

Reducing the Burdens on Industry

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The current U.S. export control system has come under strong criticism from some U.S. industrial associations and companies. As noted in chapter 4, in the section on estimating the costs of the system, they complain that many U.S. export controls both fail to produce any meaningful results and place unfair burdens on U.S. exporters. **From the point of view of the effectiveness of export controls, it is desirable to have exporting companies see the system as fair and just, so that they will have every incentive to help make the controls effective—for example, by reporting possible illicit buying attempts.** From the point of view of U.S. competitiveness in international markets, it is desirable to place the least constraints consistent with national security on exporting firms.

Some measures for reducing the burdens of the system on exporters could be carried out without impairing the effectiveness of controls, and it can be argued that some of those measures would even enhance effectiveness. There is inevitable controversy, however, over whether some burden-reducing measures would help or hinder the effectiveness of controls in slowing proliferation.

REDUCE THE NUMBERS AND PURPOSES OF CONTROLS

Exporting industries have been the strongest advocates of severely reducing the numbers of commodities on the Commerce Control List (CCL). The companies in these industries are understandably concerned about the burdens the export control system places on them compared to companies from other countries. **There is a case to be made that limiting controls to a relatively few key technologies could enhance their effectiveness.** The

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benefits of a much smaller export control list might include the following:

- feeling less burdened by the system, exporting companies might be more enthusiastically cooperative in helping to see that the remaining controlled items do not fall into the wrong hands;
- with the United States arguing for a much smaller range of controlled items and a smaller range of reasons for controlling them, cooperation of other nations in export controls might be easier to obtain;
- the range of U.S. controls is broad enough that other countries sometimes suspect commercial motives to be behind U.S. attempts to enforce controls; that reason for resistance could be reduced with a smaller list; and
- government administrative and enforcement efforts might be released from nonproductive attempts to block exports that the buyers will still find elsewhere.

These arguments are most persuasive when applied to the items controlled by the Coordinating Committee on Multilateral Export Controls (COCOM) industrial list, which is being phased out (but which may be replaced in some form by a successor agreement). **Most U.S. nonproliferation controls coincide with those already wonowed by negotiation in the multilateral nonproliferation export control regimes. Thus, controls** over items related to weapons of mass destruction and missiles are the strongest candidates for continuation if controls overall are reduced.

I Foreign Availability

Exporters have argued that if a commodity is available from foreign sources that do not have comparable export controls, U.S. export controls

are useless, since objectionable users can obtain the items elsewhere and continue unhindered with their weapon programs. Proponents of unilateral export controls argue that this argument is tantamount to condoning selling a gun to a criminal just because he may have been able to buy it from someone else. Some exporters may feel that they should not be denied licenses to sell to such users, on the ground that someone else will anyway. Most, however, would not wish to do business with users trying to build weapons of mass destruction. It is not the loss of these relatively rare sales that exporters fear, but rather that the export licensing process itself causes them to lose *legitimate* business to foreign competitors at the same time that it fails to keep the proscribed items out of the hands of proliferants. Industry representatives cited as an example of this problem the case of high-performance computers, which have been controlled both because of conventional military-related applications and because of their potential use in nuclear weapon and missile programs. The Clinton administration announced in September, 1993, that it agreed computers no longer could or should be controlled at previous levels (see below).

In the case of such “national security” controls (as opposed to the “foreign policy” controls, which include items of proliferation concern), the Export Administration Act (EAA) requires the government to remove items from the list when investigation shows that they are readily available from foreign sources. In this context, “availability” means that it is possible to buy the item in quantities and of quality comparable to that available in the United States.

One proposal for export control reform, then, is to make timely employment of the test

¹ For example, see Frederick P. Waite and M. Roy Goldberg, “Responsible Export Controls or ‘Nets to Catch the Wind’?: The Commerce Department’s New U.S. Controls on Exports of Chemical Precursors, Equipment and Technical Data Intended to Prevent Development of Chemical and Biological Weapons,” *California Western International Law Journal*, vol. 22, 1991-1992: 193-208.

of foreign availability to all items retained on the CCL.* The Department of Commerce (DOC) would be required to conduct frequent reviews of foreign availability, without exporters having to request such reviews formally. The United States would remove unilaterally controlled items from the CCL. It might propose removal of items from multilaterally agreed export control lists if its review finds them available from outside the multilateral regime. An item might be found to be *unavailable* abroad for one of two reasons. First, the U.S. producer might be the only source of supply, and items that could substitute for the controlled item could not be purchased elsewhere. Second, all, or nearly all, of the principal suppliers might have agreed to control their exports of the item in the same way. A policy of attempting to control only items that were not available from other sources would lead to a shorter list and to fewer losses of business from U.S. companies to foreign competitors.

A policy of decontrolling goods or technology that are available from other countries without controls could lead to a vicious circle. Achieving multilateral controls has usually required leadership by one nation, most often the United States. Other countries may be more willing to control new items (or exports of currently controlled items to newly identified end-users) if the United States demonstrates its own will to do so first. Thus, proposals to limit U.S. export controls to multilaterally controlled items have included provisions for at least temporary impositions of unilateral controls to allow attempts to reach multilateral consensus.² Putting a legislative limit on the term of unilateral controls does carry a risk: other

nations whom the United States is trying to persuade to follow suit can just stall negotiations until the statutory limit on the U.S. controls runs out. Negotiating multilateral controls might then become more difficult in the absence of U.S. leadership by example.

Another objection to the strict foreign availability requirement is that in some situations the United States, for moral reasons, does not want its citizens to contribute to another nation's program to acquire weapons of mass destruction, whether that prohibition would significantly delay the weapon program or not. **Requiring effective multilateral export controls as a condition of U.S. export controls removes the option of setting a unilateral standard for U.S. nationals.**

Eliminating, or even putting a short time limit on, unilateral controls could also inhibit the use of export controls as an indirect form of sanctions aimed at controlling weapon proliferation. In the currently most publicized example, the United States is denying high-technology exports to Iran as a way of punishing Iran for its apparent pursuit of weapons of mass destruction and its support of international terrorism. Some of the denied exports—most notably jet transport aircraft that Boeing wanted to sell the Iranian airline—are nominally controlled as a sanction in punishment of Iran's support for international terrorism. But U.S. Secretary of State Warren Christopher has explained the actual intent of the U.S. controls is to make Iran

... understand that it cannot have normal commercial relations and acquire dual-use technologies on the one hand, while trying to develop weapons of mass destruction on the other.⁴

² Congressional testimony and a draft revision of the Export Administration Act by the National Association of Manufacturers stress this idea. See *Export Control Reform: A Key to U.S. Export Success; Policy Recommendations* (Washington, DC: National Association of Manufacturers, June 1993).

³Ibid.

⁴Warren Christopher, at a press conference in Luxembourg, June 9, 1993, quoted by Elaine Sciolino, "U.S. Asks Europe to Ban Arms-Linked Sales to Iran," *New York Times*, June 10, 1993, p. A-5.

Other countries have shown little inclination to go along with this policy, and the aircraft sale seems likely to go eventually to the European Airbus Industrie consortium.⁵

Even when the focus is on control of items that could be used for weapons of mass destruction, there is a further disadvantage to a strict requirement that the items be under rigorous multilateral control. There is an inherent fuzziness in the workings of export controls; as noted above, their effectiveness is subject to a wide range of variables. Even when it is not possible to achieve 100% agreement and compliance on multilateral controls among all possible suppliers, **partially effective controls may still be better than none at all, depending on the financial and technical resources of the buyer and the state of progress of his weapon program.** Therefore, although it is reasonable to have a strong presumption against unilateral controls, there may be instances where controls that do not have universal support can still be useful. Decisions for complete decontrol should be informed by the best possible analysis and intelligence data about current countries of proliferation concern.

It may be possible to persuade key suppliers to withhold particular exports in special instances. But it will be harder for the U.S. government to persuade foreign governments to go along in those instances unless it has a legal and regulatory basis for imposing the same restraints on its own exporters, as well as a consistent policy of denying exports in comparable situations. How long any given control is worth pursuing before being given up as a lost cause is hard to specify in advance. An alternative to a fixed (say, 6 month) term for all unilateral, or less than unanimously multilateral, controls would be to establish an explicit process of accountability by officials entrusted with judging just how long an effort makes sense. Such a process might, for example, include a periodic as-

essment of foreign availability for all controlled items, coupled with an explicit justification to Congress of the rationale behind continued controls for goods found to be available outside the United States in comparable quantity and quality.

I Alternatives

Besides applying a strict foreign availability criterion, another way to reduce the size of the export control list is to narrow the scope of its purposes. After the initial reforms of COCOM controls with the end of the Cold War, the DOC Office of Export Licensing went from handling over 100,000-125,000 export license applications a year to about 24,000 in 1992 and 25,000 in 1993. With the end of COCOM and the further relaxation of controls on computers and telecommunications technologies in March 1994, the DOC estimated that license applications would decline by nearly half again.⁶ Many of the remaining license applications concern items controlled for other purposes than the nonproliferation of weapons of mass destruction. Most of the remaining COCOM or “national security” items relate to possible conventional military applications. The COCOM lists were designed primarily to slow Soviet progress in a broad range of military technologies. The fact that they might also slow the development of the Soviet civilian economy was seen as, if anything, an additional national security benefit of the regime. COCOM’S original purposes became largely (though perhaps not entirely) obsolete with the breakup of the Soviet Union.

But a new set of goals for controls over dual-use technologies related to conventional weapons has not yet emerged. Late in 1993, COCOM members agreed to abolish the organization in the spring of 1994, but to replace it with a successor regime. At this writing, the goals and procedures

⁵US reexport controls on certain U.S.-supplied components of Airbus planes may prevent such sales in the short run, but substitution of European components seems likely in the longer run.

⁶Thomas L. Friedman, “U.S. Ending Curbs on High-Tech Gear to Cold War Foes,” *New York Times*, Mar. 31, 1994, p. D5.

of that successor regime remain unclear. Some have proposed that the United States initiate an explicit new nonproliferation regime aimed at limiting the spread of advanced conventional weapon technologies. Such a policy, aimed at keeping particular types of weapons out of reach of many nations, would require a different export control strategy than one directed at restraining the technical development of a single large military-industrial complex. In the absence of clear-cut opposing blocks of allies, there is bound to be less consensus about who should be the targets of such a strategy. It is therefore likely to be more difficult to sell the strategy multilaterally than it was to persuade states to participate in the original COCOM regime.

A third way to reduce the size of export control lists would be to partially substitute reporting requirements for licensing requirements as a nonproliferation tool. That is, the government could require firms to report, but not seek a license for, the export of any items from a published list of goods and technologies. This list would be compiled from technical analyses of the overall needs of programs for weapons of mass destruction, not just the most critical items. The objective would be to discover *constellations* of imports that might serve as indicators of weapon programs or clandestine acquisition networks. Although goods that might contribute to proliferation would still be shipped under this approach, national intelligence organizations or multilateral nonproliferation organizations could then utilize this information to take action against specific proliferant programs.

Such an export reporting regime would clearly be most productive if it were multilateral: proliferants seeking to conceal their buying patterns would have less opportunity to find alternative sources. The current multilateral export control regimes (Nuclear Suppliers Group [NSG], Australia Group, Missile Technology Control Regime

[MTCR], and the COCOM successor) would provide logical frameworks in which to place export reporting agreements. However, even if the United States, one of the world's larger exporters, were to establish a reporting list unilaterally, that would probably significantly assist proliferation analysts.

An export reporting list would probably be larger than the current export control lists: an item would be subject to reporting not just if it could make a significant *contribution to* a weapon program, but also if it could serve as an *indication of* a weapon program. Although the numbers of manufacturers and transactions would be larger than those now affected by export controls alone, the burdens would be lessened: fewer exports would be subject to complex regulations and licensing delays. On the other hand, as noted earlier, exporters may resist revelation of their approved licenses because of fears of revealing proprietary data of use to competitors.

ELIMINATE THE “KNOWS, IS INFORMED, OR HAS REASON TO KNOW” TESTS

The Bush administration's Enhanced Proliferation Control Initiative and certain legislation led to Export Administration Regulations requiring Individual Validated Licenses (IVLS) for almost any items that the exporter “knows “ might be used in any way in a chemical, biological, or missile weapon program.⁷ Late in 1993, the Commerce Department issued further guidance specifying that a license is required if the exporter knows or is informed that an item will be *directly employed* in such a program.⁸ *for nuclear weapon* programs, the rule is stronger: a license is required for any item that the exporter “knows *or has reason to know*” will be used in such a program. Industry representatives, at least before the December 1993 clarifications, argued that the effect of this policy is to require virtually all exporters to

⁷The only other countries with a “knowledge test” regardless of the nature of the commodity are Germany and Japan. 858 *Federal Register* 68029-6803 1 (Dec. 23, 1993).

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establish costly programs to find out whether their customers are involved in a proscribed activity. In this way, they say, companies are forced to perform intelligence services for the government. Moreover, the items exported, if available anyway from uncontrolled suppliers, will not actually affect the outcome of proliferant programs. Meanwhile, government licensing and enforcement efforts go to monitoring exports to impose unilateral controls that do not really make a difference.

Exporting firms opposing this policy have also raised three other objections. First, although honest exporters will be exposed to liability, criminal firms will simply not apply for licenses. Second, many honest exporters are, nevertheless, not aware of the sweeping nature of the “know” rule, and therefore simply do not apply for licenses. This fact puts those firms who do apply for licenses at a competitive disadvantage compared to those who do not. Third, with respect to the “is informed” part of the rule, firms have also complained that the government has informed only some exporters about bad customers, foreclosing that business for them while leaving other exporters free to trade and profit in ignorance with the same customers. Commerce Department officials have acknowledged that sometimes firms have been informed only selectively about risky customers; they say they are going to improve that situation.

| Advantages of an All-Inclusive List

In its draft revision of the EAA, the National Association of Manufacturers (NAM) proposed barring the “knows or is informed” rule through a requirement that the United States consolidate its dual-use or “commercial” export controls into a single list which fully enumerates *all* the products for which an export license is required and all the countries and specific end-users as well. This would greatly simplify the exporting companies’

job in deciding whether a license application was necessary and whether it was likely to be approved.

Such a published list might also help improve international export control coordination. Many countries lack the information and intelligence resources of the United States. **One way of sharing information about potential suppliers and proliferants would be to publish the U.S. lists of target programs. Even in the absence of formal export control coordination mechanisms, the U.S. proscription list could have useful influence.** Foreign governments and companies would be informed that the United States considered certain firms, countries, and end-users to be proliferation risks. The NAM draft bill, however, carries the coordination a step further: the United States would not maintain commodities or users on its own list unless it could gain multilateral agreement among all the significant suppliers to impose equivalent controls, and to do so as effectively as the United States. Under the requirement that all lists be multilateral, publishing the list would be not only beneficial, but essential.⁹

Elements of this proposal exist in the current regimes. The NSG, the Australia Group, and the MTCR all center on agreed, published lists of commodities. On the other hand, the regimes do not require the members to agree in advance on who all the controlled countries and end-users may be. Instead, they provide agreed criteria for deciding whether an export should go forward.

| Drawbacks of an All-Inclusive List

The United States export regulations concerning missile-related technologies do identify some end-user programs to which exports are not permitted. The United States also publishes a Table of Denial Orders listing entities barred from receiving licenses to export controlled items. Nevertheless, publishing the names of all suspect end-

⁹In addition, the NAM bill proposes that no licenses be required for trade among adherents to the multilateral agreements, while a license would always be required for export to a non-member. The Administration draft EAA proposes the *option* for license-free zones, but does not require them.

users could have drawbacks. Using information based on clandestine sources or methods of data collection risks tipping off the observed parties so that they can reduce or eliminate their vulnerabilities to those methods. Moreover, merely identifying front companies or illicit transshippers as suspect may lead them to change names and locations or go out of business and reestablish themselves in another form. Such actions could interfere with ongoing investigations, or prevent break-up or prosecution of illegitimate supply networks. Sharing suspicions about prospective buyers also risks the embarrassment, and possibly the injustice, of dissemination of information that turns out to be incorrect. These risks (of compromising intelligence and of releasing unprovable suspicions), then, must be weighed against the benefits of giving exporters better information about prospective customers. Since these risks are likely to vary with each case, it can be argued that the government should have some discretion in publishing its concerns about buyers.

Another drawback to publishing complete lists of proscribed firms and countries is that at least some are likely to consider their names to have been placed there unfairly. Firms or governments may demand either that proof (which might have been based on classified intelligence sources) be revealed or that they be removed from the list. An unsatisfactory response by the U.S. Government might lead to unnecessarily strained relations with the objecting foreign governments. Questions might also be raised domestically or internationally about why some target countries are named while others that should be are not.

On the other hand, when a license is denied, the nominal consignee or end-user implicitly receives information that he is “on the list,” whether the list is published or not. (However, if the end-user is in a country with proscribed programs, and the denial is justified on that ground, possibly the particular consignee or end-user may not infer that it is suspect and on the proscribed list.)

Transshipper and end-use data available to export control officials may change rapidly, putting a premium on flexibility and last-minute changes in licensing decisions. The NAM draft bill permits “emergency” unilateral U.S. controls, provided that the list is published. It does not, however, appear to allow for any discretion by licensing officials based on last-minute or classified information.

I Arguments for the “Know” Rule

Defenders of the “knows or has reason to know” rules argue that exporters who may be trading with a proliferant end-user find it too easy to look the other way, or to fail to report what they know, as long as their own particular export is not on a specific control list. Suppose, for example, that another nuclear proliferant chose to follow the example of Iraq and build calutrons to enrich uranium. When a military research establishment bought parts suitable for use in calutrons, that might be an indicator of a nuclear weapon program; the supplier might realize that, but not feel obligated to inform its own government. The government might feel, however, that a) the supplier should not be aiding a nuclear weapon program (whatever his competitors might do) and b) that it should report its knowledge of the existence of such a program and of the possibility that calutrons might be under construction.

Supporters of the “know” rule or (in the case of nuclear-related items) the “reason to know” rule also argue that in reality U.S. exporting firms do not have to worry that they will be subjected to extraordinary demands to probe deeply into the character of end-users of relatively innocuous products. They point out that the stronger form of the rule (“has reason to know”) has existed for some time for nuclear exports and in other legal areas. The judicial system has not generally permitted unreasonable interpretations of what constitutes a “*reason to know.”¹⁰ In practice, no firms appear to

¹⁰See Sen. John Glenn, “omnibus Nuclear Proliferation Control Act of 1993: A Section-by-Section Description,” *Congressional Record* May 27, 1993, Daily ed., S6773.

BOX 6-1: Department of Commerce "Know Your Customer" Guidance

In December 1993, the Department of Commerce provided further guidance to exporters on their responsibilities under the "know" and "reason to know" rules governing applications for exports items not on the Commerce Control List that might be going to activities involving design, development, production, stockpiling, or use of missiles or weapons of mass destruction. Here are excerpts from this "Know Your Customer" Guidance

(A.) *Decide whether there are "red flags."* Take into account any abnormal circumstances in a transaction that indicate that the export may be destined for an inappropriate end-user or destination. Commerce has developed lists of such red flags that are not all-inclusive but are intended to illustrate the types of circumstances that should cause reasonable suspicion that a transaction will violate the EAR [Export Administration Regulations].

(B.) *//there are "red/flags, "require. absent "redflags"...* there is no affirmative duty upon exporters to inquire, verify or otherwise "go behind" the customer's representations. However, when "red flags" are raised information that comes to your firm, you have a duty to check out the suspicious circumstances and inquire

(C.) *Do not se//b/red. Do not cut off the flow of information that comes to your firm in the normal course of business.* An affirmative policy of steps to avoid "bad reformation" would not insulate a company from liability. Employees need to know how to handle "red flags." Knowledge possessed by an employee of a company can be imputed to a firm so as to make it liable for a violation. This makes it important for firms to establish clear policies and effective compliance procedures to ensure that such knowledge about transactions can be evaluated by responsible senior officials.

(D.) *Reevaluate all the information after the inquiry...* If [the "redflags" can be explained or justified] you may proceed with the transaction [Otherwise]... you run the risk of having had "knowledge" that would make your action a violation of the EAR.

(E.) *Refrain from the transaction disclose the information to BXA[Bureau of Export Administration] and wait...* Industry has an important role to play in preventing exports and reexports contrary to the national security and foreign policy interests of the United States. BXA will continue to work in partnership with industry to make this front line of defense effective, while minimizing the regulatory burden on exporters.

As can be seen, the regulations as explained by Commerce do not require firms to initiate intelligence operations. At the same time, they do seem to require a thorough understanding of what "red flags" to look for and a systematic program of company compliance policies and procedures. Although companies exporting toilet paper or light bulbs would not have to be concerned about their products being directly employed in proliferation activities, other companies might have to make intelligent guesses about what combinations of their products and customer red flags should be reported to Commerce.

SOURCE 58 Federal Register 68029-68031 (Dec 23, 1993)

have been penalized for having failed to apply for a license for something that they are alleged to have known would be used in a banned project. In its December 1993 guidance to exporters, the DOC spelled out in greater detail what is expected of exporters under the "know" rules. See box 6-1 for excerpts from that guidance.

There are arguments in favor of maintaining a "know" rule. First, it gives the government a safety net by allowing the application of export controls when it learns about a pending transaction

which risks helping a weapon program, but which is not explicitly covered by the current Commerce Control List. Second, it improves the government's ability to obtain information about possible weapons proliferation programs by requiring firms who come into such information, or who encounter a "red flag" (the term in Commerce Department guidance) that should arouse suspicion, to pass the information along to the government. Third, many companies would themselves prefer not to deal with end-users developing weapons of

mass destruction, whether their products are critical to those programs or not. Procedures for the government to inform them of the character of their buyers may well save them from public embarrassment later on.

A weakened alternative to the “knows or is informed” rule would be a simpler “*is informed” rule. Today Germany has a “knows or is informed” rule applying to all its dual-use technology exports, not just those for weapons of mass destruction. In negotiation with other European Union (EU) partners, however, Germany has apparently indicated a willingness to settle for the “is informed” part of the rule for EU regulations, and for that to apply only to goods destined for programs to produce weapons of mass destruction and missiles (i.e., to hold exporters responsible for applying for licenses for unlisted goods only when the government informs them that they may be utilized in such a program).¹ If the United States were to establish this rule, then at least the government would retain the legal ability to stop risky transactions about which it had obtained intelligence, even if it could not expect companies to report the “red flags.”

Another alternative to subjecting the export of *all* commodities to the “knows or is informed” rule would be for the government to generate a separate control list of products or technologies that, although not listed as requiring export licenses, could be significantly useful in proliferant

programs. (A variation on this idea is presented above: there, an expanded list would be subject only to *reporting* requirements, not to licensing.) The exporting companies would then be responsible only for knowing or having reason to know whether recipients of those particular items were engaged in illicit activities. The firms, if in doubt, could ask the government for advisory opinions on prospective buyers. The government could also make the companies’ job easier by publishing those advisory opinions about particular end users so that other firms could be forewarned. The government could further supplement its published lists by indirectly assisting private organizations in developing lists of suspect end users from public sources.

END UNILATERAL REEXPORT CONTROLS ON EXPORTS TO COOPERATING COUNTRIES

The United States may require, as a condition of granting an export license, that the receiving party guarantee that it will not reexport the controlled item to a third country. In the past, some Europeans have resented U.S. imposition of reexport controls as attempts at extraterritorial enforcement of U.S. laws.² U.S. exporters have argued that when foreign competitors do not require such reexport assurances, they have a better chance of making sales. If the country of the first user is en-

¹See H. Müller et al., *From Black Sheep to White Angel? The New German Export Control Policy*, PRIF Reports No. 32 (Frankfurt am Main, Germany: Peace Research Institute Frankfurt, January 1994), p. 54.

²In 1990 a National Academy of Sciences study panel delegation reported after a European fact-finding mission:

Throughout Europe there was a strong adverse reaction to U.S. export control policy, in particular its extraterritorial aspects. The Europeans have major problems with U.S. controls on the reexport by any country of U.S.-origin items. Nearly all the Europeans with whom the delegation met thought their country was doing an adequate job of maintaining of a domestic export control regime. They argued, therefore, that U.S. reexport controls on COCOM items were both unnecessary and an unneeded intrusion. In a sense, such controls were seen as a threat to national sovereignty and as driving a wedge between the United States and Europe.

Panel on the Future Design and Implementation of U.S. National Security Export Controls, *Finding Common Ground: U.S. Export Controls in a Changed Global Environment* (Washington, DC: National Academy Press, 1991), p. 268. See also Jan Hoekema, “The European Perspective on Proliferation Export Controls,” in Kathleen Bailey and Robert Rudney, eds., *Proliferation and Export Controls* (Lanham, MD: University Press of America, 1993).

On the other hand, J. David Richardson, *Sizing Up U.S. Export Disincentives* (Washington: Institute for International Economics, 1993), found no statistical evidence that U.S. exports to COCOM partners fell below what one would have expected without reexport controls. In addition, DOC officials argued to OTA in late 1993 that, although U.S. reexport controls may have led to tensions with COCOM partners in the past, more permissive reexport provisions in the Export Administration Regulations had since largely addressed the partners’ concerns.

forcing export controls equivalent to those of the United States, then it should not be necessary for the United States to demand that it be given the right to judge further exports. The problem is greatest when other countries have not agreed to the same rules as the United States (for example, in banning the sales of commercial aircraft to Iran); or when they have agreed to the same controls but are unable or unwilling to enforce them effectively.

For nonproliferation controls, the problem does not appear to be as great. The NSG members, for example, have agreed that they will all require reexport licenses for the nuclear-related dual-use items that they export. This could be another issue, therefore, that is best separated from negotiations over how to revamp COCOM controls.

STREAMLINE THE APPLICATION PROCESS

Industry representatives have complained that the sometimes lengthy decision process for U.S. export controls has placed them at an unfair competitive disadvantage with respect to foreign suppliers. Although average license processing times are short, some license decisions are delayed by the interagency reviews conducted to assure that some applications receive the most thorough scrutiny from all the relevant experts and agency standpoints. Commerce officials point out that although the changes in COCOM requirements have reduced the annual number of license applications from around 125,000 to around 25,000, the remaining 25,000 are the most difficult to analyze. Defense Department officials argue that considerable progress has already been made in shortening license review times.³

The Administration EAA draft proposes assuring that nearly all license applications would be either resolved or referred to the President within 90 days of filing with the DOC. If no referral to other agencies were required, the license would be approved, or the applicant notified of DOC'S intent to deny it, within 9 days. If the application were referred to other agencies, they would have to recommend approval or denial within 30 days; if they should fail to act, they would be deemed to have no objection to the export. If the agencies involved disagreed, an interagency committee would review the case and its chairman would make a recommendation to the Secretary of Commerce. If one or more agencies objected to that recommendation, they could appeal it to a higher level interagency process which would either resolve the dispute or refer it to the President—again, all within the 90-day period that began with DOC'S receipt of the application.

There seems to be no reason why, with sufficient resources, current license decision deadlines could not be shortened to the times proposed in the Administration bill, or even less, without diminishing the quality of analysis and review that the license applications receive. This might be accomplished by:

- increasing the personnel needed to process licenses;
- streamlining interagency review processes, perhaps by detailing expert personnel to a central review office where their full-time work would be license review; or
- developing the kinds of computer network resources described earlier in this report.

These measures would, however, cost additional funds that the executive branch has not re-

³In calendar year 1993, the average processing time for licenses not referred to other agencies was 10 days; the average for referred licenses was 49 days; the average for all licenses was 31 days. The DOC Inspector General reported in 1993 that from Jan. 1 to Sep. 30, 1992, 9,004 licenses not referred to other agencies took an average of 9 days to process; 8,695 others, referred to other agencies, took an average of 50 days. See Offices of Inspector General at the U.S. Departments of Commerce, Defense, Energy, and State, "The Federal Government's Export Licensing Processes for Munitions and Dual-Use Commodities: Special Interagency Review," September 1993, p. A-5.

cently been willing to allocate to export control management.

ANALYZE AND PUBLISH THE ECONOMIC COSTS

Some U.S. exporters have argued that the government imposes export controls without adequate consideration of the costs they will impose on U.S. industries. They have proposed, therefore, that assessment of the costs of controls should be made an integral part of the export control process. One analyst suggests that the new Export Administration Act:

... should require timely annual reports on the quantitative effects of US export controls on US export competitiveness . . . Such reports should include sectoral and product detail, and should also attempt to size up effects of export controls on US direct investment and alliances abroad and on foreign direct investment and alliances in the United States.¹⁴

This analyst suggested that the statistical techniques he used to study the question of national security controls on exports to Communist countries could be applied in such reports. They probably can be used, but assessing the economic effects of particular export control measures would require more specific and detailed data than the current export control data management system yields. First, analysts would need to be able to break down license applications into their individual product components and assess the values of each type of component affected. (Under the current system, the values of exports affected can only be reported by the total value of the items falling un-

der various Export Control Classification Numbers, not by the exact descriptions of the items or by the reasons for which they are each controlled).

It would also be desirable to develop a means of comparing the types of products controlled with the categories of products for which the Bureau of the Census collects export data. Second, analysts would need some means of assessing the amounts of business forgone because exporters were deterred by the licensing process from even attempting to make some sales, because the licensing process deterred buyers from carrying through orders, or because buyers went first to suppliers in other countries with less burdensome controls. Estimates on forgone sales would depend heavily on exporting firms' perceptions and judgments; some means would have to be found of compensating for possible biases in their perspectives.]¹⁵

Analysts making economic impact assessments of national security (COCOM) export controls would also have to conduct surveys of businesses that maintain internal control mechanisms to qualify for distribution licenses (which permit them to avoid applying for IVLS). The report writers would need information on the costs of maintaining such internal mechanisms and estimates of the competitive disadvantages or advantages they may produce. For nonproliferation controls, though, the costs of qualifying for distribution licenses do not apply, since such licenses are rarely granted for those items.

Insofar as export controls help stem proliferation (or achieve other objectives), the costs of going *without* certain export controls should also be given weight in assessing the net benefits and

¹⁴See J. David Richardson, "Economic Costs of US Export Controls," Statement before the Subcommittee on Economic Policy, Trade, and Environment, Committee on Foreign Affairs, U.S. House of Representatives, Nov. 18, 1993 p. 12. A similar proposal for formal evaluation of the costs of controls is found in Benjamin H. Flowe, Jr., "Testimony before the Subcommittee on Economic Policy, Trade, and Environment of the House Committee on Foreign Affairs," June 9, 1993, pp. 8-9.

¹⁵An alternative to this direct empirical approach would be to use the method applied by Richardson, *Sizing Up U.S. Export Disincentives*, op. cit. That method involved a) estimating the level of overall exports (or, at best, exports categorized by the broad Standard International Trade Classification system) that the United States should expect to send to other countries depending on their income, population, and geographical distance; and b) estimating the shortfall from those levels of exports to countries subject to controls. Whatever else the advantages or disadvantages of this method, it will be difficult to apply specifically to nonproliferation controls until global trade statistics become available for the specific goods controlled.

costs of those controls. That is, the potential costs of proliferation taking place should be weighed in. This kind of assessment, though, as noted in the first section of this report, is an even more difficult task. **The issue is not merely what the costs of proliferation would be, but what the *probability* of hypothesized proliferation events would be with and without the controls in question.**

Some argue further that, at least in the case of nuclear nonproliferation controls, the national obligation under the Nuclear Non-Proliferation Treaty (NPT) to refrain from helping other nations acquire nuclear weapons outweighs any likely economic costs of nuclear-related dual-use export controls; therefore, those costs should not be an important consideration in whether the controls are maintained or not. This interpretation, how-

ever, has not been subscribed to either by U.S. administrations or by other NPT members.

On the other hand, a benefit for nonproliferation efforts may result from better U.S. and international data collection on the economic effects of some kinds of export controls. Better information about the actual patterns of trade in proliferation-relevant commodities could lead to a better understanding of the consumption patterns and supply networks of potential proliferants.

The Clinton administration's draft EAA states as U.S. policy:

... to ensure that U.S. economic interests play a key role in decisions on export controls and to take immediate action to increase the rigor of economic analysis and data available in the decision-making process.