

## **CHAPTER II**

# **The Export Administration Act of 1979**

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# The Export Administration Act of 1979

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A detailed account of the history of U.S. export control from 1949 to 1979 can be found in chapter VII of *Technology and East-West Trade*. This account reveals two related themes. The first is the continued tension between the forces urging export control versus export promotion. The second is the clear change in the relative weight accorded these factors by Congress, a change manifested by the passage of the first Export Administration Act in 1969. The 1969 law reflected con-

gressional adoption of the view that East-West trade restraints should be loosened. Nevertheless, the perpetuation of the two divergent positions has continued to shape U.S. export control policy, and both can find expression in the Export Administration Act of 1979 (EAA). This chapter reviews the major provisions of the current legislation and identifies the controversies which have grown up around its interpretation.

## FORERUNNERS TO THE 1979 EXPORT ADMINISTRATION ACT

Before 1949, U.S. efforts to control exports on the grounds of national security had been largely confined to times of war or national emergency. The Export Control Act of 1949, passed in the early stages of the Cold War, marked the inception of two important policies: the imposition of export controls on a regular and continuing basis during peacetime; and the legislative expression of the thesis that nonmilitary trade with potential adversaries could adversely affect U.S. security. Under this policy, the economic advantages to the United States of unfettered foreign trade were clearly subordinated to the perceived security dangers of commercial intercourse with the Communist world; and the broad language of the act allowed the control of exports of primarily economic (as opposed to military) significance to the purchaser.

In 1969, a long process of pressure for the abandonment of this policy, much of it from the business community and much of it reflecting the goals of detente, reached its climax with the passage of an Export Administration Act. One expression of the new spirit of the

law was the change in its title. This act implicitly treated the ability to export as a right to be infringed only under explicit limited circumstances, and all language implying that trade restrictions might be used to promote economic warfare was deleted. The act now attempted to reconcile an encouragement of trade with the East with the maintenance of U.S. military security. Thus, the dual but often contrary tendencies in export control policy remained; the weight and the presumption, however, had shifted in the spirit of detente to the side of liberalizing exports to the East.

Major amendments to the 1969 act were enacted three times—in 1972, 1974, and 1977. Each time, the debate between the demands for increased ease of export and increased control in the name of national security was revived. Each time some provisions to strengthen export controls were included, but the prevailing opinion weighed largely in favor of modest facilitation of East-West trade. The debate which preceded the passage of the 1979 EAA, however, reflected both disenchantment with detente and an intensified concern with

the security implications of trade with the Communist world, and a major effort on the part of the business community to remove constraints on nonmilitary trade. The resulting legislation embodies both concerns, although its findings and declaration of policy clearly lean in the direction of easing the difficulties attendant on conducting East-West trade.

The law assumes that the freedom to export is a basic and important right which should be abridged only under specific circumstances and then only in a clearly delineated manner. At the same time, EAA grants the Executive sweeping powers to define these circumstances. The Executive power is offset primarily by nonbinding provisions designed to deter its use. Herein lies an inherent ambiguity

in the law and the root of much of the controversy surrounding its administration. When an emergency situation produces a national consensus on the propriety and utility of instituting export controls, differences between the basic intentions of the EAA framers and the manner of its implementation do not arise. However, under less drastic circumstances where the President and Congress may disagree as to whether export controls are appropriate or effective, the provisions of EAA tend to magnify any basic policy differences between the law's spirit and its execution. In sum, because EAA assumes Executive self-restraint, it is most vulnerable to criticism when that restraint is foregone. This point can be further illuminated through a brief survey of the major provisions of the act.

## **PROVISIONS OF THE 1979 EXPORT ADMINISTRATION ACT**

The major provisions of the 1979 EAA can be summarized as follows:

- The findings and declaration of policy of the act both stress the importance of exports to the U.S. economy and thereby to the national security and well-being of the country. It is deemed the policy of the United States to minimize uncertainty in export controls; to apply such controls only after full consideration of their economic impacts; and only to the extent necessary to protect national security, further significant foreign policy goals, or protect the domestic economy in cases of short supply.
- EAA separates the criteria and procedures of controls enacted for national security from those instituted for foreign policy reasons. The former are to be applied only to the extent necessary to restrict exports which make a significant contribution to the military potential of another country which would prove detrimental to the national security of the United States. The latter are to be used only where necessary to significantly further the foreign policy of the United States or to fulfill its international obligations.
- A number of provisions are designed to make the export licensing process more accountable to the public, quicker, more efficient, and less inclusive. Among these are the following:
  - The establishment of Qualified General Licenses which authorize multiple exports to the Soviet Union, Eastern Europe, and China.
  - Language strengthening the requirements that the business community be fully apprised of changes in export control policy; that their views on this policy be solicited regularly by the Secretary of Commerce; and that license applicants be informed of the progress of their application and the reasons for denial.
  - The establishment of action deadlines for referral of applications in the event of interagency review.
  - The inclusion of an indexing provision which would allow for the periodic de-

control of goods and technologies which can be considered "obsolete" relative to annual increases in performance levels of new technologies.

- The detailed specification of procedures for establishing an ongoing capability within the Department of Commerce (DOC) to collect and disseminate information on foreign availability of goods and technologies comparable to those sold by U.S. firms.
- The stipulation that validated licenses may not be required in cases where foreign availability has been demonstrated, unless this provision is specifically waived by the President. In the latter case, the Secretary of Commerce must publish the grounds and estimated economic impact of the waiver.
- The President is given total discretion in deciding to apply foreign policy controls, but the act clearly intends to inhibit this power by providing detailed guidance on the factors to be considered and steps taken in his decision. Although no congressional veto over foreign policy controls other than those on agricultural commodities was included in the act, it provides that affected industries be consulted and Congress be notified before the imposition of restrictions; and it enjoins the President to consider alternative actions and the following criteria before instituting the controls:
  - the probability that the controls will achieve the intended purpose;
  - the compatibility of the controls with other U.S. foreign policy objectives;
  - the reaction of other countries;
  - the likely impact on the U.S. economy;
  - the ability of the United States to enforce the controls; and
  - the foreign policy consequences of not imposing the controls.
- Authorization, but not funding, is provided for U.S. participation in CoCom, and the President is enjoined to enter into

negotiations with other CoCom governments with a view to reaching agreement on publication of the CoCom export control list; establishment of periodic high-level meetings; reduction of the CoCom list to a mutually acceptable and enforceable level; and enhancement of foreign enforcement activities.

- The role and powers of the Secretary of Defense in export licensing are delineated, and he is charged with primary responsibility for developing a Militarily Critical Technologies List (MCTL), which will be incorporated into the Commodity Control List. The Secretary of Defense is also given the right to review all license applications to countries for which exports are controlled for national security purposes.

On balance, these provisions tend to ease rather than restrict the ability of U.S. firms to export to the Communist world. But the overall effect of the law has not been export promotion. Indeed, the period since the passage of EAA has seen a marked contraction of U.S. trade with the Communist world (see ch. V). This is in large part due to the application of foreign policy controls after the Soviet invasion of Afghanistan and the declaration of martial law in Poland, but it also reflects a widening of the criteria for the exercise of national security controls.

Soviet actions have been strongly condemned in the United States, but there has been disagreement over the extent to which export control constituted a proper or effective arena for the American response. The fact that such measures are perceived by many in business and in Congress as being at odds with the intent of Congress in enacting EAA is a reflection of the ambiguity embodied in the legislation. It should hardly be surprising that such legislation is interpreted differently by different parties, or that those empowered to execute the law will do so in a manner consistent with their own policies.

## **AMBIGUITY IN THE 1979 EXPORT ADMINISTRATION ACT**

The controversies which have arisen on the administration of the 1979 EAA stem from several different sources. First, the language of export control has always included broad terms which lend themselves to varying interpretations. The discussion in chapter VI over the meaning of the term "military significance" reflects this problem.

Second, the Export Administration Act involves concepts, such as extraterritoriality, which have rarely been fully invoked. This provision has traditionally been used to control reexport of U.S. technology. The expansion of this power to cover all goods and equipment produced by subsidiaries and licensees of U.S. firms has engendered surprise and alarm in the U.S. and international business communities, anger in allied governments, and extensive legal debate. (See chs. IV and V.)

Third, the law provided guidelines for Presidential actions without imposing real controls on those actions. Congress has, in fact, relied on Executive self-restraint to fulfill its intent. The result has been the administration's paying only lip service to legislative provisions in cases where these might inhibit desired policy actions. Thus, in the case of the West Siberian gas pipeline equipment embargo, the administration has been accused of only perfunctory compliance with the stipulations regarding the imposition of foreign policy controls, including failure to seriously consider circumstances likely to affect the outcome of the controls, and failure to adequately notify Congress of the intent to impose the embargo. (See chs. III, IV, and V for further discussion of this case.)

Fourth, EAA does not and was not intended to frame a totally inclusive and comprehensive

East-West trade policy. There are issues—export credit, for example—central to such a policy which are outside the traditional jurisdiction of EAA. (See the appendix to this document.) Other issues, i.e., control of scientific and technical publications and U.S. policy regarding academic and scientific exchanges, involve delicate constitutional and domestic policy issues and are extremely intractable to clarification in the context of an export control law. (See ch. VI.)

Fifth, important areas of U.S. export control policy involve multilateral issues, particularly the role and status of CoCom. This subject has been resistant to legislation due to the informal and consensual character of CoCom and the political sensitivity of its activities for some European nations. Issues involving consultation with, and the cooperation of, U.S. allies are areas in which Congress seems to have limited influence. (See ch. V.)

Finally, EAA authorizes activities—the establishment of ongoing foreign availability capabilities and the MCTL, for example—which are complex and controversial enterprises. There have been substantial disagreements within the Government over the form these activities should take and the way their results should be utilized. The net effect is that few concrete results have yet been seen in either area, albeit for different reasons. The MCTL is discussed at length in chapter VI and foreign availability in chapter VII. Here, it is appropriate to note that it is unlikely that either concept will form a useful part of the export administration process in the near future.

## **SUMMARY AND CONCLUSIONS**

It has been nearly 4 years since the passage of the 1979 EAA, and the intervening time has seen numerous controversies over the execu-

tion of specific provisions, and more generally, over the intent of its framers. Much of this controversy is the familiar expression of the

dichotomy of views which has characterized U.S. export control policy since its inception. But if the arguments presented and the interests involved on each side seem largely the same, there has been one change of great significance: the stakes are now higher for all parties. Worldwide recession and the state of the domestic economy have made the encouragement of exports, the maintenance of established trading relationships, and the development of new export markets of critical importance to the United States as well as to Europe and Japan. Meanwhile, evidence of the extent

and nature of the Soviet military buildup, coupled with Soviet aggression in Afghanistan and events in Poland, have intensified awareness of the importance of safeguarding U.S. national security through protecting technological leads. Ironically, it has become simultaneously more important to sell to and to withhold U.S. goods from the Communist world. It will be the difficult task of those drafting the next Export Administration Act to craft a policy which addresses both of these needs without being so dualistic as to further neither.