Export Administration Act Amendments of 1983: Foreign Availability of Controlled Goods and Technology, The; Note

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THE EXPORT ADMINISTRATION ACT
AMENDMENTS OF 1983: FOREIGN
AVAILABILITY OF CONTROLLED
GOODS AND TECHNOLOGY

On September 30, 1983, the Export Administration Act of 1979
(EAA)\(^1\) expired, renewing congressional debate over the use of export
controls to protect national security and further foreign policy goals.\(^2\)
One of the most significant controversies involves the EAA's inade-
quate consideration of the availability of foreign substitutes for con-
trolled items. Congressional reports show that export administrators
have failed to implement the foreign availability provisions of the 1979
Act.\(^3\) Critics argue that when the United States restricts the export of
goods and technologies which are freely available from foreign sources,
it punishes American exporters without achieving export policy objec-
tives.\(^4\) Proponents of export restrictions respond that regardless of the
availability of foreign substitutes, the United States should neither arm
its adversaries nor trade with nations whose policies or behavior it
abhors.\(^5\)

A series of bills to amend and reauthorize the 1979 EAA were intro-
duced in both Houses of Congress in January and February of 1983.\(^6\)
President Reagan transmitted his own proposed changes to the House
of Representatives on April 7, 1983.\(^7\) Following extensive committee
hearings, each House produced its own proposed Export Administra-
tion Amendments Act of 1983. The Senate bill, S. 979, reflected the
Reagan Administration's desire to strengthen and expand export con-
trols to tighten national security.\(^8\) The House bill, H.R. 3231, was de-

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1. 50 U.S.C. app. §§ 2401-2420 (Supp. III 1979). The present Act was repeatedly extended on a
month to month basis. See, e.g., 130 CONG. REC. S1917 (daily ed. Feb. 29, 1984).
2. The EAA also authorizes the President to restrict the export of scarce materials. 50 U.S.C.
3. OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGY AND EAST-WEST TRADE: AN UPDATE
4. Oversight on the Commerce Department's Fulfillment of Its Responsibilities Under the Export
Administration Act: Hearing Before the Comm. on Banking, Housing and Urban Affairs, 98th
sight on the Commerce Department].
Cal.).
6. HOUSE COMM. ON FOREIGN AFFAIRS, EXPORT ADMINISTRATION AMENDMENTS ACT OF
1983, H.R. REP. No. 257, 98th Cong., 1st Sess. 1 (1983); SENATE COMM. ON BANKING, HOUS-
ing and Urban Affairs, the Export Administration Act Amendments of 1983, S. REP. No. 170, 98th
7. EXPORT ADMINISTRATION AUTHORIZATION, COMMUNICATION FROM THE PRESIDENT OF
THE UNITED STATES TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO AMEND AND
REAUTHORIZE THE EXPORT ADMINISTRATION ACT OF 1979, H.R. DOC. NO. 40, 98th Cong.,
1st Sess. (1983) [hereinafter cited as EXPORT ADMINISTRATION AUTHORIZATION].
8. S. REP. No. 170, supra note 6, at 1.
cidedly pro-trade, favoring fewer controls and more congressional oversight of the export control system. Both bills include provisions to improve the foreign availability assessment capacity of the Office of Export Administration (OEA). The bills intended to more efficiently integrate foreign availability considerations in the export control system. The final Export Administration Amendments Act of 1983 will be the product of compromise by joint conference. This analysis of the two bills will examine whether foreign availability of controlled goods and technologies ought to affect America's export control policy.

This note briefly describes technology transfers to non-friendly nations, outlines the system of export controls under the EAA, and describes the provisions of the EAA which consider foreign availability. It then examines the sections of S. 979 and H.R. 3231 which amend the EAA's foreign availability provisions and analyzes the curative value of these proposed amendments. Finally, the note suggests the appropriate uses and limitations of foreign availability considerations in the export control system.

CONSIDERATIONS OF FOREIGN AVAILABILITY IN PRESENT EXPORT CONTROL MECHANISMS

The Dangers of Technology Transfers

In an unclassified report published in April, 1982, the Central Intelligence Agency (CIA) reported that the Soviet Union is involved in a "massive, well-planned, well-managed, national" campaign to obtain U.S. technology. As a result of technology acquisitions, the Soviet Union has saved billions of dollars and years of research needed to accelerate its industrial growth and military capabilities. Defense...
Department officials warn that the United States now risks "losing the quality edge on which our structure of national defense and alliance depends" as a result of technology transfers.

The danger posed by these transfers is even more immediate than that posed by the long-running "arms race." In September, 1983, a Soviet SU-15 bomber shot down a Korean Airlines commercial flight which strayed over a Soviet base on Sakhalin Island. All two hundred and sixty-nine passengers died. The SU-15 normally carries one radar homing, one infrared homing, and two infrared close-range missiles. The technology needed to build and fire such missiles was directly borrowed from American high-tech resources. Technical design information for the American-made F-15 look-down/shoot-down radar system and the B-1 bomber radar system has been used to make counterpart and countermeasure Soviet radar systems. The Department of Defense believes that an American Sidewinder missile, stolen from a Bavarian NATO base, was the prototype for strikingly similar Soviet air-to-air infrared homing missile systems. These transfers of American technology enabled the Soviet Union to build the weapon that killed thirty Americans. Transfers of Western technology have also allowed the Soviet Union to copy America's SS-20 and Backfire bomber; to develop inertial missile guidance systems ten times more accurate than the Soviets could previously produce; and to mass produce heavy duty military trucks. Technology transfers which enable the Soviet Union to improve and expand its military capabilities are a present threat to the safety of American citizens.

The CIA estimates that about seventy percent of the militarily significant Western technology acquired by the Soviet Union has been obtained through illegal espionage. Legal purchases of technological

Ikle, Undersecretary for Policy, Department of Defense) [hereinafter cited as The Extent of Technology Transfers].


16. Id.


19. Id. at S1942; A SUTTRTON, NATIONAL SUICIDE: MILITARY AID TO THE SOVIET UNION 204 (1973).

20. Among the Americans killed, was Rep. Larry McDonald, D-Ga.; McFadden, supra note 15, at A4, col. 1.


22. Soviet Acquisition, supra note 12, at 6-7.

23. Id. at 3.

equipment have nevertheless been very important to the growth of the Soviet industrial base.\textsuperscript{25} The Soviet Union devotes about fifteen percent of its gross national product (GNP) to its war machine.\textsuperscript{26} Any expansion of the Soviet industrial base is more likely to result in increased military production rather than an increase in the production of consumer goods.\textsuperscript{27} For example, in the late 1960's, the United States and Western Europe sold one and one half million dollars worth of truck manufacturing equipment to the Soviet Union.\textsuperscript{28} With the help of substantial loans from the American Export-Import Bank, the Soviets built the Kama Truck plant, which is capable of producing 100,000 multi-axle heavy trucks per year.\textsuperscript{29} In 1981, trucks manufactured at the Kama River plant were used to invade Afghanistan.\textsuperscript{30}

The export of weapons and munitions is controlled by the Arms Export Control Act of 1976.\textsuperscript{31} The EAA restricts the transfer of technology imbedded in consumer and "dual use" goods.\textsuperscript{32} "Dual use" goods have both a civilian and a military use.\textsuperscript{33}

The ability of the United States to prevent the transfer of technology to the Soviet Union and its allies is limited by the availability of foreign substitutes. Western Europe and Japan are not only capable of producing technology equal to or better than American technology, but are generally eager to sell technology to the Soviet Union and its allies.\textsuperscript{34} Presently, the United States only enjoys a qualitative lead over foreign producers of some types of computer software and microprocessors.\textsuperscript{35} Recent Japanese advances in the development of supercomputers\textsuperscript{36} have effectively ended the United States' monopoly in high performance computers.\textsuperscript{37}

The availability of these comparable, and sometimes superior, foreign substitutes for American technology poses three dangers which United States export policy must address. First, the United States risks losing foreign markets, further damaging an already unsatisfactory

\textsuperscript{25} Soviet Acquisition, supra, note 12, at 3.
\textsuperscript{26} Department of Defense, supra note 17, at S1941. By comparison, the United States devotes about seven percent of its GNP to the military. Id.
\textsuperscript{27} Transfer of United States High Technology, supra note 14, at 846 (statement of Dr. Lara H. Baker, Jr., assistant office leader, International Technology Office, Los Alamos National Laboratory, University of California).
\textsuperscript{28} Soviet Acquisition, supra note 12, at 3.
\textsuperscript{29} A. Sutton, supra note 19, at 134 (1973).
\textsuperscript{30} Soviet Acquisition, supra note 12, at 3.
\textsuperscript{33} For example, the same semiconductors and integrated circuits used in video games can be used in missile guidance systems. Zonderman, Policing High Tech Exports, N.Y. Times, Nov. 27, 1983, § 6 (Magazine) at 100, 125.
\textsuperscript{34} The Extent of Technology Transfers, supra note 13, at 109 (statement of Sen. John Heinz, R-Pa.).
\textsuperscript{35} Id. at 13 (statement of Sen. William Armstrong, R-Colo.).
\textsuperscript{36} Supercomputers are high speed, easily programmed computers which are used both by business and the military.
Second, the United States risks becoming dependent on foreign manufacturers for technology which is critical to its national security. Third, it has become virtually impossible to deprive adversaries of high technology goods. It is essential to harmonize American export policies with the realities of foreign technological advances.

The Structure of Export Controls

Under American law, freedom to export is a privilege, not a right. Since 1949, Congress has delegated to the President broad discretionary powers to limit or deny export privileges for national security and foreign policy reasons. Under the EAA, the Commerce Department, through its Office of Export Administration (OEA), grants export privileges by issuing three types of export licenses: a general license, a qualified general license, and a validated license. An exporter determines what type of license it needs by consulting the Commodity Control List (CCL), published in the Code of Federal Regulations. The regulations divide all exportable commodities into technical categories and all foreign countries into seven country groups. The present CCL contains 200 categories, including 100,000 items. The CCL identifies which type of license is required to export goods from each technical category to each country group. The country group and CCL categories combine to form restrictions on “all goods shipped to certain countries, or for certain types of goods shipped to certain countries, or for certain types of goods shipped to any country.”

No license is required to export goods or technologies to United States territories and possessions or for most exports to Canada, but exports to all other countries require some type of license. A general

38. The merchandise trade balance has been in deficit since 1976. Economic Report of the President, February, 1984, at 185. In 1983 the merchandise trade deficit was $65 billion; a deficit of $110 billion has been forecast for 1984. Id., at 42-43.
44. 50 U.S.C. app. § 2403(a) (Supp. III 1979).
license confers broad authority to export. The OEA designates certain civilian, non-risk goods which may be exported by general license. An exporter of an item designated for general licensing need not formally apply to the OEA, but simply files a descriptive export declaration with the customs office. Between ninety and ninety-five percent of all goods exported from the United States qualify for a general license.

The remaining five to ten percent of American exports are subject to a more rigorous review by the OEA. The OEA restricts exports of these goods by requiring either a “qualified general license” which authorizes a series of transactions, or a “validated license” which authorizes a single transaction. In some cases, these licenses require authorization by the OEA before the goods can be re-exported by the foreign purchaser to a third country. Exporters of goods which require a qualified general license or a validated license must apply to the OEA for permission to export that particular item to a specific destination. Approximately 80,000 such applications are made to the OEA annually.

National Security Controls

Under present law, the OEA restricts exports of goods and technology “which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States.” The Commerce Department, with the advice of interested government agencies, lists goods with potential national security risks on the CCL. The annually updated list includes both civilian and dual-use goods and technologies. The Secretary of Defense reviews and re-

52. 15 C.F.R. § 370.2 (1983).
53. For example, a traveler’s baggage, if it contains only “household” and “personal” effects, “vehicles,” “tools of trade” and a limited number of “shotguns and shotgun shells” qualifies for a general license. 15 C.F.R. § 371.6 (1983).
56. Id.
57. 15 C.F.R. § 372.2(a)-2(b) (1983).
61. The EAA instructs the Secretary of Commerce to seek the advice of “appropriate departments and agencies.” 50 U.S.C. app. § 2404(c)(2) (Supp. III 1979). In the past these have included the Departments of State, Energy, Defense and Treasury, and the Central Intelligence Agency, the National Aeronautics and Space Administration, and the National Bureau of Standards. TECHNOLOGY AND EAST-WEST TRADE, supra note 12, at 131.
63. Id. § 2404(c)(3).
vises the Commerce Department’s CCL, and the President resolves conflicts between the Commerce and Defense Departments regarding the CCL and has ultimate authority over its content.\(^\text{65}\)

In a 1979 Amendment, the EAA directs the Secretary of Defense to compile and maintain a list of “Military Critical Technologies” (MCTL).\(^\text{66}\) Unlike the CCL, which lists specific types of technological goods, the MCTL lists specific types of technological knowledge, processes, and techniques which have military applications.\(^\text{67}\) The MCTL was intended to eventually replace the CCL and thereby simplify export restrictions.\(^\text{68}\) Drafters of the 1979 amendment envisioned a very short MCTL, containing only “the subset of technologies of significant military value on which our national military technology superiority can be presumed to be most dependent.”\(^\text{69}\) Nevertheless, the over-cautious Defense Department has compiled an 800 page MCTL which it has kept classified.\(^\text{70}\) Thus, the Defense and Commerce Departments review applications for export using separate restrictive lists.

The Defense and Commerce Departments review applications to export items listed for control with closer scrutiny if the purchasing country is communist or Soviet-aligned.\(^\text{71}\) The OEA has authority to approve most applications for export to “Free World” countries without referral to other government agencies.\(^\text{72}\) Sixty thousand of the 73,000 applications to export CCL items to “Free World” countries were approved in fiscal 1982.\(^\text{73}\)

Even applications to export to “non-Free World” countries are rarely denied. In 1982, 4,900 out of 6,700 applications to export CCL items to communist countries were approved.\(^\text{74}\) The 1979 EAA gives the Department of Defense a power to preempt OEA license decisions on applications to export to communist countries.\(^\text{75}\) In practice, the Defense Department informally reviews a large number of applications, but formally processes relatively few applications,\(^\text{76}\) in part be-


\(^{66}\) Id. § 2404(d).

\(^{67}\) UPDATE, supra note 3, at 82.

\(^{68}\) TECHNOLOGY AND EAST-WEST TRADE, supra note 12, at 93.

\(^{69}\) Id. at 92.

\(^{70}\) UPDATE, supra note 3, at 37.

\(^{71}\) 50 U.S.C. app. § 2404(b). Communist countries are divided into five groups. Relatively liberal controls apply to Romania (Group Q), Poland, Hungary (Group W) and the People’s Republic of China (Group P). Export to Kampuchea (formerly Cambodia), Cuba, North Korea and Vietnam (Group Z) are essentially forbidden. A middle group (Group Y) containing Albania, Bulgaria, Czechoslovakia, Estonia, German Democratic Republic (and East Berlin), Laos, Latvia, Lithuania, Outer Mongolia and the U.S.S.R. is subject to controls which restrict the quantity, end-use, and re-export of CCL goods. 15 C.F.R. § 370, Supp. 1 (1983); see Abbott, supra note 40, at 753.

\(^{72}\) Oversight on the Commerce Department, supra note 4, at 138 (Letter from Lionel Olmer, Undersecretary for International Trade, Department of Commerce to Senator Jake Garn, R-Utah, Mar. 10, 1983).

\(^{73}\) EXPORT ADMINISTRATION REPORT: 1982, supra note 58, at 6.

\(^{74}\) Id.

\(^{75}\) 50 U.S.C. app. § 2409(g) (Supp. III 1979); see Evrard, supra note 41, at 27.

\(^{76}\) UPDATE, supra note 3, at 38.
cause formal review can take up to two years. In fact, in 1982 only 1,800 applications were referred to the Defense Department for formal review.

Foreign Policy Controls

While National Security controls apply only to goods specified by the CCL, the EAA gives the President authority to restrict any export "to the extent necessary to further significantly the foreign policy of the United States." No potential military use need be present.

Foreign policy controls are designed to economically coerce other nations to conform their conduct to American standards, and to express American disapproval of other nations' conduct. The President, in consultation with the State Department, determines which goods and countries are to be subject to foreign policy controls.

When the President imposes a foreign policy control, the Commerce Department implements the control using the same licensing system used for national security controls. Foreign policy controls expire after one year if not renewed by the President.

FOREIGN AVAILABILITY IN EXISTING CONTROL MECHANISMS

Foreign Availability Provisions in the EAA

The Export Administration Act of 1979 was the first significant attempt to incorporate the assessment of foreign availability into the export license process. The general provisions of this Act state:

the President shall not impose controls for foreign policy or national security purposes on the export from the United States of goods or technology which he determines are available without restriction from sources outside the United States in significant quantities and comparable in quality to those produced in the United States.

The general provisions, however, give the President power to prohibit the export of goods or technology which are available from foreign sources if he determines that the lack of the prohibition would be detrimental to either national security or foreign policy. This caveat, and

77. Zonderman, supra note 33, at 132.
78. UPDATE, supra note 3, at 38.
80. Id.
83. Id.
84. Id. § 2405(a)(2).
85. Comment, The Export Administration Act of 1979: An Examination of Foreign Availability of Controlled Goods and Technologies, 2 N.W. J. INT'L L. & Bus. 179, 186 (1980). Several 1972 and 1977 amendments to the Export Administration Act of 1969 also directed the President to consider foreign availability when imposing export controls, however these amendments were ignored in practice. Id. at 183-84.
86. 50 U.S.C. app. § 2403(c) (Supp. III 1979).
87. Id.
the absence of objective criteria for defining terms such as "without restriction," "significant quantities," and "comparable quality" nullifies the effect of this foreign availability provision. The President is given virtually unlimited discretionary authority to restrict exports which are available from foreign sources.

Foreign Availability and National Security Controls

The EAA directs the Secretary of Commerce to review the CCL periodically to assess whether listed items are available from foreign sources. The test for foreign availability is whether an item is available in sufficient quality or quantity to defeat the purpose of an export control. If this particular level of availability is found, the Secretary must remove the item from the CCL. Nevertheless, the President is specifically authorized to retain items on the CCL notwithstanding their foreign availability in order to protect national security; in doing so, he must initiate negotiations with foreign source countries to eliminate foreign availability. If the President exercises this veto power, the Secretary of Commerce is required to publish the basis of the President's decision and its estimated economic impact.

The EAA forbids the Secretary of Commerce from denying approval of a validated license for any controlled item which is available "in fact" from a foreign source. The exporter bears the burden of proving foreign availability. The applicant must offer reliable evidence "including scientific or physical examination, expert opinion based upon adequate factual information, or intelligence information." Uncorroborated representations by applicants are not considered reliable evidence.

Determining whether a foreign substitute for a controlled item is available requires extensive intelligence gathering and complicated analysis. The OEA appears to have been paralyzed by the complexities of developing the capacity to make foreign availability analyses. Though the 1979 Act authorized appropriations of $1.25 million to develop an intelligence gathering and assessment program, no funds were actually appropriated to the foreign availability program in fiscal 1980 or 1981. In fiscal 1982, Congress granted the OEA $280,000 to hire private consultants who would develop a foreign availability assessment program. The OEA hired a foreign availability program man-

88. Comment, supra note 85, at 195.
90. id. § 2404(f)(1).
91. id. § 2404(f)(1)-(4).
92. id. § 2404(f)(1).
93. id. § 2404(f)(2).
94. id. § 2404(f)(3).
95. id. § 2404(f)(3).
96. id.
98. id.
ager in the spring of 1982. As of May 1983, however, only three people staffed the foreign availability assessment office. An office of three people could not adequately assess worldwide availability of comparable strategic goods and technology.

To assist the Commerce Department in developing a foreign availability assessment capacity, drafters of the EAA also created Technical Advisory Committees (TAC's) composed of government and business representatives. If the Secretary of Commerce cannot determine whether an item is available abroad due to technical matters, he may appoint a TAC to determine whether foreign availability exists. Certification of foreign availability from a TAC requires the Secretary of Commerce to investigate and verify this availability. If verified, the Secretary must remove the item from the CCL, but only if the availability of the foreign substitute renders the export control ineffective. Removal is subject to a Presidential national security veto.

To date, no certification of foreign availability from a TAC has resulted in removing an item from the CCL, nor have any licenses for export of CCL items been granted specifically on the basis of foreign availability. Thus, foreign availability provisions of the 1979 EAA have had no significant effect on the administration of national security export controls.

Foreign Availability and Foreign Policy Controls

As discussed above, the EAA delegates broad discretionary power to the President to regulate exports for foreign policy reasons. References to foreign availability considerations do not limit this discretion in theory or in practice. The EAA directs the President to consider "the availability from other countries of the goods or technology proposed for such controls." The Act does not specify how much weight should be given to the consideration of foreign availability in foreign policy regulation; nor does it refer to availability of "comparable" goods; rather it refers to the availability of the specific goods being considered for export. The Secretary of State, as the President's agent, is directed to review the list of controlled items and to consider whether any listed items are available from foreign sources. Finally, the President is directed to "take all feasible steps to initiate and conclude negotiations with foreign governments to eliminate foreign availability of controlled items." Since none of these directives are subject to

99. Id.
100. UPDATE, supra note 3, at 91.
102. Id. § 2404(h)(6).
103. H.R. REP. No. 257, supra note 48, at 19.
104. UPDATE, supra note 3, at 38.
105. See supra text accompanying notes 79-81.
107. Id. § 2405(k).
108. Id. § 2405(g).
congressional or administrative oversight, the President is free to consider, or to ignore, foreign availability when imposing foreign policy controls.

The 1979 EAA was the first export control legislation to incorporate any reference to foreign availability in connection with foreign policy controls.\(^{109}\) This historic failure to consider foreign availability of controlled items has contributed to the overall failure of foreign policy export controls.\(^{110}\) Foreign policy controls are principally designed to coerce a target nation to conform its behavior to American standards.\(^{111}\) If the "costs created by the denial of American goods or technology outweigh the benefits" of the non-conforming behavior, the target country will presumably terminate its objectionable behavior.\(^{112}\) When the target country is able to obtain foreign substitutes for the prohibited goods, foreign policy controls become merely a symbolic expression of disapproval.\(^{113}\)

If the success of foreign policy controls is to be measured by their ability to change a target country's behavior, foreign availability of controlled items cannot be ignored. By such a standard, President Reagan's 1981 embargo of pipelaying equipment to the Soviet Union was a complete failure. President Reagan imposed these controls to protest Soviet repression in Poland.\(^{114}\) American manufacturers lost one-half billion dollars in sales, while Japanese manufacturers won eighty-five percent of the Soviet market for pipelaying equipment.\(^{115}\) American business also lost foreign credibility following the sanctions. For example, the National Association of Manufacturers reports that after the imposition of the pipeline embargo, foreign invitations to bid began to specify non-U.S. equipment.\(^{116}\) When the embargo was lifted in November of 1982, there had been virtually no change in the Soviet Union's policies towards Poland.\(^{117}\) President Reagan lifted the controls because European suppliers had refused to impose similar sanctions.\(^{118}\) Since the Soviet Union had alternative suppliers of pipelaying

\(^{109}\) Abbott, supra note 40, at 802.

\(^{110}\) Most foreign policy economic sanctions appear to have only symbolic value and do not in fact coerce the target country into conforming behavior. The Institute for International Economics studied 78 foreign policy economic sanctions by various countries. The group found that the sanctions were successful in achieving their purpose in about 40% of the cases. 129 CONG. REC. H7455 (daily ed. September 26, 1983) (statement of Rep. Toby Roth, R-Wis.).

\(^{111}\) Abbott, supra note 40, at 799.

\(^{112}\) Id. at 822-23.

\(^{113}\) Id.

\(^{114}\) Statement on U.S. Measures Taken Against the Soviet Union, 17 WEEKLY COMP. PRES. Doc. 1429 (Dec. 29, 1981). President Carter also used the EAA to implement a partial grain embargo against the Soviet Union in 1979. UPDATE, supra note 3, at 26.


\(^{117}\) East-West Trade Relations and the Soviet Pipeline Sanctions, 18 WEEKLY COMP. PRES. Doc. 1475 (Nov. 15, 1982).

\(^{118}\) Id. at 1476.
equipment, the embargo had no coercive effect on her conduct in Poland and the purpose of the embargo failed.

Hardline proponents of foreign policy controls argue that the United States should symbolically express outrage or disapproval through trade sanctions, regardless of whether the sanctions modify the behavior of the target country.\(^\text{119}\) Even the symbolic impact of such gestures has been reduced as America's share of world markets, particularly in high technology goods, continues to steadily decline.\(^\text{120}\) Many such gestures may go unnoticed abroad while exporters suffer economic losses at home. Furthermore, the same Administration that symbolically denounced Soviet repression in Poland is willing to give economic aid to non-communist countries it considers strategically important, even when those countries suffer under repressive governments.\(^\text{121}\) Symbolic expressions of outrage lose much of their moral credibility in this atmosphere.

### Multilateral Export Controls Under the EAA

The EAA authorized continued United States participation in the Coordinating Committee (CoCom).\(^\text{122}\) CoCom was organized in 1949 as an informal, voluntary association of free world countries that agreed to restrict the export of strategic goods to communist countries.\(^\text{123}\) CoCom membership now consists of Japan and the NATO countries, except Iceland.\(^\text{124}\) Export officials from member countries meet to compile classified lists of restricted items having some military use.\(^\text{125}\) CoCom restrictions are enforced only to protect the national security of member nations, and not for foreign policy reasons.\(^\text{126}\)

CoCom lists are updated every three to four years and issued to each member government.\(^\text{127}\) Each individual government is then responsible for enforcing the embargoes. Member countries may request one-time exceptions for permission to export an embargoed item to a proscribed country.\(^\text{128}\) Exceptions are granted by unanimous consent of CoCom members. CoCom's success in preventing the transfer of

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\(^\text{119}\) Abbott, supra note 40, at 822-23.
\(^\text{121}\) For example, the Reagan Administration has asked Congress to continue economic and military aid to Sudan in order to help that country counter military threats from Libya and Ethiopia. House Foreign Affairs Committee members have expressed concern about Sudan's repression of southern Sudanese people. Ayres, Administration Seeks Money and Arms to Bolster Sudan, N.Y. Times, March 29, 1984, § 1, at 4, col. 3. Similarly, millions of dollars of military aid has been given to El Salvador, a country with a history of government by terror, and a human rights record which only began to improve after millions of American dollars had already been spent. Taubman, Shultz Indicates Salvadoran Gains on Human Rights, N.Y. Times, Feb. 1, 1984, § 1, at 1, col. 4.
\(^\text{123}\) Berman & Garson, supra note 43, at 834.
\(^\text{124}\) TECHNOLOGY AND EAST-WEST TRADE, supra note 12, at 153.
\(^\text{125}\) Id. at 835.
\(^\text{126}\) Id. at 841.
\(^\text{128}\) Comment, supra note 85, at 190.
technology to communist countries has been seriously undermined by CoCom's informal structure. CoCom is not based on a formal treaty and its policies do not have the force of international law.  

Furthermore, there are no provisions for international sanctions against members who do not comply with CoCom embargoes.  

CoCom's effectiveness has also been limited by a lack of consensus among member nations. America's CoCom allies are generally more economically dependent than it is on trade with the Soviet Union and Warsaw Pact countries. In 1981, United States exports to the Soviet Union were valued at $2 billion; exports from NATO countries to the Soviet Union during the same period were estimated to be worth $15 billion.  

As a result of this dependence, CoCom allies are less willing than the United States to impose broad export restrictions. The CCL is a more comprehensive list than the CoCom embargo list. The United States presently controls thirty-three categories of goods and technology for national security reasons which are not restricted by CoCom. Items on the CoCom list, available from CoCom countries, can be multilaterally restricted. CoCom does nothing to relieve the problem of foreign availability of items falling within the CCL's additional thirty-three categories.

The United States is the only CoCom country to restrict the re-export of goods subject to its own controls from CoCom countries. The added cost in time and paper work for the necessary double licensing often causes foreign purchasers to seek alternative goods to American-made items. Yet, without double licensing, the United States cannot insure that a CCL item, which may have been cleared for export because it is destined for a CoCom purchaser, will not be diverted to an adversary.

While the United States imposes controls on more goods and technologies than does CoCom, it also asks for more exceptions to CoCom embargoes than any other member. Requests for exceptions are rarely denied. The Congressional Office of Technology Assessment

129. TECHNOLOGY AND EAST-WEST TRADE, supra note 12, at 154.
130. Id. at 12.
131. Id. at 160.
133. Id.
134. TECHNOLOGY AND EAST-WEST TRADE, supra note 12, at 173.
135. Id. at 117 (statement of Sen. Heinz, R-Pa.).
137. Comment, supra note 85, at 192.
138. For example, in 1981 the Commerce Department denied Boeing's application to export its 767, containing a sophisticated laser gyroscope, to Soviet-aligned Ethiopia. Ethiopia then purchased an Air-Bus from France. The Air-Bus contained the same American manufactured laser gyroscope used in the Boeing 767. Zonderman, supra note 33, at 103.
139. Oversight on the Commerce Department, supra note 4, at 81 (statement of Lionel Olmer).
(OTA) reported that since 1973 the majority of U.S. requests were for exceptions to sell computer equipment.\textsuperscript{4} The OTA claims that CoCom controls more computer exports than any other type of export and that America's status as preferred supplier of such equipment results in a high number of exceptions requested.\textsuperscript{142} The Commerce Department, on the other hand, reports that exceptions are requested because many items embargoed by CoCom are available from non-CoCom countries.\textsuperscript{143} This admission signals two significant problems with CoCom: the embargo list is too broad, and the membership is too narrow to effectively restrict the transfer of militarily useful Western technology to communist countries.

The 1979 EAA directed the President to negotiate with member nations to make CoCom a more effective control mechanism.\textsuperscript{144} Towards this goal, in January, 1982, the United States participated in the first high level CoCom meeting since 1950.\textsuperscript{145} The agenda and results of the meeting remain classified; however, State Department officials representing the United States at the meeting were encouraged by a consensus favoring more vigorous enforcement of CoCom restrictions.\textsuperscript{146} Member nations accepted U.S. proposals to update the CoCom list to include modern laser and computer technologies.\textsuperscript{147} The updated CoCom list is scheduled to be completed by July, 1984.\textsuperscript{148} Persistent differences among organization members, however, are likely to delay plans to restructure and strengthen CoCom.\textsuperscript{149} Actual improvements in the CoCom system are likely to take several years. Worldwide technological advances have made it impossible for the United States to unilaterally control technology transfers to communist countries. A multi-lateral control system is required if U.S. export controls are to be effective.

CONSIDERATIONS OF FOREIGN AVAILABILITY IN FUTURE CONTROL MECHANISMS

Proposals to Improve Foreign Availability Assessment Capacity

The Senate Committee on Banking, Housing, and Urban Affairs reported dissatisfaction with the OEA's "almost total lack of progress" in establishing procedures to evaluate foreign availability of controlled items.\textsuperscript{150} In response to the Commerce Department's complaint that

\textsuperscript{141} Technology and East-West Trade, supra note 12, at 159.

\textsuperscript{142} Id.

\textsuperscript{143} Oversight on the Commerce Department, supra note 4, at 81 (statement of Lionel Olmer).

\textsuperscript{144} 50 U.S.C. app. § 2405(i) (Supp. III 1979).

\textsuperscript{145} The Extent of Technology Transfer, supra note 13, at 45 (statement of Fred C. Ikle).

\textsuperscript{146} Transfer of United States High Technology, supra note 14, at 158 (statement of James L. Buckley, Undersecretary for Security Assistance, Science and Technology, Department of State).

\textsuperscript{147} UPDATE, supra note 3, at 46.

\textsuperscript{148} U.S. Trade Bars Anger Europeans, N.Y. Times, Jan. 23, 1984, at D1, col. 3, at D8, col. 4.

\textsuperscript{149} UPDATE, supra note 3, at 46.

\textsuperscript{150} S. REP. NO. 170, supra note 6, at 22.
funds were not available to develop a foreign availability assessment program,\textsuperscript{151} the Senate Committee noted that since 1979 Congress has granted the OEA its full requests for funds.\textsuperscript{152} Though critical of the Commerce Department's lack of progress, Senate bill 979 offers minimal directions for improving the foreign availability program. The bill instructs the Departments of Commerce and Defense to cooperate in gathering and assessing information on foreign availability, and furthermore directs the departments to establish a joint computer system for foreign availability data.\textsuperscript{153} It would also require the Commerce and Defense Departments to provide Congress with a joint quarterly report describing their ability to assess foreign availability.\textsuperscript{154}

The 1979 EAA implicitly mandates cooperation between the Commerce and Defense Departments,\textsuperscript{155} but cooperation has been historically handicapped by the divergent goals of the two departments. The Commerce Department is simultaneously responsible for promoting trade and restricting exports.\textsuperscript{156} The Defense Department, on the other hand, is primarily responsible for protecting national security and tends to favor trade restriction.\textsuperscript{157} Commerce and Defense have long disagreed over the proper scope of export controls,\textsuperscript{158} and it is therefore unlikely that these basic differences can be resolved by legislative order.

House bill 3231 goes farther than requiring general cooperation and would create an Office of Foreign Availability within the Commerce Department.\textsuperscript{159} The bill would require the Office of Foreign Availability to report its activities to Congress every six months.\textsuperscript{160} The present law directs the Secretary of Commerce to consult "appropriate" government agencies and TAC's in order to assess foreign availability.\textsuperscript{161} A sophisticated assessment of foreign availability requires integration of information from the American intelligence agencies, the Defense Department, domestic and foreign manufacturers, the scientific community, and economists.\textsuperscript{162} This complicated process could be carried out most efficiently in a centralized office within the OEA.

\begin{footnotes}
\item[151] Oversight on the Commerce Department, supra note 4, at 80 (statement of Lionel Olmer).
\item[152] S. REP. No. 170, supra note 6, at 22.
\item[153] Id. at 39.
\item[154] Id. at 79.
\item[156] Oversight on the Commerce Department, supra note 4, at 18 (statement of Senator William Cohen, R-Me.).
\item[157] 129 CONG. REC. H7452 (daily ed. Sept. 6, 1983) (statement of Rep. Frank Annunzio, D-Ill.).
\item[158] UPDATE, supra note 3, at 92.
\item[160] Id.
\item[162] Abbott, supra note 40, at 805-06.
\end{footnotes}
National Security Controls Amendments

Senate Bill 979

Senate bill 979 alters the definition of foreign availability within the EAA. Under the present Act, "foreign availability" renders national security controls ineffective when goods or technology are available "in sufficient quantity and sufficient quality" from sources outside the United States. In an effort to strengthen export restrictions, S. 979 adopts provisions from the Reagan Administration's bill that would make it more difficult to find foreign availability of controlled goods. The bill would replace "sufficient quality" with "comparable quality." This choice of words is intended to imply fungibility. Under the Administration's bill, the mere capacity of a foreign country to produce comparable goods does not constitute foreign availability unless the proscribed country can interchange the substitute at no additional costs.

This change fails to establish a useful definition of "foreign availability." Proponents of unrestricted trade argue that availability exists when the proscribed country "can satisfy its need with a foreign substitute at an acceptable price." Those who favor tighter controls argue that the Soviet Union and its allies prefer the quality of American products, and that because foreign substitutes do not fill Soviet demand for strategic goods and technology, they therefore do not represent actual "foreign availability."

Foreign availability cannot be effectively assessed until it is accurately defined. Under the definition provided in S. 979, foreign availability only exists where comparable substitutes would "render the controls ineffective in achieving their purpose," whether that purpose is motivated by foreign policy or national security. This qualification negates the objective criteria for determining foreign availability offered by subsequent portions of the Senate bill. The executive branch has considerable discretionary authority to determine when exports of goods and technology are to be controlled for both national security and foreign policy reasons.

164. EXPORT ADMINISTRATION AUTHORIZATION, supra note 7, at 9.
165. Id. at 30.
166. Id.
168. Oversight on the Commerce Department, supra note 4, at 173 (Letter from Theodore Thau, retired Executive Secretary of the Export Administration Review Board, to Senator Jake Garn, R-Utah, Feb. 28, 1983).
170. Senate Bill 979 suggests that the Secretary of Commerce consider "cost, reliability, the availability and reliability of spare parts and the cost and quality thereof, maintenance programs, technical data packages, back up packages, durability, quality of end products produced by the item proposed for export, and scale of production" when determining foreign availability. S. Rep. No. 170, supra note 6, at 45.
171. Comment, The Regulation of Technical Data Under The Arms Export Control Act of 1976 and
with the Commerce, Defense, and State Departments, thus has the authority to decide when those purposes have been achieved. In effect, this "definition" merely reinforces other provisions in the existing EAA which allow the President to impose controls "notwithstanding" foreign availability. \(^{172}\) Export controls imposed for national security reasons "notwithstanding foreign availability" do not deprive targeted countries of the controlled goods or technology.

The Senate Banking Committee intended to limit the imposition of controls "notwithstanding" foreign availability, and to make an objective foreign availability analysis an essential part of the licensing process. \(^{173}\) The Committee noted that "in most situations the exporters themselves are in the best position to be aware of the foreign availability of controlled items, since they are knowledgeable about their competitors and the nature of the products they offer." \(^{174}\) Senate bill 979 injects this knowledge in two provisions. First, the Commerce Department is instructed to give notice of its annual review of the CCL and invite public comment in the Federal Register before the review begins. \(^{175}\) The present law requires only that notice be given at some time during each annual review. \(^{176}\) Second, and more importantly, the bill gives increased weight to evidence presented by exporters seeking to remove an item from the CCL or obtain a validated license on the basis of foreign availability. Once "reliable" evidence is put forth by the exporter, S. 979 would require the OEA to grant a validated license or remove the controls, unless the OEA finds "reliable" evidence that foreign substitutes do not exist. \(^{177}\) Exporters' representations would be given equal weight with Technical Advisory Committees' representations. \(^{178}\) The present Act does not require the OEA to provide evidence in support of its denials of its foreign availability. \(^{179}\) Shifting this burden of proof to the OEA should increase cooperation between the OEA and exporters, who frequently view OEA decisions as capricious and anti-business. \(^{180}\) Under S. 979, the OEA can only defeat an applicant's representations of foreign availability with "scientific or physical examination, expert opinion based upon adequate factual information, or intelligence information." \(^{181}\) This burden will force the OEA to go forward in developing a foreign availability assessment capacity.

Senate bill 979 would make three additional significant changes in

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173. S. REP. No. 170, supra note 6, at 10.
174. Id.
175. Id. at 42.
177. S. REP. No. 170, supra note 6, at 45.
178. Id. at 46.
180. The Extent of Technology Transfers, supra note 13, at 69.
181. S. REP. No. 170, supra note 6, at 45.
foreign availability analysis under the EAA. The bill would require the Secretary of Defense to consider foreign availability when drafting the MCTL; allow TAC's to initiate steps to remove a CCL by reason of foreign availability; and provide an illustrative list of factors for the Secretary of Commerce to consider in determining foreign availability.

House Bill 3231

The House bill makes no attempt to clarify or define foreign availability. The report of the Committee on Foreign Affairs stresses the negative economic impact to American exporters when markets are lost to foreign competitors who produce substitutes for items controlled by American export laws. The bill offers procedural amendments to ensure that controls are not retained on any goods available from foreign sources.

The present Act requires that when goods are controlled, notwithstanding foreign availability, the President is to "initiate" negotiations with foreign producers of substitute goods or technology in an effort to form multilateral export restrictions. The House bill would allow controls to remain in effect for a six month negotiation period. If the negotiations do not totally eliminate foreign availability within that six months, the goods or technology must be removed from the CCL. The President could only extend the six month negotiation period upon certification to Congress that lifting the control would be detrimental to national security. The bill would also require that when a TAC certifies that a controlled item has become available from foreign sources, that item must be removed from the CCL unless foreign availability is eliminated within six months.

Due to the complexities and delicate nature of international agreements it seems unlikely that foreign availability of most controlled items could be eliminated in six months. Negotiations within CoCom to add or delete embargoed items can take up to two years. The President faces two primary obstacles to successful negotiations with countries producing the particular goods. First, America's allies do not share the high level of concern over technology transfer to Eastern Europe, the Soviet Union, and the People's Republic of China. Second,
given the OEA's present inability to assess foreign availability and the
Soviet Union's extensive intelligence regarding Western technological
developments, information about available foreign substitutes may
reach Soviet-bloc sources before it reaches the OEA. Thus, it is likely
that the United States would be seeking negotiations with foreign sup-
pliers already trading with countries which it seeks to embargo.

The Committee on Foreign Affairs found that foreign suppliers of
controlled goods render national security export controls pointless.192
The House report presumes that controlling goods and technology for
which there are comparable foreign substitutes will do nothing to fur-
ther national security goals.193 This presumption, however, ignores the
fact that adversaries, in particular, the Soviet Union, seek American
military technology for two reasons: to copy innovative designs and to
assess American military capabilities in order to develop effective
countermeasures.194

According to the House report, losses in export profits and Ameri-
can jobs damage national security by hindering technological research
and development.195 As America's lead time in high technology de-
creases, further research and development becomes even more im-
portant to maintaining the qualitative edge on which it depends for
national defense. For example, in the mid-1960's, American computers
and microelectronics had advanced a decade ahead of those of any for-
eign competitors.196 By 1983, that lead time had been reduced to three
to five years.197 In February, 1984, American researchers reported that
the Japanese are now producing supercomputers which are more ad-
vanced than American computers.198 Supercomputers are used to de-
sign nuclear weapons and are therefore important to national security.
A loss of our qualitative edge in the computer field has therefore
threatened national security.

Trade restrictionists argue that even where export controls directly
result in lost sales, the economic consequences are trivial.199 In 1982,
exports to Soviet Bloc countries represented only 1.7% of total U.S. ex-
ports.200 The Commerce Department estimates that of the $2.8 billion
worth of goods exported to the Soviet Union in 1983, $1.9 billion worth

193. Id. at 19.
194. SOVIET ACQUISITION, supra note 12, at 10; Transfers of United States High Technology, supra
note 14, at 573 (statement of Charles Lecht, former president, Advanced Computer Tech-
niques, a private exporter).
197. Id.
198. Big Japanese Gain in Computers Seen, supra note 37, at 1, col. 1.
199. UPDATE, supra note 3, at 54.
200. Id. at 51; American business' small share of the Soviet high tech market is a result of overall
restrictive American East-West trade policies. The United States has denied "most-favored-
nation" status to most communist countries, and has restricted the amount of subsidized
official export credits available to the communist world. As a result, American exporters
have not shared in the significant increases in the volume of East-West trade which occurred
were agricultural products. The sales of high tech goods represent only about ten percent of American trade with the Soviet Bloc. Furthermore, the vast majority of applications to sell goods subject to national security controls are approved. In 1982, only 658 applications to export to communist countries, representing $90 million in lost sales, were denied for national security reasons.

The loss of $90 million in export sales must be balanced against long-term increases in defense costs. The Defense Department estimates that it will spend $1.6 trillion on national defense during the next five years. The Defense Department also estimates that these expenditures could have been tens of billions of dollars less had American military technology and "know how" not been transferred to the Soviet Union during the 1970's. Reduction of American high technology export sales would not have eliminated this transfer, but may have helped reduce it.

In other foreign availability-related amendments to the national security controls, H.R. 3231 would require the Secretary of Defense to issue regulations governing foreign availability determinations; authorize the General Accounting Office to determine whether foreign availability was used in drafting the CCL; and require the Department of Defense to consider foreign availability in drafting the MCTL.

Foreign Policy Controls Amendments

Senate bill 979 and H.R. 3231 propose identical changes to the foreign availability provisions relating to foreign policy controls. Both bills suggest that the President consider foreign availability before imposing foreign policy controls. Nevertheless, foreign availability would not become a criterion in the licensing process until six months after a foreign policy control was put into effect. The bills would require that the President evaluate the foreign availability of controlled items in a report to Congress at the end of the initial six month period and prior to extending any control for another six month term. If an extension is sought, the Secretary of Commerce is to "take into account" the foreign availability of controlled goods. If the Secretary

201. Id. at 52.
204. The Extent of Technology Transfers, supra note 13, at 18 (statement of Fred C. Ikle).
205. Id. at 9 (statement of Sen. William Armstrong, R-Colo.).
206. Id. at 48 (statement of Fred C. Ikle).
207. H.R. 3231, supra note 159, § 108(e).
208. Id. § 109.
209. Id.
210. S. REP. NO. 170, supra note 6, at 52; H.R. 3231, supra note 159, § 110(a).
211. S. REP. NO. 170, supra note 6, at 55; H.R. 3231, supra note 159, § 110(c).
212. S. REP. NO. 170, supra note 6, at 55; H.R. 3231, supra note 159, § 112(b)(2).
“affirmatively determines” that the availability of foreign substitutes for controlled goods renders the controls “ineffective in achieving the purpose of the control,” the license may issue, and where appropriate, the item may be removed from the control list.\footnote{Id.}

Both the House and Senate bills limit the OEA’s discretionary power to impose national security controls when foreign substitutes are available; the OEA’s discretionary power to impose foreign policy controls, on the other hand, would remain considerably more broad. Under both bills, only the President could override the automatic removal of national security controls once foreign availability is found.\footnote{S. REP. NO. 170, supra note 6, at 44; H.R. 3231, supra note 159, § 108(b).} By contrast, when an item controlled for foreign policy reasons is found to be available from foreign sources, those controls may not be lifted until the Secretary of Commerce “affirmatively determines” that foreign availability has thwarted the purpose of the control.\footnote{S. REP. NO. 170, supra note 6, at 55; H.R. 3231, supra note 159, § 112(b)(2).}

Initially, it seems ironic that Congress would restrict national security controls more than foreign policy controls. American exporters, CoCom allies, and most export control critics support national security controls when used to prevent the transfer of militarily useful technology to adversaries.\footnote{129 CONG. REC. H7797 (daily ed. Sept. 30, 1983); Abbott, supra note 40, at 808.} At the same time, the general consensus emerging is that foreign policy controls do not work.\footnote{129 CONG. REC. H7451 (daily ed. Sept. 26, 1983) (statement of Rep. Frank Annunzio, D-Ill.).} The foreign policy controls amendments reflect congressional deference to Presidential authority to determine foreign policy.\footnote{See U.S. v. Curtiss-Wright, 299 U.S. 304 (1936).} Imposing fewer limitations on foreign policy controls also reflects congressional approval of their use as symbolic expressions of moral outrage.

**Amendments to Multi-Lateral Export Controls**

The United States can only insure that foreign exporters of high risk technological goods will not sell to Soviet-aligned countries through international export control agreements. Both the Senate and the House have proposed strengthening the Coordinating Committee. In identical provisions, both bills direct the President to:

- improve the International Control List and minimize the approval of exceptions to that list, strengthen enforcement and cooperation in enforcement efforts, provide sufficient funding for the Committee, and improve the structure and function of the Secretariat of the Committee by upgrading professional staff, translation services, data base maintenance, communications, and facilities.\footnote{S. REP. NO. 170, supra note 6, at 48. H.R. 3231, supra note 157, § 107.}

Both bills speak in broad terms of revising CoCom’s embargo lists to insure the national security of all members. Senate bill 979 would pro-
provide strength through sanctions, while H.R. 3231 promotes strength through cooperation.

Senate bill 979 instructs the President to raise the CoCom agreement to international treaty status, thereby giving it legitimacy in international law. The bill also provides that the President may deny trading privileges, including the freedom to export goods into the United States, to any foreign exporter who violates American national security controls. This sanction would apply to both foreign exporters who re-export CCL items without OEA approval, and those who violate CoCom embargoes.

The Senate Banking Committee justifies these increased sanctions on the grounds that the United States should not be obliged to keep its markets open to those who violate its national security. The Committee notes that the United States has the sovereign right to control imports into the U.S. and that these sanctions do not involve extra-territorial application of American law.

These sanctions are not likely to be well received by America’s CoCom allies. CoCom restrictions apply only to strategic goods controlled for national security reasons. Although CoCom members are generally inclined to support unilateral national security controls, the failed 1982 Soviet pipeline equipment embargo has left most members wary of American efforts to enforce any export policies multilaterally. Commerce Department regulations proposed in January, 1984 which would impose additional re-export restrictions on foreign purchasers of CCL items met strong European objections. The additional threat of import sanctions could inhibit cooperation among an already divided CoCom group.

In contrast, H.R. 3231 does not contain import sanctions. The Foreign Affairs Committee emphasized the need to recognize the sovereignty of CoCom partners with respect to goods and firms within their territory. The bill requires the President to “consult” with “appropriate” allies in an effort to obtain their cooperation before imposing foreign policy controls. This vague directive will not insure international cooperation on foreign policy controls. Nevertheless, it does offer, at least in form, the type of international dialogue concerning foreign policy controls which is presently available through CoCom for national security controls.

Both proposals would eliminate the double licensing procedure re-
required for goods to be exported to CoCom countries. Presently, controlled goods shipped to CoCom countries are cleared once by the OEA, and a second time by CoCom if re-exported. About one-third of all license applications are for exports of CCL items to CoCom countries. The House bill would waive license requirements for any goods shipped to CoCom countries, subject to exceptions made by the Secretary of Commerce. The Senate bill would still require licenses for goods controlled unilaterally and for MCTL items. Neither bill requires the elimination of unilateral controls; however, the House bill effectively eliminates unilateral controls since any CoCom member could import unilaterally controlled goods without being subject to re-exporting requirements. CoCom members would be free to observe United States export controls, but only required to observe CoCom controls.

Senate bill 979 and H.R. 3231 both recognize the need to expand multi-lateral controls outside the CoCom group. Both bills specifically direct the Secretary of State to negotiate with non-CoCom countries to establish multi-lateral national security export controls. The Senate bill insures that these agreements will be effective, by directing the Secretary of Commerce to enforce non-CoCom cooperative export agreements in the same manner as CoCom agreements. Both would be elevated to treaty status, and exports of designated items to cooperating countries would not require OEA licensing. Ultimately, it is through such a system of treaty agreements that the United States can eliminate the foreign availability of goods and technology it seeks to restrict.

CONCLUSIONS AND RECOMMENDATIONS

America does not have a monopoly on high technology, nor can it persuade all foreign suppliers of high technology to abide by its perceptions of beneficial national security controls. Likewise, the United States cannot prevent Soviet Bloc countries from developing their own military technology. Nevertheless, a perilous and clearly hostile Soviet military buildup confronts the United States and her allies. It would be foolish to sell to adversaries directly or indirectly products with a potential military use which they lack the capacity to produce themselves. It would be equally unwise to sell technology to an adversary simply because it could have been purchased elsewhere.

228. S. REP. No. 170, supra note 6, at 44. H.R. 3231, supra note 159, § 106(b).
229. Evrard, supra note 41, at 24.
230. H.R. REP. No. 257, supra note 6, at 6.
231. H.R. 3231, supra note 159, § 106(b).
232. S. REP. No. 170, supra note 6, at 44.
233. S. REP. No. 170, supra note 6, at 49. H.R. 3231, supra note 159, § 106(b)(1).
234. S. REP. No. 170, supra note 6, at 49.
237. Mavroules, supra note 235.
extent that technology acquisition is made difficult and costly to adver-
saries, the United States gains valuable lead time to develop defense
238
technology. The present EAA noticeably lacks a definition of foreign availabil-
ity. Foreign availability should be a primary consideration in the im-
position of national security controls. It is a complex idea which
requires a precise definition. A precise definition of foreign availability
should include a sophisticated analysis not only of quantity and quality
of the substitute; it should also consider the amenability of the supplier
to export controls, any costs of substitution the proscribed country
would incur, and the value of the item for defense intelligence pur-
poses. This analysis should be done by an objective group having
members from the Departments of Commerce, State, and Defense, rep-
resentatives from the intelligence community and significant input
from private industry. If a controlled good would potentially leak sen-
sitive information about technological ability, that good should be con-
sidered unique and therefore subject to strict controls. House bill
3231's proposal to establish an Office of Foreign Availability will en-
able the OEA to undertake such a sophisticated analysis.

The most effective national security controls would incorporate pro-
visions from both the Senate and House bills. Items with a significant
military end use should be controlled for national security reasons both
as a means of depriving American adversaries of useful technology and
of making acquisition of technology more difficult and costly. Vigor-
ous negotiations to obtain multilateral cooperation in export controls
would be the most effective way to insure such technological depriva-
tion. These negotiations should not be pressured by a congressional
time limit. The Executive should remain free to impose restrictions
notwithstanding foreign availability. Granting TAC's power to initiate
applications to remove items from the CCL based on foreign availabil-
ity and requiring the OEA to produce reliable evidence when negating
an exporter's representation of foreign availability will insure that con-
trols imposed in spite of foreign availability are truly necessary to na-
tional security.

Foreign availability considerations should be removed from the for-
egn policy control provisions of the EAA. Symbolic statements
through export controls can be part of a consistent foreign policy, but it
is unlikely that such economic statements of position will attain wide-
spread international support.

International support for multilateral national security controls
should be actively pursued. CoCom should be not only strengthened
but its membership should be expanded. Increased dialogue between
both CoCom and non-CoCom allies, with recognition of the need to

238. The Extent of Technology Transfer, supra note 13, at 68 (statement of Lawrence J. Brady,
Assistant Secretary of Commerce for Trade Administration).
compromise, can both eliminate foreign availability problems and improve America’s business credibility abroad. Using multilateral controls in conjunction with limited unilateral controls, the United States can restrict the flow of sensitive goods and technology without punishing American exporters.

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