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Dan Haendal

Amy L. Rothstein

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The Shifting Focus of Dual Use Export Controls: An Overview of Recent Developments and a Forecast for the Future†

Recent dramatic shifts in the global political system are causing the United States and its Western allies to reevaluate their military and commercial relationships with Eastern Europe and the Soviet Union. While not all have concluded that the Cold War is over, almost everyone agrees that the dawn of a new era has begun in East-West relations. Indeed, many question the continuing relevance of such organizations as NATO and COCOM, especially since Western policy makers are viewing certain countries in Eastern Europe not as military threats, but as commercial markets waiting to be developed.

As a matter of strategy, the United States Government recognizes the importance of taking the lead in fashioning a post-Cold War world. From a commercial perspective, the United States clearly cannot sit idly by while its allies rush to develop new markets. Yet, as a principal member of the NATO alliance, the United States is well aware of the need for caution in dealing with the relatively new and untested governments of Eastern Europe. It appears to be in the interest of the United States, however, to assist in the development of the Eastern European economies. Striking a balance between the desire to encourage these fledgling democracies and the need to continue to protect Western security interests lies at the heart of the challenge facing the United States.

At the same time, the United States Government is focusing greater attention on the threat to global security posed by certain of the so-called "third world

*Deputy General Counsel, U.S. Department of Commerce.

**Associate in the international law practice group of Miller & Chevalier, Chartered, in Washington, D.C.

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nations.” In order to combat this perceived threat, the United States and its industrialized allies are renewing their efforts to limit the proliferation of certain hazardous items, such as materials that can be used to manufacture and deliver nuclear, chemical, or biological weapons. These nonproliferation concerns move to the forefront as the immediate strategic threat from the East Block eases. As the concerns of the East-West military and political struggles that were at the core of U.S. policy for the past forty years recede, North-South issues are likely to provide a substitute agenda. Policy makers will continue to use export controls as a tool for responding to these shifting concerns in the global environment.

I. Export Controls Generally

Throughout the federal government, executive branch agencies apply export controls to a variety of goods and technology, from cameras to cannons, and for a variety of reasons. For instance, the State Department—through its newly constituted Office of Defense Trade Controls—regulates the export of defense articles and services, such as tanks, munitions, and rockets, pursuant to the Arms Export Control Act.¹ The office was formerly known as the Office of Munitions Control. The Treasury Department—through its Office of Foreign Assets Control—maintains embargoes against North Korea, Cuba, Vietnam, and Cambodia under the Trading with the Enemy Act.² In addition, the Treasury Department controls certain exports to, and financial transactions with, Iran, Libya, and, until recently, Nicaragua and Panama under the International Emergency Economic Powers Act.³ In response to Iraq’s invasion of Kuwait, the President added Iraq to this list of outlaw countries. The Nuclear Regulatory Commission also controls certain exports, including nuclear equipment and materials, under the Atomic Energy Act.⁴

The Department of Commerce (Commerce), acting through the Bureau of Export Administration, administers and enforces the export control program that most view as especially relevant to commercial exporters. This stems from Commerce’s control over the export of so-called “dual use” items—those that have both military and commercial applications. Most commercial technology falls within this “dual use” category. Because the emerging democracies in Eastern Europe will need this dual use technology to rebuild their decimated economies, Commerce’s export control program has become the focus of intensive review at all levels of the United States Government.

Commerce derives its authority to administer export controls from a number of statutes. The Export Administration Act of 1979, as amended (Export Ad-

1. 22 U.S.C. §§ 2751–2796 (1988); 22 C.F.R. 120–130 (1990).

2. 50 U.S.C. app. §§ 1–44 (1982 & Supp. V 1987); 31 C.F.R. 500, 505, 515, 520 (1989).

3. 50 U.S.C. §§ 1701–1705 (1982 & Supp. V 1987); 31 C.F.R. 535, 540, 550, 565 (1989).

4. 42 U.S.C. §§ 2011–2296 (1988); 10 C.F.R. 110 (1990).

ministration Act or EAA),⁵ is the most important of these from the perspective of industry as a whole. Not only does the EAA authorize the vast majority of dual use export controls, it also provides the organizational structure for the control system.

The EAA authorizes, and in some cases requires, the imposition of export controls for three reasons: to protect national security, to further foreign policy goals, and to protect the domestic economy from a drain of goods that are in short supply. Because so-called "short supply" controls are rarely used today, this article focuses on export controls maintained for national security or foreign policy reasons.

II. The Changing Role of Export Controls

A. NATIONAL SECURITY CONTROLS

1. *Generally*

The EAA authorizes the President to impose national security export controls "to restrict the export of goods and technology which would make a significant contribution to the military potential of any other . . . countries which would prove detrimental to the national security of the United States."⁶ The President has delegated this authority, along with most of the authorities under the EAA, to the Secretary of Commerce.⁷ Commerce imposes national security export controls on goods and technology that can be used to improve the military capabilities of certain, primarily Communist, countries.

For more than forty years, Commerce has maintained national security export controls in cooperation with an organization known as COCOM—the Coordinating Committee for Multilateral Export Controls. COCOM is a nontreaty organization comprising the NATO countries (except Iceland), plus Japan and, most recently, Australia. Its purpose is to restrict East Bloc access to sensitive Western technologies.

The United States also has bilateral export control agreements with several friendly third countries that do not wish to or cannot join COCOM for political or other reasons. Under section 5(k) of the Export Administration Act, the State Department negotiates with non-COCOM nations concerning the control of strategic items.⁸ In exchange for their cooperation in restricting exports, the Commerce Department grants these nations certain preferential licensing benefits, known as "5(k) benefits." Currently, Switzerland, Finland, Sweden, Singapore, and Austria enjoy 5(k) benefits.

5. 50 U.S.C. app. §§ 2401–2419 (1982 & Supp. V 1987); 15 C.F.R. 768–799 (1990).

6. 50 U.S.C. app. § 2402(2)(A) (1982 & Supp. V 1987).

7. Exec. Order No. 12,214, 3 C.F.R. 256 (1981), *reprinted in* 50 U.S.C. app. § 2403 note (1982 & Supp. V 1987).

8. 50 U.S.C. app. § 2404(k) (1982 & Supp. V 1987).

For years, the United States and its COCOM allies engaged in an effort to streamline the national security control system. As used in this context, the term "streamlining" means the process of critically evaluating the effectiveness and enforceability of existing export controls in light of the changing global economic, political, and technological climate. Streamlining is intended to eliminate gradually those controls that are no longer deemed necessary or effective, while protecting national security interests. However, this moderate, long-term approach was overtaken by the events in Eastern Europe and the Soviet Union.

The political changes in Eastern Europe and the Soviet Union required a more dramatic response from the West. Especially in light of the impending unification of East and West Germany, the COCOM system was viewed as increasingly unrealistic and obsolete. There were even fears that COCOM would dissolve.

Our COCOM allies were anxious to liberalize exports to the East Bloc and were growing increasingly frustrated by what they perceived to be the slow pace advocated by the United States. For its part, the United States would not agree to liberalize controls until it could determine the degree to which the strategic threat had decreased in fact. At the request of the President, the Joint Chiefs of Staff (JCS) undertook an expedited study of dual use export controls. The study was designed to determine the extent to which controls could be eliminated without compromising national security interests in light of the evolving strategic threat posed by Eastern Europe and the Soviet Union.

On May 2, 1990, the White House issued a press statement announcing the conclusion of the JCS study. The statement provided, in part:

After reviewing the changed nature of this [strategic] threat, and in particular the welcome and dramatic changes in Eastern Europe, the President concluded that a complete overhaul of the control lists is warranted. . . . In evaluating the current export control lists, the President also determined that a significant portion of the controls could be revised immediately, and will so recommend to the COCOM allies.⁹

Based on the results of the JCS study, the United States recently proposed a dramatic liberalization of COCOM controls designed to preserve the COCOM system while making it more flexible and realistic. The U.S. proposal was welcomed at the June 6–7, 1990, COCOM High Level Meeting (HLM) in Paris, where several COCOM delegations admitted to being impressed by the proposal's scope and boldness. Various delegations dropped their opposition to certain key elements in favor of adopting the proposal as a whole.

At the conclusion of the HLM, COCOM agreed to a liberalization program based on the following elements:

- (1) replacing the current list of controlled items with a "core" list;
- (2) deleting one-third of the industrial list entries;
- (3) decontrolling to the so-called "China Green Line";
- (4) decontrolling in certain priority sectors;

9. Statement by White House Press Secretary Marlon Fitzwater (May 2, 1990).

- (5) special procedures for countries representing a lesser strategic threat;
- (6) special procedures for exports to East Germany; and
- (7) a renewed commitment to the common standard level of effective protection.

2. *Core List*

The COCOM list of multilaterally controlled dual use items is known as the "Industrial List." COCOM agreed to replace this Industrial List with a drastically reduced and restructured "core list" of key technologies and goods. The core list will be drawn from scratch and is unlikely to bear much resemblance to the current Industrial List. The Commerce Department's Control List, which is based to a significant extent on the Industrial List, is similarly undergoing massive revision. The initial target date for completion of core list negotiations was December 1990.

3. *Interim Measures*

To facilitate transition to the core list, COCOM agreed to revise the existing Industrial List. The revisions included eliminating thirty entries from the Industrial List by July 1, 1990, with eventual elimination of an additional eight, thereby decontrolling a total of one-third of the current list. Also, COCOM agreed to decontrol, by July 1, 1990, seven Industrial List entries to the so-called "China Green Line" level—that is, the level at which member nations can license exports to the People's Republic of China at national discretion, without prior ad hoc approval by COCOM.¹⁰ Additional entries will be decontrolled to the China Green Line level in the near future.

COCOM agreed to significant liberalizations in the priority sectors of computers, telecommunications, and machine tools. COCOM also established special procedures for exports of higher level telecommunications equipment and technology to Poland, Hungary, and Czechoslovakia, in exchange for their implementation of certain safeguards to protect the imported items against diversion.¹¹ In addition, COCOM adhered to the principle of differentiation by agreeing to grant special wide-ranging licensing benefits to Eastern European countries that represent a lesser strategic threat and that adopt appropriate safeguard systems. As yet, COCOM has not determined any country to qualify for this special treatment.

The July 1, 1990, economic union of West Germany and East Germany posed special challenges. On the one hand, the elimination of a customs border between the two Germanys would make it extremely difficult to control effectively exports between them. On the other hand, East Germany could not be considered to be a free and democratic society until after unification had been completed. In light of these considerations, COCOM agreed to a special, interim arrangement

10. Implemented by Commerce through revisions to the Commodity Control List. 55 Fed. Reg. 26,655 (1990) (to be codified at 15 C.F.R. 776, 778, 779, 799).

11. *Id.*

to take effect on July 1 and to remain in effect until unification had been completed, at which time the single Germany would be a member of COCOM. This interim arrangement essentially decontrolled the vast majority of exports from COCOM countries to East Germany, on the condition that exporters obtain an end-use assurance from the East German Government for each export and file such assurances with their respective national authorities.

Finally, COCOM nations at the HLM renewed their commitment to implement the common standard level of effective protection. The common standard, as it is known, represents the agreed minimum elements that must be present for an effective control system. COCOM members recognize that the strategic importance of each item subject to control will increase as the number and scope of controls decrease. The United States Government fully expects a new core list also to facilitate implementation of the common standard by all member nations. For these reasons, COCOM agreed to an expedited schedule for implementation of the common standard.

It is important to emphasize that the United States and its Western allies have not given away the store, technologically speaking. On the contrary, high technology continues to be subject to export controls, even after the HLM. Any liberalization of exports to our former adversaries hinges on the concept of differentiation, both between the Soviet Union and Eastern Europe and among the individual Eastern European countries. Only those countries that have demonstrated an actual ability and a political will to protect high tech imports will receive the benefits of liberalization. The United States and its COCOM allies recognize the strategic threat still posed by certain countries, including the Soviet Union, and continue to control Western technology accordingly.

B. FOREIGN POLICY CONTROLS

The EAA authorizes the President to use foreign policy controls to restrict the export of goods and technology "to further significantly the foreign policy of the United States or to fulfill its declared international obligations."¹² Commerce maintains such foreign policy controls relating to broad issues such as human rights, missile technology proliferation, antiterrorism, regional stability, and chemical warfare. In addition, Commerce maintains controls against specific countries, such as Libya, Cambodia, and South Africa.

Unlike national security controls, foreign policy controls are not intended merely to limit other countries' access to strategic items. Instead, foreign policy controls have a largely symbolic value: they promote policies that the United States approves or they distance the United States from objectionable actions of foreign governments. Accordingly, foreign policy controls can be effective even when maintained on a unilateral basis.

12. 50 U.S.C. app. § 2402(2)(B) (1982 & Supp. V 1987).

Even in the foreign policy area, however, Commerce recognizes the value of international cooperation. For this reason, Commerce maintains foreign policy controls on a multilateral basis, to the maximum extent possible. For instance, since 1987 Commerce has maintained so-called "missile tech" controls in cooperation with seven other leading industrial nations under the Missile Technology Control Regime (MTCR). Missile tech controls apply to goods and technology that can be used to develop missiles capable of delivering nuclear weapons. In July 1990, members of the MTCR met in Canada, where they discussed the possibility of involving the Soviet Union and East European nations in administering missile tech controls. Previously, these nations had been viewed as part of the problem, not as part of the solution. This willingness to consider involving the Soviet Union in what historically has been a Western alliance indicates that the shift from East-West to North-South has begun.

Another example of multilateral cooperation is the recent expansion of chemical weapons controls. In December 1989, Commerce imposed additional foreign policy controls on the export of certain chemical weapons precursors, in cooperation with nineteen other industrialized nations participating in the so-called "Australia Group." In June 1990, members of the Australia Group met in Paris to discuss issues related to strengthening the controls on key chemical weapons precursors and the possibility of extending coverage to include biological weapons.

C. OTHER LEGAL AUTHORITIES

In addition to the controls authorized by the EAA, Commerce maintains certain export controls under other statutes. Most significant among these are the Comprehensive Anti-Apartheid Act of 1986 (CAAA)¹³ and the Nuclear Non-Proliferation Act of 1978.¹⁴ On its enactment, the CAAA codified then existing Commerce foreign policy controls on exports of computer- and nuclear-related items to South Africa. The CAAA also expanded some existing controls on computers and related equipment and imposed an embargo on exports of crude oil and refined petroleum products to that country. This is in addition to the virtual embargo on exports to the South African military and police that Commerce maintains under the EAA for foreign policy reasons.

Under the Nuclear Non-Proliferation Act, Commerce controls exports of items that, if used for purposes other than those for which they are intended, could be of significance for nuclear explosive purposes. Commerce also controls the export of any item that the exporter knows or has reason to believe will be used for a so-called "sensitive nuclear use," such as designing nuclear explosive devices or operating facilities for the production of heavy water.

13. 22 U.S.C. §§ 5001-5116 (1988).

14. 22 U.S.C. §§ 3201-3282 (1988).

III. The Evolving Legal Framework

The 1988 Trade Act¹⁵ is the most recently enacted legislative revision to the EAA. By requiring Commerce to take a number of decontrol actions, the Trade Act reflects Congress's growing awareness of the role of streamlining in maintaining the effectiveness of U.S. export controls and in improving the competitive position of U.S. industry. Commerce's decontrols under the Trade Act have affected exports valued at billions of dollars per year.

Congress continues to focus on the need to streamline national security export controls. On June 6, 1990, the House passed a bill¹⁶ sponsored by Representative Gejdenson that would extend the EAA for one year, while requiring a myriad of decontrol actions, including the automatic expiration of the control list. The provisions of the House bill have been substantially eclipsed by the results of the COCOM HLM.

In contrast, the Senate bill¹⁷ was not reported out of committee until after the conclusion of the June HLM, and many of its provisions are based on the agreements reached at the HLM. In fact, an early version of the bill expressly required the Executive Branch to comply with all HLM agreements. However, the most recent version does not compel implementation; instead, it expresses support for the agreements, which are incorporated by reference, in a variety of ways. The bill, which would have extended the EAA for two years, was passed by the Senate on September 13, 1990. On September 30, 1990, the EAA expired before Congress could agree on reauthorization legislation. The President invoked his authority under the International Emergency Economic Powers Act to maintain export controls in the interim.¹⁸

The House and Senate conferees met on several occasions before they were able to reach an agreement in the waning hours of the 101st Congress on a comprehensive bill to amend and extend the EAA. The Omnibus Export Amendments Act of 1990 was finally approved by both chambers on October 27, and was presented to the President for his approval on November 6.¹⁹ As drafted, the bill substantially revised the export control system administered under the EAA. For example, it required a "license free zone" for exports to and from COCOM countries, established new procedures for handling exports of supercomputers, compelled implementation of agreements reached at the COCOM High Level Meeting, and provided for limited judicial review of final agency actions taken under the EAA. In addition, the bill clarified the distinction between, and scope

15. Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

16. H.R. 4653, 101st Cong., 2d Sess., 136 CONG. REC. 3,339 (1990).

17. S. 2927, 101st Cong., 2d Sess., 136 CONG. REC. 13,004 (1990).

18. 50 U.S.C. §§ 1701 *et seq.* (1988).

19. H.R. 4653, 101st Cong., 2d Sess. (1990).

of, the State Department's Munitions List and Commerce's Control List. The bill also expanded the Defense Department's role in licensing issues and provided important tools to assist in enforcing the EAA.

In addition to the export control provisions, the bill contained several controversial provisions that have raised substantial veto concerns. For example, the bill contained a provision that requires foreign subsidiaries of U.S. companies to comply with the U.S. embargo on trade with Cuba. This provision drew sharp criticism from foreign governments because of its extraterritorial effect. In fact, Canada adopted a blocking statute to prevent Canadian subsidiaries from complying with the provision.

In addition, the Administration objected to the bill's requirement that certain sanctions be imposed for a minimum one-year period on both countries and individuals that use or trade in chemical or biological weapons in violation of international law. The bill also required the imposition of sanctions for violations of missile technology controls, and imposed sanctions on Iraq, mainly in response to its invasion of Kuwait.

IV. Conclusion

The changing global political landscape calls for a reassessment of U.S. export control policy. Recent events in Eastern Europe and the Soviet Union require a reappraisal of the strategic threat posed by those countries, while the increasing proliferation of nuclear, chemical, and biological weapons in third world countries demands an appropriate response. In contrast to previous years, 1991 will usher in an era of West-East decontrol, with the focus of export controls evolving to reflect more accurately global concerns.

The United States is coordinating its activities in these areas with those of its allies. As a result of the COCOM HLM, for example, the United States already had decreased significantly the number and the scope of national security controls, thereby facilitating trade with the East Bloc and, to a lesser extent, the Soviet Union. But much work remains. The Administration intends to introduce a reduced and restructured control list in 1991, with further decontrols envisioned for those emerging democracies that demonstrate an ability to safeguard high technology items. National security controls will continue to be eliminated as the strategic threat recedes.

In the foreign policy area, the United States is increasing its efforts to coordinate control measures with other countries, as demonstrated by the recent activities of the Missile Technology Control Regime and the Australia Group. The Commerce Department will continue its two-pronged approach to foreign policy controls: general controls applicable to the majority of countries, with specific controls targeted against individual countries. These specific controls are likely to proliferate in response to the increased activities of the Irans and Iraqs of the world.

Because of the importance of international cooperation in the export control area, the agendas of existing strategic trade organizations are likely to shift to address North-South concerns. COCOM may set the example by reorienting itself along North-South lines. Indeed, a compelling case may be made for certain actions that were unthinkable until very recently, such as the inclusion of Soviet observers in COCOM discussions of nonproliferation issues.

Finally, there will be increased congressional involvement in the export control area. As demonstrated by the Omnibus Export Amendments Act, Congress intends to require decreased West-East controls and enhanced North-South controls. This legislation will continue to be amended in response to the shifting global dynamic. For its part, Commerce has been working within the Executive Branch to implement the appropriate changes under existing legal authorities. Until the situation stabilizes, the United States Government anticipates an extraordinary amount of activity involving export controls.