CHAPTER VII

Options for U.S. Policy

Contents

Table

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EXPORT ADMINISTRATION POLICY ORIENTATIONS

In February 1983, Congressman Don Bonker introduced the "Export Promotion and Control Act of 1983,"[1] a bill to amend the 1979 Export Administration Act (EAA). The bill's title neatly captures the twin foci of U.S. export administration policy, which has sought to deal with the sometimes irreconcilable problems of maximizing the commercial benefits of trade and safeguarding national security. Indeed, one informed observer of the legislative process has predicted that measures for amending or replacing EAA "will be proposed by legislators who have as their primary concern one or the other of these two problems.

Arrays of specific proposals have already been put forward by both sides. The bill drafted by the administration emphasizes the importance of preventing or delaying the transfer of "militarily sensitive" technology, and includes provisions aimed at tightening strategic controls. In contrast, Congressman Bonker's bill would lift many of the burdens placed on exporters by existing control policies. Bills sponsored by Senators Gain, Heinz, and Nunn and Representatives Byron and Roe fall within these two extremes.

Examination of these proposals and of the arguments advanced in their support reveals that while this dichotomy of views accurately captures the basic concerns of many of the pro tagonists in the export administration policy debate, there exists a more complex matrix of policy goals. In fact, the debate over U.S. export administration policy toward the U.S.S.R. centers on how to simultaneously pursue and to balance four different objectives. In the past, the relative emphasis accorded these elements has from time to time shifted. A new or revised Export Administration Act will reflect congressional decisions—or refusal to decide—how best to accommodate all four objectives.

[1] H. R. 1566.

[2] Paul Freedenberg, "U.S. Export Controls: Issues for High Technology Industries," *National Journal*, Dec. 18, 1982, p. 2190.

THE NATIONAL SECURITY PERSPECTIVE

Goals

The primary goal of policy options which focus on U.S. national security is to make it as difficult as possible for the Soviet defense establishment to acquire and use Western technology. Therefore, proposed legislation is designed to prevent or inhibit the dissemination of equipment and technologies believed to have military utility. Such exports are deemed inherently damaging to the United States. These proposals seek to impose permanent-or at least relatively long-lasting—controls on items, based on technical evaluation of their properties and capabilities.

Assumptions

Adherents of this perspective believe that:

- the U.S.S.R. is making important military gains through the acquisition of Western technology;
- tightening U.S. export licensing requirements can make significant inroads into this process;
- the security benefits of such controls outweigh the economic costs of foregone exports; and
- that sustained U.S. pressure can bring America's allies closer to its own position on these matters.

THE FOREIGN POLICY PERSPECTIVE

Goals

The primary goal here is to preserve a situation in which Presidential use of exports as an instrument for achieving diplomatic objectives has been as easy and effective as possible. This involves the power to apply controls to items which do not fall under the rubric of national security, and envisages that such controls would be flexible and of limited duration.

Assumptions

Advocates of maintaining broad executive discretion in the use of foreign policy controls believe that:

- the Soviet need for Western imports provides an effective lever for affecting Soviet policy and behavior; and/or
- political intervention in the conduct of international trade is an appropriate mechanism of diplomacy; and/or
- U.S. foreign policy requires a means by which the President can reward or punish Soviet actions where no suitable alternative instruments to manipulation of trade controls exists.

THE EFFICIENCY PERSPECTIVE

Goals

The primary goal of this category of proposals is to create a licensing system which will allow actual or potential exporters the ability to plan ahead and to retain or acquire reputations as reliable suppliers. A secondary goal is to encourage compliance and increase the efficiency of the export licensing process. These ends would be achieved by making the export control system more predictable, consistent, and efficient.

Assumptions

This perspective is based on the proposition that, whether its objective is to limit or encourage exports, U.S. policy should be administered in a timely and predictable manner and enforced so as to encourage compliance and achieve the maximum benefit/cost ratio for its policing efforts. It also assumes that such development would allow U.S. companies to invest more sensibly and compete more effectively in international markets. This expectation is grounded on the necessity for business to predict well in advance whether a given export will be approved. Holders of this perspective tend to believe that foreign policy controls are highly disruptive of trade but unlikely to cause changes in policies abroad. Some hold that such controls are appropriate only when there is a general consensus in CoCom on their appropriateness. Similarly, some proponents of this position hold that complex licensing procedures place unnecessary burdens on U.S. businessmen and taxpayers which could be avoided by adherence to a clear and consistent policy.

THE TRADE PROMOTION PERSPECTIVE

Goals

The primary goal of the trade promotion perspective is to enable U.S. companies to compete effectively in selling the widest possible variety of civilian goods and technologies anywhere in the world. Therefore, controls should be tightly limited in scope and administered in a consistent and predictable manner.

Assumptions

The trade promotion perspective rests on various combinations of some or all of three basic lines of reasoning. First, the United States does not have a worldwide technological monopoly; and since our allies are unlikely to change their own export promotion policies which protect only clearly military items, U.S. efforts to deny the U.S.S.R. many technologies are destined to fail. Second, foreign policy controls nearly always fail to alter the behavior of those against whom they are directed. Moreover, because they are by nature unpredictable, these controls are highly disruptive and cost U.S. business present and

future sales. Third, export controls are costly to the United States and should be used to the minimum extent necessary. This view is based on the perceptions that the United States is increasingly becoming a trading nation, that its balance of payments is consequently important, and that export controls beyond those obviously necessary for national security purposes reduce U.S. firms' ability to compete for sales.

In some cases, these policy orientations are mutually supportive. It is consistent, for instance, to sponsor both provisions which strengthen national security controls and those which promote flexibility for imposing foreign policy controls on trade. Similarly, attempting to maximize the efficiency and predictability of the export licensing system is consistent with either the national security or trade promotion perspective. On the other hand, the national security and export promotion perspectives are inherently at odds. Furthermore, the very existence of foreign policy controls introduces an element of unpredictability into the export licensing system, which works against both efficiency and trade promotion. Administration of the 1979 EAA is complicated by the fact that inconsistencies of this sort were built into it, and a like result in September 1983 could lead to similar problems. The relationships between basic policy objectives are summarized in table 8.

The remainder of this chapter examines the specific options available to Congress in crafting an export control policy, and discusses some of the potential consequences of and criticisms aimed at each. Several of these proposals embody more than one of the four basic perspectives described above. While they are reviewed here under the rubric of strengthening national security versus promoting exports, the reader should bear in mind the variety of possible combinations. For instance, it is entirely consistent to seek to limit the flow of technology by tightening export requirements to non-Communist nations, while at the same time seeking to improve the reliability of U.S. exporters by forbidding the retroactive application of foreign policy controls.

Table 8.– Relationships Between Policy Objectives

	National Security	Foreign Policy	Efficiency	Trade Promotion
I. National security	—	Consistent	Consistent	Inconsistent
II. Foreign Policy	Consistent	—	Inconsistent	Inconsistent
III. Efficiency	Consistent	Inconsistent	—	Consistent
IV. Trade Promotion	Inconsistent	Inconsistent	Consistent	

SOURCE Office of Technology Assessment.

EXPORT ADMINISTRATION POLICY OPTIONS

PROPOSALS DESIGNED TO STRENGTHEN NATIONAL SECURITY CONTROLS

Remove Primary Responsibility for Export Licensing From the Department of Commerce

Critics of the export licensing system have observed that the Department of Commerce (DOC) plays an ambivalent role because it is simultaneously responsible for the promotion and control of trade. It is possible that in some cases this may result in neither function being optimally served, but the focus here is primarily on the fear that, because of its promotional mandate, DOC is not as vigorous as it should be in applying and expanding national security controls on exports to the U.S.S.R. Two kinds of legislative remedies have been proposed: to assign primary responsibility for export control to the Secretary of

Defense; or to create an entirely new and independent body with sole responsibility for export control.

The first of these suggestions appeared in two bills introduced in January 1983 in the House of Representatives.[3] In 1979, OTA reviewed similar proposals and observed that such a shift might have greater symbolic than operational impact, given the active role already assigned the Secretary of Defense by EAA. This symbolic value could be significant, however, both as a signal to America's allies of U.S. resolve to increase the prominence of security in trade policy; and as a signal to the business community that Government policy was clearly moving to restrict trade with the U.S.S.R.

The second suggestion, put forth by Senator Jake Garn, is to create an independent Office of Strategic Trade (OST), with a director who would sit on the National Security Council. It is Senator Garn's contention that export control is too important a function to be lodged in a Department whose principal trade function is promotional, and that a high-level OST would "be able to attract top quality personnel and be able to give consistent and balanced policy guidance to the President." The Senator further argues that the United States will never "devote the resources commensurate with the magnitude of the Soviet effort to acquire Western technology as long as the export control function is contained within the export promotion agency; and that "we will never make the consistent, high level effort necessary to induce our allies to tighten up and harmonize the CoCom control list unless we have an agency with direct access to the National Security Council, and through it to the President."[4]

Compelling as this argument may be, the concept of an OST has been criticized by parties on both sides of the export control/promotion debate because it would create a new agency. In this case, the intrinsic merits of the proposal may be subordinated to the prevailing mood, both in and out of government, which argues against the proliferation of bureaucracies. An intermediate step, less likely to arouse opposition on these grounds, would be to reorganize the export control functions within DOC, both to elevate the status of the Office of Economic Affairs within the Department and to remove it from the jurisdiction of an Under Secretary who also has trade promotion responsibilities. Such a reorganization has reportedly been proposed, but held up within the Administration. Should it eventually take place, it will address part, but not all, of Senator Garn's concerns.

Remove Indexing From EAA

Existing law mandates that, where appropriate, annual increases be made in the performance level for items subject to export licensing requirements, and that goods and technologies be periodically deleted from the Commodity Control List (CCL) as they "become obsolete with respect to the national security of the United States." Indexing has been opposed by those who see in it the danger that items obsolete in terms of Western state of the art, but still able to significantly improve existing Soviet military capabilities, will be decontrolled. On the other hand, the business community has charged that the CCL still contains items which are trivial by today's technological standard and which are easily available worldwide. Room probably does exist for removal of such items without potential damage to U.S. national security. Interestingly, the indexing provision of the 1979 Act has not been implemented by the executive branch. The administration proposes modifying the automatic nature of this provision by requiring that the anticipated military needs of potential adversaries be taken into account before decontrol.

Broaden the Definition of Technology

Senator Garn's Office of Strategic Trade bill expands the definition of technology to cover technological or technical data which include:

[3]H.R. 381, introduced by Mr. Roe; and H.R. 483, introduced by Mrs. Byron.
[4]Freedenberg, op. cit., p. 2192.

> . . . information or knowledge of any kind that can be used or adapted for use in the design, production, manufacture, repair, overhaul, processing, engineering, development, operation, maintenance, or restoration of goods or commodities, including computer software. Information or know-how may take tangible form, such as models, prototypes, drawings, sketches, diagrams, blueprints, or manuals, or take an intangible form, such as training or technical services. Technological data shall also include all goods or commodities that will be used in the industrial application of the technological information, regardless of the end-use classification of the good or commodities.

This definition rightly recognizes the subtlety and complexity of technology, and the wide and diverse array of hardware and software, tangibles and intangibles, which can ultimately result in the creation of militarily relevant capabilities. The problem with basing an export licensing system on such a definition is its very breadth and subtlety. The more inclusive the categories of goods and knowledge covered by licensing regulations, the more difficult such regulations are to promulgate, administer, and enforce. This is particularly true of controlling the movement of highly portable and easily conveyable items, and of monitoring oral communication.

Redefine or Remove Foreign Availability Criteria From EAA

Existing law recognizes that the availability from other sources of items controlled by the United States undermines U.S. policies and places American firms at a competitive disadvantage. EAA, therefore, directs the Secretary of Commerce to establish an ongoing capacity for reviewing foreign availability, and requires that, unless the President directs otherwise, licenses be granted for those items for which foreign availability can be demonstrated.

Some proposals have been made to entirely remove foreign availability as a ground for granting licenses or to define it so as to make its finding more difficult. The latter approach is taken in the Office of Strategic Trade bill, which requires that for an item to be available it be possessed in "comparable quantity or quality, " a term which includes the following factors:

> . . . cost, reliability, the availability and reliability of spare parts and the cost and quality thereof, maintenance programs, long-term durability, scale of production, ease with which machinery will be integrated in the mode of production, and spoilages and tolerance factors for end products produced by the machinery.

This language goes well beyond that of the 1979 EAA, which nowhere defined comparable quantity or quality. The administration's bill would modify the foreign availability test by substituting "sufficient" or "significant" quantities.

In *Technology and Soviet Energy Availability,* OTA discussed at length the practical and conceptual issues entailed in the requirement that DOC establish a foreign availability assessment mechanism. The above definition addresses many, but not all, of the conceptual issues; the practical problems remain. Foremost among them is that most of the required information is likely to be proprietary data which would have to be obtained from private firms in other countries, raising the spectre of the U.S. Government's engaging in industrial espionage in allied nations. OTA concluded that ascertaining foreign availability would be "expensive, time-consuming, and perhaps intrusive;" and that since DOC's foreign availability activities had yet to become fully operational, it could not be determined whether foreign availability could be assessed in a cost-effective manner.

In fact, eliminating or narrowing the foreign availability provision may be moot. DOC still has done little to implement this part of the existing law. In December 1982, it let a contract to a private firm for a year-long study (which will be completed only after expiration of EAA) designed, among other things, to determine the kind of data needed and the relevant technological parameters for assessing foreign availability. At this writing, three employees staff DOC's foreign availability as-

sessment program; additional slots have been authorized but not filled. It is difficult to imagine how the enormous task mandated by Congress can be accomplished at this level of effort. The degree to which foreign availability has been ignored or neglected is reflected in the fact that few validated licenses have been granted on these grounds. Any attempt to establish a serious foreign availability capacity would require a large appropriation, active cooperation by industry, willingness on the part of the executive branch to administer the law, and sustained congressional oversight.

Move Quickly to Subject Items on the Militarily Critical Technologies List (MCTL) to National Security Controls

This proposal is already part of existing law. Chapter VI discussed the problems which have accompanied the Critical Technologies Exercise and the difficulties encountered in absorbing its results into the CCL. So long as the Departments of Commerce and Defense continue to disagree over the optimal degree of inclusiveness of the CCL and over the proper scope of the MCTL, it is unlikely that further progress will be quickly made. Moreover, so long as the MCTL remains classified, its existence is likely to engender both ill will and apprehension—perhaps misplaced but nonetheless real-in the business community, which believes that in its present form it is so over-inclusive that it poses a serious threat to the ability of U.S. firms to compete effectively, not only in the U. S. S. R., but in free world markets as well.

Maintain and Tighten Licensing Requirements for Exports to Non-Communist Nations

At present, a number of dual-use technologies require validated licenses for export to allied countries. Applications for such licenses are routinely "rubber-stamped" in DOC, and the General Accounting Office (GAO) has recommended that these licensing requirements be eliminated. The Department of Defense (DOD), on the other hand, opposes discontinuing this practice and furthermore seeks better access to the information contained in the applications. In addition, DOD is considering proposals to control the transfer of items on the MCTL anywhere in the world, an effort which would significantly raise the level of control on West-West technology and technical data transfers.

These proposals are realistic in acknowledging the worldwide diffusion of technology and the potential threats to American security from many countries outside the Soviet bloc. They also acknowledge the fact that many other nations—Western and non-Western—have export licensing policies which provide the U.S.S.R. access to the equipment and processes it cannot obtain from the United States. Attempts to tighten West-West controls are certain, however, to meet with determined resistance from the business community, which, would find them an additional impediment to engaging in international business. The licensing of data would be especially burdensome for multinational corporations, who would have to obtain individual transaction licenses for routine communication with foreign national employees and business partners; and overseas subsidiaries, licensees, and subcontractors.

Attempt to Strengthen CoCom

Proposals here reflect two different but related goals: making CoCom a more effective implementor of allied consensus where it does exist; and attempting to use CoCom as a vehicle for bringing allied East-West trade policy in line with that of the United States. Specific measures in these areas have been proposed by the administration and include working toward formalizing the organization in a treaty; improving the enforcement and monitoring of CoCom decisions and/or instituting sanctions against transgressing members; expanding and strengthening the CoCom list so that it includes items now unilaterally controlled by the United States; attempting to remove foreign availability where it currently exists in member nations; and raising the level of funding for America's CoCom activities.

Obtaining multilateral agreement to the U.S. position is liable to be a difficult and long-term process; some would say it is impossible. Part of the difficulty stems from the nature of CoCom itself. CoCom is based on an informal agreement. Decisions must be unanimous and compliance with its decisions is voluntary. In addition, CoCom's day-to-day activities are conducted by fairly low-ranking officials, who require guidance from their governments. None of these are insurmountable obstacles to action; in fact, many of these problems exist in the North Atlantic Treaty Organization and are probably endemic to international organizations.

A more serious difficulty stems from the fundamental differences between the United States and the other members in their perspectives on East-West trade. (See ch. V.) There is a consensus that goods and technology that would strengthen the military capacity of the Communist countries should be controlled to protect Western security and that CoCom is the appropriate mechanism to achieve this end. But since CoCom was founded in 1949, there have been differing definitions of what constitutes a strategic commodity and, hence, what to control. The United States has generally favored controlling a larger number of items than the other members. This was true even during the 1970's when the United States was the largest requester of exceptions to the CoCom controls. Moreover, the United States devotes more resources to enforcement than do the other members, and it treats violations more seriously. Other members do not impose reexport controls, and few impose criminal penalties on violators. Finally, while the U.S. Government has endorsed the critical technology approach, European and Japanese leaders remain skeptical that it can be made to work in practice and are likely to balk at its inclusiveness.

The question is not whether these problems are insurmountable, but rather whether Congress can legislate meaningful changes in allied policy. Recent events–notably the pipeline embargo-have suggested that policies that can be interpreted as coercive or critical of the allies may be counterproductive in countries where East-West trade is a sensitive issue. Yet, there is evidence that quiet diplomacy and careful preparation of cases based on solid evidence have led to positive movement in CoCom. It would seem, therefore, that CoCom negotiations best take place at a high level out of the public eye. On the other hand, Congress could signify the importance it attaches to the CoCom effort by appropriating funds for America's CoCom activities.

Curtail Academic and Scientific Exchange Programs and Access to Open Literature

The difficulties raised by such proposals are discussed in chapter VI. The conclusions drawn in this discussion are that first, it has not been previously demonstrated that the potential security danger to the United States of exchange programs outweighs the political, scientific, and cultural benefits of maintaining open channels of communication with the U.S.S.R. Second, it is generally believed that such passive mechanisms of technology transfer are less likely to result in Soviet ability to absorb, diffuse, and improve on technological acquisitions than are more active, commercial channels.

While few would suggest that the U.S. Government attempt to control scientific journals, there have been calls for restricting access to the National Technical Information Service (NTIS) on the grounds that the U.S.S.R. uses this service to acquire valuable militarily relevant information arising from Government-sponsored research. It is true that Soviet citizens can easily and legally obtain NTIS documents. However, it is not clear that one class of potential recipients can be excluded from NTIS circulation without placing cumbersome restrictions on, or changing the open nature of, the entire service. A more promising alternative would be to ensure that militarily relevant research be disseminated not through NTIS, but through the Defense Technical Information Center, to which Soviet officials do not have legal access.

Restrict Technology Sales to Foreign Embassies

The administration favors granting the President authority to prohibit sales within the United States of goods and technology to embassies of countries to which such exports are controlled. This proposal is justified on the grounds that such sales may be reducing the effectiveness of national security controls. While this provision would eliminate a gap in the law, and thereby have symbolic value, it would be extremely difficult to administer, and it is not clear that it could be made effective.

PROPOSALS DESIGNED TO PROMOTE EAST-WEST TRADE

Restrict Presidential Power to Impose Foreign Policy Controls on Trade

Perhaps no trade control issue has so galvanized the U.S. business community as the recent controversy over extraterritorial and retroactive foreign policy controls on oil and gas technology. The legislative grounds for and circumstances under which these controls were extended, as well as their potential economic and political consequences, have been discussed elsewhere in this report. Fear of these consequences, coupled with the general climate of unpredictability and uncertainty engendered by President Reagan's action, has led to a number of proposals designed in various degrees to curtail the President virtually unlimited powers in this area by making it more costly and less easy to impose trade controls for reasons of foreign policy.

Suggestions here fall into three basic categories. First, a number of proposals seek to involve Congress and the public to varying degrees in the decision to impose foreign policy controls on trade. Second, legislation has been introduced by Congressman Bonker (H.R. 1565) to authorize insurance against losses incurred by firms from the imposition of export controls. Third, some measures are designed to make the imposition of foreign policy controls less attractive or available by either limiting the range of eligible transactions or requiring that export controls be accompanied by other measures. Thus, the "Export Administration Act Amendment of 1983" (S. 397) introduced by Senator Heinz contains a sanctity of contract provision, meant to ensure that finalized contracts and other agreements not be abrogated by foreign policy controls imposed after the fact. Also in this category are suggestions to eliminate or curtail extraterritorial controls, and to require that controls be placed on imports from as well as exports to countries which are the targets of foreign policy sanctions.

Measures in the first category include creating the mechanism for an outright congressional veto of foreign policy controls; instituting shorter expiration periods for controls once imposed; requiring meaningful prior notification of Congress, including a showing of need, effectiveness, and foreign unavailability; prior assessment by the administration of the economic and political costs of trade sanctions; and holding public hearings and soliciting written comments on proposed controls. Many of these measures are strengthened versions of safeguards already enacted into law in 1979. Their reappearance is a reflection of the extent to which presidential actions are perceived to have departed from Congress' intent in drafting the foreign policy control section of EAA; and of the lack of faith in future executive self-restraint.

However, this class of proposals raises several difficult problems. Foremost is that the ability to conduct foreign policy is essential to the concept of Presidential power. Laws which seek to encroach on that power risk being unenforceable. They also risk inhibiting necessary elements of diplomacy-flexibility, the ability to respond quickly to international situations, and the ability to select from a variety of responses, short of military action. Moreover, denying the President formal access to foreign policy controls does not *necessarily* mean that exports will not be used as foreign policy tools. A determined President would still have access to powers under the In-

ternational Emergency Powers Act (IEPA). Forcing recourse to this Act or encouraging the President to justify trade sanctions as matters of national security might be counterproductive. Using IEPA would require declaring a national emergency and thus perhaps escalating the importance of the situation. It is possible that this alone would deter the use of foreign policy controls, but once imposed on these grounds, virtually no checks would exist on them. Surely this outcome runs directly counter to the desires and expectations of those seeking to remove trade from the foreign policy arena.

The insurance proposal assumes both that Government insurance could adequately compensate U.S. firms for lost business, and that measures which would directly raise the domestic cost of foreign policy controls would make them less attractive and tend to limit their use. While insurance coverage of nonagricultural goods would constitute equitable treatment for nonfarm exporters, in fact, it is not clear that the compensation provided would be satisfactory to affected firms or that serious eligibility problems would not arise. More importantly, insurance might well have the opposite effect to that intended: the imposition of foreign policy controls might be encouraged if the government anticipated that insurance reimbursement would neutralize negative reaction from U.S. businesses.

Those proposals in category three which would result in narrowing the range of transactions subject to foreign policy controls seem the most promising. A sanctity of contract provision would effectively extend to all exporters the same protection now offered only to sellers of agricultural commodities. This in itself would be equitable treatment. Such a provision might also help dispel part of the reputation of unreliability, discussed in chapter IV, which U.S. exporters believe now hampers their efforts abroad. Efforts to conduct "lightswitch diplomacy, condemned by Secretary of State Schultz when he was President of Bechtel Corp., would probably be curtailed.

The concept behind sanctity of contract has been accepted by the administration, but many businessmen feel that as framed in the administration's bill, it would do little to actually discourage the imposition of foreign policy controls or ameliorate their impact on existing contracts. The administration bill would protect only those contracts requiring delivery within 270 days of the imposition of controls, and even these contracts could be set aside if the President deemed it in the national interest that such exports be prohibited. By contrast, the existing contract sanctity provision for agricultural goods can be set aside only in case of war or a national emergency declared by the President.

Similarly, reducing the scope of U.S. foreign policy controls which could be applied to foreign nationals would be welcomed by U.S. allies and would possibly retard some of the emerging reluctance on the part of foreign firms to enter into business relationships with the United States. Both of these measures to some extent limit Presidential options. Neither does so as fundamentally as the proposals in category one above.

Decontrol Items Containing Embedded Technology

One area of dispute between the Departments of Commerce and Defense has been the extent to which the list of items subject to national security controls can be shortened, particularly by deleting items incorporating microprocessors. At present, all equipment which contains microprocessors requires a validated export license, regardless of foreign availability or strategic significance. The Under Secretary of Commerce has testified before Congress that as many as 10,000 separate products—including personal computers and electronic toys—are controlled simply because they included this so-called embedded technology. The embedded technology debate reflects the classic dispute between those who put the benefit of the doubt on the side of national security at the expense of U.S. commercial interests, and those who believe that the evidence for the military risk claimed in these cases is too tenuous to justify the economic costs of controls.

Ease Foreign Availability Criteria

Chapter III discussed the problems associated with creating the capability to assess foreign availability within the U.S. Government. One alternative to undertaking this difficult effort would be to accept potential exporters' own evidence of the existence of such availability. The practical consequence of such a policy would probably be to moot most of the national security controls which the United States imposes unilaterally, as there are few cases in which the United States holds a world technological monopoly, and many cases in which other Western nations differ from U.S. views on military criticality. Unless and until the U.S. national security control list contains a manageable number of militarily critical items which the United States and its CoCom allies all agree to deny to the U. S. S. R., the result would be to release goods and technologies which the Government considers dangerous to U.S. security, but which firms in other countries can and do sell to the U.S.S.R.

Decontrol Exports to Non-Communist Nations

The Business Roundtable, expressing a view shared by many other business organizations, has recommended that except for militarily critical technologies, validated licenses not be required for any exports to CoCom countries; and that the same principle should apply to sales to neutral non-CoCom nations, so long as they enter into bilateral agreements with the United States that subject them to rules similar to those observed by CoCom members.

As was observed above, adoption of these proposals would significantly reduce the paperwork routinely processed by DOC. Furthermore, it would reduce burdens on firms, especially multinationals, which regularly send large quantities of equipment and data overseas. Such streamlining makes particular sense in light of the fact that information from routinely processed West-West license applications does not now appear to be used in any way by the Departments of Commerce or Defense. On the other hand, these proposals rely on the dual assumptions that a small subset of militarily critical technologies can be readily and consensually identified, and that CoCom and bilateral agreements can be relied on to protect U.S. security interests. As this report's discussions of the MCTL and of CoCom have indicated, both assertions are debatable.

Create a New License Category for Multiproject Operations

Several business organizations have proposed the establishment of a Comprehensive Operations License (COL) which would be used for the transfer of militarily critical technology by firms with substantial overseas manufacturing operations. COLs would cover the transfer of a broad spectrum of militarily critical goods and data between Western companies which have a defined legal relationship (e.g., licensees, subsidiaries, joint ventures) as long as the transferred material belonged to a class enumerated in the application and served the company's predefine mission. These licenses would be of unlimited duration, but subject to periodic review. Transfers to multiple destinations would be authorized provided these were listed on the application. This proposal has support in the House and Senate but is opposed by the administration.

The COL would meet part of the demand by U.S. businesses for increased predictability, efficiency, and flexibility in the export licensing process. And, as in the case of suggestions for eliminating West-West licensing requirements, Government paperwork could be significantly reduced. However, this proposal is bound to arouse the opposition of those who believe that U.S. security would not be well enough protected by controls which would be essentially self-imposed and self-patrolled by private companies.

PROPOSALS DESIGNED TO IMPROVE THE ENFORCEMENT OF U.S. EXPORT CONTROL LAWS

Chapter III has discussed criticisms recently directed at export control enforcement efforts, and a forthcoming GAO report will assess the effectiveness of existing enforcement procedures. There is widespread agreement that such efforts need to be improved. Indeed, this is one issue on which the opinions of trade controllers and promoters alike are in substantial harmony. As might be expected, however, specific suggestions on how best to enhance enforcement activities vary greatly. One issue which can be expected to receive prominent attention, for instance, is that greater clarity in the laws and regulations could substantially increase voluntary compliance and thereby greatly facilitate enforcement. This section reviews other proposals which have emerged in this area.

Organizational Issues

Perhaps the most fundamental dispute among those who agree that the system needs improving is over where the primary responsibility for export control enforcement and compliance should rest. The three leading suggestions are that it remain with DOC; that it be moved to Customs; or that it become part of a new OST. The latter option is subject to the difficulty discussed above, i.e., the present resistance to the notion of creating new government agencies. The Administration clearly favors the first proposal, acknowledging DOC's poor record in the past, but claiming substantial improvements in recent months. Some of those who have investigated enforcement and compliance activities (notably the Senate Permanent Subcommittee on Investigations) have recommended that the responsibility be assumed by the Customs Service. Their reasoning, as presented in chapter 111, is that Customs has better domestic and foreign resources for and experience in investigating export control violations; and that DOG enforcement activities can hardly help but be weakened by the Department's dual mission to simultaneously promote and control trade.

Powers and Authority

There is also a fair degree of consensus on the fact that Government power to investigate export control cases should be enhanced, regardless of where primary enforcement responsibility is lodged. Thus, legislation has been introduced in the House (H.R. 1566) which would keep the compliance function in Commerce, but would authorize DOG employees to: 1) carry firearms and make warrantless arrests; 2) execute warrants; and 3) conduct warrantless searches and seizures on the basis of probable cause. Proposals to transfer enforcement to the Customs Service have also recognized existing limitations in the powers and flexibility of investigators. These problems are addressed in Senator Nunn's bill, the "Export Administration Enforcement Act of 1983 (S. 407) which gives Customs officers broad power to search persons, vehicles, vessels, packages, and containers where there is reasonable cause to suspect that goods or technology will be illegally exported.

These provisions address the problem that existing law inhibits the conduct of export control-related investigations by constraining agents' intervention. But increasing search and seizure powers too far is likely to meet with resistance. One response to complaints that Operation Exodus has seriously interfered with routine shipment of goods, for instance, is a proposal by Mr. Bonker that random inspections in the enforcement of export controls be prohibited, and searches limited to cases where specific information of possible violations has been received.

Other suggestions may be found in the administration's bill. It contains a criminal forfeiture provision authorizing the Government to seize any proceeds of a violation of national security controls. This provision aims to reduce the monetary incentives to violate export controls. The administration's bill would also authorize the President to prohibit foreign violators of U.S. national security controls from

exporting to the United States. The administration views this provision as a forceful means of penalizing foreign companies that violate U.S. national security controls. However, it has already met with strong European opposition.

Resources

A final issue on which there appears to be substantial agreement is that additional resources should be devoted to enforcement. But while the level of effort funded in DOC has been obviously inadequate, it would be a mistake to believe that money can solve export control enforcement problems, or that there is a necessary correlation between the budget and the results of an enforcement program. There are three reasons for this situation. First, so long as various kinds of intelligence and investigation activities are dispersed within the Government, interagency cooperation is vital. Larger budgets will not necessarily solve problems of duplication or turf issues. Second, an important part of the enforcement effort depends for its success on the cooperation of foreign officials. The degree of this cooperation may partly reflect the scope of U.S. efforts, but it is also directly related to the larger diplomatic issues discussed in chapter V.

Finally and most importantly, no enforcement effort, no matter how massive, can hope to detect and prosecute all, or even most, illegal shipments. An enforcement program must be visible and successful enough to pose a serious deterrent, but it should also recognize some point beyond which the cost/benefit ratio produces diminishing returns. The very nature of sensitive technology -e.g., the size of microprocessors; the portability of data; the volume and variety of computer software—makes much of it relatively easy to carry undetected and/or extremely intractable to well-defined control guidelines.

A FINAL NOTE

Few of the policy options discussed in this chapter are new. Similarly, the basic policy orientations have long constituted the central themes of the export control debate, and it is highly unlikely that September 1983 will see the passage of a radically different export administration law. However, this hardly means that the present process is trivial or irrelevant. Congress presently faces both a great opportunity and a great danger: it can craft legislation which expresses a coherent stance on trade with the U.S.S.R.—be it more restrictive or liberalizing-and contains provisions designed to ensure as far as possible that the execution of the law is in accordance with that stance; or it can compromise in ways that fragment its message and vitiate efforts to pursue consistent policies. As this report has already noted, the stakes are now higher for all parties interested in U.S.-Soviet trade.