act of 1979 can be categorized according to four primary goals: (1) Trade Promotion, (2) Efficiency, (3) Foreign Policy, and (4) National Security.

In updating its *Technology and East-West Trade* report for the Senate Banking Committee, the Office of Technology Assessment also prepared a chart listing many of the options for revising the Act and designating which of the four goals each option promoted.[114] The following chart is an adaptation of the same idea. A few options have been added in order to give a more complete listing of the issues discussed in this article. The chart has also been altered from its original form by the addition of two columns, one telling whether the item was enacted in EAAA 1985 and the other telling the section in this article where the matter will be discussed.

110. *See supra* note 89.
111. A. GREEN & M. JANIK, *supra* note 68, at 8-9.
112. Pub. L. No. 96-72, *supra* note 21, § 10(h), at 528.
113. *See supra* text accompanying notes 58-66.
114. OTA, *supra* note 60, at 12.

OPTIONS FOR UNITED STATES POLICY*

(Key: T=Trade Promotion/ E=Efficiency/ FP=Foreign Policy/ NS=National Security)

		Primary Goal			EAAA 1985?	Where Discussed?
	T	E	FP	NS		
1. Redefine foreign availability criteria to either:						
(a) Eliminate foreign availability as a reason for granting license, or		X	X	X	no	III A
(b) Make it easier to prove foreign availability	X	X			yes	III A(2)
2. Decontrol embedded technology	X				yes	III B(2)
3. Broaden definition of technology to bring more transactions under national security controls				X	no	III B(2)
4. Eliminate indexing (i.e. automatic decontrol of "obsolete" technologies)				X	no	III B(3)
5. Create comprehensive operations license	X	X		X	yes	III C(3)
6. Change licensing requirements to either:						
(a) Tighten West-West export controls, or				X	no	IV A
(b) Eliminate licensing requirements for West-West trade	X	X			yes	IV A
7. Restrict application of foreign policy controls	X	X			yes	V B-F
8. Curtail exchanges and open access to scientific/technical literature				X	no	VI B
9. Strengthen CoCom				X	yes	VI C
10. Change locus of primary export licensing/enforcement responsibility:						
(a) Create an Office of Strategic Trade, or		X	X	X	no	VI D(1)
(b) Shift enforcement responsibility to Customs Service;		X	X	X	no	VI D(2)
(c) Give primary licensing responsibility to Defense Dept.				X	no	VI E(1)
11. Use Militarily Critical Technologies List (MCTL) by either:						
(a) Adopting existing MCTL, or		X		X	no	VI E(3)
(b) Shortening MCTL	X	X			yes	VI E(3)
12. Improve enforcement		X		X	yes	VI D(3);F
13. Use import sanctions to motivate multilateral cooperation with FP goals			X		no	V D(4);
14. Use import sanctions to motivate multilateral cooperation with NS goals				X	yes	VI F(4)
15. Restrict technical sales to foreign embassies and affiliates				X	yes	VI G

*Adapted from OFF. TECH. ASSESSMENTS, CONG. OF THE U.S., TECHNOLOGY AND EAST WEST TRADE: AN UPDATE 12, Library of Cong. No. 79-600203 (available from the Superintendent of Documents, U.S. Government Printing Office.

III. TRADE PROMOTION

A primary tactic in revising the 1979 Act was to eliminate controls that are ineffective because of foreign availability of the controlled item. The reasoning of those who sought some relaxation of national security controls, in order to permit more exports, could be stated as follows. First, the United States does not have a monopoly on worldwide technology, and it is clear that our allies are unlikely to change their policy of protecting only clearly military items. For this reason, U.S. efforts to prevent the Soviet Union from acquiring many products and technologies are destined to fail.[115]

A second line of reasoning of export promoters was based on the fact that even controls that are truly necessary to protect national security are costly to the United States. There comes a point of diminishing returns, where the measure of military security gained by restricting certain exports is outweighed by the economic damage that results from the loss of sales.[116] Logically, then—goes the argument—the aim should be to control the minimum range of items consistent with national security. It follows that efforts should be focused on determining which dual-use technologies are truly militarily critical, and concentrating only on them.[117]

A third proposition by export promoters was that the move in

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115. *Id.* at 14; *see also* Hyde, *The search for a solution: Foresight rather than hindsight*, ELECTRONIC BUS., Sept. 15, 1984, at 148:

> A sane and practical approach is needed. For starters, the Reagan administration should abandon the pompous idea that advanced technology originates in the United States, and the United States alone. To force allied nations to swallow tough export controls on items widely available throughout the Western world only discredits a sound export policy. To assume that every computer crossing the border will be put to immediate military use is crying wolf. And it is creating an unfair disadvantage to U.S. companies competing in Western European markets.

116. As Senator Tsongas (D-Mass.) stated in urging reform to the Export Administration Act to reduce obstacles to export:

> [T]echnology exports are a growing sector of our economy of increasing economic significance. High technology industries now contribute about 7 percent of our entire GNP. Over the next decade, it has been estimated they may grow to a 10-percent share, or more than $206 billion worth of goods.
>
> . . . With a trade deficit for goods and services of $2.5 billion in the third quarter of last year [1982], we simply cannot afford to tolerate unnecessary barriers to technology products sold by our many small and large technology exporting firms. *Only technology products made a positive contribution to our manufacturing trade account*, and we do not have the luxury of losing the assets they bring to our current accounts balance.

129 CONG. REC. S6852 (daily ed. May 17, 1983) (emphasis added).

117. "Given Soviet persistence, the time and money wasted to police everything on the books would be better spent tightening controls on the items of utmost importance from a stragetic point of view." Hyde, *supra* note 115, at 148.

the Commerce Department to allow multiple shipments under a single license should be codified and even expanded. The benefits to both government administrators and business managers from an efficiency standpoint are obvious, but another benefit also accrues to businesses that can qualify for a multiple export license. That benefit is decreased government involvement with internal business operations as the Office of Export Administration shifts part of its burden onto the private sector to self-regulate.

These issues—foreign availability, a narrowed focus of controls, and use of multiple export licenses—are discussed next as they relate to the changes proposed and adopted in amending the 1979 Act.

A. Changes in the Concept of Foreign Availability from the 1979 Act

The 1979 Act, as discussed earlier, did address the issue of foreign availability. In general, the Commerce Department was not to require a validated license for goods and technologies found to be available abroad,[118] and the Act authorized negotiations with foreign countries to control and reduce foreign availability.[119] Moreover, the Department of Commerce was directed to develop procedures and criteria for the continual review of the foreign availability of controlled goods.[120] But, as noted in a Comment written shortly after the enactment of the 1979 Act, "[T]he strict legislative standards and procedures for assessing foreign availability may realistically translate into only limited benefits to United States international trade."[121] Despite the measures provided for in the 1979 Act, in 1983 the matter was still a problem for U.S. exporters.

1. Burden of proof shifted to government in EAAA 1985

Both sections 5 and 6 of the 1979 Act are revised by the 1985 amendments to provide new rules on the evidence and criteria to be considered in making foreign availability determinations.[122] That is,

118. Pub. L. No. 96-72, *supra* note 21, § 5(f)(1), at 509: "[T]he Secretary [of Commerce] may not . . . require a validated license . . . unless the President determines that the absence of export controls would prove detrimental to the national security of the United States."

119. *Id.* § 5(f)(4), at 510.

120. *Id.* § 5(f)(1), at 509.

121. Comment, *An Examination of Foreign Availability of Controlled Goods and Technologies*, 2 NW. J. INT'L L. & BUS. 179, 180 (1980).

122. Pub. L. No. 99-64, *supra* note 5, § 107(b), at 129, and § 108(g), at 134. Section 5 governs national security controls, while section 6 governs foreign policy controls.

the changes apply both with regard to national security and foreign policy controls. While the exporter still has to provide as much detail as possible, the Commerce Department is directed to "accept the representations of applicants unless such representations are contradicted by reliable evidence . . . ."[123] This tends to shift the burden of proof regarding foreign availability away from the private sector to the government.

2. "Foreign availability" as defined by EAAA 1985 and creation of Office of Foreign Availability

Under the 1979 Act, foreign availability was considered to exist when "any such goods or technology are available in fact to such destinations from such sources in *sufficient quantity* and of *sufficient quality*" as to make a validated license requirement ineffective.[124] The Senate bill, S. 979, proposed to change this language so as to find foreign availability if the item were available in "*comparable* quantity and of *comparable* quality."[125] The desire was to allow for decontrol if the same capabilities were available from some other source, even if the technologies were not identical.

A contrary stance was taken by a 1983 study[126] published in the *Heritage Foundation Backgrounder*, placed in the *Congressional Record* by Senator Garn.[127] The study argued that

> even if an item were available elsewhere, it would not necessarily make sense for the U.S. to export that item. The United States is the political and moral leader of the free world, and, choosing the circumstances wisely, occasionally must set an example in order to have effective leverage.[128]

In the view of this study, the conclusion that restrictions are unnecessary should only be reached after careful consideration of such matters as comparability, quantity, quality, price and maintenance. For (1) if the non-U.S. item is only similar but not the same, (2) if the foreign supplier cannot quickly match the quantities available from the U.S., (3) if the foreign item will not last as long or perform as efficiently, (4) if the Soviets would have to expend more hard currency

123. *Id.*

124. Pub. L. No. 96-72, *supra* note 21, § 5(f)(1), at 509.

125. S. REP. NO. 170, *supra* note 102, at 44 (citing S. 979). The House bill had no comparable provision.

126. Weinrod & Pilon, *supra* note 7, at S1293.

127. R-Utah.

128. Weinrod & Pilon, *supra* note 7, at S1295.

for the item from non-U.S. sources or (5) if the foreign supplier could not provide the maintenance that a U.S. company would, then perhaps it is not accurate to say there is foreign availability.[129] The report also expressed the opinion that the Department of Defense should be involved in evaluating the foreign availability question.

The revised law partially adopts the Senate position, by changing the language "sufficient" quality to "comparable" quality. But, unlike S. 979, "sufficient" quantity is still required.[130] The new law also responds to concerns such as those raised in the *Heritage Foundation Backgrounder* report by incorporating the following new language into section 5(f)(3):

> In making determinations of foreign availability, the Secretary may consider such factors as cost, reliability, the availability and reliability of spare parts and the cost and quality thereof, maintenance programs, durability, quality of end products produced by the item proposed for export, and scale of production.[131]

In addition, the Department of Defense is now expressly mentioned as an agency to be involved in evaluation of the foreign availability question.[132] The amendments appear to avoid shifting the "balance of power" on this issue from Commerce to Defense, however, for the 1985 Act also establishes a new office within the Commerce Department, the Office of Foreign Availability. The new Commerce office is responsible for gathering and analyzing all information necessary for making determinations of foreign availability under the Act.[133]

3. President must negotiate to attempt elimination of foreign availability

As a result of EAAA 1985, whenever the President has determined that, despite foreign availability, the absence of such controls would be detrimental to our national security, a new provision that originated in the House bill now requires the President to enter into negotiations with other countries to eliminate foreign availability. The provision only applies to exports going to countries with whom we have export control agreements. If foreign availability has not

129. *Id.*
130. Pub. L. No. 99-64, *supra* note 5, § 107(i), at 131, and § 108(g), at 134.
131. *Id.* § 107(b), at 129.
132. *Id.* § 107(a).
133. *Id.* § 107(d), at 130.

been eliminated after six months (extendable by the President to eighteen months), Commerce can no longer require a validated license for the item involved.[134]

In the case of foreign policy controls, an even stronger amendment of section 6(g) now requires the President to report to Congress after six months (*not* extendable to eighteen months) regarding the effort to negotiate elimination of foreign availability. If a similar item is determined to still be available abroad, licenses shall be issued to permit the export of the U.S.-source item, except in cases involving terrorism, crime control instruments, and fulfillment of international treaty obligations.[135]

B. Narrowing the Focus of Controls

In 1976 the Defense Science Board, a task force chaired by J. Fred Bucy,[136] published what has come to be known as the Bucy Report, promoting the view that the administration should give up trying to control everything and concentrate instead on protecting "recent major advances in technology critical to improved military capability."[137] In his September 1984 article in *Electronic Business*, J. Fred Bucy noted that the Bucy Report had led to the 1979 Act's requirement that the Secretary of Defense develop the Militarily Critical Technologies List.[138] However, beyond that, said Bucy, the recommendations of the Report had not been carried out.[139] Reiterating a point made there, Mr. Bucy stated that

> [t]echnology is know-how. It is not science and it is not product. Technology is comprised of the myriad design and manufacturing steps that begin with science and end with product. . . . [T]he key element in controlling the transfer of technology is delaying the acquisition of know-how.[140]

The EAAA 1985 amended section 5(e) of the 1979 Act to eliminate the requirement of a license for *replacement parts* that are being

134. *Id.* § 107(c), at 129; H.R. 3231, 98th Cong., 1st Sess.; H. REP. No. 257, pt. 1, 98th Cong., 1st Sess. 44 (1983) [hereinafter cited as H. REP. NO. 257 pt. 1].

135. Pub. L. No. 99-64, *supra* note 5, § 108(g), at 134.

136. President and Chief Executive of Texas Instruments, Inc.

137. Schmitt, *Export Controls: Balancing Technological Innovation and National Security*, ISSUES IN SCI. & TECH., Fall 1984, at 117, 121.

138. Bucy, *Some Thoughts on a Realistic Approach to Export Control*, ELECTRONIC BUS., Sept. 15, 1985, at 130.

139. *Id.*

140. *Id.*

exported to replace, on a one-to-one basis, parts that were in a good legally exported from the United States. There were four other important changes specifically designed to narrow the range of goods and technologies subject to control: (1) the elimination of controls imposed solely because a good contains an embedded microprocessor; (2) a shift away from controlling the end-products of critical technologies; (3) a mandated, annual review of the Commodity Control List to remove obsolete technologies; and (4) the requirement that foreign availability be researched in developing the CCL. These changes will now be discussed in full.

1. Embedded microprocessors no longer trigger requirement of an export license

Under new paragraph (m) to section 5 of the Act,

> [e]xport controls may not be imposed under this section on a good solely on the basis that the good contains an embedded microprocessor, if such microprocessor cannot be used or altered to perform functions other than those it performs in the good in which it is embedded. An export control may be imposed . . . on a good containing an embedded microprocessor . . . only on the basis that the *functions of the good itself* are such that the good, if exported, *would make a significant contribution* to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States.[141]

For some U.S. companies, this is perhaps the single-most significant change made by the EAAA 1985[142] because, overnight, it eliminated all export licensing requirements—to all destinations—for the bulk of their products.[143] Products coming within this exclusion can

141. Pub. L. No. 99-64, *supra* note 5, § 105(j), at 127 (emphasis added).

142. A very close second place would have to go to decontrol of low-tech goods and technology to CoCom destinations, discussed *infra* notes 193-96 and accompanying text, which similarly makes for wholesale elimination of many companies' entire export licensing obligation.

143. The Commerce Department had already, in April 1984, decontrolled ninety-four categories of unilaterally controlled instruments incorporating microprocessors. H. REP. No. 180, 99th Cong., 1st Sess. 57 (1985) [hereinafter cited as H. REP. No. 180]. By adopting new paragraph 5(m), however, Congress codified this administrative action and thus clarified legislative intent. It is worth noting that OEA's April, 1984 act of decontrolling some instruments containing microprocessors followed introduction of the measure in the House's bill, H.R. 3231. *See* H. REP. No. 257 pt. 1, *supra* note 134, at 48. The Report of the Senate Banking Committee, dated June 29, 1983, also expressed approval of the measure: "In this regard the Committee believes that national security export controls need not, as a general rule, be im-

now be shipped under a general license.[144]

2. Controls reduced for technology end products

In keeping with the Bucy Report's recommendation that export controls focus on keystone technology rather than on end products, section 5 of the Act has been amended with a view to both of these objectives. Added to the criteria for the Defense Department's development of the Militarily Critical Technologies List is a provision that it would be appropriate to include "keystone equipment which would reveal or give insight into the design and manufacture of the *United States military system*."[145] At the same time, however, it is intended that the process of adding militarily critical technologies and keystone equipment should include "suitable reductions in the controls on the products of that technology and equipment."[146] Also in keeping with the increased emphasis on controlling technologies, the word "commodity" has been dropped, so that now the list of controlled technologies is known simply as the Control List.[147]

3. Annual review of Control List required

The Act now mandates *annual* review of the Control List[148] to ensure that national security controls are imposed only if the items restricted would "make a significant contribution to the military potential" of another country in a way that would prove detrimental to U.S. national security.[149] The requirement of the 1979 Act was basically the same, but review was only triannual.[150] This amendment was intended to reemphasize the need for prompt and frequent review of national security controls, both to remove items from the list for which control would no longer serve the purposes of the Act and to incorporate new items whose transfer to foreign countries would pose a threat.[151]

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posed on a scientific or analytical instrument solely because it contains an embedded microprocessor." S. REP. NO. 170, *supra* note 102, at 7. The Commerce Department evidently read the handwriting on the wall.

144. *See supra* notes 86-91 and accompanying text.

145. Pub. L. No. 99-64, *supra* note 5, § 106(a)(1), at 128 (emphasis added).

146. *Id.* § 106(a)(2) (adding new paragraph 6), at 129.

147. *Id.* § 105(c)(1)(A), at 124.

148. *Id.* § 105(c)(1)(B), at 124.

149. Pub. L. No. 96-72, *supra* note 21, § 3(2)(A), at 504. This language was unchanged by EAAA 1985.

150. *Id.* § 5(c)(3), at 507.

151. S. REP. NO. 170, *supra* note 102, at 7.

In order to invite greater input from the private sector, paragraph 5(c)(3) provides for prior notice of the annual review in the Federal Register.[152]

The Commerce Department is also now instructed to consider, as a criterion for the removal of items from licensing requirements, "the anticipated needs of the military of controlled countries."[153]

As explained earlier,[154] one main source for generating the Control List is the Militarily Critical Technologies List (MCTL) developed by Defense. The MCTL is a classified document, and the Defense Department consults it when making licensing decisions referred to that agency by the Office of Export Administration. The Control List, which is codified at 15 C.F.R. § 399.1 (updates to which are published in the Federal Register), is the public document that defines which goods require a validated license and which goods are prohibited for export to particular destinations. Implicit in an item's being listed on the Control List, however, is the understanding that a good or technology *can* be exported, albeit, not to all countries of the world.

The amended Act requires that the "integration of items on the list of militarily critical technologies into the control list shall proceed with all deliberate speed."[155] Presumably, then, Congress desires more goods and technologies to become available for sale abroad, and, moreover, that the exporting community be kept better informed of what items are considered to be militarily critical and why.

4. Control List should not include items available abroad

In developing its Control List, the Commerce Department must now find out whether the good or technology sought to be controlled, or one that is functionally equivalent, is "available in fact to a controlled country from sources outside the United States in sufficient quantity and of comparable quality so that the requirement of a validated license for the export of such good or technology is or would be ineffective in achieving the purpose" under the Act.[156] This change is designed to ensure that the Office of Export Administration will not only consider foreign availability in making licensing decisions, but

152. Pub. L. No. 99-64, *supra* note 5, § 105(c)(1)(B), at 124.
153. *Id.* § 105(e), at 125 (amending section 5(g)).
154. *See supra* notes 78-82 and accompanying text.
155. Pub. L. No. 99-64, *supra* note 5, § 106(a), at 128 (adding new paragraph 4).
156. *Id.*

that the Control List itself will reflect this consideration. There is no point in even putting an item on the list, and making exporters go through the exercise of applying for a license, if foreign availability would defeat the purpose of the control.

C. Broadening Available License Types to Serve Marketing Needs

The 1979 Act provided for two types of licenses covering individual transactions, the general license and the validated license described earlier.[157] It also authorized the "Qualified General License," covering multiple transactions.[158] The Qualified General License was a new type of license under the 1979 Act, which permited multiple shipments to a particular consignee and for a specified end use.[159] The report of the Senate Banking Committee accompanying that legislation stated that

> [t]he Committee believes the number of separate licenses required and the attendant paperwork and expense for both applicants and the Government can be greatly reduced without reducing the effectiveness of export controls, by the adoption of qualified general license requirements in place of validated license requirements whenever feasible and appropriate.[160]

The Qualified General License was repealed by EAAA 1985,[161] in part because it had not been used as widely as anticipated by the drafters in 1979.[162] Nevertheless, the same desire to reduce the burden of licensing was the basis for several bulk licenses authorized under the 1985 amendments.[163]

1. Codification of recently developed license types

Congress has codified three types of multiple-export licenses de-

157. *See supra* note 89 and accompanying text.

158. Pub. L. No. 96-72, *supra* note 21, § 4(a), at 505.

159. 15 C.F.R. § 373.4 (1985). Under regulations developed by Commerce, the QGL was made available especially for exports to these countries, which are controlled for national security purposes: Romania, Hungary, Poland, U.S.S.R., Albania, Bulgaria, Czechoslovakia, East Berlin, German Democratic Republic, Estonia, Latvia, Lithuania, Outer Mongolia and Laos. 15 C.F.R. §§ 370.13, 373.4(a) (Supp. No. 1) (1985).

160. S. REP. No. 170, *supra* note 102, at 3.

161. H. REP. No. 180, *supra* note 143, at 54. The repeal of the QGL and new emphasis on multiple export licenses to non-controlled countries is apparently part of Congress' overall intention to tighten controls on East-West trade while easing licensing requirements on West-West trade.

162. S. REP. No. 170, *supra* note 102, at 3.

163. *Id.*

veloped by Commerce in its regulation of exports, which are described in the Code of Federal Regulations:[164]

(a) the *project license*, designed for use with a substantial capital expansion project, for supplying maintenance and repair services, or for use in the production of other commodities for sale;[165]

(b) the *distribution license*, designed to cover exports by a U.S. individual or company to its affiliated foreign distributor;[166] and

(c) the *service supply procedure*, to enable U.S. individuals or companies to provide service for U.S. equipment exports or to foreign manufacturers who use parts imported from the U.S.[167]

In endorsing the project, distribution, and service supply licenses, the House committee stated that

> [a]pplications for the same type products, to the same destinations and to the same end-users are needlessly expensive and time-consuming for both government and industry, place U.S. exporters at a competitive disadvantage by creating uncertainty with respect to

164. Pub. L. No. 99-64, *supra* note 5, § 104, at 122-23. There is an additional multiple-export license issued by the Commerce Department, the "validated bulk license," that is not described in the Code of Federal Regulations. According to James J. Branagan, Senior Counsel, TRW Inc., Automotive Worldwide Sector, who has obtained several, the "validated bulk license" is an expedient developed for obtaining simultaneous authorization for (1) the export of products to a single foreign distributor and (2) the distributor's subsequent re-export to designated countries. Once the bulk license issues, no further U.S. government approval is required for the license-holder to export the products to its foreign distributor (or for re-export to the countries listed on the application) during the one year term of the license. A bulk license authorizes only the volume of exports applied for (requiring a realistic estimate of 12 month projected volume of sales) and does not cover the products described if the license-holder subsequently improves or modifies them. Interoffice correspondence from J.J. Branagan, Corporate Counsel, TRW Inc., Automotive Worldwide Sector, in Solon, Ohio (May 11, 1984).

165. 15 C.F.R. § 373.2 (1985). Goods and technologies being exported must be "covered by entries in the Commodity Control List under at least four Commodity Processing Numbers in which the first two digits of each differ from the first two digits of the other three Commodity Processing Numbers." Also, it is a prerequisite that at least 25 individual validated licenses would be needed to transfer the goods and technologies abroad. *Id.*

166. 15 C.F.R. § 373.3 (1985). For this license to be obtained, the foreign consignee must be approved in advance as a distributor or user, and the approved foreign distributor must be a subsidiary, affiliate, or branch of the U.S. exporter, or a distributor of the U.S. exporter under a written agreement, or an end-user importing for its own use or to include in another product. As with the project license, the distribution license must replace at least 25 individual validated licenses. *Id.*

167. 15 C.F.R. § 373.7 (1985).

> likely shipment dates, and most importantly, divert attention from applications for exports to countries to which exports are controlled for national security purposes. [The three licenses are only available to Free-World destinations; i.e., country groups T and V, except for the Peoples Republic of China.] The distribution, project, and service supply licenses have served well to reduce the burdens on government and business of individual licenses for each transaction, with no adverse impact on national security, and the committee insures the continued availability of these licenses by specific statutory language.[168]

2. New types of multiple export license authorized in EAAA 1985

The House and Senate committees wished to encourage as wide a use as possible of multiple validated licenses, particularly "by United States exporters that have demonstrated a sensitivity to United States national security concerns through their own effective security procedures and practices."[169] Thus, in addition to affirming the three licenses just described, the EAAA 1985 authorizes a new type of multiple export license, the comprehensive operations license (COL).[170] The COL, like the other three, is made available to all countries other than controlled countries.[171] It is intended to facilitate cooperative innovation and transfer of know-how among affiliated companies, such as subcontractors and suppliers of international operations of U.S. exporters.[172]

Whereas the distribution license covers the multiple export of *goods* to approved distributors and end users, the comprehensive operations license authorizes multiple export of *technology* and related goods from a domestic concern to and among its foreign subsidiaries, affiliates, joint venturers, and licensees that have long-term, contractually defined relations with the exporter.[173] Both the distribution license and the COL are specifically authorized for exports of items from the Militarily Critical Technologies List.[174]

The Committee recognizes the international scope of the U.S. high-

168. H. REP. NO. 257 pt. 1, *supra* note 134, at 16-17.

169. S. REP. NO. 170, *supra* note 102, at 4. The House report similarly refers to "U.S. companies with a history of compliance with export control regulations and strong internal management controls. . . ." H. REP. NO. 257 pt. 1, *supra* note 134, at 16-17.

170. Pub. L. No. 99-64, *supra* note 5, § 104(a), at 122.

171. H. REP. NO. 180, *supra* note 143, at 54.

172. S. REP. NO. 170, *supra* note 102, at 4.

173. Pub. L. No. 99-64, *supra* note 5, § 104(a), at 122-23.

174. *Id.*

technology industry and the desirability of utilizing existing proprietary controls on U.S. technology where such controls are adequate. Transfers of technology take place in a variety of ways, many of them quite different from the flow of goods across borders. The comprehensive operations license is intended to accommodate the special characteristics of critical technology by facilitating cooperative innovation and transfers of know-how within the international operations of U.S. firms. It will minimize administrative burdens for U.S. industry while at the same time enabling U.S. officials to focus on the most crucial aspect of the licensing process—the system of control—rather than on an overwhelming number of individual transactions.[175]

3. Comprehensive Operations License (COL) remains to be implemented

It should be noted that the EAAA 1985 merely authorizes the COL. The Commerce Department has not yet developed regulations for a comprehensive operations license, so it is still unavailable to U.S. exporters. In fact, it is doubtful that the COL will become available until after the Militarily Critical Technologies List has been incorporated into the Control List.[176]

In the meantime, multiple exports of technology can take place through use of the distribution license. Alternatively, a company would have to obtain an individual validated license or, if applicable, a technical data license. At present, in some cases, companies are violating the law and simply making data transfers without a license, perhaps not even aware that one is required. The future COL, since it will be designed to accomodate the special requirements of exports of technical data, will encourage compliance with the government's

175. S. REP. NO. 170, *supra* note 102, at 4.

176. Telephone interview with Michael T. Schilling, Manager, International Affairs, TRW Inc., in Arlington, Va. (Nov. 22, 1985). IBM provided the impetus in getting Congress to authorize the comprehensive operations license. IBM has a highly organized export control office that handles all of the corporation's exports. Its staff processes all IBM export licenses. It was IBM that developed the concept of the COL, and the regulations for its use will probably also be developed by IBM (along with other interested companies) and submitted to the Commerce Department for possible adoption. Controls, restrictions and criteria will likely be patterned after the requirements for obtaining a distribution license, which are strict, highly detailed and require *yearly audit* by the OEA. The difficulty in developing appropriate COL regulations arises from the fact that the "paper trail" generated by exchanges of technical data—often exported on a daily basis via telecommunication and even computer to computer—is qualitatively different from the letters of credit, shipping documents, etc., associated with the export of goods. *Id.*

scheme of monitoring such data flows. In a sense, then, the comprehensive operations license is an envisioned means of implementing greater controls on what may presently be an unmonitored, high volume of exchange of data and technology between parent and subsidiary companies or between joint venture partners.[177]

The Senate drafters of the COL provision expressed the hope that the approach taken by the comprehensive operations license would provide "a strong incentive for U.S. firms to maintain their own controls on technology, . . . [allow] the Government to concentrate its enforcement efforts more efficiently, and . . . [provide] an attractive model that allied and friendly countries could adopt."[178] The COL is thus evidence of a legislative desire to find a realistic way of preventing leakage of militarily critical technology through dataflow means that can be as sophisticated and efficient as the very technology described in the exchange.

D. Funding for Export Promotion

Title II of the EAAA 1985 authorizes Commerce to spend $133 million for each of the fiscal years 1985 and 1986 to carry out export promotion programs.[179] These programs are designed to stimulate or assist U.S. businesses in marketing their goods and services abroad competitively with businesses from other countries.[180]

IV. EFFICIENCY

The goal of efficiency, although espoused most strongly by those seeking to promote exports, is based on the proposition that regardless of whether the objective is to limit or encourage exports, controls should be administered in a timely and predictable manner and enforced so as to (1) encourage compliance and (2) achieve the maximum cost/benefit ratio for the administration's policing efforts. Proponents of this goal urged that greater efficiency in the exporting process would allow U.S. companies to invest more sensibly and compete more efficiently in international markets.[181]

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177. *Id.*

178. S. REP. No. 170, *supra* note 102, at 4.

179. Pub. L. No. 99-64, *supra* note 5, §§ 201, 202, at 157-58.

180. *Id.*

181. OTA, *supra* note 60, at 13. "In many cases, the long timelag between the application for a license and approval was tantamount to a loss of sales as potential customers grew impatient and placed their orders with alternative suppliers." 130 CONG. REC. S1860 (daily ed. Feb. 28, 1984) (statement of Sen. Tsongas).

In addressing the House on these issues, Congressman Zschau[182] noted that the two objectives of greater exports of technology products and national security were not necessarily in conflict. "I know of no executives in high technology companies who wish to help the Soviet Union improve its military might. In fact, very little of our trade actually goes to the Soviet Union or Warsaw pact countries."[183] Congressman Zschau reiterated the sense of frustration expressed by U.S. exporters who lose business to foreign competitors that are able to respond quickly with similar products, because U.S. shipments to Free World countries are delayed by time-consuming licensing procedures.

> Most export license applications are approved. It just takes time. Out of the more than 80,000 validated license applications made in 1982, less than 900—slightly more than 1 percent—were denied. This high approval ratio suggests that the licensing procedures can be streamlined and focused without increasing the risk of losing critical technology. In fact, streamlining the control procedures could enable the controls that are applied to be tighter and more effective.[184]

Increased efficiency was a principal goal in enacting the EAAA 1985. The 1985 Act introduces several reforms designed to speed and simplify the licensing process by the following tactics:

(1) taking advantage of multilateral control mechanisms to reduce or hasten licensing to CoCom destinations;
(2) one-third reduction in licensing time mandated for non-CoCom destinations;
(3) greater sensitivity to business needs through other revisions to promote efficiency; and
(4) congressional oversight to ensure implementation.

A. Taking Advantage of Multilateral Control Mechanisms

Congressman Zschau noted that during House debates on reauthorization, two basic points were made, with which he con-

182. R-Cal. "My congressional district in northern California includes the area often referred to as 'Silicon Valley.' I have in my district about 700 electronics companies manufacturing high technology products. Most of these companies are subject to the Export Administration Act in the regular conduct of their business." 129 CONG. REC. E2025 (daily ed. May 3, 1983).

183. *Id.*

184. *Id.*

curred.[185] First, our greatest national security concerns are not with West-West trade, and yet a majority of our enforcement efforts go to monitoring those transactions.[186] Second, relaxation of those controls would diminish the administrative burden for our greatest percentage of trade and simultaneously free up resources for strengthening enforcement of controls on trade with controlled countries.[187]

In order to reduce the burden of licensing requirements for exports to other CoCom countries, the House bill would have amended section 5(b) of the 1979 Act to provide that no export license could be required in the case of exports to a country that maintains export controls cooperatively with the U.S. The House bill excepted certain end users who may be specified by regulation because, for example, they are suspected of diverting items to controlled countries. In lieu of requiring a license, exporters could have been required simply to notify the Office of Export Administration of such exports.[188]

Congressman Toby Roth objected to such a sweeping elimination of licensing requirements, stating that what the General Accounting Office had actually recommended was to "[r]eexamine the need for licensing of high technology products to COCOM countries and other allies by exploring various alternatives that would satisfy control objectives and reduce or eliminate the burden of licensing."[189] Congressman Roth then asserted that "[t]he provision in H.R. 3231 before the House does not satisfy control objectives—it just eliminates U.S. export licensing and does not put anything in its place. The provision transfers the entire burden of export controls to the Europeans and the Japanese."[190] Congressman Roth asserted that the license mechanism—even to CoCom destinations—was needed to track exports and ensure against illegal diversion to controlled countries.[191] If the United States were to weaken its controls on exports, Roth insisted, "the Europeans and the Japanese will surely respond by weakening their own controls."[192]

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185. 129 CONG. REC. E4506 (daily ed. Sept. 23, 1983).

186. *Id.*

187. *Id.*

188. H. REP. NO. 257 pt. 1, *supra* note 134, at 39.

189. 129 CONG. REC. E4470 (daily ed. Sept. 21, 1983).

190. *Id.*

191. 129 CONG. REC. E3918 (daily ed. Aug. 2, 1983).

192. 129 CONG. REC. E3283 (daily ed. June 30, 1983). Congressman Roth's concern that items shipped to CoCom could, for lack of adequate supervision via the licensing mechanisms, be diverted to controlled countries was one of the two issues at the heart of the House and Senate deadlock at the end of the 98th Congress. As discussed earlier, the Senate sought to

The Senate bill, S. 979, took a more cautious approach than the House bill in that it eliminated licensing requirements to countries controlling exports cooperatively with the U.S. under multilateral or bilateral agreements, but only for items not on the Militarily Critical Technologies List. The Senate's version was the one more closely followed in amending the Act.

Two key elements, to be examined next, were enacted in the compromise bill. First, there was a complete elimination of any requirement for a validated license for exports of low technology items to CoCom countries. Second, a "fast-track" licensing procedure was implemented for exports of high technology items to CoCom nations.

1. Elimination of validated license requirement for low-tech exports to CoCom destinations

The Joint Conference Committee agreed to eliminate the validated licensing requirement for exports to CoCom countries with respect to relatively low-technology items, such as personal computers,[193] that require only notification for export under CoCom multilateral controls.[194] These items are specified in the Administrative Exception Notes of the Control List.[195] Section 5(k) of the Act was amended to require negotiations with countries that are not members of CoCom to provide that any country which enters into an agreement with the U.S. to maintain multilateral export controls comparable in practice to those of CoCom shall be treated like a CoCom country for the purposes of export controls.[196]

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alleviate this concern by giving the DOD authority to review licenses for shipments "where the Secretary of Defense . . . determines that there is a clear risk of diversion of militarily critical goods or technology to proscribed destinations," and, in such cases, to recommend disapproval of the export. S. REP. NO. 170, *supra* note 102, at 69. *See supra* notes 42, 47-49, 102 and accompanying text, showing that the Senate view (which was also that of Rep. Roth) was implemented by Presidential directive, not by legislative consensus.

193. 131 CONG. REC. H5062 (daily ed. June 27, 1985) (statement of Rep. Mica (D-Fla.)).

194. Pub. L. No. 99-64, *supra* note 5, § 105(b)(2), at 124. New section 5(b)(2) provides:

> No authority or permission to export may be required under this section before goods or technology are exported in the case of exports to a country which maintains export controls on such goods or technology cooperatively with the United States pursuant to the agreement known as the Coordinating Committee, if the goods or technology is at such a level that the export of the goods or technology to controlled countries requires only notification of the participating governments of the Coordinating Committee.

The new general license for such exports is called "G-COM," and is discussed at 50 Fed. Reg. 38,512 (1985), codified at 15 C.F.R. §§ 371, 374, 386, 399 (1986).

195. H. REP. NO. 180, *supra* note 143, at 55.

196. Pub. L. No. 99-64, *supra* note 5, § 105(h), at 126-27. Hereafter, all references to

2. Fast-track licensing for high-tech exports to CoCom destinations

Under new paragraph (o) of section 10 of the Act, for goods and technologies contained in the Control List (and not excluded by the Administrative Exception Notes) certain expedited procedures apply when exporting to CoCom (and comparable) countries.[197] If the Office of Export Administration does not inform the applicant within 15 working days (i.e., three weeks) of the application's receipt that (1) the license is denied or (2) more time is necessary to consider it, a license automatically becomes valid and effective, and shipment can be made pursuant to that license.[198] If additional time is required for its review process, the OEA must complete that task and take action within 15 additional working days.[199] At the end of this time, if there has been no action to deny the license, it automatically becomes valid and effective.[200]

Thus, in shipping goods and technology to cooperating countries, Congress has mandated that exporters gain certainty after no more than 15 working days, or, if necesary, 30 working days.[201] The fast-track procedures for high-tech exports apply only to individual licenses, not to applications for multiple-export licenses.[202]

B. One-Third Reduction in Licensing Time Mandated for Exports to Non-CoCom Destinations

In a move to reduce processing time for all export licenses, Congress has mandated a one-third reduction in allotted time for exports *not* destined for CoCom or CoCom-like countries.[203] Thus, to rewrite the paragraph that earlier described licensing deadlines under the

"CoCom"—in connection with either (1) the just-described exemption from the validated licensing requirement for low-tech exports or (2) the "fast-track" licensing procedure for high-tech exports—will include those other countries that have entered into agreements with the U.S. similar to that of CoCom.

197. *Id.* § 111(o), at 145-46.

198. 131 CONG. REC. H2006 (daily ed. Apr. 16, 1985) (statement of Rep. Bonker). Hence, no news is good news.

199. *Id.*

200. *Id.* The export license application number, of which the OEA must inform the applicant immediately upon receipt, is the same number that will be used for the subsequent license to export. The exporter can then refer to that number in exporting its goods and technology and need not await return receipt of a formal license to export. *Id.* at H2007.

201. *Id.*

202. *Id.* Significantly, any inter-agency review that may be required must take place within the 30 working day time frame. Pub. L. No. 99-64, *supra* note 5, § 111(b)(3), at 142.

203. Pub. L. No. 99-64, *supra* note 5, § 111(a), at 142.

1979 Act,[204] the new procedure is as follows:

Under the EAAA 1985, the Office of Export Administration is allowed *60* days in which to act upon a license if interagency review is not required. If interagency review is required, then, within *20* days of initially receiving the application, Commerce must refer it to the other agency or agencies, who will then have up to *40* days to consider the application. By the time Commerce gets the application back, up to *two* months will have elapsed since the application was initially submitted, and Commerce is allowed *60* days from this point within which to take final action. The whole process, including interagency review, can now take not longer than *four* months, from the time the application is filed, until the license is approved or rejected.[205]

C. Sensitivity to Business Needs in Additional Revisions to Promote Efficiency

1. Faster processing of classification inquiries

As mentioned earlier,[206] the Control List is not an easy document to decipher, and it can sometimes be difficult to determine which is the applicable Export Commodity Control Number for one's product. It is possible to obtain an Office of Export Administration advisory opinion relating to the classification of a commodity on the Control List by submitting a written description and allowing the OEA to examine and classify it.[207] In the past, however, this process could sometimes take months.[208] Under new paragraph (l) to section 10, the OEA must "within 10 working days [i.e., within two weeks] after receipt of the request, inform the person making the request of the proper classification."[209]

When the OEA receives a written inquiry about the applicability of export license requirements to a proposed transaction or series of transactions, it must now reply with that information within 30 days.[210]

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204. *See supra* text accompanying notes 107-09.
205. Pub. L. No. 99-64, *supra* note 5, § 111(a), at 142.
206. *See supra* notes 90-91 and accompanying text.
207. A. GREEN & M. JANIK, *supra* note 68, at 7.
208. *Id.*
209. Pub. L. No. 99-64, *supra* note 5, § 111(*l*), at 144.
210. *Id.* § 111(*l*)(2).

2. What happens if application requirements change while license is pending

Under the 1985 amendments, if it happens that the Office of Export Administration changes certain license requirements after an application has already been submitted, the OEA may not return the application without action for failure to meet the new requirements.[211]

3. Right of applicant to respond to negative recommendations

In cases where questions or negative considerations are received from departments or agencies to which Commerce has referred the application, applicants are now entitled, under the amended section 10(f)(2), to respond in writing or in person.[212] Where a determination has been reached to deny the application, the applicant, under changes made to section 10(f)(3), shall have 30 days to respond to the determination before the application is finally denied. Furthermore, the applicant must now be informed of those modifications which *would allow* the license to issue.[213]

4. Small business assistance

Within four months of the July 12, 1985 date of enactment, the Commerce Department was required to develop a plan to assist small businesses in export licensing procedures. Congress desires that the

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211. *Id.* (adding new paragraph 10(k)). The Secretary may request appropriate additional information of the applicant, however. *Id.*

212. *Id.* § 111(c), at 143.

213. *Id.* In the following excerpt from the amended section 10(f)(3), although the format is different, only items D and E are *new* requirements.

> In cases where the Secretary [of Commerce] has determined that an application should be denied, the applicant shall be informed in writing, within 5 days after such determination is made, of:
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> (A) the determination,
>
> (B) the statutory basis for the proposed denial,
>
> (C) the policies set forth in section 3 of this Act which would be furthered by the proposed denial,
>
> (D) what if any modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with export controls imposed under this Act,
>
> (E) which officers and employees of the Department of Commerce who are familiar with the application will be made reasonably available to the applicant for considerations with regard to such modifications or restrictions, if appropriate,
>
> (F) to the extent consistent with the national security and foreign policy of the United States, the specific considerations which led to the determination to deny the application, and

plan include, for example, "arrangements for counseling small businesses on filing applications and identifying goods or technology on the control list, proposals for seminars and conferences to educate small businesses on export controls and licensing procedures, and the preparation of informational brochures."[214]

D. Congressional Oversight to Ensure Implementation

Within six months of the July 12, 1985 date of enactment, and quarterly thereafter, the Commerce Department was required to commence periodic submission of a report to the House Foreign Affairs Committee and the Senate Banking Committee describing all licensing activity for that reporting period. Commerce must give certain specified, comprehensive data regarding the number of licenses processed, the length of time required for review, including interagency review, how many went over the mandated deadline, and so forth, so that these committees can monitor the OEA's compliance with the new legislative requirements.[215]

Addressing the floor of Congress on April 16, 1985, Congressman Bonker noted that the Foreign Affairs Committee was aware of "instances in which the competitiveness of U.S. exporters has been hampered by the inefficiency of the agencies with regulatory and enforcement authority," and that on occasion the export regulations had been applied inconsistently and irrationally.[216] He stated that the committee had not sought to directly address this situation in its legislation since it already is "the express policy of the United States that these controls be administered fairly."[217] Mr. Bonker stated that it was the Committee's intent to closely monitor administrative practices in the future and, "if necessary, to consider remedial legislation."[218]

V. FOREIGN POLICY

Those who favor giving the President broad discretion in the use of foreign policy controls make certain basic assumptions. First, that the targeted nation (whether Libya, Nicaragua or the Soviet Union) has such a need for Western imports, and that restraint of exports to

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(G) the availability of appeal procedures.

214. *Id.* § 111(e), at 144 (adding new paragraph 10(m)).
215. *Id.* § 111, at 144-45 (adding new paragraph 10(n)).
216. 131 CONG. REC. H2007 (daily ed. Apr. 16, 1985).
217. *Id.*
218. *Id.*

that country provides an effective lever for affecting its policies and behavior. Second, that Presidential intervention in the conduct of international trade is appropriate as a diplomatic mechanism. Finally, that U.S. foreign policy requires a means by which the President can reward or punish the actions of other nations where there is no suitable alternative to manipulation of trade controls.[219]

Advocates of the use of foreign policy controls maintain that they are an important tool for the President. Export controls can, they argue, (1) deter future actions, (2) mobilize international support against certain behavior, (3) impose economic costs on the targeted nation, (4) express disapproval of another nation's policies, and (5) set a moral example. In addition, their authorization ensures that the President has a variety of diplomatic tools at his disposal.[220]

A. The Soviet Pipeline Embargo Fiasco

Opinions on the value of foreign policy controls vary dramatically. In response to the imposition of martial law in Poland, President Reagan imposed numerous political and economic sanctions on both Poland and the Soviet Union.[221] The sanctions were dominated by the pipeline controls, for which the United States imposed extraterritorial, retroactive export controls on oil and gas technology in its attempt to embargo all oil and gas equipment trade between the U.S.S.R. and foreign subsidiaries or licensees of U.S. firms.[222]

Depending on who is speaking, the pipeline sanctions against the Soviet Union were either a great success or a complete disaster. In the view of the study cited earlier that was published in the *Heritage Foundation Backgrounder*,[223]

> [t]he Soviet pipeline sanctions, for example (1) delayed the

219. OTA, *supra* note 60, at 13.

220. Weinrod & Pilon, *supra* note 7, at S1295.

221. The U.S. cancelled Aeroflot landing rights, deferred grain negotiations, ended exchange agreements, restricted the movement of Polish diplomats, expanded controls on the Kama River truck plant and extended them to the Zil truck plant, froze all export licenses for sales to the Soviets, withdrew Poland's most-favored nation status, and—best remembered and most controversial—imposed new controls on pipeline equipment and later extended those controls to various foreign countries. MOYER-MABRY STUDY, *supra* note 25, at E2347.

222. OTA, *supra* note 60, at 4. Originally the President imposed controls on exports and re-exports of *U.S.*-origin oil and gas goods and technical data, but, by regulation published in the Federal Register on June 24, 1982, these controls were expanded to restrict exports to the U.S.S.R. of *non*-U.S.-origin goods or technical data by U.S. owned or controlled firms wherever organized or doing business. *International Operations*, MACHINERY & ALLIED PRODUCTS INST. BULL. No. 6274, June 24, 1982, at 1.

223. Weinrod & Pilon, *supra* note 7, at S1293-96.

> construction of the Siberian pipeline; (2) compelled the USSR to allocate scarce resources between priority domestic projects and the export pipeline; (3) gave the Europeans an opportunity to assess alternative energy supply options in view of the soft petroleum and gas market and possibly prevent further reliance on Soviet gas; (4) gained European cooperation for a more coordinated approach toward East-West trade. Europeans are now more cooperative on a coordinated economic policy toward the Soviet bloc because, not in spite of, the sanctions.[224]

In contrast, according to the Moyer-Mabry Study,[225] the pipeline controls were "the most controversial, and perhaps least successful, controls in U.S. history. Not only did our allies not cooperate, they vehemently opposed the pipeline controls and directed companies in their countries to disregard them."[226] Another study reported that

> [s]everal European firms defied U.S. orders, and were subjected to U.S. import control sanctions as a result. The West Europeans viewed the Siberian pipeline as a desirable way to increase and diversify energy supplies. American critics of the pipeline viewed such policies as politically shortsighted. Therein lay one of the problems with the use of this particular sanction as a tool of U.S. foreign policy, namely, that the diplomatic reason for imposing this embargo was not at all clear.[227]

The OTA study prepared for the Senate Banking Committee pointed out how a failure to have a clear purpose for imposing foreign policy controls can dilute their effectiveness.[228]

> It has been argued that equivocal economic impacts aside, the political utility of trade sanctions lies as much in the message of U.S. resolve that they convey to the U.S.S.R. as in precipitating measurable changes in Soviet behavior. Yet messages sent to the U.S.S.R. through imposition of pipeline sanctions have been unclear, being variously justified as designed to:
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> —protest Soviet responsibility for the declaration of martial law in Poland;

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224. *Id.* at S1295-96.

225. MOYER-MABRY STUDY, *supra* note 25, at E2347-48.

226. *Id.* at E2347. "The efforts by each side to press its claims to the fullest in the pipeline dispute obviously left the foreign subsidiaries of U.S. firms in an impossible situation—caught between competing national laws and regulations." *Reauthorization of the Export Administration Act*, NAT'L A. MANUFACTURERS 1 (Apr. 1983) (available from NAM, 1776 F Street, N.W., Wash., D.C. 20006) [hereinafter cited as NAM].

227. OTA, *supra* note 60, at 7.

228. *Id.* at 8.

—prevent West European dependence on Soviet gas;

—damage—or at least not aid—general Soviet economic development by inhibiting a project of great economic importance;

—protest the use of "slave labor" in pipeline construction; or

—deny the U.S.S.R. hard currency earnings from gas sales in Europe.

These are very different goals. Yet, if the success of a policy rests on its symbolic message, its impact may be weakened when the message itself is unclear.[229]

B. U.S. Economy Pays Price for Ill-Conceived Foreign Policy Controls

The U.S. exporting community strongly protested the pipeline sanctions, complaining bitterly that this symbolic gesture was made with little regard for its adverse impact on them. The loss encompassed far more than mere lost profits suffered by U.S. firms. More critical were (1) the loss of our market share to foreign competitors and (2) the blow to the reputation of U.S. firms as reliable suppliers. Senator Lautenberg[230] further described the damage that retroactive foreign policy controls can inflict on U.S. exporters:

> More generally, the uncertainty that has surrounded U.S. export policy has itself been a major problem for American companies seeking to do business abroad. As a former businessman myself, I know how critical customer goodwill and confidence are, especially in international business. It takes years to build up the kind of relationships on which effective marketing depends. A firm's most valuable asset, in many cases, is its reputation for reliability and a capacity to back up its initial sales with dependable service and replacement parts. That kind of credibility is the first casualty of retroactive export controls that nullify existing contracts.[231]

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229. *Id.*

230. D-N.J.

231. 130 CONG. REC. S2142 (daily ed. Mar. 1, 1984) (speaking in support of S. 979). In an article written while he was president of Bechtel Corporation, Secretary of State George P. Shultz summarized many of the concerns of business with regard to the use of foreign policy controls:

> It takes a long time to go abroad, get positioned and learn about how to do things. A considerable investment is made on both sides of the transaction. . . . In this process the company develops what the government may regard as a bargaining chip. But if our government then takes the bargaining chip and spends it, where does that leave the company? The company has lost out and its commercial relationship deteriorates.

The embargo on oil and gas equipment was lifted in November 1982,[232] but the exporting community continued in its united efforts in this area by launching a major campaign in early 1983 to have Congress restrict presidential authority under the 1979 Act to use foreign policy controls.[233] Many even supported the complete elimination of section 6 (the section authorizing presidential use of foreign policy controls) from the 1979 Act.[234] Neither the House nor the Senate bill actually went this far, but the legislation passed by Congress in June 1985 does attempt to significantly restrain the President's power under the Export Administration Act to interfere with existing trade contracts. In urging passage of S. 979 in late February, 1984, Senator Heinz[235] was expressing many of the sentiments of a majority of both houses:

> The [thrust] of the committee bill with respect to foreign policy controls is, frankly, to discourage them, without at the same time repealing the President's authority to impose them. Our experience with most foreign policy controls has been largely an unhappy one. They have usually been unilateral. They have had little impact on their intended targets, and they have caused real harm to American exporters. They have not only caused us lost sales but have led to permanent lost market share abroad. They have also struck a crippling blow to the credibility of Americans as suppliers.[236]

In amending section 6 of the 1979 Act, Congress addressed four main issues: (1) contract sanctity; (2) exterritorial reach of U.S. authority; (3) restraints on the use of foreign policy controls; and (4) required consultation with Congress. Each of these issues will now be discussed in turn.

C. Resolution of the Contract Sanctity Issue in EAAA 1985

1. Curtailing foreign policy controls—Houses divide over whether to allow exceptions

The House bill sought to accommodate contrasting feelings about authority to impose controls for foreign policy purposes. The

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NAM, *supra* note 226, at 1.

232. OTA, *supra* note 60, at 7.

233. *The Green Memo, The Export Administration Amendments Act of 1985, P.L. 99-64*, NAT'L A. MANUFACTURERS, Oct. 17, 1985, at 7 [hereinafter cited as NAM *Green Memo*].

234. *Id.*

235. R-Pa.

236. 130 CONG. REC. S1696 (daily ed. Feb. 27, 1984).

bill supported the conclusion that "actions taken under the act, particularly for purposes of furthering U.S. foreign policy goals, may be the single greatest hindrance to U.S. exports, costing significant loss of U.S. jobs."[237] H.R. 3231 therefore specified that "[a]ny export controls imposed under this section shall not affect any contract to export entered into before the date on which such controls are imposed or any export license issued under this Act before such date."[238] But "for circumstances involving imminent or actual foreign acts of military aggression, nuclear test, gross violation of human rights, or acts of terrorism," H.R. 3231 allowed an exception to the proscription against abrogation of existing contracts.[239]

The Senate bill was more absolute. It provided simply that no controls could be imposed that curtail the ability to perform under an existing contract.[240] The *Heritage Foundation Backgrounder* report,[241] however, had warned against eliminating the mechanism of foreign policy controls: "Not maintaining this authority would mean that the President would be powerless to act promptly and effectively should it be discovered that a particular item's export would be damaging to Western security or would be shipped to a country which has openly aided a heinous terrorist act."[242] This line of reasoning was persuasive to some senators, apparently, for the Senate tempered its bill by including an amendment to the International Emergency Economic Powers Act[243] to make explicit the President's authority to abrogate contracts in foreign policy emergencies.[244]

2. Compromise reached

The differences between the House and Senate on the issue of contract sanctity were one of the major sticking points in the long joint conference during the spring and summer of 1984. In October,

237. H. REP. NO. 257 pt. 1, *supra* note 134, at 6.

238. *Id.* at 60 (adding new paragraph 6(m)).

239. *Id.* at 7. Unfortunately, both the Soviet invasion of Afghanistan (prompting the grain embargo of the Carter years) and the imposition of martial law in Poland would seem to fit this language as permitting an exception to the rule.

240. S. REP. NO. 170, *supra* note 102, at 13.

241. Weinrod & Pilon, *supra* note 7, at S1293-96. It should be recalled that this report was placed in the Congressional Record by Senator Garn, the Chairman of the Senate Banking Committee.

242. *Id.* at S1296.

243. 50 U.S.C. § 1703 (1985), the authority through which President Reagan extended the 1979 Act until it was reauthorized by Congress. *See supra* note 33.

244. S. REP. NO. 170, *supra* note 102, at 13. *See* statements by Sen. Proxmire at 130 CONG. REC. S1693 (daily ed. Feb. 27, 1984).

House Conferees finally acceded to the Senate on this issue, but the victory for business interests was short lived. Pressed by the deadlock and the short time remaining before Congress adjourned, in exchange for concessions on other issues, Senate conferees agreed to a less restrictive foreign policy provision. Although Congress failed to jointly approve a bill before adjournment, the compromise language became part of the final EAAA 1985.[245]

The language adopted in the EAAA 1985 allows the abrogation of existing contracts in instances involving a "breach of the peace pos[ing] a serious and direct threat to the strategic interest of the United States."[246] Such abrogations of contract must be "instrumental in remedying the situation posing the direct threat" and may continue only so long as the direct threat persists.[247]

3. Consultation with industry required

The main complaint of industry (aside from the fact that foreign policy controls are allowed at all) has been that trade sanctions are invoked by the President with seemingly little thought for the cost that will be borne by U.S. companies.[248] A Senate measure, adopted by the EAAA 1985, amended section 6(c) to *require* the Secretary of Commerce "in every possible instance" to "consult with and seek advice from affected United States industries and appropriate advisory committees" with respect to five criteria before imposing foreign policy controls.[249] The effectiveness of this measure may depend

245. NAM *Green Memo*, *supra* note 233, at 8.

246. Pub. L. No. 99-64, *supra* note 5, § 108(*l*)(1), at 136 (adding new paragraph 6(m)).

247. The statement of managers of the House Conference Report on S. 883 (the bill that became Pub. L. No 99-64) explained, regarding the contract sanctity provision:

> The most important thing to note in this new language is the operation of the cause and effect relationship between the two actions that are prerequisites to the imposition of controls on exports subject to a contract or agreement. Simply put, the provision requires a clear and direct relationship between the proposed control that requires the breaking of a contract and the remedying of the event causing the direct threat to our strategic interests. The certification required of the President by this provision must make clear that such breaking or curtailment of a contract or contracts will be instrumental in remedying the situation that has occurred.

H. REP. NO. 180, *supra* note 143, at 58-59.

248. Under section 6(b)(4) of the 1979 Act the President is supposed to consider "the likely effects of the proposed controls . . . on individual United States companies and their employees and communities," but this suggestion by the Act is nonbinding. Pub. L. No. 96-72, *supra* note 21, § 6(b)(4), at 514.

249. 130 CONG. REC. H12153-54 (daily ed. Oct. 11, 1984) (heading entitled "Subsection (c)—Consultation With Industry"). The October 1984 draft statement of managers [hereinafter cited as Draft Stmt], found at 130 CONG. REC. H12150-62, is a section-by-section delineation, on behalf of the House Conferees to the joint conference committee, of the compromises

on the aggressiveness of U.S. industry groups in verifying its implementation.

D. Extraterritorial Reach of U.S. Authority

1. Allied irritation with U.S. conduct

There are two types of extraterritorial controls that may be imposed by the President: (1) restrictions on exports of non-U.S. items made by U.S. subsidiaries located abroad[250] and (2) restrictions on the reexport by non-U.S. companies located overseas of items originally exported from the U.S.[251] It has been argued that the jurisdiction of national security and foreign policy controls *must* have an extraterritorial reach, or U.S. firms will flee the country to escape their power.[252]

The problem is that the United States and its European and Asian allies do not share the same view regarding the "role, importance and acceptable scope of trade with the Soviet Union"[253] and other nations targeted by U.S. foreign policy controls. Europeans "also resent American attempts to dictate matters which they consider to be internal economic policy, and to take major foreign policy steps without consultation."[254] In the case of the pipeline embargo, U.S. notions of what was best for the Europeans actually differed from those of the Europeans themselves.[255]

> The broad scope of extraterritorial controls, as they were applied in this case [pipeline embargo], may lead to long-term adverse impacts on West-West trade, far more important to the U.S. economy than trade with the Soviet Union. The intense negative reaction at home and abroad provoked by the U.S. sanctions argues that they struck close to the nerve. Multilateral deals are highly intricate, potentially involving multifarious second- and third-order relationships in several nations. Extraterritorial controls can therefore have many unanticipated and undesirable consequences as their impact spreads in a ripple-like effect to

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worked out between H.R. 3231 and S. 979. *See* Pub. L. No. 99-64, *supra* note 5, § 108(c), at 132. The five criteria are discussed *infra* notes 284-88 and accompanying text.

250. For example, the controls imposed on foreign subsidiaries of U.S. firms as part of the Soviet pipeline sanctions. *See supra* notes 221-26 and accompanying text.

251. *See supra* note 89 and accompanying text regarding end-user statements.

252. Weinrod & Pilon, *supra* note 7, at S1295.

253. OTA, *supra* note 60, at 6.

254. *Id.* at 7.

255. *Id.*

numerous and varied interested parties.[256]

2. Proposed restriction to domestic items not adopted in EAAA 1985

During Committee consideration of the 1979 Act, during the 96th Congress, an amendment was proposed in the Senate that would have specifically prohibited the imposition of foreign policy controls on the foreign subsidiaries or licensees of U.S. companies, but the proposal was dropped in the face of strong opposition by the Carter Administration.[257] The House bill in the 98th Congress sought to do exactly that, restricting the President's authority to impose controls to the export of goods or technology *produced in the United States.*[258]

The Senate bill, S. 979, did not contain a similar provision, and, in the end, it was the Senate position that was agreed to by the joint conference.[259] Despite the absence of language restricting the use of foreign policy controls to domestically produced goods and technology, congressional intent under the 1985 Act was to "protect from disruption by new export controls both the foreign and domestic contracts entered into by U.S. nationals, as well as their foreign subsidiaries and affiliates."[260]

3. Consultation with other countries

A provision of the House bill, partially adopted by the 1985 Act, added a new paragraph (d) to section 6 to urge the President to consult with other countries *before* imposing controls. The version agreed to by the conference committee, and enacted, requires consultation with other countries at the earliest appropriate opportunity.[261]

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256. OTA, *supra* note 60, at 6.

257. Freedenberg, *supra* note 1, at 2193.

258. H. REP. NO. 257 pt. 1, *supra* note 134, at 48 (amending section 6(a)(1)). The 1979 Act allowed presidential control over *any* "goods, technology, or other information subject to the jurisdiction of the United States," not solely such items produced in the U.S. *Id.*

259. Draft Stmt, *supra* note 249, at H12153 (heading entitled "Extraterritoriality").

260. *Id.* The draft statement of managers took note of the fact that their legislation perhaps reaches only to protect *contractual* commitments from the extraterritorial powers of the executive branch. "Extraterritorial application of U.S. export controls affecting non-contractual transactions and relationships remains a serious matter of contention and strain upon U.S. relations with other countries, particularly with European governments, and possible ways of further limiting such effects merit continued study and consideration." *Id.*

261. *Id.* at H12154 (heading entitled "Subsection (d) - Consultations With Other Countries"). *Cf.* H. REP. NO. 257 pt. 1, *supra* note 134, at 50; Pub. L. No. 99-64, *supra* note 5, § 108(d), at 132.

4. Import controls as an extraterritorial assertion of U.S. power

The Senate bill provided for import controls, as a further means of promoting U.S. foreign policy, by adding this language to section 6: "Whenever the authority conferred by this section is exercised with respect to a country, the President is also authorized to impose controls on imports from that country to the United States."[262] Such a measure would have provided authority to restrict imports from countries whose activities are objectionable to the United States on foreign policy grounds, as an alternative to gaining foreign policy leverage by controlling U.S.-origin items.[263] It would only have been applied against target countries, not friendly nations.[264] The position of the House bill, which did not contain a comparable provision, was the one agreed to by the committee of conference.[265]

The Senate bill likewise provided for import sanctions in furtherance of *national security* interests,[266] a measure that *was* incorporated into EAAA 1985, as an amendment to the Trade Expansion Act of 1962.[267]

The use of import sanctions in addition, or as an alternative, to the use of other export controls raises an important dilemma. Should they be favored as preferable to mechanisms that require U.S. industries to bear the cost of foreign policy or national security objectives, or should they be avoided as yet another inappropriate extension of U.S. authority into the affairs of foreign entities? Since the measure that was adopted applies only to national security controls, this issue will be discussed more fully in connection with the National Security portion of this article.[268]

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262. S. REP. NO. 170, *supra* note 102, at 51.

263. *Id.* at 13. "Not only will the authority to control imports from countries that are the targets of foreign policy controls widen the President's options, it could also lessen the burden on American exporters, who have heretofore been asked to pay the entire price of foreign policy actions in this area." *Id.*

264. *Id.*

265. Draft Stmt, *supra* note 249, at H12153 (heading entitled "Import Controls").

266. S. REP. NO. 170, *supra* note 102, at 73 (adding new paragraph 4 to section 11(c)).

267. Pub. L. No. 99-64, *supra* note 5, § 121, at 155 (amending Chapter 4 of title II of the Trade Expansion Act of 1962 (19 U.S.C. § 1864 (1986)) by adding a new section 233).

268. Discussed *infra* notes 536-57 and accompanying text.

E. Presidential Restraint Through Required Threshold Criteria

1. Failure of the 1979 Act's mechanism of "executive self-restraint"

Under the 1979 Act the President is directed to consider six specific criteria and to consult with Congress and industry before instituting foreign policy controls.[269] These provisions were designed to limit the use of foreign policy controls by encouraging consultation, public involvement, and consideration of alternatives. The provisions are nonbinding, however, a regrettable feature from industry's standpoint because they tend to be honored perfunctorily, if at all.[270] Often, the envisioned economic impact of the controls on a targeted nation has been overestimated while the costs to the United States were underestimated.[271] These costs can include, for example, "budgetary costs, loss of principal and follow-up contracts (revenues, profits, jobs, taxes), and the loss of market share. While many costs are

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269. These criteria are set out at section 6(b) of the 1979 Act:

> (b) CRITERIA. —When imposing, expanding, or extending export controls under this section, the President shall consider—
>
> (1) the probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls;
>
> (2) the compatibility of the proposed controls with the foreign policy objectives of the United States, including the effort to counter international terrorism, and with overall United States policy toward the country which is the proposed target of controls;
>
> (3) the reaction of other countries to the imposition or expansion of such export controls by the United States;
>
> (4) the likely effects of the proposed controls on the export performance of the United States on the international reputation of the United States as a supplier of goods and technology, and on individual United States companies and their employees and communities, including the effects of the controls on existing contracts;
>
> (5) the ability of the United States to enforce the proposed controls effectively; and
>
> (6) the foreign policy consequences of not imposing controls.

Pub. L. No. 96-72, *supra* note 21, § 6(b), at 513-14.

270. MOYER-MABRY STUDY, *supra* note 25, at E2347.

271. *Id.* at E2348.

> OTA found that trade leverage usually works under very limited conditions, and that past precedents have demonstrated its weakness when used against the Soviet Union. The aftermath of U.S. attempts to embargo grain and energy equipment exports to the U.S.S.R. dramatically demonstrate the limitations on U.S. power to successfully conduct a trade leverage policy. Although both embargoes were directed at vulnerable areas of the Soviet economy, their results were inconclusive at best. U.S. sanctions and embargoes may well have hurt the U.S.S.R., but it is unlikely that they have hurt enough to make a real economic difference.

OTA, *supra* note 60, at 8.

hidden, total long-term costs may be very large."[272]

Another factor, which is not even listed among the criteria the President is supposed to consider, is the thought of how the controls might be ended, once imposed. Especially in the case of controls that failed to have the desired effect, lifting trade sanctions can be an awkward move. In addition, since lifting the controls can be seen as a diplomatic "signal," a decision whether or not to end foreign policy controls can itself become a major issue.[273]

2. Proposals considered by the 98th Congress

In his 1982 article discussing the issues that would be raised during the reauthorization debates in Congress,[274] Dr. Freedenberg listed some of the alternatives that had been suggested for generally curtailing the President's freedom to utilize foreign policy export controls as a tool of international diplomacy.[275] One approach would have been to prohibit their use except when there has been a declaration of war or national emergency. This is the prerequisite to invocation of the International Emergency Economic Powers Act (IEEPA).[276] While observing that this constraint did not prevent President Carter from imposing economic sanctions on Iran pursuant to the hostage crisis, Dr. Freedenberg pointed out that IEEPA does require biannual reviews of sanctions, and the sanctions can only continue as long as the emergency does.[277]

> The *proponents* of this approach argue that the president would still have the power to deal with true emergencies on the order of Iran, or similar events, but it is felt that the added step of the declaration of national emergency would lessen the probability of "light-switch" diplomacy using U.S. trade as the initial weapon of diplomatic leverage called upon by the Administration in confrontational situations.[278]

Another approach noted by Dr. Freedenberg was the suggestion by some that the 1979 Act provide for a one- or two-house congressional veto of foreign policy controls. Dr. Freedenberg stated, however, that a significant problem with that mechanism arises from the

272. MOYER-MABRY STUDY, *supra* note 25, at E2348.
273. *Id.*
274. Freedenberg, *supra* note 1, at 2190.
275. *Id.* at 2192-93.
276. *Id.* at 2193.
277. *Id.*
278. *Id.*

fact that a primary purpose for using the controls is to send a diplomatic message to adversary countries. If Congress were to veto the President's measures, it "would have the exact opposite effect of the intent of original export control, signalling American weakness and indecision instead of strength of purpose."[279]

The real root of Congress's dissatisfaction with the mechanism provided by the 1979 Act was not so much that prior consideration of certain criteria was ineffective, but that presidential compliance with this step was voluntary. This sentiment is reflected in the fact that neither the House nor the Senate bill drastically altered the criteria to be considered. Rather, congressional control over the matter was sought in H.R. 3231 by a stricter requirement that the President consult with and report to Congress *prior* to imposing such controls.[280] Similarly, S. 979 strengthened the use of the 1979 Act's six criteria by requiring the President to go beyond mere consideration of them and actually *make a pre-determination* that the criteria had been satisfied.[281]

One other means of curtailing presidential use of foreign policy controls considered by Congress was S. 979's provision that foreign policy controls expire unless renewed every six months, instead of every year as in the 1979 Act.[282] The House bill had no comparable provision, and the joint conferees elected to keep the law the way it was. The conferees did note, however, "that the President has the authority to add or life [sic] controls at any time, and [the conferees] expect the President to modify controls, when appropriate, prior to the annual renewal date."[283]

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279. *Id.*

280. Discussed *infra* at text accompanying notes 305-18.

281. Weinrod and Pilon state that such a requirement would be "inadvisable," since it would leave the President with "no discretion concerning, or ability to weigh, competing factors." Weinrod & Pilon, *supra* note 7, at S1293-96. This conservative view did not find adequate support in the Senate. In fact, the Senate bill contained two strict requirements on which presidential authority to impose, extend, or expand trade sanctions was contingent: (1) prior submission of a written report to Congress; and (2) testimony by the Secretary of Commerce to Congress if, after six months, the President wished to continue the controls.

In the House, Representative Roth argued that economic and trade sanctions are among the few options for crafting foreign policy available to the President, but his ability to use them would be unduly restricted by H.R. 3231. 129 CONG. REC. E3284 (daily ed. June 30, 1983). However, in the House, also, congressional determination to curb executive freedom in this area won out in the end.

282. S. REP. NO. 170, *supra* note 102, at 51 (amending section 6(a)(2)).

283. Draft Stmt, *supra* note 249, at H12153 (heading entitled "Expiration of Controls").

3. Strict criteria required under new law

As just mentioned in the preceding section, the Senate's approach to tightening the reins on presidential discretion to utilize foreign policy controls was to force him to first make a determination that certain criteria had in fact been satisfied. As adopted in the EAAA 1985, the wording of the introductory clause of section 6(h) has been strategically reworded from the 1979 Act. From this:

> When imposing, expanding, or extending export controls under this section, the President shall consider—[284]

To this:

> [T]he President may impose, extend, or expand export controls under this section only if the President determines that—[285]

The specific criteria that must be satisfied have been altered in some respects from the list given in the 1979 Act[286] by the addition of certain affirmative language. Specifically, in revising section 6(b) Congress sought to assure that:

(1) if an alternative means of achieving his foreign policy objective exists, the President will not impose foreign policy controls;
(2) foreign reaction to the controls will not render them ineffective or counterproductive to their purpose; and
(3) the *benefit* to U.S. foreign policy objectives exceeds *any adverse effects* engendered by the controls.

Finally, the criterion of the 1979 Act that the President consider the "foreign policy consequences of not imposing controls"[287] has been expunged.[288]

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284. Pub. L. No. 96-72, *supra* note 21, § 6(b), at 513.

285. Pub. L. No. 99-64, *supra* note 5, § 108(b), at 132.

286. The Senate's bill added the requirement that "such controls . . . not have an extraterritorial effect on countries friendly to the United States adverse to overall United States foreign policy interests." S. REP. NO. 170, *supra* note 102, at 52. But the version adopted in Pub. L. No. 99-64 did not use such direct language. *See infra* note 288. The text of the 1979 Act's Section 6(b) appears at *supra* note 269.

287. Pub. L. No. 96-72, *supra* note 21, § 6(b)(6), at 514.

288. This is evident from a comparison of the present wording of section 6(b), below, with the wording of the 1979 Act, *supra* note 269. Italics have been used here to highlight those concepts that have been added to section 6(b).

> (b) CRITERIA. —(1) Subject to paragraph (2) of this subsection [requiring the President to consider the foreign policy consequences of modifying export controls that were already in effect as of EAAA 1985's enactment], the President may impose, extend, or expand export controls under this section only if the President determines that—
>
> (A) such controls are likely to achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the

4. Presidential power to impose trade sanctions expressly restricted when foreign availability exists

The 1979 Act had included foreign availability as one of the criteria the President should consider before implementing foreign policy controls,[289] but, as discussed in the Trade Promotion portion of this article,[290] Congress perceived a need to expressly restrict the use of trade sanctions when foreign availability would defeat their effectiveness.

The House bill added a seventh criterion to section 6(b), explicitly requiring the President to consider whether the controlled item, or one similar to it, was available in sufficient quantity outside the U.S. or whether negotiations had been successfully concluded to ensure the cooperation of other governments in controlling the good or technology.[291] The House bill did not, however, prohibit foreign policy controls if there was foreign availability, and it also exempted proposed controls deemed necessary "to further efforts by the United States to counter international terrorism or to promote observance of internationally recognized human rights."[292]

The language of the Senate's bill seemed to state that foreign policy controls could not even be imposed unless the President had first

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goods or technology proposed for such controls, and *that foreign policy purpose cannot be achieved through negotiations or other alternative means*;

(B) the proposed controls are compatible with the foreign policy objectives of the United States and with overall United States policy toward the country to which exports are to be subject to the proposed controls;

(C) the reaction of other countries to the imposition, extension, or expansion of such export controls by the United States *is not likely to render the controls ineffective in achieving the intended foreign policy purpose or to be counterproductive to United States foreign policy interests*;

(D) the effect of the proposed controls on the export performance of the United States, the competitive position of the United States in the international economy, the international reputation of the United States as a supplier of goods and technology, or on the economic well-being of individual United States companies and their employees and communities *does not exceed the benefit to United States foreign policy objectives*; and

(E) the United States has the ability to enforce the proposed controls effectively.

Pub. L. No. 99-64, *supra* note 5, § 108(b), at 132 (emphasis added).

289. "When imposing, expanding, or extending export controls under this section, the President shall consider—

(1) the probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls . . . ."

Pub. L. No. 96-72, *supra* note 21, § 6(b)(1), at 513.

290. *See supra* text accompanying notes 118-35.

291. H. REP. NO. 257 pt. 1, *supra* note 134, at 50.

292. *Id.*

determined that foreign availability was not likely to hinder their effectiveness.[293] But the Senate Banking Committee in fact intended a more moderate approach. Senator Heinz stated that under S. 979 "foreign availability would not be a criterion in licensing products for export to countries that are the subject of foreign policy controls for the first six months, but that after that, in the absence of multilateral cooperation it will become a factor."[294]

This approach was taken in order to provide time for negotiations toward multilateral controls and to "provide the President with sufficient flexibility even in subsequent six-month periods of controls to take foreign availability into account among other factors."[295] Senator Proxmire[296] noted the recognition by the Banking Committee that "there may be cases in which the actions of the country against which controls have been instituted are of such an abhorrent nature that U.S. foreign policy controls would be appropriate despite the decision of our allies not to cooperate."[297] The key to the Senate approach was that foreign policy controls *could* be imposed under S. 979, notwithstanding foreign availability, if the purposes of the controls could nevertheless be achieved.[298]

The amended Act tightens the wording of paragraph (b)(1)(A) by stipulating not only that the President must not impose controls likely to fail due to foreign availability, but that he must have reached a determination that the "foreign policy purpose cannot be achieved through negotiations or other alternative means."[299] Under section 6(h) of the amended Act, in seeking to *extend* any export controls, if the President has not, within six months from the date of enactment (or for controls already in effect as of the enactment of the EAAA 1985, within six months of July 12, 1985), succeeded in securing the cooperation of appropriate foreign governments, the Secretary of

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293. "The President may impose, expand, or extend export controls under this section only if he determines that—

(1) such controls are likely to achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls . . . ."

S. REP. NO. 170, *supra* note 102, at 52.

294. 130 CONG. REC. S1696-97 (daily ed. Feb. 27, 1984). Sen. Heinz (R-Pa.) is a member of the Banking Committee.

295. *Id.*

296. (D-Wis.), a member of the Banking Committee.

297. 130 CONG. REC. S1693 (daily ed. Feb. 27, 1984).

298. *Id.*

299. Pub. L. No. 99-64, *supra* note 5, § 108(b), at 132.

Commerce is required to approve licenses for exports of goods or technology available "in sufficient quantity and comparable quality from sources outside the United States" such that the denial of licenses would be ineffective in achieving the purposes of the controls.[300]

Two things should thus be taken into consideration in evaluating the significance of the new foreign availability requirements in section 6. First, the special attention accorded to foreign availability in section 6(h) applies only in the context of *extending* foreign policy controls. Second, the Senate Banking Committee expressly intended that foreign availability *not* be a criterion until the President has had six months to evaluate that factor and to negotiate with foreign countries to remove foreign availability. Apparently, despite the plain language of the statute, which requires a determination *before* the controls can be imposed, Congress still intends for the President to have the freedom to impose such controls—and allow them to remain in effect for at least six months—notwithstanding initial foreign availability. However, this may be the best that exporters can hope for, since otherwise the President would lack the ability to act quickly. Frequently, the ability to respond quickly is a necessary component if the sanctions are to achieve any impact at all.

Congress has, nevertheless, imposed the absolute requirement that the President report to and consult with Congress before he may impose, expand, or extend any foreign policy controls.[301] In order to satisfy that requirement, moreover, the President must describe to Congress

> the availability from other countries of goods or technology comparable to the goods or technology subject to the proposed export controls, and describing the nature and results of the efforts made pursuant to subsection (h) to secure the cooperation of foreign governments in controlling the foreign availability of such comparable goods or technology.[302]

5. Exemptions for donations

Both the House and Senate bills introduced an explicit exemption from foreign policy controls for items intended to meet basic

300. *Id.* § 108(g), at 134.

301. *Id.* § 108(e), at 133.

302. *Id.* Prior consultation with Congress is discussed more fully *infra* notes 312-18 and accompanying text.

human needs. The conferees accepted the narrower Senate version in amending section 6(f) (now renumbered to 6(g)). S. 979 exempted from controls *donations* of such items. It thereby distinguished exports of "freely donated items of a people-to-people nature" from exports of a commercial nature.[303] The new law would thus permit, for example, exports to Nicaragua of donated food and clothing for suffering people there.[304]

F. Required, Prior Consultation with Congress

1. Failure of the 1979 Act's mechanism

The 1979 Act had a provision that the President, "in every possible instance" was to consult with the Congress prior to imposing export controls under section 5.[305] When such controls were imposed, expanded, or extended, the President was supposed to "immediately notify the Congress of such action" and simultaneously submit a report.[306] That report was to contain (1) the President's conclusions with respect to each of the six criteria contained in section 6(b)[307] and (2) the nature and results of his attempts to employ alternative means to achieve the same result or tell why he had not attempted to use any alternative means.[308]

In practice, however, the President tended to disregard these requirements of the 1979 Act.[309] For example, the Joint Conference Committee noted that (ironically enough) two days after the committee had taken action to revise that particular section of the Act, the Commerce Department published expanded foreign policy controls in the Federal Register. Although Congress had *not* yet been consulted on the matter, the notice of controls included the statement, "Members of Congress have been consulted."[310]

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303. Draft Stmt, *supra* note 249, at H12154 (heading entitled "Subsection (f)—Exclusion for Donations").

304. By Executive Order 12513, issued May 1, 1985, the President declared a national emergency with respect to Nicaragua, invoking the authority of the International Emergency Economic Powers Act. Under that order, all exports to Nicaragua from the United States are prohibited, except those for the organized democratic resistance. 50 Fed. Reg. 18,629 (1985) (to be codified at 31 C.F.R. § 540).

305. Pub. L. No. 96-72, *supra* note 21, § 6(e), at 514.

306. *Id.*

307. *See supra* note 269.

308. Pub. L. No. 96-72, *supra* note 21, § 6(e)(1), (2), at 514.

309. Draft Stmt, *supra* note 249, at H12154 (heading entitled "Subsection (e)—Consultations With the Congress").

310. *Id.*

In another case—the 1982 embargo on oil and gas refining and transmission equipment imposed against the U.S.S.R.—a report was required to be submitted to Congress by June 22, 1982. The controls were lifted on November 13, 1982. The required report was not submitted until November 29, 1982.[311]

2. Stricter requirements under EAAA 1985

Out of sheer frustration with Executive disregard for legislative intent under the Act, Congress resolved to impose a strict prerequisite to the President's authority to use foreign policy controls:[312]

> The conferees emphasize that with the enactment of this provision, the President *lacks authority* to impose, expand, or extend policy controls until the requirements of this subsection [6(f)] have been satisfied.[313]

Congress claims this authority over Executive prerogative under article 1, section 8 of the Constitution, which gives Congress the exclusive right to regulate international commercial transactions.[314] Legislative intent, as stated explicitly in the House Conference Report on S. 883 (the bill that became Pub. L. No. 99-64), is that "the President consult with Congress in the conduct of . . . [his] delegated authority."[315] The amended section now requires that:

(1) the President (a) consult with Congress and (b) submit a written report to Congress and to the General Accounting Office *before* imposing controls[316] and that

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311. *Id.*

312. *Id.*

313. *Id.*

314. H. REP. NO. 180, *supra* note 143, at 57.

315. *Id.*

316. Pub. L. No. 99-64, *supra* note 5, § 108(e), at 133. Section 6(f)(2) now provides:

(A) specifying the purpose of the controls;

(B) specifying the determinations of the President (or, in the case of those export controls described in subsection (b)(2) [controls already in effect as of July 12, 1985], the considerations of the President) with respect to each of the criteria set forth in subsection (b)(1) [see *supra* note 288], the bases for such determinations (or considerations), and any possible adverse foreign policy consequences of the controls;

(C) describing the nature, the subjects, and the results of, or the plans for, the consultation with industry pursuant to subsection (c) and with other countries pursuant to subsection (d);

(D) specifying the nature and results of any alternative means attempted under subsection (e), or the reasons for imposing, expanding, or extending the controls without attempting any such alternative means; and

(E) describing the availability from other countries of goods or technology comparable to the goods or technology subject to the proposed export controls, and describing the nature and results of the efforts made pursuant to subsection (h) to

(2) the Secretary of Commerce testify before Congress annually on controls.[317]

The President can satisfy the congressional consultation requirement by consulting with the chairman and ranking members of the committees having jurisdiction in the Senate and House.[318]

VI. NATIONAL SECURITY

The fundamental reason why the United States desires to exercise caution—and why it wishes its allies would use greater caution—in allowing its high-tech products to be marketed abroad stems from the belief that the Soviet Union can achieve considerable improvements in its military strength by acquiring Western technology.

> There is no question that the U.S.S.R. has benefited militarily from Western technologies and equipment. In cases where the U.S. Government has expressly permitted the sale of such items to the Soviet Union, it has engaged in actions which injure its own national security. Recent intelligence analysis has confirmed the fact that the U.S.S.R. is engaged in a massive high-level effort to acquire militarily relevant Western technology, and that it has obtained these technologies by both legal and illegal means.[319]

The concern for national security is the other side of the export expansion issue. For some, it is a question of balance. Somehow a way must be found to "close the doors on our technology while preserving both national security and economic interests; and . . . to do that without squelching, not only our economy, but the free flow of information that—ironically in this case—produces the same technology."[320] For others, such as Stephen D. Bryen, a deputy assistant secretary of defense who heads the DOD's technology transfer office, "there is no balance. National Security comes first."[321]

Those such as Mr. Bryen, who take the national security perspec-

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secure the cooperation of foreign governments in controlling the foreign availability of such comparable goods or technology.

Such report shall also indicate how such controls will further significantly the foreign policy of the United States or will further its declared international obligations.

Id.

317. *Id.* § 7(f)(5), at 133-34.

318. H. REP. No. 180, *supra* note 143, at 58. The Conference Report also stated that this consultation "should extend to the Chairman and Ranking members of the relevant subcommittee of these committees." *Id.*

319. OTA, *supra* note 60, at 10.

320. *Spies at Work*, ELECTRONIC BUS., Sept. 15, 1984, at 94.

321. *Id.*

tive with regard to U.S. export controls, make some basic presumptions in their approach to national security controls. They believe, first, that the Soviet Union is making significant military gains by acquiring and applying Western technology.[322] Second, they feel that tighter U.S. export requirements can substantially slow this acquisition process.[323] Third, they consider the benefits to national security gained by such controls to outweigh the economic cost of the exports foregone.[324] Finally, they believe that the United States can, by sustained diplomatic pressure, bring its allies closer to the U.S. position on these matters.[325]

Those holding a national security perspective on the subject of export controls are not without their horror stories to influence public opinion in favor of tighter licensing requirements and greater vigilance in general. But few would deny that there is, indeed, a legitimate cause for concern. A 1984 article appearing in *Electronic Business* began by describing an incident two years earlier, in which Pentagon officials had examined a buoy that washed up on a beach in Washington state.[326] Inside, they found electronic components identical to RCA Corporation components, produced in the U.S. only three years prior.[327] The buoy had been planted offshore by the Soviet Union to monitor passing U.S. submarines.[328] "The incident merely confirmed what most businessmen, government officials and scientists have known for years—that the Soviets would rather spend their resources acquiring technology from the West than developing their own."[329]

A primary target for the overt and covert KGB intelligence officers is computer technology, especially the increasingly fast and powerful microcomputers. Working in a united effort to steal, or somehow legally or illegally obtain, the high technology that separates the two superpowers and their allies, the KGB empire of half a million employees easily outnumbers all the intelligence agencies in the United States.[330]

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322. OTA, *supra* note 60, at 13.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Spies at Work*, *supra* note 320.
327. *Id.*
328. *Id.*
329. *Id.*
330. Ulsch, *I Spied*, ELECTRONIC BUS., Sept. 15, 1984, at 94.

Anatol Fedoseyen, one of the Soviet designers of the powerful magnetrons used in radar transmitters, spoke at a seminar series on Soviet Science and Technology, jointly sponsored by Harvard University, the Massachusetts Institute of Technology and the Ford Foundation. He reported that researchers in the Soviet Union are uniquely well informed on technology developments worldwide.[331] "Researchers in the West have very limited access to information about companies with which they are in competition, whereas their Soviet counterparts have access to internal information from competing major corporations around the world," Fedoseyen noted.[332] Russian researchers of enterprises working for the military have plentiful access to periodicals and equipment samples, as well as classified material, consisting of blueprints, reports and other types of information obtained from the West in an "informal manner."[333]

Eric Firdman, a Soviet émigré interviewed by *Electronic Business*, was formerly chief designer for microelectronics at the Leningrad Design Bureau. He told *Electronics Business* that in 1963, in Leningrad, he was given photocopies of blueprints for a new U.S. computer.[334] "We got information on what became the IBM 360. Before the IBM 360 was introduced in the United States, we got photocopies of the architecture," Firdman said.[335] And in fact, the IBM System/360 line was not announced until April 1964.[336]

A. Channels of Loss as a Guide to Methods of Control

The point made earlier that "there is no question that the U.S.S.R. has benefited militarily from Western technologies and equipment"[337] came from the study undertaken in 1979, and later updated at the request of Senators Riegel and Garn, by the Office of Technology Assessment.[338] The upcoming sections of this article draw further from that same OTA material. The conclusions and observations of the Office of Technology Assessment are relevant to the discussion because, on close analysis, it seems apparent that the OTA

331. Alster, *Marching Orders: The Military Imperative*, ELECTRONIC BUS., Sept. 15, 1984, at 118.
332. *Id.*
333. *Id.*
334. Alster, *Inside Russia: The Copying Machine*, ELECTRONIC BUS., Sept. 15, 1984, at 114.
335. *Id.*
336. *Id.*
337. *See supra* text accompanying note 319.
338. *See supra* notes 59-60 and accompanying text.

study influenced the direction taken by the 1985 amendments. This seems especially true of the proposals and enactments made in response to national security concerns.

The OTA study asserted that, while it may or may not be prudent to extend controls to a larger array of technologies and products and to reduce commercial relations with the Soviet Union, it is crucial to maintain a clear distinction between Russian military gains made through theft or deception and gains made "legitimately" under U.S. law:[339]

> Observers of the Soviet economy still disagree over the efficiency of this technology acquisition program, but the significance of its multifaceted nature for U.S. policymakers is that different transfer mechanisms lend themselves to different legislative and administrative remedies. Unfortunately, in the rhetoric surrounding export control, the distinction between legal and illegal technology transfers is often blurred. The resulting confusion intensifies the impression that the West is a "sieve," and that the U.S.S.R. is benefiting from a veritable hemorrhage of U.S. technology.[340]

1. Five channels for technology flow identified

The OTA study identified five channels for technology flow from the United States to the U.S.S.R.:

I. Legal transfers made possible by the open nature of Western society, e.g., transfers occurring through perusal of open scientific literature, academic exchanges, trade fairs, etc.
II. Legal transfers through purchase of technologies under general license.
III. Legal transfers through purchase of technologies under validated license.
IV. Illegal transfers through purchase, e.g., by agents, through third countries or foreign embassies, dummy corporations, etc.
V. Illegal transfer through industrial espionage or the theft of materials classified by the U.S. Government.[341]

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339. OTA, *supra* note 60, at 10.

340. *Id.* As stated in Weinrod & Pilon, *supra* note 7, at S1293:

> The Soviet Union consistently has sought to obtain militarily relevant Western technology by every means possible. Its success has contributed to shifting the military balance away from the West. As a result of mistaken licensing, weak enforcement, and illegal Soviet bloc activities, the West has suffered a virtual hemorrhage of technology in the past decade.

341. OTA, *supra* note 60, at 10.

2. Some security improvement proposals

In response to the leakage of U.S. technology through the five channels just listed, Congress did consider numerous alternatives for thwarting Soviet efforts via each of these routes.

Losses through the first channel—the open nature of Western society—prompted suggestions that tighter controls be placed on scientific and scholarly exchange.[342]

Losses through the second and third channels—legal purchases through general and validated licenses—brought urgings that license requirements should be stiffened. In amending the 1979 Act, however, Congress chose largely to relax controls for lower-risk exports. Since this action should make it possible for enforcement agencies to focus attention on higher-risk exports, it was not thought necessary to stiffen licensing requirements.[343]

Finally, losses that occur through illegal transfers brought various proposals for enhancing enforcement capabilities and discouraging violations, most notably by (1) strengthening CoCom,[344] (2) shifting responsibility for Export Administration Act enforcement to another agency,[345] (3) increasing the Defense Department's input and involvement in controlling exports,[346] and (4) imposing stricter penalties for violations of the Export Administration Act and other laws designed to protect U.S. technology from illegal acquisition.[347]

B. Scientific Exchange

One of the simplest ways of acquiring U.S. technology is to come to this country and check out relevant material from a public library. The following story, told by assistant director of intelligence Richard J. O'Malley of the Federal Bureau of Investigation, illustrates the technique:[348]

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342. *See infra* text accompanying notes 348-69.

343. Changes to the licensing process have already been discussed. *See supra* text accompanying notes 182-204. In general, however, the decision was made to greatly relax licensing requirements for exports to countries maintaining multilateral export controls cooperatively with the United States. The plan is to lighten controls to areas where there is the least risk of loss, so as to enable a greater concentration of enforcement efforts for exports to areas where there is the greatest risk of loss. Similarly, high-tech items will receive correspondingly more administrative attention than lower-tech items.

344. *See infra* text accompanying notes 370-77.

345. *See infra* text accompanying notes 378-447.

346. *See infra* text accompanying notes 448-92.

347. *See infra* text accompanying notes 493-509.

348. Story retold in *Spies at Work*, *supra* note 320, at 94-95.

> Two Soviet diplomats wearing blue jeans and sport shirts and posing as travelers from Washington, walked into a public library in Nevada and asked to see the Environmental Impact Statement for the nearby nuclear-test site. They walked across the street, xeroxed every page and a few hours later drove away with everything they wanted to know.[349]

Other readily accessible sources of information are computer manuals sold in bookstores,[350] trade journals, scholastic journals, foreign student exchange programs,[351] and scientific conferences and seminars.

1. Proposed restrictions on scientific exchange

Some have argued that since scholarly conferences and exchanges, especially, are such tempting targets for the Soviets, certain restrictions should be promulgated, including limiting access to the United States for certain foreign nationals, reviewing key, government-financed research prior to publication, restricting communication of technical data vis-a-vis foreign nationals, and classifying certain information.[352]

The use of the Export Administration Act to control the flow of scientific information at open scientific meetings dates to February 1980, in the aftermath of the Societ invasion of Afghanistan. At that

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349. *Id.*

350. Soviet émigré Emanuel Bobrov gave this example:

> 'I wish to present two very peculiar documents, one of which you can buy in any American bookstore that sells technical literature and the other a volume on software published for limited circulation in Russia, for users of the ES series computers, called RIAD. I will call your attention to the astonishing similarity between the two documents. If you open any page of the English text of the Fortran manual to the corresponding Russian text of that same manual, you will find the Russian version to be an exact translation of the English version. . . . The Russians did not even change the identificator names. . . . The software has about 600 volumes, and all 600 volumes of the description of the ES software are exact copies of those for the IBM software. This is how Soviet computer technology is being developed.'

Alster, *supra* note 336, at 115.

351. *Spies at Work*, *supra* note 320, at 95. "Over 500 Soviet scientists, many of them posing as students, have been granted visas since 1979, according to the State Department." *Id.* Rep. Courter (R-N.J.) informed the Congress that:

> Americans at Moscow State University currently study issues such as musical genres in Russian music; the history of the Russian Empire under Catherine the Great, 1762-96; and the planning and design of the Soviet environment. Soviet students in the United States, however, engage in topics of study such as research in the theory and application of scientific experiments and testing power engineering objects; research in the field of automatic control as applied to spaceships; and development of recurrent methods for navigation in space and optimal filtration of hindrances.

129 CONG. REC. E4599 (daily ed. Sept. 28, 1983).

352. Weinrod & Pilon, *supra* note 7, at S1294.

time the Carter Administration opened to debate the question of whether and how the communication of unclassified but militarily sensitive scientific information should be controlled.[353]

> The Commerce Department and the State Department warned the organizers of two open scientific meetings that some papers scheduled for presentation contained sensitive information whose release to foreigners would infringe export control law. Soviet scientists were subsequently disinvited to one meeting and prohibited by the State Department from attending the other.[354]

In other instances, during the Reagan Administration, the Defense Department has raised objections prompting attempts to restrict access to unclassified projects on university campuses by Chinese and Soviet-bloc scientists, visas have been denied or restricted, and papers have been ordered withdrawn prior to scheduled presentation at scientific meetings.[355] Such measures have frequently been based on the authority of the Export Administration Act.[356] The problem with using the Export Administration Act to restrict communication of sensitive, unclassified information, however, is that the Act is "an unwieldy instrument, carrying potential heavy criminal penalties, whose use can have an extremely chilling effect on scientific communication."[357]

2. Counter recommendations of the Bucy Report

One of the points made by the Bucy Report[358] was that "controlling strategic technology" does not mean that the results of scientific research should be controlled.[359] Members of the scientific community warned that the proposed repressive measures could have a negative, even devastating, effect on the scientific process.[360] They maintained that without the free flow of ideas—typically through trade and scholastic journal publications and scientific conferences—researchers and scientists cannot build on each others' work. Furthermore, by shutting out foreign scientists from high-security

353. Norman, *Administration Grapples with Export Controls*, SCI. MAG., June 3, 1983, *reprinted in* 129 CONG. REC. E3962 (daily ed. Aug. 2, 1983) (placed in the Congressional Record by Rep. George Brown, Jr. (D-Cal.)).

354. *Id.*

355. *Id.*

356. *Id.* at E3963.

357. *Id.*

358. *See supra* note 137 and accompanying text.

359. Bucy, *supra* note 138, at 130.

360. Schmitt, *supra* note 137, at 122.

projects, a tremendous input of talent is excluded from U.S. research and development efforts. Ironically, "[i]t is the openness of the system that makes it possible for our adversaries to tap into it. But imposing controls strong enough to stop this leakage totally would also cripple our ability to generate new technology."[361]

3. EAAA 1985 shields scientific exchange from control through export administration

During the pendency of the 1979 Act's reauthorization in Congress, several groups lobbied their legislators in an attempt to have scientific research exempted from the Act.[362] Their pleas for help fell on sympathetic ears, for both the House and Senate passed bills safeguarding basic scientific research from control under the Export Administration Act.[363]

Thereafter, section 3 of the 1979 Act was amended by the addition of this paragraph as part of the Act's Declaration of Policy:

> It is the policy of the United States to sustain vigorous scientific enterprise. To do so involves sustaining the ability of scientists and other scholars freely to communicate research findings, in accordance with applicable provisions of law, by means of publication, teaching, conferences, and other forms of scholarly exchange.[364]

It should be borne in mind, however, that this refusal of Congress to allow the Export Administration Act to be used as a control mechanism over scientific exchange does only that. The Act is not by any means a "bill of rights" to protect the free flow of scientific infor-

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361. *Id.* at 118.

362. Norman, *supra* note 353, at E3963.

363. H. REP. NO. 257 pt. 1, *supra* note 134, at 15-16, and S. REP. NO. 170, *supra* note 102, at 3.

364. Pub. L. No. 99-64, *supra* note 5, § 103(5) (adding new paragraph (12)), at 121. In urging the House to pass H.R. 1786, the bill that with very few changes later became Pub. L. No. 99-64, Rep. Bonker stated:

> The Committee recognizes that there are legitimate concerns about the flow of sensitive U.S. technology through scientific communication and exchanges which may be damaging to U.S. national security and that there may be an important role for U.S. Government oversight.
>
> However, the committee conferees believe that existing government authority to declare material classified, to control work performed under contracts, and to limit the entry to and movement within the United States of foreign nationals is adequate to meet virtually all our reasonable security needs. Any application of the provisions of the Export Administration Act to traditional scientific communication that deviates from the views stated here bears a heavy burden of justification to the Congress.

131 CONG. REC. H2006 (daily ed. Apr. 16, 1985).

mation from other lines of attack. There are still numerous means available to the Administration for accomplishing many of the same feared results.

For example, since a great deal of the research likely to be deemed militarily sensitive is funded by the federal government, largely the Defense Department, constraints of scientific exchange often come about by *contractual* agreements between the researcher and the funding agency.[365] At times, researchers have not been informed of obligations to restrict access to information, and controls are not imposed until after the work is under way.[366] Under procedures announced in September 1982, new DOD research contracts were required to contain a clause obligating researchers to submit their papers to the Defense Department when submitting them for publication.[367]

Noteworthy, also, is the State Department's authority to deny or restrict visas to foreign scientists on exchange visits (for example, restricting access to parts of a university campus) and the Energy Department's right to control the release of unclassified nuclear information.[368] There are also other laws aimed at preventing the loss of U.S. technology to potential adversaries, although they are not as broad as the Export Administration Act. These include the Arms Export Control Act, the Atomic Energy Act of 1954, the Trading With the Enemy Act of 1917, and the International Emergency Economic Powers Act of 1976.[369]

C. Strengthening CoCom

President Reagan gave a clear indication to Congress that he wished to receive the authority under the 1979 Act to negotiate with other governments to achieve an improved multilateral control system.[370] Congress has sought to comply with his request.

As the 98th Congress considered the matter, it was plain that the multilateral effort represented by the CoCom organization was inadequate to effectively administer national security controls. Characteristic was the fact that the full-time staff of CoCom "consisted of only

365. Norman, *supra* note 353, at E3963.
366. *Id.*
367. *Id.*
368. *Id.*
369. Schmitt, *supra* note 137, at 118.
370. 130 CONG. REC. S1693 (daily ed. Feb. 27, 1984) (statement of Sen. Proxmire); H. REP. NO. 257 pt. 1, *supra* note 134, at 18.

ten to fifteen persons in a makeshift office."[371] Ministerial-level CoCom meetings had not, until recently, been held for twenty-five years.[372] It was claimed that "[t]hese inadequacies harm the security of all by strengthening our potential adversaries and requiring increased defense costs among the CoCom countries."[373]

Another complaint, raised by U.S. exporters, was the lost sales to competitors in CoCom countries because, whereas the U.S. government denies certain licenses in strict compliance with CoCom regulations, companies in the other CoCom countries manage to either violate the provisions or circumvent the system.[374]

Both the House and Senate bills called for the addition of new objectives to section 5(i), the paragraph authorizing U.S. participation in CoCom. The Senate differed from the House, however, in that it sought to have the status of this informal agreement raised to the level of a treaty.[375] This proposal was rejected by the Joint Conference Committee. In general, however, the provisions of the two bills were combined.[376]

Under the EAAA 1985, there has been a deletion of the 1979 Act's objective to reach an agreement with CoCom members to reduce the scope of export controls imposed to a level acceptable to all CoCom participants. In addition, the President is directed to enter into negotiations with the other CoCom-participating governments to reach agreements to: (1) enhance full compliance, through the "establishment of appropriate mechanisms"; (2) improve the International Control List, minimize exceptions, strengthen enforcement, provide funding, and upgrade professional staff, translation services, data base maintenance, communications, and facilities; (3) coordinate systems of export control documents; (4) establish uniform criminal and civil penalties; (5) increase on-site inspections; and (6) strengthen

371. Weinrod & Pilon, *supra* note 7, at S1295.

372. *Id.*

373. S. REP. NO. 170, *supra* note 102, at 11.

374. *Id.*

375. *Id.* at 48 (adding new paragraph (4)).

> Raising this informal agreement to the status of a treaty will signal to our allies the importance our Government attaches to the need for export controls on equipment which [if diverted to Soviet bloc countries would] threaten our mutual security.
>
> Besides this symbolic move, the bill also directs the executive branch to work in Cocom to update the list of technologies that need to be controlled and to harmonize licensing and enforcement mechanisms among Cocom members.

130 CONG. REC. S1693 (daily ed. Feb. 27, 1984) (statement of Sen. Proxmire).

376. Draft Stmt, *supra* note 249, at H12151 (heading entitled "Subsection (e)—Objectives for CoCom Negotiations").

the Committee to increase its effectiveness for the mutual national security benefit of all participants.[377]

D. Optimal Agency for Export Control Enforcement

1. Proposed Office of Strategic Trade

The Senate was largely dissatisfied with the way the 1979 Act confers on the *Commerce* Department the duty of enforcing export restraints when that Department is dedicated to the role of promoting U.S. exports. Senator Proxmire echoed the thoughts of many in that body when he told the Senate, "[f]or years I have felt the Department of Commerce should not simultaneously administer both our export promotion and control programs because there is an inherent conflict between these two functions."[378]

One alternative suggested to resolve this perceived problem was to create a new independent agency, an "Office of Strategic Trade," with sole responsiblity for administering export controls. One advantage to the idea, from a national security perspective, is that it "would assure a high-level advocate within the Executive Branch to present a security perspective on export issues and to provide independent information and analysis to Congress."[379] Another advantage, as envisioned by the Senate Banking Committee, is that an Office of Strategic Trade would coordinate in one, central agency all the export administration and enforcement functions of the government.[380] Senator Proxmire explained, "[p]resently such functions are scattered throughout a number of different departments and agencies and we wanted to pull them together."[381]

Although it found considerable merit in this proposal, the Banking Committee decided that the creation of an Office of Strategic Trade should be postponed until the President submitted to Congress a feasibility plan on how such an office could be effectively established.[382] The Senate bill therefore contained only the provision that the President submit a plan, within a few months, for creating an Of-

377. Pub. L. No. 99-64, *supra* note 5, § 105(f), at 126.

378. 130 CONG. REC. S1294 (daily ed. Feb. 27, 1984). *See, e.g.*, 130 CONG. REC. S2141 (daily ed. Mar. 1, 1984) (statement of Sen. Nunn); and 131 CONG. REC. S8923 (daily ed. June 27, 1985) (statement of Sen. Garn).

379. Weinrod & Pilon, *supra* note 7, at S1294.

380. 130 CONG. REC. S1294 (daily ed. Feb. 27, 1984) (statement of Sen. Proxmire).

381. *Id.*

382. *Id.*

fice of Strategic Trade.[383] For the meantime, S. 979 provided for a shift in enforcement authority from Commerce to Customs.

2. Proposed shift of all enforcement authority to Customs Service

a. Senate preference to make Customs Service responsible for enforcement under the Act

While conceding that the Commerce Department had recently made great strides toward better enforcement of export regulations,[384] security-minded persons felt that the Customs Service would be a better agency for that task:

> Commerce is not a traditional law enforcement agency. It does not arm its agents with traditional police powers. It has dubious law enforcement jurisdiction in foreign countries where American agents must operate within the sanction of, and in close harmony with, the host nations.
>
> Conversely, the U.S. Customs Service is an official Federal law enforcement entity with trained agents and unequivocal law enforcement authority. Customs has bureaus throughout the United States and in many foreign nations. Its agents operate abroad according to treaties, international agreements and bilateral compacts. Customs is the logical place for the export function to reside.[385]

The drawbacks seen with maintaining enforcement authority in the Commerce Department—aside from the "conflict of interest" problem already mentioned—were:

(1) that Commerce was not a traditional law enforcement agency and, consequently, was neither oriented toward a police function nor clothed with legal authority to make arrests, serve search warrants, conduct warrantless searches at U.S. borders, take sworn statements, or carry firearms;[386]

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383. S. REP. NO. 170, *supra* note 102, at 82.

384. "Commerce has made extraordinary progress in the past two years in remedying past weaknesses. . . ." Weinrod & Pilon, *supra* note 7, at S1294. "The Committee commends the Commerce Department for the efforts that have been made during the past two years to improve enforcement." S. REP. NO. 170, *supra* note 102, at 21. "In the last year, the Commerce Department has taken steps to improve its enforcement capability." 130 CONG. REC. S2141 (daily ed. Mar. 1, 1984) (statement of Sen. Nunn).

385. 130 CONG. REC. S2141 (daily ed. Mar. 1, 1984) (statement of Sen. Nunn). If the Banking Committee had not included the transfer in its EAA amendments, Senator Nunn said he would have promoted the idea through legislation that he and Senator Chiles (D-Fla.) had introduced, S. 407. *Id.*

386. *Id.* at S2139 (statement of Sen. Mattingly (R-Ga.)).

(2) that Commerce lacked the resources in trained manpower and facilities possessed by Customs,[387] and to do an adequate job of enforcement Commerce would need to duplicate Customs' operations;[388] and

(3) that Commerce lacked experience as a law enforcement agency as well as the foreign counterparts with whom it could coordinate efforts, unlike the Customs Service.[389]

Accordingly, the Senate bill transferred enforcement responsibility, but not licensing responsibility, to the Customs Service, "an agency better equipped in terms of resources and its overall mandate to enforce the act . . . ."[390] The bill added a provision to the Act permitting Customs officers to conduct border searches of suspected *exports* of goods or technology, making it clear that its searches of exports could be conducted on the same basis as its present searches of imports.[391] The bill also contained specific authority for warrantless arrests in connection with the enforcement of any law governing exports, giving Customs specific Federal arrest authority.[392]

b. mixed results with "Operation Exodus" by Customs Service

Soon after being elected, President Reagan demonstrated that he

387. "The Commerce Department has a limited staff of approximately 35 criminal investigators located in four cities and five export inspectors, stationed only in New York." *Id.* at S2140. In contrast, "[c]ustoms currently has a designated [Operation] Exodus staff of approximately 292 specialists and investigators . . . supplemented by the approximately 750 customs agents and inspectors . . . at the major ports of entry. . . ." *Id.* at S2139.

388. S. REP. NO. 170, *supra* note 102, at 21.

389. 130 CONG. REC. S2139 (daily ed. Mar. 1, 1984) (statement of Sen. Mattingly). In the opinion of Senator Proxmire:

> The Customs Service is in an excellent position to conduct export control investigations abroad because it has counterpart agencies in so many countries with which it has day-to-day working relations.
>
> I may say, Mr. President, this Senator was very impressed by the testimony of the Department of Defense and by the testimony of the U.S. Customs Service.

130 CONG. REC. S1694 (daily ed. Feb. 27, 1984). The Senate Banking Committee drew attention to the long history of the U.S. Customs Service by noting that its "enforcement of export controls dates from 1793, when President Washington, in order to prevent American involvement in the French Revolutionary Wars, issued the first proclamation of U.S. neutrality and directed its enforcement by officers of the Customs Service." S. REP. NO. 170, *supra* note 102, at 21.

390. 130 CONG. REC. S1695 (daily ed. Feb. 27, 1984) (statement of Sen. Heinz).

391. 130 CONG. REC. S2139 (daily ed. Mar. 1, 1984) (statement of Sen. Mattingly). S. REP. NO. 170, *supra* note 102, at 74 (amending section 12(a)).

392. S. REP. NO. 170, *supra* note 102, at 21. The Committee noted that without federal arrest authority, Customs would be required to make its arrests in compliance with the standards set forth in the various state laws. *Id.* at 22.

considered the matter of keeping U.S. technology out of the hands of unfriendly countries to be one of his highest priorities. In October of his first year in office, Mr. Reagan instituted Operation Exodus, a program administered by the Commerce Department but implemented by the Customs Service.[393] The President subsequently channeled millions of dollars into Customs to police international ports in search of cargo illegally bound for Soviet-bloc countries.[394]

Operation Exodus was another of those programs that (like the Soviet pipeline sanctions), depending on who is speaking, was either a success story or a near disaster. In explaining why Export Administration Act enforcement ought to be shifted to Customs, Senator Mattingly[395] cited the "effective export enforcement program" that Customs had developed in Operation Exodus.[396] The report on S. 979 by the Senate Banking Committee said that the Customs Service had "enhanced the effectiveness of export controls" through the Exodus program.[397] Other sources pointed to the high number of port seizures as a measure of Customs' success with the program.[398] According to one of these sources, in the initial two years of enforcing the program, "Customs officials detained and seized 2,300 foreign-bound shipments and won indictments for export control law violations in 221 cases."[399] But as illustrated by a story told in the *Minneapolis Tribune,* placed in the *Congressional Record* by Senator Durenburger,[400] such a ratio of seizures to convictions is not necessarily an indication of progress.

According to the *Minneapolis Tribune* article, Central Engineering Co. was one of several Minneapolis-area companies that experienced the "frustations created by Operation Exodus."[401] At the time the article was written, Central Engineering Co. was primarily in the business of making custom-ordered equipment for the ground testing

393. Chucker, *Who's in Charge Here?*, Minneapolis Tribune, Sept. 5, 1982, *reprinted in* 130 CONG. REC. S1726 (daily ed. Feb. 27, 1984).

394. *Stopping the Flow*, ELECTRONIC BUS., Sept. 15, 1984, at 128. "At the same time, Reagan has beefed up the enforcement arm of the Commerce Department . . . and he has sternly told the two agencies to put aside petty differences and work together." *Id.* This may partially explain the reasons behind the Commerce Department's "improved track record" in recent years. *Id.*

395. R-Ga.

396. 130 CONG. REC. S2139 (daily ed. Mar. 1, 1984).

397. S. REP. NO. 170, *supra* note 102, at 20-21.

398. *See, e.g., Stopping the Flow*, *supra* note 394, at 129; Schmitt, *supra* note 137, at 119.

399. Schmitt, *supra* note 137, at 119.

400. R-Minn.

401. Chucker, *supra* note 393, at S1726.

of jet engines. A company of about eighty-five employees, it then derived approximately two-thirds of its sales revenues from exports, having as its customers various airlines around the world. According to its vice president for operations, William Jones, Central Engineering's "products are not convertible to military uses."[402] He gave as an example the fact that equipment for testing the jet engines of a jumbo jet passenger plane cannot be used in testing fighter plane engines. Finally, another company spokesman stated that the same testing equipment was available in Britain and Japan.[403]

In early April 1982, at the Minneapolis-St. Paul International Airport, Customs officers detained a shipment of Central Engineering's testing equipment, which had been manufactured for Iraqi National Airline. The officers said the equipment was "mislabeled" and moved the shipment to a "seized" status. It was months before the shipment was released. Jones told the *Tribune*, "[i]t's a guessing game with Customs," and remarked that Customs seems to take the tack that "the safest thing they can do, especially if they don't understand the technology and its use, is to detain the shipment."[404]

Mr. Jones also discussed another reason Customs may seize cargo. Under export regulations, a shipment has to match its license exactly. If it does not, the license is invalid. But in the approximately forty-five days that it takes to get a license, design changes may have been made to the product. A company may ship under what it believes is a proper export license, only to have Customs disagree with the license.[405]

Central Engineering's shipment was finally released for export on August 25, 1982, after nearly five months of waiting. Because the product was available from other countries in both Europe and the Far East, the company president pointed out that an inability to ship products when promised meant Central Engineering would lose its market to foreign competitors.[406]

c. House preference to maintain enforcement authority in Commerce Department

Unlike the Senate Banking Committee, the House Foreign Af-

402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.*

fairs Committee was not terribly impressed with the results of Operation Exodus: "[T]he Customs Service enforcement program, known as Operation Exodus, has not been very cost-effective. It has resulted in few prosecutions of serious violations under the Export Administration Act, while at the same time needlessly delaying many legitimate export shipments on the basis of indiscriminate detentions."[407]

The House bill maintained enforcement authority in the Department of Commerce. In answer to objections that Commerce lacked appropriate law enforcement authority, the House bill authorized Commerce enforcement officials to execute search warrants, make arrests, search and seize illegal commodities and carry firearms. H.R. 3231 limited Customs' authority to detain and seize items to instances in which its officers had received specific information about possible violations.[408]

Under the House bill, enforcement activities of the Customs Service under the Export Administration Act included only "preseizure targeted inspections, detentions, preliminary investigations, and seizures," under the belief that this "affirms the role that the Customs Service, with its personnel at every port, is best able to perform."[409] Furthermore, the Customs Service was required, upon seizure, to forward all cases to Commerce for appropriate action.[410] Finally, as a reflection of the Foreign Affairs Committee's "view that budgetary balance [was] needed between the two agencies,"[411] Customs' budget for export control enforcement was limited to $14 million per year, while Commerce was allotted $15 million per year toward its enforcement activities.[412] The House's budgetary position was enacted.[413]

3. EAAA 1985 gives more authority to both Commerce and Customs

The House Committee on Foreign Affairs had considered the possibility of shifting responsibility to a single department, or, alternatively, of creating an Office of Strategic Trade, but it rejected both of

407. H. REP. NO. 257 pt. 1, *supra* note 134, at 5.

408. *Id.* at 14.

409. *Id.*

410. *Id.*

411. *Id.* at 5.

412. *Id.* at 14. The executive branch's funding request for Commerce's EAA enforcement activities was $4,970,000 (for Fiscal Year 1984). *Id.* at 5.

413. Pub. L. No. 99-64, *supra* note 5, § 113(a), at 150 (adding paragraph (6)).

these approaches.[414] Its conclusion was that "the only means of assuring that both economic and national security or foreign policy considerations are fully weighed in export control decisions is to involve fully and equally the Departments charged with furthering those goals."[415]

The Joint Conference Committee adopted the House position in that the final bill did not require the President to submit a feasibility plan on an Office of Strategic Trade.[416] Likewise, on the issue of the division of authority between Commerce and Customs, the result reached was close to what the House wanted, except that, in general, rather than taking authority away from one agency to give it to the other, the final bill simply gives more authority to both agencies.[417] A description of the actual division of enforcement authority between the two agencies follows.

a. jurisdiction of the Commerce Department and creation of Under Secretary of Commerce position

The 1985 amendments make clear that the Commerce Department is to have the exclusive right to impose civil penalties and administrative penalties under the enforcement section of the Act.[418]

Under the compromise worked out by the Joint Conference Committee, it is the intent of Congress that Commerce focus its responsibility on domestic violations of the Act and on pre-license and post-shipment checks to (1) "identify possible violations before controlled items leave the country," (2) "prevent issuance of export licenses based on invalid information," and (3) "discover and deter domestic circumvention of the export licensing system."[419] The Commerce Department is to conduct its investigations primarily at points *other than* borders and "ports of entry and exit."[420]

414. H. REP. NO. 257 pt. 1, *supra* note 134, at 9.

415. *Id.*

416. Draft Stmt, *supra* note 249, at H12157 (heading entitled "Office of Strategic Trade").

417. *Id.* at H12157-58 (heading entitled "123-Enforcement").

418. Pub. L. No. 99-64, *supra* note 5, § 113(a), at 149 (adding new paragraph (a)(5)): "All cases involving violations of this Act shall be referred to the Secretary for purposes of determining civil penalties and administrative sanctions under section 11(c) of this Act, or to the Attorney General for criminal action in accordance with this Act." *Id.* "Any investigations undertaken, expanded, or continued on the basis of prelicense or post-shipment inquiries should be considered part of the prelicensing and post-shipment verification authority granted to Commerce in this Act." 130 CONG. REC. H2008 (daily ed. Apr. 16, 1985) (statement of Rep. Bonker).

419. H. REP. NO. 180, *supra* note 143, at 63.

420. *Id.*

Commerce is specifically authorized to "search, detain (after search), and seize goods or technology at those places within the United States other than"[421] at places of ingress and egress to and from "the United States where officers of the Customs Service are authorized by law to conduct such searches. . . ."[422] Enforcement of export laws at ports of entry and exit is intended by Congress to be "the sole province of the Customs Service unless that Service agrees to a Commerce role for specific operations."[423] In addition, similar to H.R. 3231's provision,[424] under EAAA 1985 any Office of Export Enforcement (Commerce Department) officer or employee may be designated to have authority to (a) execute a warrant, (b) make a warrantless arrest (with probable cause), and (c) carry firearms (in carrying out (a) and (b)).[425]

One other change made by the EAAA 1985 with regard to the enforcement activities of Commerce is the creation of a new, Presidential-appointment position within Commerce, the Under Secretary of Commerce for Export Administration.[426] The new Secretary "shall carry out all functions of the Secretary [of Commerce] under this Act which were delegated to the office of the Assistant Secretary of Commerce for Trade Administration" before the EAAA 1985's enactment.[427] Originally a Senate provision, this requirement to create the Under Secretary position, "while [not curing] completely the inherent conflict between Commerce's export promotion and control activities, . . . ensures that the latter activities will have a higher priority and visibility."[428] This new provision will not become effective until Octo-

421. Pub. L. No. 99-64, *supra* note 5, § 113(a), at 149 (at new paragraph (a)(3)(A)).

422. *Id.* § 113(a), at 148 (at new paragraph (a)(2)(A)).

423. 131 CONG. REC. S8925 (daily ed. June 27, 1985) (statement of Sen. Proxmire). "The search, detention . . . , or seizure of goods or technology at [ports of entry and exit] . . . may be conducted by . . . the Department of Commerce . . . *with the concurrence of* the Commissioner of Customs. . . ." Pub. L. No. 99-64, *supra* note 5, § 113(a), at 149 (emphasis added). Regarding this requirement, Congressman Bonker stated the intention of the Foreign Affairs Committee "that Customs and Commerce [develop] procedures which will allow for swift and routine concurrence on the part of the Commissioner." 131 CONG. REC. H2008 (daily ed. Apr. 16, 1985). Also, as Rep. Coleman (D-Tex.) pointed out, Commerce would be permitted to maintain computer terminals for their own use at ports of entry and exit. *Id.* at H2014.

424. H.R. 3231 allowed *any* Commerce officer or employee to have these enforcement authorities. H. REP. NO. 257 pt. 1, *supra* note 134, at 66 (emphasis added).

425. Pub. L. No. 99-64, *supra* note 5, § 113(a), at 149.

426. *Id.* § 116(a), at 152.

427. *Id.* The President is also required to appoint two Assistant Secretaries of Commerce, to assist the Under Secretary. *Id.*

428. 131 CONG. REC. S8925 (daily ed. June 27, 1985).

ber, 1986.[429]

b. jurisdiction of the Customs Service

In a role designed to be complementary to that of the Commerce Department, the Joint Conference Committee has made the Customs Service the lead agency for enforcement of the Export Administration Act at U.S. ports of entry and exit and for overseas investigations of Act violations.[430] The term "ports of entry and exit" is intended to be construed *narrowly*, thus limiting the areas in which the Department of Commerce can engage in search and seizure activities *only* if it has the concurrence of Customs.[431]

The 1985 amendments authorize Customs to conduct border searches when investigating suspected exports of goods and technologies in violation of the Act.[432] The Service's authority is also extended to stopping and searching vehicles, vessels, aircraft, persons, packages, and containers suspected of containing goods exported or about to be exported in violation of the Act.[433] These authorizations are intended as a clarification of Congress' intent that the Service's authority to search exports be conducted on the same basis as their searches of imports.[434] Finally, the amended law specifically confers federal arrest authority on the Customs Service in connection with its right to make warrantless arrests under the Act.[435] Having federal arrest authority will enable Customs to make arrests under a uniform, federal standard, rather than having to conform to the standards of the laws of fifty states.[436]

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429. Pub. L. No. 99-64, *supra* note 5, § 116(d), at 153.

430. *Id.* § 113(a), at 148, and 131 CONG. REC. H2008 (daily ed. Apr. 16, 1985) (statement of Rep. Bonker).

431. H. REP. NO. 180, *supra* note 143, at 63-64. The term "ports of entry and exit from the United States," as explained by Congressman Bonker, is limited to

> the actual areas at which international carriers arrive and depart, such as airports, boat docks, or bus terminals, and public and private premises immediately adjacent to such areas which provide direct services to ports, such as port authority facilities, warehouses, and freight forwarding terminals. It also includes the international vehicles and carriers entering such port areas.

131 CONG. REC. H2008 (daily ed. Apr. 16, 1985).

432. Draft Stmt, *supra* note 249, at H12157 (heading entitled "Section—123 Enforcement Subsection (a)—Enforcement Authority").

433. *Id.*

434. *Id.* at H12158.

435. *Id.*

436. *Id.* Congress deemed this necessary in light of the holding of a Second Circuit case. Although Customs officers currently make warrantless arrests for export violations, as well as for violations of other laws delegated to Customs for enforcement, *U.S. v.*

c. cooperation in information sharing

Since it was felt that effective enforcement depends on close cooperation between Commerce and Customs, the conferees added the following provision to section 12(b):

> [t]he Secretary [of Commerce] and the Commissioner of Customs, upon request, shall exchange any licensing and enforcement information with each other which is necesary to facilitate enforcement efforts and effective license decisions. The Secretary, the Attorney General, and the Commissioner of Customs shall consult on a continuing basis with one another and with the heads of other departments and agencies which obtain information subject to this paragraph, in order to facilitate the exchange of such information.[437]

The amendment is not intended to provide either Commerce or Customs unlimited access to the other's licensing enforcement data. Rather, it is hoped that when one agency uncovers evidence or information pertinent to an ongoing investigation by the other, that agency will readily provide the information to the other. The sharing of Customs' information with Commerce will help ensure that Commerce makes informed licensing decisions at the outset. It is also Congress' intent that whenever the two agencies determine they are independently investigating an export control violation in the same case, the agencies will work jointly to determine which one will take primary responsibility for completing the investigation stage.[438]

As Senator Proxmire put it, "[h]opefully, this clearer delineation of enforcement responsibilities will prevent our enforcement officials from tripping over and even thwarting one another. In areas where they do share enforcement responsibilities, this bill makes clear they must cooperate and share information."[439]

4. How the Attorney General became involved under EAAA 1985

As discussed earlier in the section describing the legislative history of the EAAA 1985, not long after the two houses had finally

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Swarovski, 557 F.2d 40 (2nd Cir. 1977) held that such arrests were to be determined by the standards set forth in the various state laws since Congress had not given Customs officers specific Federal arrest authority in this area. One effect of this amendment is to create uniformity in the law of export arrests.

Id.

437. Pub. L. No. 99-64, *supra* note 5, § 113(b), at 150.

438. 131 CONG. REC. H2008 (daily ed. Apr. 16, 1985) (statements of Rep. Bonker).

439. 131 CONG. REC. S8925 (daily ed. June 24, 1985).

come together on the issue of dividing enforcement powers between Commerce and Customs, the House Judiciary Committee succeeded in persuading the House to add a provision giving the Justice Department authority over Commerce and Customs enforcement activities.[440]

Senators Garn[441] and Heinz[442] objected to the provision,[443] but when the conferees met on June 25, Judiciary Committee Chairman Peter Rodino[444] insisted that the Attorney General should have the power to review the other agencies' activities to block illegal exports.[445] In particular, Congressman Rodino wanted the Justice Department to regulate Commerce and Customs activity in carrying firearms, issuing warrants and making arrests, but Senate negotiators protested that such review would merely complicate enforcement.[446] In the compromise reached on June 25, the bill was changed to permit the Attorney General to issue guidelines for Commerce, but not Customs.[447]

E. Continued Role of the Department of Defense

Since the thrust of the national security goal of the Export Administration Act is to control exports of militarily significant technology and products to the Soviet bloc, and the Department of Defense is viewed as the one most capable of identifying which exports are likely to threaten that goal, some reformers of the 1979 Act sought a more significant role for the DOD in export control procedures. Two proposals were made for amending the 1979 Act that would arguably

440. *See supra* notes 51-52 and accompanying text. In his statements to Congress on April 16, 1985, Congressman Bonker explained that the intent of the provision was "to ensure that, through guidance to be provided by the Attorney General, police powers are exercised in a uniform manner by all agencies that have the legislative authority to use such powers." 131 CONG. REC. H2008 (daily ed. Apr. 16, 1985).

441. R-Utah.

442. R-Pa.

443. Green, *House Votes to Renew Law on Export Controls*, 43 CONG. Q. 739 (1985).

444. D-N.J.

445. Green, *Congress Clears Bill to Renew Main Law Regulating Exports*, 43 CONG. Q. 1302 (1985).

446. *Id.*

447. *Id. See* Pub. L. No. 99-64, *supra* note 5, § 113(a), at 149 (adding paragraph (4)).

> The statutory requirement of Attorney General guidelines is not extended to the Customs Service, since the law enforcement authority of the Customs Service is not new. However, the managers intend that there be consultation between the Attorney General and the Secretary of the Treasury on the exercise of law enforcement authority . . . by the Customs Service.

H. REP. NO. 180, *supra* note 143, at 49-50.

have increased Defense's influence over exports. Significantly, neither of these proposals was incorporated into the 1985 amendments. These proposals were to:

(1) Reverse the license review procedure for all licenses that Commerce is bound to send to Defense for review, so that these would go immediately to the DOD, rather than being reviewed first for thirty days at Commerce.

(2) Confer on Defense the statutory right to review licenses for exports to Free World countries where there is a high risk of diversion to controlled countries.

The first proposal, one of several suggestions that was made in the General Accounting Office 1982 publication *Export Control Regulation Could Be Reduced Without Affecting National Security,*[448] was not incorporated into either house's bill. The proposal will nevertheless be discussed here because its rejection illustrates the importance Congress places on the "balance of departmental power" in controlling exports.

The second proposal became law, not through an amendment to the Export Administration Act, but by presidential directive.[449] It will be recalled that the Senate's insistence on giving the Defense Department statutory authority to review license applications to certain Free World countries was one of the last roadblocks to reaching a consensus on the 1979 Act's amendment and reauthorization.[450]

Thus, although in the end Defense did acquire additional authority over exports, this authority was not conferred by the EAAA 1985. The proposal will be discussed here for what it shows about Congress' role in maintaining the desired balance among the agencies charged with overseeing exports.

Two other proposals were made for revising the 1979 Act with respect to the DOD. Both were aimed at increasing the effectiveness of Defense's role in controlling exports. Both were enacted in EAAA 1985. These proposals were to:

(1) Step up the process of integrating the Militarily Critical

448. COMPTROLLER GENERAL OF THE U.S., EXPORT CONTROL REGULATION COULD BE REDUCED WITHOUT AFFECTING NATIONAL SECURITY (May 26, 1982) (available from U.S. General Accounting Office, Document Handling and Information Services Facility, Gaithersburg, Md., GAO/1D-82-14) [hereinafter cited as GAO]. The study was prepared at the request of Senators Jake Garn and Harry Byrd (D-W.Va.) "to examine how well the export control system is carrying out the Export Administration Act's national security goal." *Id.* at i.

449. *See supra* notes 47-49 and accompanying text.

450. *See supra* note 42 and accompanying text.

Technologies List into the Control List and review the MCTL at least annually to remove goods and technologies no longer militarily critical. To the extent that Defense complies with the measure's intent, the DOD will be releasing more products and technologies for export and enhancing the ability of Commerce and Customs to focus their attentions on those items that are truly militarily critical.

(2) Create a National Security Control Office within the DOD so as to better coordinate within that department the tasks assigned under the Export Administration Act. Implementation will have the effect of increasing Defense's influence to the extent that better organization and coordination within the DOD will heighten its effectiveness. The creation of the new National Security Control Office is not, however, a grant of additional authority—or more money—to the Defense Department.[451]

The following discussions expand on these four proposals.

1. Proposed: reversing order of review in licensing procedure

As described earlier, the Defense Department has a statutory right to review all exports to countries controlled for national security purposes, after informing Commerce of those applications it wishes to see.[452] As with other applications requiring interagency review, however, the application is not immediately forwarded to Defense.[453] Rather, Commerce holds the application for up to thirty days while it develops its own required recommendation on the proposed export.[454]

The 1982 study prepared for Congress by the General Accounting Office (GAO) argued that this procedure "delays decisionmaking by up to 30 days with no perceptible benefit and results in additional staff at Commerce."[455] The study pointed out that Commerce was "severely limited in identifying military risk" and must therefore focus its review on "providing an industry perspective."[456] The GAO

451. The paragraph authorizing creation of the National Security Control Office, Pub. L. No. 99-64, *supra* note 5, § 105(j), at 128, which does not mention authorization of funding for its purpose, came from S. 979. Draft Stmt, *supra* note 249, at H12152 (heading entitled "National Security Control Office"). The Senate Report specifically states that "the directive to create a National Security Control Agency is an organizational measure and does not include authority for new resources . . . ." S. REP. NO. 170, *supra* note 102, at 12. The Senate Report did add a note to the Secretary of Defense, however, that it would not hurt to ask. *Id.*

452. *See supra* notes 101-04 and accompanying text.

453. GAO, *supra* note 448, at 15.

454. *Id.*

455. *Id.*

456. *Id.* at 17.

felt that if Commerce were to forward those applications to Defense *before* it reviewed them, "Commerce could eliminate up to 65 percent of the detailed reviews it now makes."[457] In fact, the GAO saw no reason why Commerce need ever review such applications (except to check on end-user reliability and foreign availability) unless Defense, after its review, favored denial or only conditional approval.[458] The GAO said this would save up to thirty days in review time and would eliminate the need for nineteen staff persons at Commerce.[459] Best of all, the plan would not require an increase in the resources or time required by Defense, since the DOD had to conduct such a review in any event.[460]

Not surprisingly, when asked to comment on the recommendations made in this GAO study, the Department of Commerce expressed some resentment at the implication that Commerce's contribution to the license review process was little more than a "rubber stamp" of approval.[461] In a reply letter by Lionel Olmer, Under Secretary for International Trade, Commerce asserted that amending the 1979 Act to give Defense the responsibility of first review on dual-use license applications would be inappropriate.[462]

> Such an action would undermine Congressional intent to maintain a locus of control over technology transfer within the federal government. It could damage the balance we now have between strategic, economic, and policy perspectives while merely shifting the burden from one agency to another. The recommendation is driven implicitly by a desire to expedite license processing, however, it is unwarranted on those grounds since we are processing licenses on time. The January 1981 backlog of some 2000 cases is down to virtually zero today.[463]

The March 1982 letter from Under Secretary Olmer also noted Commerce's recent act of hiring additional technical staff and increasing the training of those already on the staff. Thus it was taking affirmative steps to remedy the "weakness" complained of by the

457. *Id.*

458. *Id.* at 21-22. "Conditional approval" by the DOD involves either "derating" or "safeguards." As explained in the GAO study, "[d]erating is a strategy that lowers one or more of the proposed export's performance characteristics; safeguards normally apply to computers and are designed to discourage diversion and unauthorized uses." *Id.* at 16.

459. *Id.* at 17.

460. *Id.* at 23.

461. *Id.* at 40, app. IV.

462. *Id.*

463. *Id.*

General Accounting Office in Commerce's ability to assess the strategic implications of a proposed export.[464]

The fact that neither H.R. 3231 nor S. 979 incorporated the procedural reversal suggested by the GAO is strong evidence that Congress did, in fact, reject the measure as potentially disruptive of the balance now maintained among "strategic, economic and policy perspectives." Also, in view of the numerous measures taken by the EAAA 1985 to remove unnecessary hindrances to increased technological exports, it is understandable why Congress might not have wished to diminish Commerce's influence in reviewing export licenses in favor of increased DOD influence.

One idea that did appeal to Congress was that of cutting review time when interagency review is necessary. Under the "fast-track" licensing procedure adopted for exports to CoCom and similar multilateral agreements to control exports, any necessary interagency review must take place *simultaneously* with Commerce's review.[465] It is interesting to note, however, that exports to CoCom countries and others with whom the U.S. maintains similar multilateral controls are also the exports least likely to require referral of license applications to Defense.

2. Proposed: conferral of DOD authority to review exports to non-controlled countries

This controversy and its resolution by President Reagan have already been described.[466] As noted, the Senate wanted to amend section 10(g) to incorporate this provision, while the House did not. The House meant to encourage Commerce to consult informally with Defense in cases involving exports to free world countries where there was a significant risk of re-export to a controlled destination.[467] It refused, however, to require formal review, on the belief that this "would greatly complicate and slow free-world trade, the vast bulk of which involves little or no national security risk."[468] The Senate, on the other hand, wanted a formal review mechanism. But even its revision would have at least required the DOD to obtain the concurrence of Commerce on *which* free-world applications Defense should re-

464. *Id.*
465. Pub. L. No. 99-64, *supra* note 5, § 111(b), at 142.
466. *See supra* notes 42, 47-49, 102-03 and accompanying text.
467. H. REP. NO. 257 pt. 1, *supra* note 134, at 9.
468. *Id.*

view.[469] When the House and Senate were unable to reach a consensus on this issue, the President cut the Gordian knot.[470]

The case is an illustration of what can happen when Congress takes too long to make up its mind on important issues such as this one. The Office of Technology Assessment report reflected on the difficulty, in general, of the congressional task that then lay ahead:

> Renewal of the Export Administration Act may well lead to legislation that addresses some or all of these perspectives. It is possible that Congress will make difficult choices and select among consistent measures. If it does not, it risks leaving export administration in much the same state as at present. Implementation of the 1979 EAA has been complicated by the fact that inconsistencies of this sort were built into it. If this situation continues, *controversies will once again be transferred for [sic] the legislative to the executive arena* and resolved by Presidential decisions or administrative action.[471]

For the most part, the newly amended 1979 Act reflects Congress' remarkable task of reaching a compromise on the many divergent goals and strategies competing for incorporation. But the so-called 10(g) issue was "one that got away," one that slipped from the legislative into the executive arena. In the statement of managers on the final bill, however, the conferees made this promise: "This matter may be raised again should the need arise, and both House and Senate committees of jurisdiction intend to exercise close oversight with respect to implementation of the President's initiative."[472]

3. Enacted: pushing the DOD to fulfill its obligation to compile the Militarily Critical Technologies List

One of the goals behind the 1979 Act's requirement that the Defense Department develop a list of militarily critical technologies was the envisioned use of the list to *remove* controls from nonstrategic

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469. S. REP. NO. 170, *supra* note 102, at 17.

470. Senator Heinz, in his June 27, 1985 remarks on the Senate floor, made it clear that Congress did not quibble with the President's right to take such action.

> Since the President adequately addressed the matter, there was no need for the Congress to do so as well. The statement of managers, however, does make clear that the President had the legal authority to take the action he took last January, unpopular though it may have been in some quarters.

131 Cong. Rec. S8922 (daily ed. June 27, 1985).

471. OTA, *supra* note 60, at 14 (emphasis added).

472. H. REP. NO. 180, *supra* note 143, at 62.

items and thus enhance trade.[473] The Government Accounting Office, in its 1982 study, observed that little progress had been made in fulfilling these expectations.[474] Thus far, Defense has developed and revised an initial list, which it is presently using to make negative licensing decisions, but Commerce has not adopted this MCTL for its own use.[475] The problem with it is that the list lacks the specificity needed to make it a practical guide for licensing decisions.[476]

The 1985 amendments require Commerce and Defense to work together to integrate the Militarily Critical Technologies List and the Control List "with all deliberate speed" and to report back to Congress by 1986 on their progress.[477] In addition, for the first time, Defense is required to "establish a procedure for reviewing the goods and technology on the [MCTL] at least annually for the purpose of removing from the list . . . any goods or technology that are no longer militarily critical."[478]

One factor, not mentioned in the reauthorization discussions in Congress[479] and which was brought out in a 1981 *Harvard International Law Journal* student Comment[480] may be worth reiteration here. It will be recalled from the earlier discussion on the respective export-licensing jurisdictions of the Commerce and State Departments, that their lists are mutually exclusive, even though both the Munitions List and the Control List contain military items.[481] The distinction is that if a product or technology also has a commercial application, it would belong on the Control List rather than the Munitions List.[482] The *Harvard* Comment noted a tendency in the Defense Department, especially in the case of dual-purpose technologies that Defense regarded as "volatile,"[483] to ask the State Department to include the item on the Munitions List, rather than asking

473. GAO, *supra* note 448, at 5-6.

474. *Id.* at 6.

475. *Id.* at 32. A recent conversation with Michael T. Schilling, of TRW Inc., confirms that this is still the case. *See supra* note 176.

476. GAO, *supra* note 448, at 32.

477. Pub. L. No. 99-64, *supra* note 5, § 106(a)(2), at 128.

478. *Id.* at 129.

479. Although particularly looking for such a discussion, this author was unable to find any mention of the problem in the Congressional Record or other legislative materials consulted.

480. *Recent Developments, supra* note 79, at 416.

481. *See supra* notes 68-73 and accompanying text.

482. *Id.*

483. "Examples of especially volatile technologies include some types of space technology and very high speed integrated circuitry." *Recent Developments, supra* note 79, at 416 n.30.

Commerce to put it on the Control List.[484]

According to the *Harvard* commentary, the advantage seen by Defense for relegation to the Munitions List is that "there is less pressure to grant a license if such a technology is viewed as a military weapon, reviewable by the State Department rather than the Commerce Department."[485] The *Harvard* author noted that such a decision by the DOD to use the Munitions List rather than the Control List would circumvent the procedures envisioned by Congress and further restrict overseas sales of technologies.[486]

4. Enacted: creation of a National Security Control Office

The provision for creating a National Security Control Office[487] originated in the Senate, where it was felt by the Banking Committee that "delays in the processing of license applications for national security purposes have in some degree been due to inadequate coordination and devotion of resources within the Department of Defense."[488] The Banking Committee believed that by institutionalizing the DOD's export control functions, Defense could better organize its responsibilities under the Act.[489]

In agreeing to include the measure, the Joint Conference Committee made it clear that it was not their intent that the new office exercise any functions not already authorized and delegated to the Defense Department.[490] The purpose of the new office is simply to centralize the personnel within Defense who review licenses and to expedite their recommendations to Commerce.[491] As noted in the introduction to this section, however, that in itself may be sufficient to shift the "balance of power" in the DOD's favor. Senator Garn, in fact, seemed to see in this provision a sort of "mandate" to Defense to fulfill the role he had hoped to embody in an Office of Strategic Trade:

> [The National Security Control Office will] be under the responsibility of the Under Secretary for Policy, who draws upon information from the Under Secretary for Research and Engineering in

484. *Id.* at 416.
485. *Id.* at 416 n.30.
486. *Id.* at 416.
487. Pub. L. No. 99-64, *supra* note 5, § 105(j), at 128.
488. S. REP. NO. 170, *supra* note 102, at 12.
489. *Id.*
490. Draft Stmt, *supra* note 249, at H12152 (heading entitled "National Security Control Office").
491. *Id.*

> establishing Defense export control policies. This arrangement is vital if Defense's role is to be anything more than to provide technical input. As long as export controls are assigned to the Commerce Department for overall administration[,] a broad and direct policy role for the Defense Department will be necessary to counter balance that natural pro-trade bias inherent at the Commerce Department.[492]

F. Stricter Penalties for Violations of Export Laws

1. Criminal violations

Under the 1985 amendments, "conspiring to violate" the Act (or an order or regulation issued pursuant to it) has been codified as a separate crime under section 11(a), subject to the same penalties as an actual violation.[493] The Joint Conference Committee affirmed its belief, however, that "criminal intent" is needed to violate section 11(a).[494] In other words, the crime must be done "voluntarily and purposely" and not merely because of accident, mistake or other innocent purpose.[495]

Under the 1979 Act, an 11(b) violation[496] required that the violator know either (1) that the exports would be used for the benefit of a controlled country (contrary to the license) or (2) in cases where the item had been approved for export to a controlled country, that the country would use it for military or intelligence-gathering purposes (contrary to the conditions under the license).[497]

Under the new law, it is now also an 11(b) violation if the exporter simply knows that the destination or intended destination is either a controlled country or one subject to a foreign policy embargo (in contravention of the license).[498] Additionally, Congress has made it an 11(b) violation even to possess the goods or technology when the

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492. 131 CONG. REC. S8923 (daily ed. June 27, 1985).

493. Pub. L. No. 99-64, *supra* note 5, § 112(a), at 146. Unless subject to the provisions of section 11(b), which carries an even heftier fine and/or prison sentence, the penalty for violating subparagraph (a) is either five times the value of the exports involved or $50,000, whichever is greater, or a five-year prison sentence, or both. *Id.*

494. Draft Stmt, *supra* note 249, at H12156 (heading entitled "Section 113-Violations").

495. *Id.*

496. A section 11(b) violation carries a penalty of $250,000, or ten years imprisonment, or both, in the case of an individual or a fine of five times the value of the exports involved, or $1,000,000, whichever is greater, in the case of non-individual entities. 50 U.S.C. § 2401(a) (1986).

497. Pub. L. No. 96-72, *supra* note 21, § 11(b), at 529.

498. Pub. L. No. 99-64, *supra* note 5, § 112(b)(3), at 146-47.

person or entity (1) intends to violate national security or foreign policy controls or (2) knows that the items would be so exported.[499]

Finally, an act done with the intent of evading the provisions of the Export Administration Act (or regulation, order or license issued under it) will be subject to 11(a) penalties, unless it is an evasion of a national security or foreign policy control. Then it is subject to the higher 11(b) penalties.[500]

2. Civil sanctions and penalties

The Secretary of Commerce has the authority under section 11(c) to impose civil penalties, either in addition to or in lieu of any other liability or penalties imposed, for violations of the Act or a regulation, order or license issued under the Act.[501]

The Senate Banking Committee wanted to give Commerce the authority to revoke or suspend the export privileges of any person convicted of violating any other federal law arising out of an export prohibited under the Export Administration Act,[502] but the Joint Conference Committee decided not to adopt it.[503] A provision that was adopted was the related Senate measure that persons convicted of violating the Arms Export Control Act or certain espionage statutes may be ineligible to apply for or use an export license under the Export Administration Act for a period of up to ten years.[504]

A new penalty that Commerce may now impose under the Act, in addition to other penalties in its arsenal, is to require violators of national security controls to forfeit to the government goods or tangible items that were the subject of the violation as well as any tangible property used in or derived from the violation.[505]

In the interest of encouraging cooperation with the government in disclosing a violation, the President is authorized to set standards for establishing *levels* of civil penalties, based upon "the seriousness of the violation, the culpability of the violator, and the violator's record

499. *Id.*

500. *Id.*

501. 50 U.S.C. § 2410 (1986). The Attorney General must bring any criminal charges that arise. Pub. L. No. 99-64, *supra* note 5, § 113(a), at 149 (adding paragraph (5)).

502. S. REP. No. 170, *supra* note 102, at 73 (paragraph (c)(3)).

503. Draft Stmt, *supra* note 249, at H12156 (heading entitled "Subsection (e)-Forfeiture; Prior Convictions").

504. *Id. See also* Pub. L. No. 99-64, *supra* note 5, § 112(e), at 148 (adding new paragraph (h)).

505. Pub. L. No. 99-64, *supra* note 5, § 112(e), at 147-48 (adding new paragraph (g)).

of cooperation with the government in disclosing the violation."[506]

Finally, a provision desired by the House Foreign Affairs Committee prohibits exceptions to orders denying export privileges unless the Foreign Affairs Committee and the Banking Committee are first consulted.[507] This would allow Congress an opportunity to review the justification for any such exception.[508] The House Report accompanying the introduction of this measure stated, as well, that the drafters expected "such consultation to occur well in advance of approval of any exception."[509]

3. Judicial review

The 1979 Act provides for a number of civil penalties to punish the violators of the Export Administration Act and regulations, orders, and licenses issued under it, all at the disposal of the Secretary of Commerce. They include (1) suspension or revocation of a validated license, (2) a general denial, as well as a temporary denial, of export privileges, (3) exclusion from practice before the Department of Commerce, and (4) civil money penalties. Under the 1985 amendments, Commerce may also impose certain forfeiture penalties.[510]

Before the 1985 amendments, however, those alleged to have committed violations of the Act had almost no right to independent judicial review,[511] because section 13 of the Act exempted functions carried out under the Export Administration Act from the provisions of the Administrative Procedures Act, a statute designed to provide due process and procedural rights in administrative proceedings.[512] The policy reason behind this exemption, as explained by Senator Proxmire, was

> the intimate relation to foreign policy and national security of the functions invoked under this act. These foreign policy and na-

506. *Id.* at 147 (adding paragraph (4)).

507. *Id.* (adding paragraph (3)).

508. H. REP. NO. 257 pt. 1, *supra* note 134, at 14.

509. *Id.*

510. 130 CONG. REC. S1702 (daily ed. Feb. 27, 1984) (statement of Sen. Dixon (D-Ill.)).

511. *Id.*

512. *Id.* at S1700 (statement of Sen. Proxmire). Section 13(a) provides: "except as provided in section 11(c)(2)[regarding violations of the anti-boycott provisions of section 8], the functions exercised under this Act are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5, United States Code." Pub. L. No. 96-72, *supra* note 21, § 13(a), at 531. The Administrative Procedures Act is a statute designed to provide due process and procedural rights in administrative proceedings. 130 CONG. REC. S1703 (daily ed. Feb. 27, 1984) (statement of Sen. Dixon).

> tional security functions may at times require secrecy, speed, unity of design, and special expertise. We certainly did not, and do not now want, the courts second guessing the President with regard to how he carries out such functions under this act.[513]

Senator Dixon[514] and others on the Senate Subcommittee on International Finance and Monetary Policy were concerned, nonetheless, because civil penalties were being imposed without giving alleged violators a chance to defend or explain their position.[515]

> Alleged criminal violations of the act are handled like alleged criminal violations of any other Federal statute; a full trial, judicial review, and all the usual safeguards apply. However, the treatment of alleged civil violators of the act is far different than applies in most other areas of Federal law. Under the Export Administration Act, the Commerce Department essentially gets to act as prosecutor, judge, and jury, with essentially no right of independent judicial review.[516]

a. administrative procedure under the 1979 Act

Under the 1979 Act, proceedings to impose sanctions were held before a hearing commissioner, a position not having the same independence as an administrative law judge.[517] Even fewer safeguards accompanied the granting of temporary denial orders, which were being imposed on an ex parte basis and which could last indefinitely.[518] Commerce regulations required a hearing but did not specify when the hearing had to be held.[519] Thus, a temporary denial order could be imposed without any proceeding guaranteeing the right of the affected party to be present and no timely right to contest the matter afterward.[520]

Under section 11(f) of the 1979 Act,[521] if a party failed to pay a penalty imposed under 11(c), the government could enforce it by going to the district court.[522] In such an action, the court was required

513. 130 CONG. REC. S1700 (daily ed. Feb. 27, 1984).
514. D-Ill.
515. *Id.*
516. *Id.* at S1702 (statement of Sen. Dixon).
517. *Id.* at S1703.
518. *Id.*
519. *Id.*
520. *Id.*
521. This section was eliminated by the 1985 Act. Pub. L. No. 99-64, *supra* note 5, § 114, at 150.
522. Pub. L. No. 96-72, *supra* note 21, § 11(f), at 530.

under the Act to determine de novo all issues necessary to the establishment of liability.[523] But, as Senator Dixon explained,

> the Commerce Department has never, as I understand it, attempted to go to court in the past to collect a fine in any event. What the Department did instead, in some cases at least, was to impose temporary denial orders, which of course are not subject to judicial review, and then only remove the temporary denial order when the party paid the fine determined to be appropriate by the Department.[524]

b. EAAA 1985 allows a narrow form of judicial review in section 11 cases

To remedy these problems without exposing national security and foreign policy decisions to judicial scrutiny, the EAAA 1985 provides a narrow exception to the Export Administration Act's exemption from judicial review. The Act now provides:

> In any case in which a civil penalty or other civil sanction (other than a temporary denial order or a penalty or a sanction for a violation of section 8 [regarding boycotts, for which the Act provides special procedures]) is sought under section 11 of this Act, the charged party is entitled to receive a formal complaint specifying the charges and, at his or her request, to contest the charges in a hearing before an administrative law judge. Subject to the provisions of this subsection, any such hearing shall be conducted in accordance with sections 556 and 557 of title 5, United States Code.[525]

For those persons and businesses on whom the Commerce Department has imposed civil sanctions under the Export Administration Act, therefore, the law now accords:

(1) a hearing before an administrative law judge rather than a hearing commissioner;
(2) the rights, for example, to submit briefs, call witnesses, cross-examine witnesses and submit supporting materials; and
(3) after the administrative law judge has made his or her findings of fact and conclusions of law in written form, the right to appeal this decision to the Secretary of Commerce, who within thirty days must review the decision and either affirm, modify or vacate

523. *Id.*
524. 130 CONG. REC. S1703 (daily ed. Feb. 27, 1984).
525. Pub. L. No. 99-64, *supra* note 5, § 114, at 150.

it.[526]

The Senate sought to make the Secretary of Commerce's decision appealable to the Court of Appeals for the District of Columbia,[527] but the Joint Conference Committee would not agree to this feature of the Senate bill.[528] Under the 1985 amendments, therefore, this decision by the Secretary of Commerce is final and is not subject to judicial review.[529]

c. temporary denial orders

The treatment of temporary license denials under the 1985 amendments to the Act is slightly different from that of other civil sanctions. A temporary denial order can still be imposed ex parte, but is limited to a 60-day duration and may only be imposed to prevent an "imminent violation of this Act." The order can only be renewed for 60-day periods and then solely (1) to prevent such imminent violation and (2) after notice and an opportunity for a hearing is provided.[530]

d. license denials

The 1985 amendments to section 11 provide for appeal of a very limited type of license denial. One may now appeal the narrow question of whether or not the item proposed to be exported is actually on the Control List. This is not a right to appeal the question of whether the item is properly on the Control List—only an opportunity to settle questions of product characterization under the descriptions given on the list.[531]

Thus, if Commerce denies a license under section 10(f) of the Act, the applicant has a right of appeal to an administrative law judge, "who shall have the authority to conduct proceedings to determine only whether the item sought to be exported is in fact on the control list."[532] The written determination by the administrative law judge is appealable to the Secretary of Commerce, whose written decision is final.[533] Subject to some safeguards, the Secretary's decision is

526. 130 CONG. REC. S1703 (daily ed. Feb. 27, 1984).
527. *Id.* at S1702.
528. Draft Stmt, *supra* note 249, at H12156 (heading entitled "Section 114-Exemption from Judicial Review").
529. Pub. L. No. 99-64, *supra* note 5, § 114, at 151.
530. *Id.*
531. 130 CONG. REC. S1703 (daily ed. Feb. 27, 1984) (statement of Sen. Dixon).
532. Pub. L. No. 99-64, *supra* note 5, § 114, at 151.
533. *Id.* at 151-52.

to be published in the *Federal Register*.[534] As noted by Senator Dixon, this "provision is designed to help bring greater precision to the control list, and to provide additional guidance to the business community as to what is being controlled."[535]

4. Import sanctions against foreign violators

As originally proposed, S. 979 included a provision that would have allowed the President to impose import sanctions in two national security-related situations:

(1) against anyone violating a national security control imposed under section 5 of the Act; and
(2) against anyone violating any regulation issued *pursuant to a multilateral agreement* to control exports for national security purposes (to which the United States is a party).[536]

Presidential authority to impose import sanctions in the first situation—violation of a U.S. law—was adopted by the Senate without protest and subsequently adopted by the full Congress in the 1985 amendments.[537] Presidential authority to impose import sanctions in the second situation—violation of what are essentially a foreign country's laws—underwent a major modification before it passed the Senate and became part of the 1985 amendments. The Senate's debate over the matter, which took place shortly before S. 979 was passed,[538] highlights the competing factors that made it difficult to agree on this country's best approach to increasing the strength and effectiveness of multilateral cooperation to control high technology exports.

a. Banking Committee's proposed sanctions against CoCom violators

It will be recalled from the discussion on CoCom that one of the things that really irks U.S. businesspersons is to lose a market to foreign competition because our government turns down a license application, in adherence to CoCom regulations, while the competitor's government, a CoCom member, does nothing when its companies ex-

534. *Id.* at 152.
535. 130 CONG. REC. S1703 (daily ed. Feb. 27, 1984).
536. S. REP. NO. 170, *supra* note 102, at 73.
537. Pub. L. No. 99-64, *supra* note 5, § 121, at 155 (amending Chapter 4 of title II of the Trade Expansion Act of 1962, 19 U.S.C. § 1864 (1986), by adding new section 233).
538. *See* 130 CONG. REC., S1716 (daily ed. Feb. 27, 1984) (beginning with heading entitled "Amendment No. 2742") to S1721.

port in violation of the same regulations.[539] The Banking Committee thus sought to obtain for the President the authority to impose sanctions against such foreign companies as punishment for not adhering to the CoCom agreement. They believed that the ever-present threat of this remedial action would work to motivate greater compliance with CoCom requirements.

b. Finance Committee's concerns about possible negative consequences

The Senate Finance Committee, on the other hand, reasoned that the use of such a device would backfire, actually undermining CoCom cooperation. Senator Danforth,[540] therefore, introduced an amendment to S. 979, deleting the authority to impose import sanctions against foreign violators of multilateral security agreements.[541] As expressed by Senator Danforth, the main flaw with this provision was its disregard for "foreign, particularly European, sensitivities to American infringements on their sovereignty."[542] Since CoCom is only a voluntary organization, said Danforth, the best hope of enforcing controls on high-technology exports to the Soviet bloc is through tactics aimed at motivating increased cooperation from the governments involved.[543]

Another problem that would likely arise from the use of this provision, the senator said, was retaliation against U.S. exports in bitter resentment over yet another manifestation of the extraterritorial application of U.S. law.[544] Senator Danforth inferred that the United States has no right to act as a judge of whether foreign laws have been adhered to and to mete out justice to presumed violators.[545] The senator also pointed out that this provision would be directed against our closest allies, who are likewise our major trading partners.[546] The proposed measure would thus jeopardize our own trading interests.[547] Finally, as evidence of the Administration's concurrence with his petition (that of the Finance Committee), Senator Danforth placed in the

539. *See supra* text accompanying note 374.
540. R-Mo.
541. 130 CONG. REC. S1716 (daily ed. Feb. 27, 1984).
542. *Id.*
543. *Id.*
544. *Id.*
545. *Id.* at S1717.
546. *Id.*
547. *Id.*

Congressional Record a supporting letter from Lionel Olmer, Under Secretary for International Trade.[548]

c. compromise reached in EAAA 1985

The Banking Committee returned the volley with an amendment of its own, a compromise retreating from the Banking Committee's original position but retaining the possibility of presidential authority to impose sanctions against violators of CoCom regulations.[549] This compromise measure eventually became part of the 1985 amendments.[550]

While the Banking Committee did come out the victor in that contest, Committee Chairman Jake Garn took the opportunity to make it clear that he would have preferred the force of the original measure as a necessary tool to pressure our allies into compliance:

> I do not think that in my entire public career, I have ever seen so many European parliamentarians come to try to convince me of the error of my ways than I have in the past year. . . . This Senator understands their problems with extraterritoriality and also with export controls but I have very little sympathy. . . . For a mess of pottage, for a few jobs, [the Europeans] are willing to sell most anything they can sell to anybody without regard to security.[551]

Senator Garn noted the fact that the United States spends a great deal for the military defense of the Europeans and Japanese, and he remonstrated our allies' seeming disregard for the national security of us all by "selling the Soviets our technology jewels." Senator Garn felt that the measure as originally proposed was needed to "send a message" to our allies that they had better cooperate and "quit selling our enemies strategic and technological goods that increase [the United States'] defense budget."[552]

The compromise agreed to that day, later enacted in the EAAA 1985,[553] gives the President power to impose import controls against

548. *Id.*

549. *Id.* at S1720.

550. Pub. L. No. 99-64, *supra* note 5, § 121, at 155.

551. 130 CONG. REC. S1720 (daily ed. Feb. 27, 1984).

552. *Id.*

553. Pub. L. No. 99-64 authorizes import sanctions by providing for an amendment to Chapter 4 of title II of the Trade Expansion Act of 1962. Pub. L. No. 99-64, *supra* note 5, § 121, at 155.

foreign violators of multilateral security agreements, but only if the following three conditions are met:

(1) an unremedied violation to such an agreement has been identified and the President has been *unsuccessful in quietly negotiating* with the government concerned to achieve compliance;
(2) the President has announced to the government concerned and to the other parties to the multilateral agreement his *intention to impose import sanctions in sixty days* against the offending company; and
(3) after 60 days, *a majority* of the parties to the multilateral agreement *have indicated their support* for the sanctions or have abstained from stating a position.[554]

Senator Heinz, of the Banking Committee, explained that this compromise measure would "multilateralize" the enforcement effort and bring the issue "directly to the attention of all the CoCom members."[555]

> In particular, it makes the government of the offending country confront the problem of ineffective enforcement or noncompliance with Cocom rules and discuss the issue with other Cocom members. I believe that that process will result in correcting the problem and thereby enhance the enforcement of these export controls.
>
> Finally, Mr. President, I think it avoids some of the trade policy concerns that Senator DANFORTH has raised, because what we have created is a process that should result in the import sanction never ultimately having to be imposed.[556]

Senator Danforth "reluctantly and temporarily" gave in to the compromise proposed by the Banking Committee, but he said he hoped it would be removed by the Joint Conference Committee. He stated his understanding that the Administration also opposed even this revised form of the provision.[557] Now that this limited authority to impose such sanctions has become law, it will be interesting to see whether this new arrow in the diplomatic quiver is as loath to be used as Senator Danforth believed.

554. 130 CONG. REC. S1719 (daily ed. Feb. 27, 1984).
555. *Id.* at S1720.
556. *Id.*
557. *Id.* at S1721.

G. Embassies Specifically Made Subject to Export Administration Controls

Reports of illegal exports via diplomatic pouches and shipments from embassies and affiliates in the United States raised concerns in the executive branch and both houses of Congress.[558] The Banking Committee noted the discovery by Customs officers that embassies and missions were being used as conduits for illegal exports.[559] In addition, the Committee stated that certain foreign government-owned companies have used their legitimate operations to gain access to controlled goods and technologies, establish business relationships, and then serve as a front for illegal operations, meanwhile becoming directly involved with illegal exports.[560] The Foreign Affairs Committee, concluding that *tougher enforcement* of laws prohibiting espionage, conspiracy, and theft—rather than stricter standards for licensing—was the solution to technology leaks by illicit means, went on to list foreign embassies to the United States as one of the targets for increased control.[561]

Thus, although the Act had not previously precluded the imposition of such controls,[562] the executive branch requested, and Congress conferred, express authority in this area.[563] The 1985 amendments add to section 5(a)(1) the power to regulate sales to foreign embassies and affiliates[564] of controlled countries.[565]

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558. S. REP. NO. 170, *supra* note 102, at 6; H. REP. NO. 257 pt. 1, *supra* note 134, at 5, 17.

559. S. REP. NO. 170, *supra* note 102, at 6.

560. *Id.*

> For several years a high official of the Polish Government-owned firm Polamco, which is incorporated in Delaware and Illinois, obtained information on several U.S. defense systems through an employee of a prominent American defense contractor. Although the Polish official and the American were subsequently convicted and jailed for their involvement, Polamco was allowed to continue its operations.

Id.

561. H. REP. NO. 257 pt. 1, *supra* note 134, at 4-5.

562. *Id.* at 17.

563. *Id.*; Pub. L. No. 99-64, *supra* note 5, § 105(a)(1), at 123.

564. The Report of the Senate Banking Committee defined "affiliate" as including "diplomatic officers, employees of foreign governments, and offices of foreign governments such as consulates, offices of military attachés, and permanent and temporary trade or diplomatic missions." S. REP. NO. 170, *supra* note 102, at 6.

565. Pub. L. No. 99-64, *supra* note 5, § 105(a)(1), at 123. The Joint Conference Committee adopted the House version of this provision. Draft Stmt, *supra* note 249, at H12151 (section entitled "Subsection (a)—Transfers to Embassies"). The House Report recorded the Foreign Affairs Committee's intent that

> the new controls authorized in this legislation be implemented by the Commerce Department and other agenices to which it may delegate enforcement responsibilities in the closest possible consultation and coordination with the Secretary of State, par-

VII. CONCLUSION

As Dr. Freedenberg pointed out in his December 1982 discussion of the soon-to-expire 1979 Act, the 1970's were a time in which "the U.S. lead in many aspects of high technology dwindled or disappeared."[566] He went on to say:

> For the first time in the postwar era, U.S. high technology firms saw their foreign markets taken away by aggressive new competitors and even their domestic share challenged. This meant that export controls and other constraints, which served as a nuisance in earlier times of unquestioned U.S. high technology dominance, could possibly make the difference between holding on to an important market or losing it, or the difference between penetrating a lucrative new market or forfeiting it to a foreign competitor.[567]

The increasingly high U.S. trade deficit was a concern of many legislators, who saw in the expired 1979 Act an opportunity to turn the situation around.[568] They hoped that by modifying the Act to remove arguably superfluous controls, the level of U.S. exports could be increased.[569]

As discussed at length in this article, the administration of exports under the 1979 Act was creating several roadblocks for U.S. exports and hampering their competitiveness in the world market. Particularly problematic were the following:

(1) the ill-advised use of foreign policy controls by Presidents Carter

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ticularly with regard to the authorities and responsibilities of the Department of State under sections 202, 203, and 204 of the State Department Basic Authorities Act of 1956, as amended by the Foreign Mission Act (Public Law 97-241).

H. REP. NO. 257 pt. 1, *supra* note 134, at 5.

566. Freedenberg, *supra* note 1, at 2190.

567. *Id.*

568. *See, e.g.*, 131 CONG. REC. H2010 (daily ed. Apr. 16, 1985) (statement of Rep. AuCoin (D-Or.)); 130 CONG. REC. S2142 (daily ed. Mar. 1, 1984) (statement of Sen. Lautenberg (D-N.J.)); 130 CONG. REC. S1860 (daily ed. Feb. 28, 1984) (statement of Sen. Tsongas (D-Mass.)).

569. As Congressman Bonker told an audience in his remarks before a July 18, 1985 conference on the EAAA 1985:

> There is a whole litany of industries that is being impacted by exports. So, it is understandable that the pressure is on Congress to act. . . .
>
> The fact is that if we do not do something to bring down the trade deficit, we have no choice but to move down the path of protectionism. . . .
>
> High technology happens to be the one place where America is still competitive, yet last year we posted an $8 billion deficit on high technology. This year [1985] it will be $12 billion. As long as we have these restraints on our ability to export, we are not going to be competitive and that deficit will grow.

Address by Rep. Bonker, *supra* note 8, at 3.

and Reagan, resulting in U.S. companies gaining a reputation for unreliability;

(2) the imposition of unilateral controls despite foreign availability, which forced U.S. companies to relinquish profitable foreign markets to European and Asian competitors, who rushed in to fill the vacancy; and

(3) the more onerous pre-licensing documentation and review required by the Office of Export Administration, as compared with the requirements of our competitors' governments, resulting in (a) longer waits to buyers of U.S. merchandise, and (b) the annoying requirement that foreign customers warrant not to re-export their U.S. purchases without prior authorization from the OEA.

Despite these negative factors, however, many in Congress and the Administration believed that the leakage of Western technology into the hands of the Soviets posed such a threat to national security, that the foremost task during the Export Administration Act reauthorization process was to ensure that existing licensing requirements were not eliminated[570] and that heightened safeguards were provided.[571]

The bill that was finally approved by the 99th Congress passed because both sides saw in it significant improvements over the licensing and enforcement mechanisms of the 1979 Act. The following two subsections highlight these gains.

A. Recapitulation of Gains for United States Exporters

Gains for United States Exporters in EAAA 1985

- *Elimination of requirement for some validated licenses* namely those required solely because goods contain embedded microprocessors and those for "low-tech" goods, such as personal computers, to CoCom destinations.
- *Expedited licensing time*, particularly through fifteen- and thirty-working-day licensing of "high-tech" goods to CoCom destinations.
- Increased attention to *foreign availability*, both before imposing controls and as a reason to lift controls.
- Tighter restrictions on presidential use of *foreign policy controls*.

570. *See, e.g.*, 129 CONG. REC. E3283 (daily ed. June 30, 1983) (statement of Rep. Roth); 129 CONG. REC. E4289 (daily ed. Sept. 14, 1983) (statement of Rep. Roth).

571. *See, e.g.*, 130 CONG. REC. S1636 (daily ed. Feb. 23, 1984) (statement of Sen. Helms); 130 CONG. REC. S1710 (daily ed. Feb. 27, 1984) (statement of Sen. Heinz).

- Increased emphasis on *multiple-transaction licenses.*
- Continuation of the Department of Commerce as the *lead agency* for licensing and enforcement over commercial exports.

The elimination of the validated license requirement in the case of goods containing embedded microprocessors and for "low tech" goods to CoCom destinations is particularly important. It means more companies can get involved in selling their products abroad—without the bother and delay of obtaining a validated license. The reduced turnaround time on licensing "high-tech" goods to CoCom destinations, if implemented as outlined by the 1985 Act,[572] will enable exporters to put newly developed technology on the world market more quickly and help exporters respond faster to the demands of their foreign customers. The new law also increases the number of products available for export by broadening the definition of "foreign availability." Further, the new law shifts the burden of proof on this issue from the exporter to the Office of Export Administration, which must now prove that foreign availability does *not* exist.[573]

Explicit mandatory prerequisites to presidential imposition of

572. In an interview with Washington International Business Report, the Commerce Department's Assistant Secretary for Trade Administration William T. Archey, acknowleged that complying with the "fast track" licensing requirements for high-tech exports to CoCom destinations could be difficult for the Office of Export Administration:

> The second issue is the one that will be the most difficult—the new requirement that, effective 120 days after enactment, if a product does require a license to CoCom, it should be licensed within 15 working days, unless the Commerce Department says to the exporter that it needs an additional 15 working days. For most of the products that is not going to be a problem. For some licenses to CoCom we still do pre-license checks. Doing that within 6 weeks (30 working days) will not be easy.
>
> A related problem is that we are required under the statute to provide a notification of receipt of the application. In that notification we are to include a license number so that if the exporter has not been informed otherwise by us by the 15th working day, they can ship without the hard copy of the license. That is going to create some problems because there will be some times when we will need to hold up shipment but the word did not get out. Something may go that shouldn't or we will worry about the opposite problem, something that should go won't. I think this is going to require enormous coordination with Customs and I think, in the initial stages, it is going to have some problems. We are doing everything we can to avoid them.

The Washington International Business Report Talks with . . . William T. Archey, WASH. INT'L BUS. REP., Aug. 10, 1985, at 2 (available from International Business-Government Counsellors, Inc., 1625 Eye St., N.W., Wash., D.C. 20006) [hereinafter cited as WIBR].

573. As William Archey further expressed to the Washington International Business Report:

> Another big change is in foreign availability. We think we now have a very active program which is going to be very, very important and beneficial, and we are fully

foreign policy controls have been written into the Export Administration Act to protect exporters' contractual commitments from revocation by foreign policy-based trade sanctions. Legislators hope this measure will work to rebuild U.S. suppliers' reputation for reliability. Unfortunately, these changes to the 1979 Act may be insufficient to eliminate the problem, for the International Emergency Economic Powers Act (IEEPA)[574] provides an alternative source of presidential power to revoke foreign contracts. Congressman Bonker has suggested that the addition of a "contract sanctity provision" to IEEPA may also be in order.[575]

In a move to place greater personal accountability in export administration on the private sector, while at the same time seeking to facilitate large-volume exporting operations, Congress has codified in the 1985 Act several of the multiple-export licenses developed by the Office of Export Administration. This is particularly true of the distribution license and the newly authorized license for transfers of technical data, called the comprehensive operations license. The distribution license is intended to be granted "primarily on the basis of the reliability of the applicant and foreign consignees with respect to the prevention of diversion of goods to controlled countries."[576] Similarly, the envisioned comprehensive operations license is intended for transactions "from a domestic concern to and among its foreign subsidiaries, affiliates, joint venturers, and licensees that have long-term, contractually defined relations with the exporter."[577] In practical

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staffed. I'm coming more and more to conclude that this is the dark horse program in export controls.

This is in part because of the fact that when we get a request to immediately impose unilateral controls on something, we now have a mechanism that says before we do that we must ask what is the foreign availability? I have a mechanism which can fairly quickly do a down and dirty search, if you will, throughout the world. We have a couple of instances right now where the foreign availability aspect of the cases is absolutely going to be dispositive as to whether or not we have controls.

Id.

574. 50 U.S.C. § 1703 (1985). *See supra* notes 33, 243 and accompanying text.

575. Address by Rep. Bonker, *supra* note 8, at 3.

[W]hen the State Department appeared before the committee I asked, 'If the EAA had been alive and well, and if we had no contract sanctity provision, which would you have chosen, IEEPA or the EAA to impose that embargo [against Nicaragua]?' The official response was IEEPA. All of the work that we have put into contract sanctity to protect American businessmen with long-term commitments in the world community goes out the window because the President at any time, through a mere whim, can invoke IEEPA. Does that mean now that we have to go back now and put a contract sanctity provision in IEEPA?

Id.

576. Pub. L. No. 99-64, *supra* note 5, § 104(a), at 122 (amending section 4(a)(2)(A)).

577. *Id.* (amending section 4(a)(2)(B)).

terms, this means that both the distribution license and the comprehensive operations license will be used only by companies having an enormous volume of export transactions and highly systematic internal controls over those operations.[578]

Finally, significant for the fact that a major shift in agency leadership was *not* implemented, the locus of primary licensing and enforcement authority is maintained in the Commerce Department. The Commerce Department is now charged, however, with the obligation to cooperate with the Customs Service in its enforcement responsibilities. Moreover, there now seems to be an expectation, on the part of Congress, that the Commerce Department achieve more of a balance in licensing between promoting exports and safeguarding national security. Otherwise, there are those in Congress who intend to go ahead with the proposal to create an Office of Strategic Trade.[579]

It should be noted that the EAAA 1985 establishes a new under secretary and two assistant secretaries of Commerce for export administration.[580] This provision will take effect on October 1, 1986.[581] The impact of this bureaucratic change on U.S. exports, which Congress did not discuss extensively during reauthorization debates, [582] remains to be seen.

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578. James Branagan, corporate counsel for TRW Inc., Automotive Worldwide Sector, advises that for those companies exporting about $25 million or less in sales per year, it would be more practical and feasible to export under a so-called "bulk license" than to try to obtain a distribution license. A "bulk license" can cover up to a year's supply of shipments and re-export approvals, necessitating only the legwork of obtaining annual renewal of OEA approval. However, for companies contemplating going from using a bulk license to a distribution license, it should be noted that each bulk license—even though it covers multiple exports—counts as only *one* validated license, and a distribution license is only available if it replaces twenty-five validated licenses. Exporters should also be aware that obtaining a distribution license requires extensive, well-documented and complete records, able to withstand the comprehensive Commerce Department audits. Thus, for a sales volume under $25 million per year, exporters would not likely find a distribution license cost effective over a bulk license. Telephone interview with James J. Branagan, Senior Counsel, TRW Inc., Automotive Worldwide Sector, Solon, Ohio (Nov. 20, 1985).

579. As Senator Garn commented on the day the EAAA 1985 was passed:

> I would have preferred to establish a new Federal agency to administer our export controls, which would have been a far more efficient means of bringing balance to export administration. The provisions of the legislation, however, may serve to bring balance into export controls that has been lacking up to now. If that does not prove to be the case in the future, I think the case for establishment of a separate Federal agency will have been unquestionably made.

131 CONG. REC. S8923 (daily ed. June 27, 1985).

580. Pub. L. No. 99-64, *supra* note 5, § 116(a), at 152 (creating section 15).

581. *Id.* § 116(d), at 153.

582. NAM *Green Memo*, *supra* note 233, at 12.

B. Recapitulation of Gains for United States National Security

Gains for United States National Security in EAAA 1985

- Increased ability to focus enforcement resources on higher-risk export transactions.
- Increased enforcement authority in both Commerce and the Customs Service, with greater coordination of effort between the two agencies.
- Enhanced efficiency within the Department of Defense for export-related responsibilities by coordination through the newly created National Security Control Office within DOD.
- Heightened effectiveness of multilateral control agreements by a move to strengthen the CoCom entity.
- Stricter civil and criminal penalties authorized for violators of export control laws.
- Greater restrictions placed on sales of technology for foreign embassies and affiliates of controlled countries located in the United States.

Since even the severe tightening of licensing controls would probably not prevent the Soviet Union from benefitting militarily from U.S. technology,[583] it is understandable that legislators chose to temper the 1979 Act's reliance on broad licensing requirements,[584] in favor of encouraging increased exports to counterbalance the trade deficit. Instead, the EAAA 1985 responds to the Soviet threat by emphasizing improved use of enforcement mechanisms.

It is interesting that, as a consequence, one of the greatest gains to the cause of insulating U.S. technological advancements from Soviet acquisition is actually the flip side of the move to eliminate the validated license requirement for large numbers of lower-risk exports. Now that numerous transactions do not require a validated license at all, enforcement resources can be focused on monitoring exports of

583. OTA, *supra* note 60, at 12.

584. Regarding the limitations on the effectiveness of *licensing* controls, the Office of Technology Assessment study observed:

> In sum, there are severe constraints on the power of U.S. export licensing to deny the Soviet Union access to the Western technologies it most wants. These constraints include the extent to which the Soviets use illegal means to acquire Western technology; lack of allied agreement on a more strenuous multilateral export control policy; the difficulties inherent in identifying in advance which technologies will have important military payoffs; and the increasing worldwide diffusion of technology.

Id. at 11-12.

higher-level technology to higher-risk destinations. Congressman Roth, speaking in support of the bill as it was about to pass both houses of Congress, commented on this gain for national security interests:

> The bill shifts our manpower resources at the export licensing stage to more carefully review U.S. overseas sales of high technologies. With a limited staff, the Commerce Department now reviews about 125,000 licenses. The new law eliminates about 40 percent of the workload. This provision will enable Commerce's licensing officers to scrutinize more effectively high technology trade flows and destinations and improve our ability to detect surreptitious transactions.[585]

Another gain is that the compromise plan to split enforcement responsibilities between Commerce and Customs has the potential of bringing the best capabilities of both agencies to the task of identifying and safeguarding those areas of greatest risk. Since the two agencies must in some instances work together, it seems a plus factor that the present Assistant Secretary for Trade Administration, William T. Archey, was formerly Deputy Commissioner of the U.S. Customs Service.[586]

Both the creation of the National Security Control Office, within the Department of Defense, and the measures passed to strengthen CoCom as a multilateral control mechanism are moves to better utilize and streamline existing, security-minded organizations for more effective control over high-technology trade. Lastly, the provisions for stricter penalties for export law violations and the explicit recognition of authority to regulate domestic sales to foreign embassies and affiliates of controlled countries are designed to give more muscle (and teeth) to the area of deterrence.

C. Closing Remarks to the Exporting Community

This detailed study of the legislative reasoning behind the EAAA 1985, is designed to give U.S. exporters a clear understanding of con-

585. 131 CONG. REC. H5060 (daily ed. June 27, 1985).

586. WIBR, *supra* note 572, at 1. The Washington International Business Report noted that prior to coming to his Commerce Department post in 1983, Mr. Archey

> served as Deputy Commissioner of the U.S. Customs Service between 1979 and 1982. During the period from December 1980 until September 1981, he served as Acting Commissioner. During his tenure at Customs, he also headed the U.S. Delegation to the Customs Cooperation Council and served as Vice Chairman of the Council's Policy Commission in 1980 and 1981.

Id.

gressional intent. It was Congress' strong desire that the volume of U.S. exports be increased as a result of this bill. In dealing with the administrative agencies that must implement these changes, exporters may do well to go armed with the knowledge of exactly how U.S. business is supposed to reap the benefits of these revisions.

In his speech before a July 18, 1985 conference on the new export law, Congressman Bonker expressed essentially the same concern, although in stronger terms:

> I don't know how you add up all of these reforms. We are all happy that the bill passed. I think maybe there is more in it than we expected. It could have been worse. But I feel that our work has just begun on the EAA, and I think we would be fooling ourselves if we thought for a moment that what we put into this new law is going to be fully implemented, or implemented the way Congress intended.[587]

United States exporters have a role to play in making sure that the changes called for in the new law are implemented, particularly by keeping members of Congress advised on executive branch activity in this area.[588] The reforms on behalf of exporters look good on paper. Now, the exporting community must work to hold the Administration accountable for these reforms. It is exporters who must ultimately insure that these reforms are not just talk.

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587. Address by Rep. Bonker, *supra* note 8, at 4.
588. *Id.*