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STAUNCHING THE TECHNOLOGY FLOW TO MOSCOW

INTRODUCTION

In recent years, Soviet bloc countries have been obtaining significant quantities of Western technology that strengthen Soviet military capabilities. An effective Export Administration Act (EEA) is an essential element of the remedy to this problem. At the heart of the current congressional debate over amendments to the Act are two issues: (1) whether the U.S. government will have the authority to act promptly and effectively to prevent the transfer of militarily relevant technology to the Soviet bloc; and (2) whether the President will be able to impose economic sanctions in support of the conduct of foreign policy.¹

Ideally, the free flow of goods and technology should not be restricted by the state. However, a hostile Soviet Union and its allies pose a threat to the free world. The recent downing of a Korean Airlines passenger jet highlights both the nature of the Soviet challenge as well as the need for a President to have nuanced tools at his command for responding to such incidents. Therefore, the United States must consider the national security and foreign policy impact of its international economic transactions. The Soviet Union consistently has sought to obtain militarily relevant Western technology by every means possible. Its success has contributed to shifting the military balance away from the West. As a result of mistaken licensing, weak enforcement, and illegal Soviet bloc activities, the West has suffered a virtual hemorrhage of technology in the past decade.²

¹ The Senate will consider S. 979, and the House will debate H.R. 3231.

² For background on technology transfer to the Soviet Union, see: CIA, Soviet Acquisition of Western Technology (Washington, D.C.: Government Printing Office, 1982); U.S. Congress, Senate, Permanent Subcommittee

To prevent this from continuing, national security export controls should be strengthened: (1) an Office of Strategic Trade should be established; (2) enforcement of the export control laws should be turned over to the Customs Service, which has the needed expertise; (3) licensing laws must be toughened; (4) technology diversion from other Western nations must be reduced via tighter oversight of the transfer of advanced U.S. technology to Western nations; (5) U.S. authority to act against companies outside the U.S. that violate export restrictions must be maintained; (6) foreign availability of items under consideration for transfer must be judged by strict standards; (7) the President's ability to restrict imports as well as exports must be established and maintained in order to place more pressure on potential foreign violators of U.S. export controls.

Further, presidential authority to implement foreign policy export controls must be maintained. Such controls should not be imposed frivolously, but, properly implemented, they would be effective instruments of U.S. foreign policy.

BACKGROUND

Prior to World War II, U.S. export controls were instituted on an ad hoc basis against specified nations. As the Soviet threat emerged after World War II, the U.S. took multilateral and unilateral steps to control exports for security reasons: multilaterally, the U.S. in 1949 joined with Western European nations to coordinate export controls through the Coordinating Committee (COCOM);³ unilaterally, the Export Control Act of 1949 gave the President substantial powers to restrict or prohibit trade with Communist bloc nations.

During the 1970s, influenced by detente, the statutes and their administration were relaxed to encourage greater trade with the Soviet bloc. Current export policy, with respect to foreign policy and security aspects, is governed by the Export Administration Act (EAA) of 1979,⁴ which provides the following:

on Investigations of the Governmental Affairs Committee, Transfer of United States High Technology to the Soviet Union and Soviet Bloc Nations, 97th Cong., 2d. sess., November 15, 1982; U.S. Congress, Office of Technology Assessment, Technology and East-West Trade (Washington, D.C.: Government Printing Office, 1979) and Update, May 1983; Paige Bryan et al., "Capitalists and Commissars," Policy Review, Fall 1982, pp. 19-34; Miles Costick, "Strategic Trade, Economic Sanctions and the Security of the Free World," in Geoffrey Stewart-Smith, ed., Towards a Grand Strategy for Global Freedom (London: Foreign Affairs Research Institute, 1981).

³ COCOM now consists of the NATO nations (except Iceland and Spain) and Japan.

⁴ See PL 96-72; 93 Stat. 603.

- The President is delegated authority to control U.S. exports.

- Two types of controls--national security and foreign policy--are established.⁵

- Under national security controls, the President is authorized to restrict the export of "dual-use" goods and technology, i.e. non-military items which would make a significant contribution to the military potential of any country whose strengthening would prove detrimental to the security of the U.S.

- Under foreign policy controls, the President can restrict exports where necessary to further significantly the foreign policy of the U.S. or to fulfill its declared international obligations.

- Under both types of controls, extraterritorial jurisdiction can be asserted: that is, exports by foreign subsidiaries of U.S. companies of items not made in the U.S. can be restricted, as can the reexport of items to Western nations by non-U.S. companies under contract or license to U.S. companies.

- Under both types of control, the question of whether the goods or technology involved is available from other countries is a relevant factor, but can be overridden by other considerations.

- Fulfillment of preexisting export contracts can be blocked.

NATIONAL SECURITY CONTROLS

National security controls are the most important element of the EAA.⁶ Soviet efforts, via legal and illegal means, to obtain Western technology and the beneficial use that the Soviet bloc has made of this technology are well-documented. Over the past decade, the Soviets have applied Western technology to make advances in signal processing, command and control systems, semi-conductor manufacturing, guidance technology and many other areas. While no controls can be totally leakproof, much more can be done to prevent Soviet bloc acquisition of key products and technology. Ideally, a separate agency should be created with

⁵ A third type of control--short supply--is not considered here.

⁶ Controls on strictly military items are administered by the Department of State; on items with both military and civilian use ("dual use") by the Department of Commerce.

responsibility for national security controls.⁷ Second best would be the rationalizing and strengthening of existing licensing and enforcement mechanisms, along with the creation of the post of Under Secretary of Commerce for Export Policy and an Office of International Strategic Trade Administration.⁸ A third alternative would be to establish a White House office for export control matters to coordinate all U.S. agency policies.

National security controls are now managed by the Department of Commerce. Yet there is an inherent institutional conflict between the priority duty of Commerce to promote U.S. exports and its role as licensor and enforcer of export restraints. The Department's generally poor record on national security controls is a result of this flaw.

A new independent agency, with the sole priority responsibility of dealing with export control issues, would result in deserved attention to the security aspects of export policy. It would assure a high-level advocate within the Executive Branch to present a security perspective on export issues and to provide independent information and analyses to Congress.¹⁰

STRENGTHENING ENFORCEMENT MEASURES

Creating the new agency will take time. Meanwhile, existing institutions must be strengthened. The Office of Export Administration, charged with enforcement responsibility, has not performed effectively. While Commerce has made extraordinary progress in the past two years in remedying past weaknesses, the institutional arguments for shifting criminal enforcement responsibility out of Commerce to the U.S. Treasury Department's Customs are strong. The inherent tension between Commerce's role as a promoter of exports and its role as enforcer of export controls means an almost inevitable tendency to ease up on activities which upset the business community; and Customs has the enforcement experience to do an effective job.

In addition to giving priority criminal enforcement authority to Customs, the possession of restricted goods with intent to export them should be criminalized; sentences and fines for illegal

⁷ For background on the proposed Office of Strategic Trade, see Hearing Before the Senate Banking Committee, February 3, 1983; and S. 434 introduced by Senator Jake Garn (R-Utah).

⁸ See Paige Bryan, "East/West Trade Controls," in Richard N. Holwill, ed., Agenda '83 (Washington, D.C.: The Heritage Foundation, 1983), p. 51ff.

⁹ See the testimony of Theodore L. Thau before the Senate Banking Committee, March 2, 1983, pp. 390-449.

¹⁰ It is important to note that no system of licensing, or of enforcement and controls can assure a security-minded policy; ultimately, the Administration in power will make the crucial decisions as to these matters and can override security considerations. See General Accounting Office, "Details of Certain Controversial Export Licensing Decisions Involving Soviet Bloc Countries," May 5, 1983.

diversion should be increased; court authorized surveillance should be expressly permitted when there is probable cause that a violation of technology laws is being committed; the controlled commodities list should be revised; negotiations should be opened with U.S. allies for the prosecution or extradition of those believed to have violated American export laws; and it should be a federal offense to steal, receive, buy or bribe to obtain technology with the intent to export it unlawfully.¹¹ At the same time, civil penalties should be maintained. In addition, the President should have the authority to restrict the transfer of items to U.S. diplomatic offices and other entities which are under the controls of countries to which export controls have been applied.

Another area of concern is technological research. Scholarly conferences and exchanges are tempting targets for the Soviets. The CIA has concluded that over one-third of Soviet scientific proposals made under joint exchange program auspices would have had negative security implications had they been approved. While scholarly contacts should be respected, controls, where necessary, should be applied, including: (1) classifying information; (2) restricting communication of technical data to foreign nationals; (3) requiring prepublication review by the Defense Department for key government financed research; (4) establishing voluntary agreements to limit flows of technical data; and (5) limiting access to the U.S. for certain foreign nationals. More attention also should be given to industrial research and all Western nations should expel immediately diplomats who engage in industrial spying. Finally, the Administration and Congress must consider how to assure that technology transfers via the sale of a U.S. company to a foreign corporation do not damage U.S. security.

Improved Licensing Process

In the mid-1970s, Congress authorized development of a list of Militarily Critical Technologies (MCTL) to identify items to be restricted for national security reasons.¹² Unfortunately, the list is not now fully useful. Priority should be given to completing this task, as well as to the monitoring of newly developing technologies. Monitoring new technologies (perhaps by a high-level joint government-industry committee) would reveal emerging security problems at an early stage and thus give manufacturers warning of likely export controls.

Also warranting more attention are Soviet technology needs. At little cost, the U.S. can maintain an accurate, timely list of the technologies that the Soviets are likely to seek. The Soviets

¹¹ These suggestions were made by Senator Sam Nunn (D-GA) as a result of oversight hearings by the Senate Permanent Subcommittee on Investigations of the Senate Governmental Affairs Committee.

¹² The "Bucy Report" of 1976 called for focusing on "arrays of design and manufacturing know-how," along with equipment incorporating advanced technical data, as opposed to emphasizing finished products per se.

probably will deploy over 200 weapons systems in the next decade; by analyzing the technology needed for such systems as missile guidance, computer-aided aircraft designs, and submarine and airborne navigation, the U.S. can prevent or limit Soviet breakthroughs by blocking technology transfers in these areas.

Above and beyond procedure, strict U.S. licensing is crucial, both because U.S. technology is still the most advanced and because U.S. policy sets the standard for the West. Furthermore, technology obsolete by Western standards may be state of the art to the Soviet bloc and capable of helping its military capabilities significantly. A Department of Defense veto under national security control authority of sales of oil and gas exploration equipment would be consistent with a policy of strict standards.

One suggested licensing reform should be rejected: that an item unilaterally controlled by the U.S. (i.e. not on the COCOM list or subject to bilateral control agreement) should be totally decontrolled (for the particular country group and the particular item) after one year if, after an exception to the control is made, no other license applications are received or none are disapproved. The automatic lifting of controls without regard to military considerations would be harmful to U.S. security.

Other Measures

Consideration must also be given to how the U.S. can deal with new small-sized technologies, such as microchips, as well as computer tapes, which are difficult to detect when smuggled out of the U.S. or are widely available to the public. For example, Radio Shack offers computing systems with semiconductor components that are more sophisticated than most of those used in U.S. defense systems. A policy that would automatically exempt all embedded microprocessors from controls would not be consistent with U.S. national security interests.

The business community can participate in the national security export control process. It can help determine the items to be restricted and can assist with enforcement, including counter-espionage efforts. The object of controls is not to penalize the private sector but to enhance Western security. The private sector could join the government in establishing a center for technical expertise, which would be on the cutting edge of anticipating potential military applications of emerging technologies.

RELATIONSHIP OF U.S. AND OTHER WESTERN EXPORT POLICIES

In the early postwar years, the effective implementation of U.S. export restrictions was assured by U.S. economic and technological dominance. But now the export policies of other non-Communist nations also must be considered in crafting a national security export control policy. This raises some important questions. Should the U.S. control items available from other sources? Should the U.S. control items exported to friendly

nations? Are unilateral controls on COCOM designated items necessary? Is the unilateral assertion of extraterritorial jurisdiction good policy?

Some supporters of looser national security controls make what is known as the "foreign availability" argument. If a particular product or technology is available from a foreign source, they argue, U.S. controls are useless and should not be authorized. Yet even if an item were available elsewhere, it would not necessarily make sense for the U.S. to export that item. The United States is the political and moral leader of the free world, and, choosing the circumstances wisely, occasionally must set an example in order to have effective leverage.

There are difficult questions of judgment and evaluation regarding "foreign availability." It requires subjective evaluations of such matters as comparability (is the non-U.S. item really the same, or is it only similar); quantity (can the non-U.S. producer supply quantities, or resupply, especially in a relatively short time, and is the quantity sufficient to be militarily significant); quality (is the item likely to last as long or be as efficient); price (Soviet bloc hard currency problems make this relevant); and maintenance.

In the determination of foreign availability, the burden of proof should be on those seeking an export license. The U.S. government should not have the task of proving that there is not foreign availability. The Department of Defense, moreover, should be involved in evaluating the foreign availability question. Some critics have suggested loosening the controls even further by requiring that national security controls be lifted if the President cannot persuade other nations, within six months, which item in question to stop exporting. This would undercut U.S. leverage completely, as the government in question would know that, if it held out six months, it would no longer be subject to U.S. pressure to restrict the item.

WEST-WEST CONTROLS

Many advocates of relaxed export controls suggest that restrictions on U.S. exports to non-Communist nations, or at least to fellow COCOM nations, be eliminated or substantially reduced. This should be a long-term policy goal; now it would create national security problems and would send mixed signals at a time when the U.S. is urging stricter controls by others.

The Soviets acquire much of their technology via illegal diversions from Western nations. Illegal critical technology exports totaled around \$1.6 billion in 1980, primarily because non-Communist nations in general had not taken export restrictions for national security as seriously as they should. The U.S. initiated "detente" policy of the 1970s persuaded many Western nations that they need not take the Soviet threat seriously; and exports play a substantial role in the economies of many of these nations.

There are indications, however, that COCOM nations, at the urging of the U.S., are beginning to take more seriously their role as guardians of Western militarily related technology. For example, Japan recently expelled a Soviet diplomat (for the first time since World War II) on charges of technology espionage and is now taking steps to tighten its controls. On July 22, 1983, Britain announced tighter controls on militarily useful technology. By keeping West-West controls tight, the U.S. can be more effective in assuring that the COCOM nations take their obligations seriously. Further, some discretionary authority must remain with the President to block sensitive exports that the U.S. may not want to share even with its allies; and maintenance of West-West controls allows the U.S. to monitor the flow of paper that discovers illegal diversions of U.S. technology. U.S. policy must clarify the right of the Pentagon to review critical exports so that it can play a greater role in blocking potential diversion of items to the Soviet bloc. At the same time, the Pentagon must be sensitive to Allied needs for U.S. technology for military purposes while working with U.S. allies to safeguard its utilization.

Western neutral nations which are major recipients of U.S. technology (Switzerland, Austria, Sweden, and Finland) account for much of the technology illegally diverted to the Soviet bloc. The credible threat that certain goods or technologies might not be exported to these nations is necessary to assure that this pattern will be changed. In late 1982, high U.S. officials stated that the leakage of Western technology from Austria had to stop; they subsequently held up approval of U.S. construction of a much wanted semiconductor plant in Austria. As a result, the Austrian government agreed to tighten its controls; Switzerland recently levied very heavy fines on companies that illegally diverted items to the East.

COCOM¹³

Although its effectiveness has been limited, COCOM, or some equivalent body, remains essential to preventing the hemorrhage of vital technology. COCOM's past weaknesses can be attributed to: (1) U.S. failure, especially during the 1970s, to give COCOM suitable priority; (2) the example set by the U.S. itself during the 1970s, when its own national security export control mechanism deteriorated and when it applied for the single largest number of COCOM exceptions; and (3) the absence of formal leverage to assure full implementation by participating governments of decisions made at COCOM.

COCOM needs common standards for evaluating licenses, and consideration should be given to ways of modifying COCOM's rule

¹³ For background on COCOM, see Gary Bertsch, East-West Strategic Trade, COCOM, and the Atlantic Alliance (Paris: Atlantic Institute for International Affairs, 1983).

of unanimity, so that one nation can no longer block the addition of an item to the COCOM proscribed list. At the same time, unanimity should be maintained for taking an item off the list. Multilateral policing and common sanctions against COCOM regulation violators should be considered, and the defense ministries of allied nations should be more involved in COCOM decisions. There should be no exceptions allowed for commercial reasons.

At a minimum, the COCOM structure must be strengthened. The full-time staff has consisted of only ten to fifteen persons, in a makeshift office. Ministerial-level COCOM meetings, which had not been held for two and a half decades until recently, should be held on a regular basis. Regular follow-ups to the current NATO study on technology should be instituted. An international industry-government panel, though unwieldy, might be useful to gain consensus on emerging technologies whose export should be restricted by COCOM.

It is argued by some advocates of looser national security controls that unilateral U.S. controls and procedures can be weakened because the same items will be on the COCOM lists and, thus, will be controlled by the U.S. in conformity with a COCOM mandate in any event. The trouble is that a single COCOM member can still block a consensus for restricting a particular item. Without the threat and leverage of possible unilateral U.S. sanctions, some other Western nations might ignore or, at least, not enforce the controls. While other nations are indeed gaining on the U.S. in technological areas, the U.S. still has the leadership in a variety of goods, production processes and technologies that are of great benefit to the private sectors of other countries. This could provide leverage to obtain a strong Western commitment to COCOM. Weakening U.S. standards first places the cart before the horse.

U.S. ASSERTION OF EXTRATERRITORIAL JURISDICTION

Current law gives the President authority to impose so-called extraterritorial controls when he feels that they are necessary. Such controls are of two types: restrictions on exports of non-U.S. made items by U.S. subsidiaries located abroad and controls on the reexport by non-U.S. companies located overseas of items originally exported from the U.S. Such controls should be used sparingly, but they are essential not only to effective export controls but to the effective enforcement of U.S. anti-terrorism and anti-boycott laws. Further, the absence of such controls would be an incentive for U.S. businesses to move overseas.

It is unfortunately true that assertion of extraterritorial jurisdiction occasionally may increase political tensions with U.S. allies. Certainly, allied reaction should be heavily weighed, but it cannot be a determining factor when important U.S. national

security or foreign policy interests are at issue.¹⁴ Those who argued that the pipeline sanctions would have a severe long-lasting impact upon U.S.-European relations were wrong. Recently, France's Defense Minister Charles Hernu stated that the disagreement "did not leave any scars" and "we do not even speak of it". And in their June 1983 communiqué, NATO foreign ministers agreed that "economic relations with [the Soviet bloc] must remain consistent with broad allied security concerns."

With respect to reexport controls, the EAA permits the President to require that a foreign company obtain a reexport license to export a specified U.S. origin item to another country. This means that the company has to receive approval from both its government and the U.S. This provision should remain in force until U.S. allies more consistently take into account U.S. security concerns. Extraterritoriality is a means to an end. If and when other nations have secure safeguards and tough standards regarding technology diversion, there will be no real need for such action.

A new extraterritorial issue has developed with the suggestion that authority to impose import controls be added to current presidential powers. This is a significant and potentially useful addition to U.S. national security export control laws and should be incorporated in the EAA. Specifically, the President should have the option of prohibiting imports from an overseas subsidiary of a U.S. company that violates the law by reexporting U.S. items and from a non-U.S. company outside the U.S. that violates U.S. or COCOM restrictions. Appropriate monitoring and enforcement mechanisms will also be needed. Given that the U.S. is the world's largest market, such a potential sanction should prove very effective.

FOREIGN POLICY CONTROLS

Foreign policy export controls, while not as directly related to the military security of the U.S. as national security controls, are nonetheless an important tool for the President. Export controls (aside from setting a moral example), as Undersecretary of Commerce Lionel Olmer has suggested, can deter future actions; mobilize international support against certain behavior; impose economic cost on the targeted nation; and express disapproval of another nation's policies. Further, the President must have the ability to conduct policy through a variety of means.

The Soviet pipeline sanctions, for example (1) delayed the construction of the Siberian pipeline; (2) compelled the USSR to allocate scarce resources between priority domestic projects and

¹⁴ The U.S. ambassador to the Conference on Security and Cooperation talks, Max Kampelman, has pointed out that "there is a tendency to end up sometimes with the lowest common denominator" in working with the allies and that "we must continue to maintain our standards and exercise our judgment, and express what is in our best interests without necessarily waiting for consensus." Testimony before the Commission on Security and Cooperation in Europe, December 28, 1981, p. 40; Washington Post, January 20, 1983.

the export pipeline; (3) gave the Europeans an opportunity to assess alternative energy supply options in view of the soft petroleum and gas market and possibly prevent further reliance on Soviet gas; (4) gained European cooperation for a more coordinated approach toward East-West trade. Europeans are now more cooperative on a coordinated economic policy toward the Soviet bloc because, not in spite of, the sanctions.

Under current law, the President must "consider" six criteria in deciding whether to authorize foreign policy controls. A suggestion has been made that the President must "determine" that all six tests have in fact been met. Such a requirement is inadvisable. The President would have no discretion concerning, or ability to weigh, competing factors. In any event, the distinction between foreign policy and national security is a fine one, and undue restrictions on foreign policy controls will merely encourage a President to use a national security justification.

Contract Sanctity

Some critics argue that export controls should not be applied to contracts already in effect. The abrogation of existing contracts can be unfair, but is justifiable, if important national security or foreign policy interests of the U.S. are served. Not maintaining this authority would mean that the President would be powerless to act promptly and effectively should it be discovered that a particular item's export would be damaging to Western security or would be shipped to a country which has openly aided a heinous terrorist act. Thus, an exception to contract sanctity for significant problems such as terrorism is the minimum that should be provided.

Private sector concerns can be accommodated in two ways. First, it can be stipulated that short-term contracts, below a certain volume or dollar amount, could be carried out unless the President determines that extraordinary circumstances dictate otherwise. Second, businesses, which have made expenditures with respect to a contract that cannot be carried out or is abrogated should be allowed to recover their expenses by means of tax deductions; alternatively, insurance systems could be established for such contingencies. U.S. allies could take similar action. Certainly, companies should always be put on notice that contract suspension is a possibility in certain situations.

Advocates of total contract sanctity for foreign policy controls suggest that the President could use new authority expanding the scope of the International Economic Powers Act to achieve the desired result of voiding existing contracts. While this would be better than nothing, it would expand needlessly the meaning of "emergency" beyond what it properly should be, and could raise serious legal questions.

CONCLUSION

National security export controls are an important means of protecting U.S. interests. Some argue that crucial items will reach the Soviet bloc eventually anyway and that, therefore,

tight controls are not warranted or useful. This ignores the principal benefit of controls, which is that they delay the absorption of new militarily relevant technology by the Soviet bloc. In the past, there was an eight- to ten-year technology acquisition gap from West to East, but that has already been reduced substantially, and in some instances the Soviet bloc is applying Western dual-use technology for military purposes even before the West does.¹⁵ Given the Soviet bloc conventional advantage in Europe and the increasing Western emphasis on new technologies to counterbalance the large Soviet quantitative advantage, controls are even more necessary than heretofore. Further, each Soviet bloc technological breakthrough results in huge added costs to NATO nations for countermeasures.

On the broadest plane, both national security and foreign policy controls must be seen within the context of the overall East-West struggle. The looser export controls of the detente era did not, as predicted by its formulators, result in more responsible Soviet behavior; instead, security related exports were used to build up the Soviet bloc's military capability, and other trade was used to escape the consequences of disastrous economic policies.

Given current Soviet conduct, it should be the policy of the U.S. (and a consensus of Western nations) to restrict dual-use goods or technology and to give the President the option to limit trade for foreign policy reasons, such as the Soviet invasion of Afghanistan or the imposition of martial law by the Polish government.

Economic matters are an increasingly important aspect of overall relations among nations. The export policies of the United States therefore cannot be considered solely in the context of ordinary business concerns, important though they may be.¹⁶ The context must be broadened to include U.S. security and Soviet behavior. Under present conditions, the correct policy is to err, if at all, on the side of protecting Western security and granting the President foreign policy authority and flexibility.

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¹⁵ For the latest discussion of this matter, see "Interview with Assistant Air Force Secretary Tidal McCoy," Current News, Part 2, July 15, 1983, p. 15.

¹⁶ Private sector concerns should be accommodated to the extent consistent with security and foreign policy requirements. But it is also true that export controls affect a relatively small percentage of U.S. exports (foreign policy controls affected less than one percent of the \$140 billion in U.S. manufactures exported in 1982), and are applied infrequently.