

THE TOSHIBA-KONGSBERG INCIDENT: SHORTCOMINGS OF COCOM, AND RECOMMENDATIONS FOR INCREASED EFFECTIVENESS OF EXPORT CONTROLS TO THE EAST BLOC

Wende A. Wrubel*

Capitalists are so shortsighted in the pursuit of profits that they will sell us the rope with which to hang themselves.

Vladimir I. Lenin

INTRODUCTION

The Soviet Union has in place a massive and successful program to acquire, and use for military purposes, advanced Western technology that the free world regards as vital to its security.¹ To acquire Western

* J.D. Candidate, 1989, Washington College of Law, The American University.

1. See Thomas, *Moles Who Burrow for Microchips*, TIME, June 17, 1985, at 25 (discussing the manner in which the Soviet Union acquires Western technology through legal and illegal channels); *Soviet Acquisition of Militarily Significant Western Technology: An Update*, Sept. 1985, reprinted in *Export Controls Hearings Before the Subcomm. on International Finance and Monetary Policy of the Comm. on Banking, Housing and Urban Affairs*, 100th Cong., 1st Sess. 235 (1987) [hereinafter *Soviet Acquisition of Technology*] (statement of Richard Perle, former Assistant Secretary of Defense for International Security) (confirming the significance of the 1985 United States government report that described the well-organized Soviet program for obtaining sophisticated sensitive technology); UNITED STATES CENTRAL INTELLIGENCE AGENCY REPORT: SOVIET ACQUISITION OF WESTERN TECHNOLOGY, *Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 1 (1982) [hereinafter CIA REPORT] (discussing the difficulty of curtailing the Soviet Union's extensive acquisition of militarily-related Western technology); Pipes, *How To Cope With the Soviet Threat*, COMMENTARY, Aug. 1984, at 27 (discussing the technology the Soviet Union acquired from the West during the past twenty-five years); accord Dudney, *How Soviets Steal U.S. High-Tech Secrets*, U.S. NEWS & WORLD REPORT, Aug. 12, 1985, at 33 (discussing the degree to which the Soviets rely on stolen United States industrial secrets to rescue their country from economic stagnation); *Control of Technology Transfers to the Soviet Union Before the Senate Permanent Subcomm. on Investigation of the Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 56 (1982) (statement of Sen. Nunn) (outlining the basic approaches that the Soviet Union uses to acquire necessary high-technology); Perle, *The Soviet Connection I*, DEF., Feb. 1982, at 10 (arguing that the Soviet Union has taken advantage of loose export controls in the West to acquire vital goods and equipment); UNITED STATES DEPARTMENT OF STATE, INTELLIGENCE COLLECTION IN THE USSR CHAMBER OF COMMERCE AND INDUSTRY [hereinafter INTELLIGENCE COLLECTION] (discussing how the USSR Chamber of Commerce and Industry creates and uses op-

technology, the Soviet Union devotes vast amounts of financial resources and manpower.² By saving hundreds of millions of dollars in research and development costs as well as decades in the development of new technology,³ the Soviet Union narrows the Western lead daily in virtually all key technological areas.⁴

The Soviet Union and its Warsaw Pact allies obtain vast amounts of militarily significant Western technology through both legal and illegal means.⁵ Soviet intelligence services play the primary role in gathering Western military technology.⁶ In recent years, the Soviet Union has

portunities for legally acquiring information of value to Soviet industry while misleading Westerners about their activities).

2. See CIA REPORT, *supra* note 1, at 1 (explaining that the Soviet effort to obtain Western technology is massive, well-planned, and well-managed at the national level with approval at the highest party and governmental levels).

3. Dudney, *supra* note 1, at 33. The Soviet Union saves millions of dollars and years of military research by using stolen technology that the West relies on to offset the high Soviet numerical advantage in weapon systems. *Id.* See *Soviet Acquisition of Technology*, *supra* note 1, at 1 (estimating that in the 1980s, as many as 5,000 Soviet military research projects benefitted from such stolen technology); CIA REPORT, *supra* note 1, at 10 (stating that the Soviet Union modernizes critical sectors of their military industry at a much faster rate than the West because it copies proven Western designs). This rapid modernization enables the Soviet Union to achieve greater performance from their weapons than if relying solely on its own technology. *Id.* This allows the Soviet Union to begin to incorporate countermeasures against Western weapons while developing their own weapon programs. *Id.* When it assimilates Western technology into its weapons systems, the Soviet Union improves its position in the arms race, thereby forcing American taxpayers to pay more in defense costs to counter the Soviet threat. *Id.*

4. See *Soviet Acquisition of Technology*, *supra* note 1, at 1 (noting that in the materials, explosive, and sensor technologies found in tanks, artillery, and antitank and surface-to-air missiles, the technology level of Soviet weapons systems equals or slightly surpasses that of the United States). The Soviet Union leads the West in fields such as chemical warfare and laser research. *Id.*; see also Thomas, *supra* note 1, at 25 (stating that since the late 1970s, the Soviet Union gained 30,000 pieces of high-tech equipment and 40,000 technical documents through illicit channels).

5. See CIA REPORT, *supra* note 1, at 2 (discussing the various legal and illegal methods of Soviet acquisition of goods and technology from the West). The Soviet Union legally acquires Western technology through open literature, legal trade channels, and scientific and technological exchanges and conferences. *Id.* The Soviet Union illegally acquires technology through trade channels that evade Western export controls primarily through two means that are difficult to detect and monitor. *Id.* at 3. First, the Soviets may divert controlled technology from legitimate trade channels to prescribed destinations through dummy Western corporations; through United States and foreign firms willing to engage in "profitable impropriety;" through their own agents in place in foreign firms; and through foreign purchasing agents. *Id.* Secondly, the Soviet Union may divert legally acquired technology to unauthorized military ends. *Id.* These channels are designed to evade export controls set by the Coordinating Committee for Multilateral Controls (Cocom). *Id.* at 2.

6. See *id.* at 1 (stating that the Soviet Committee for State Security (KGB) and the Chief Intelligence Directorate of the Soviet General Staff (GRU) together retain responsibility for coordinating the illegal acquisition of Western technology); see also Dudney, *supra* note 1, at 33 (stating that the success of the Soviet Union in gaining

become less interested in stealing the finished product than in acquiring the know-how used to build it.⁷ As a result, many Soviet weapons and high technology equipment are almost exact duplicates of Western weapons and equipment.⁸

In 1981, the Toshiba Machine Company and Kongsberg Vaapenfabrik began selling advanced milling machinery and accompanying numerical control equipment to the Soviet Union in violation of the regulations of the Coordinating Committee for Multilateral Export Controls (Cocom).⁹ Cocom functions to prohibit the export of sophisti-

access to advanced Western technology is due to the fact that the Soviet Union employs approximately 2,000 intelligence agents, smugglers, and international middlemen stationed around the globe); INTELLIGENCE COLLECTION, *supra* note 1, at 1 (describing that the Soviet effort to acquire militarily significant Western technology consists of two programs). The first program is managed by the Military Industrial Commission of the Presidium of the U.S.S.R. Council of Ministers. *Id.* Its function is to gather one-of-a-kind military and dual-use hardware and blueprints to improve the technical levels of Soviet weaponry and military equipment. *Id.* The Ministry of Foreign Trade and Soviet intelligence services administers the second program by diverting dual-use manufacturing and test equipment into the production lines of weapons industries. *Id.*; see generally *Soviet Acquisition of Technology*, *supra* note 1, at 2-16 (discussing in greater detail the two programs the Soviet Union uses to acquire Western hardware and documents).

7. See T. GUSTAFSON, SELLING THE RUSSIANS THE ROPE? SOVIET TECHNOLOGY POLICY AND U.S. EXPORT CONTROLS, reprinted in *American Technology Transfer and Soviet Energy Planning: Hearing before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 97th Cong., 1st and 2d Sess. 55 (1981-1982) (stating that the Soviet Union fails to exploit the potential advantages of combining high technology Western imports with their own domestic structure). The author argues that the Soviet Union, in its present capacity, is incapable of profiting from the import of finished end-products. *Id.*; accord OFFICE OF THE DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING, U.S. DEPARTMENT OF DEFENSE, *An Analysis of Export Control of U.S. Technology - A DOD Perspective (Report of the Defense Science Board Task Force on Export of U.S. Technology)* [hereinafter *Bucy Report*] (examining a number of critical technologies, their impact on United States strategic requirements, the mechanisms through which information about them is transferred, and the current effectiveness of export controls and the Cocom agreement). The Bucy Report recommended that three categories of United States exports should receive primary emphasis in control efforts, since they are the most effective in the transfer of vital design and manufacturing know-how. *Id.* at 3. The three categories are 1) information that includes intricate instructions on how to design and manufacture an item; 2) "keystone" manufacturing, inspection or automatic test equipment; and 3) products that come equipped with sophisticated information on operation or application. *Id.* at 3.

8. See Thomas, *supra* note 1, at 25 (stating that the Soviet Airborne Warning and Control System and space shuttles replicate earlier United States models). For example, the Soviet Union introduced a system identical to the Boeing short takeoff and landing prototype just months after this model appeared in the United States; the SU-15 fighter that shot down Korean Air Lines Flight 007 did so with a missile guidance system that was engineered in the West; the Soviet mainframe RIAD computer is IBM's 360 and 370 series, while the Soviet AGAT personal computer is a copy of the Apple II. *Id.*

9. See *infra* notes 10-14 and accompanying text (discussing the role Cocom plays in the control of sensitive technology among the Western nations).

cated high technology machinery to Communist bloc countries. The illegal shipments of state-of-the-art equipment to the Soviet Union by Toshiba and Kongsberg served to seriously undermine Western national and international security. This incident sharply illustrates the inherent weaknesses in the effectiveness of multilateral export controls coordinated by Cocom.

Part I of this Comment describes the multilateral agreement established by the United States and its Western allies to control the transfer of sensitive goods and technology to the Soviet Union. Part II examines Toshiba and Kongsberg Vaapenfabrik's illegal sale of sensitive Western technology to the Soviet Union. Part III explores the Japanese and Norwegian governmental responses to the incident, and Part IV provides three different analyses of the Toshiba-Kongsberg incident and suggests possible remedies for increasing the effectiveness of the multilateral export control system.

I. THE HISTORICAL DEVELOPMENT OF COCOM

The Coordinating Committee for Multilateral Export Controls (Cocom)¹⁰ was organized at the advent of the Cold War¹¹ to restrict the flow of strategic technology to the Soviet Union and other Communist nations.¹² In the post war period, the United States and its allies

10. See Comment, *Cocom: Limitations on the Effectiveness of Multilateral Export Controls*, 2 WIS. INT'L L.J. 106, 107 n.2 (1983) [hereinafter *Cocom Limitations*] (stating that Cocom is sometimes referred to as the International Export Control Coordinating Committee and as the Coordinating Committee).

11. See Recent Development, *Trade Regulation - Export Controls - Cocom Agrees on New Multilateral Export Guidelines Allowing Eastern Bloc to Purchase Low Level Technology Legally*, 16 GA. J. INT'L & COMP. L. 197, 197 n.4 (1986) [hereinafter *Cocom Agrees on Guidelines*] (stating that Cocom was initiated in 1949 in response to the Cold War following the close of World War II); Hunt, *Multilateral Cooperation In Export Controls - The Role of Cocom*, 14 U. TOL. L. REV. 1285, 1286 (1983) (maintaining that the Cold War between the United States and the Soviet Union led to the formation of Cocom); Berman & Garson, *United States Export Controls Past, Present and Future*, 67 COLUM. L. REV. 791, 834-42 (1967) (discussing the need for controls among the West to deal with the perceived security threat posed by the Soviet bloc); Bertsch, *U.S. Export Controls: The 1970s and Beyond*, 15 J. WORLD TRADE L. 67, 68 (1981) (promoting the ideological and strategic threat of the Soviet Union as a military superpower after World War II).

12. See P. Hanson, *Soviet Assimilation of Western Technology*, in TRADE TECHNOLOGY AND SOVIET-AMERICAN RELATIONS 63 (Parrot ed. 1985) (defining technology as useful knowledge pertaining to the art of production); PANEL ON THE IMPACT OF NATIONAL SECURITY CONTROLS ON INTERNATIONAL TECHNOLOGY TRANSFER, COMMITTEE ON SCIENCE, ENGINEERING AND PUBLIC POLICY: BALANCING THE NATIONAL INTEREST - U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION, 87 (1987) [hereinafter *BALANCING THE NATIONAL INTEREST*] (defining "technical data" as "information of any kind that can be used, or adopted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materi-

agreed on the need to control the transfer of militarily strategic technology to protect national security.¹³ On January 1, 1950, in Paris, France, Cocom began to coordinate the national controls that the West placed on the export of strategic goods and technology to the Communist world.¹⁴ To bolster the control policies of Cocom, Congress established sanctions in the form of the Mutual Defense Assistance Control Act of 1951 (The Battle Act).¹⁵ This act was an attempt to unite the United States with its allies in an effort to control the export of strategic materials to Eastern bloc nations.¹⁶

A. COCOM PROCEDURES AND REGULATIONS

1. Internal Operations of Cocom

The details of Cocom's operations and procedures are secret.¹⁷ Secrecy is necessary to prevent Soviet acquisition of sensitive national security information and to insulate the member governments from domestic political opposition.¹⁸ Cocom does not rest on any treaty or formal agreement that is binding on its members.¹⁹ Rather, it is a "gentlemen's agreement"²⁰ among nations because it serves as an infor-

als"); CIA REPORT, *supra* note 1, at 1 (including in its definition of "technology" the application of scientific knowledge, technical information, know-how, critical materials, keystone manufacturing and test equipment, and end-products vital to the research and development of high-quality weapons and military equipment).

13. Hunt, *supra* note 11, at 1286; *Cocom Agrees on Guidelines*, *supra* note 11, at 197. In response to the recognized need to establish multilateral export control standards, the United States and its allies initially created a Consultative Group. *Id.* at 197 n.4. Cocom, the organization that is in operation today, later replaced this group. *Id.* The Consultative Group initially consisted of export officials from the United Kingdom, France, Italy, the Netherlands, Belgium, Luxembourg, and the United States. *Id.* See UNITED STATES DEPARTMENT OF COMMERCE EXPORT ADMINISTRATION ANNUAL REPORT FY 1984 19 (stating that current Cocom membership includes Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States).

14. Buchan, *Western Security and Economic Strategy Towards the East*, 23 THE ADELPHI PAPERS No. 192 (1984) [hereinafter *Western Security*].

15. Mutual Defense Assistance Control Act, 22 U.S.C. §§ 1611-13 (1951) *superseded by* the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-20 (1982). The Battle Act denied financial aid from the United States to any nation that allowed the export of strategic material to embargoed communist nations. *Id.*

16. Bingham & Johnson, *A Rational Approach to Export Controls*, 57 FOREIGN AFF. 894, 903 (1979).

17. See *id.* at 903-04 (maintaining that secrecy also applies to the criteria employed by Cocom for including items on its embargo list).

18. *Id.*

19. *Western Security*, *supra* note 14, at 23.

20. HENKIN, PUGH, SCHACHTER & SMIT, INTERNATIONAL LAW CASES AND MATERIALS 386 (2d ed. 1987) [hereinafter INTERNATIONAL LAW MATERIALS]. A "gen-

mal, voluntary arrangement between the United States and its allies.²¹ The Committee must achieve unanimity before reaching any multilateral agreement curtailing exports.²² All members of Cocom retain the right to act independently in accordance with their own domestic legal, administrative, and policy constraints.²³ Individual members are thus free to deviate from Cocom-approved export standards.²⁴

2. *Functions of Cocom*

The main tasks of the permanent Cocom representatives are the development of embargo lists, the enforcement of export restrictions, and the approval or denial of certain exceptional sales.²⁵ Embargoed items are described on three lists: the International Atomic Energy List, the International Munitions List, and the International List.²⁶ Cocom does

lemen's agreement" is formed when states intend to create only political or moral, as opposed to legal, commitments to each other. *Id.* In such cases, the parties to the agreement assume a voluntary commitment to perform certain acts or refrain from them. *Id.* This type of commitment is termed nonlegal and thus not formally binding. *Id.* The parties, however, share the expectation that there will be general reliance upon the terms in the agreement. *Id.* An example of a gentlemen's agreement is the understanding that was undertaken in 1908 between the United States and Japan, concerning immigration matters, which was observed for nearly two decades. *Id.*

21. Note, *Accountability and the Foreign Commerce Power: A Case Study of the Regulation of Exports*, 9 GA. J. INT'L & COMP. L. 577, 582 (1979).

22. Aepfel, *The Evolution of Multilateral Export Controls: A Critical Study of the Cocom Regime*, 9 FLETCHER F. 105, 109 (1985). See Perle, *Making Sure Our Technology Stays Ours*, Wall St. J., July 22, 1987, at 16 [hereinafter *Keeping Our Technology*] (discussing the lack of staff or resources in Cocom and its resulting inability to manage effectively international transfers). Cocom has a permanent secretariat of about a dozen people, and operates on an annual budget of roughly \$500,000, funded pro rata by the members. *Id.* Prior to 1976, Cocom had no computer system, no simultaneous translation facilities, no professional staff, no research or intelligence capability, and no military advisers. *Id.* To further illustrate the constraints under which Cocom must operate it "duplicated its reports on what must have been one of the last hand-cranked mimeograph machines in Western Europe." *Id.* The first high level meeting of Cocom since its founding took place in 1982 in response to a United States request. *Id.*

23. *Cocom Limitations*, *supra* note 10, at 119 (stating that member governments have no legal obligation to participate in Cocom activities or to abide by its commitments, recommendations, or decisions).

24. Kempe & Lachica, *Cocom Feuds Over Trade to East Bloc*, Wall St. J., July 17, 1984, at 35.

25. *Export Licensing: Cocom List Review Proposals of the United States: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 84 (1978) [hereinafter *Cocom List Review*] (statement of William Barraclough, Deputy Assistant Sec'y for International Trade Policy, Dept. of State); Aepfel, *supra* note 22, at 108; *Control of Technology Transfers to the Soviet Union: Hearings Before the Senate Permanent Subcomm. on Investigation of the Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 42 (1982) (testimony of the Hon. James L. Buckley).

26. BALANCING THE NATIONAL INTEREST, *supra* note 12, at 97. The international

not publish its embargo lists, but the content of the lists are often reflected in the national lists of export controls maintained by member countries.²⁷

3. *United States Involvement in Cocom*

Since 1949, the United States government has controlled the export of militarily significant commercial products²⁸ throughout the world.²⁹ The Export Administration Act of 1979 (EAA)³⁰ codifies export guidelines in the United States. Under the EAA, the United States Department of Commerce exercises control over most articles, supplies, and unpublished technical data from the United States, its territories, and

or dual-use list includes three types of goods:

1. items specially designed or used primarily for development, production, or utilization of arms, ammunition, or military systems;
2. items incorporating unique technological know-how, the acquisition of which might give significant direct assistance to the development and production of arms, ammunition or military systems; and
3. items in which proscribed nations have a deficiency they are not likely to overcome that hinders development and production of arms, ammunition, or military systems.

Id.; See also *U.S. Tries to Cut Trade in Items that Russians Might Use for Military*, Wall St. J., Feb. 11, 1982, at 1 (stating that items that are made primarily for civilian use, such as the concrete tester often have important, although hidden, military uses); UNITED STATES GOVERNMENT ACCOUNTING OFFICE, DETAILS OF CERTAIN CONTROVERSIAL EXPORT LICENSING DECISION INVOLVING SOVIET-BLOC COUNTRIES (1983) 1 (stating that dual-use goods are industrial goods of probable military application).

27. See Hunt, *supra* note 11, at 1289 (explaining that much of the content of Cocom policy is inferred from Cocom's control lists which generally are a reflection of the member nation's export guidelines).

28. BALANCING THE NATIONAL INTEREST, *supra* note 12, at 129. In determining whether a commercial item could be classified for dual-use the Department of Defense uses the following criteria:

1. Is the item appropriate for the stated civil end?
2. Is there any evidence that the stated end-user is engaged in military or military support activities to which this item could be applied?
3. How difficult would it be to divert this item to military purposes?
4. Could such diversion be carried out without detection?

Id.; U.S. DEP'T OF COMMERCE, EXPORT ADMINISTRATION ANNUAL REPORT 1 (1986) [hereinafter 1986 EAA REPORT].

29. U.S. GENERAL ACCOUNTING OFFICE: EXPORT LICENSING-COMMERCE-DEFENSE REVIEW OF APPLICATIONS TO CERTAIN FREE WORLD NATIONS 8 (1986) [hereinafter EXPORT LICENSING].

30. See Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. app. § 2401 *et seq.* (1982)) (stating that it is United States policy to use export controls only after full consideration of the impact on the economy of the United States); see also Weyhrauch, *Operation Exodus: The United States Government's Program to Intercept Illegal Exports of High Technology*, 7 COMPUTER L.J. 203, 209 (1986) (describing the Export Administration Act of 1979 as controlling exports from the United States and the control of reexports out of foreign countries of products or data that originated in the United States).

possessions.³¹ The United States controls specific commodity exports primarily for national security,³² foreign policy,³³ and short supply reasons.³⁴ The Office of Export Administration of the Department of Commerce is the principal operating unit for administering and enforcing export controls.³⁵

The United States also maintains its own list of controlled items.³⁶ This list is called the Commodity Control List (CCL).³⁷ In addition to the CCL, the Department of Defense has established its own 800-page document that lists those items of potential military significance to the

31. EXPORT LICENSING, *supra* note 29, at 9. Section 10(g) of the Export Administration Act of 1979 also permits the Secretary of Defense to review some export license applications if the proposed goods are destined for countries to which exports are controlled for national security purposes. Export Administration Act of 1979, § 10(g), 50 U.S.C. app. § 2409(g) (1982).

32. Export Administration Act of 1979, § 5, 50 U.S.C. app. § 2404 (1982). The Act provides that the United States may use export controls "to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States. *Id.* § 3(2)(A), 50 U.S.C. app. 2402(2)(A) (1982). Exports are controlled for national security purposes to the following countries: Romania, Hungary, Poland, Albania, Bulgaria, Czechoslovakia, Estonia, German Democratic Republic [including East Berlin], Cuba, Kampuchea, North Korea, Vietnam, The People's Republic of China, Laos, Latvia, Lithuania, Mongolian People's Republic and U.S.S.R. *Id.*

33. *Id.* § 6, 50 U.S.C. app. § 2405 (1982). The Act provides that the United States may use export controls "to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations." *Id.* § 3(2)(B), 50 U.S.C. app. § 2402(2)(B) (1982).

34. *Id.* § 7, 50 U.S.C. app. § 2406 (1982). The Act provides that the United States may use export controls "to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand." *Id.* § 3(2)(C), 50 U.S.C. app. § 2402(2)(C) (1982).

35. *Id.* § 12(a), 50 U.S.C. app. § 2411(a) (1982).

36. See *Commodity Control Lists and Related Matters*, 15 C.F.R. § 399.1 (1988) (listing those goods that the United States unilaterally controls for export to Soviet bloc countries).

37. *Id.* at § 399.1(f)(2). The Commodity Control List (CCL) provides for both multilaterally and unilaterally controlled items. *Id.* Currently, the CCL list carries 214 numbered categories of controlled items, out of which only 124 coincide with the Cocom list. *Id.* See *H.R. Rep. No. 257*, 98th Cong., 1st Sess., pt. 2, 10-12 (1983) (comparing the Commodity Control List, the Militarily Critical Technologies List (MCTL), and the Cocom List). The Department of Commerce developed the CCL to control exports. *Id.* This list is available to the public as a guide for potential exporters. *Id.* The MCTL is classified mainly because it explains why various items are considered critical. *Id.* The Department of Defense developed and maintains the MCTL. *Id.* The Cocom list was developed through a largely informal process and is used as a guide to control exports by Cocom countries. *Id.* While the Cocom list is not publicly available, the CCL contains a great number of the items on the Cocom list. *Id.* The United States uses the MCTL to persuade its allies that the West must control certain strategic items. *Id.* at 12. The MCTL contains items that are not found on either the Cocom list or the CCL. *Id.*

Soviet Union.³⁸ This list is called the Militarily Critical Technologies List (MCTL).³⁹ In recent years, the Reagan administration also launched Operation Exodus,⁴⁰ an extensive effort aimed at controlling the export of sensitive technology.

While the United States has traditionally favored broadening the scope of control over strategically sensitive items, Western Europe and Japan disagree on the extent to which such restrictive control is necessary and practical.⁴¹ Disagreement centers around which technology is of military significance. During the formal list review process, sharp disagreements among Cocom members over the establishment of technical cutoff levels for controlled items manifests different conceptions of Cocom operations and philosophy.⁴²

38. Weyhrauch, *supra* note 30, at 209.

39. *Export Administration Amendments Act of 1983: Hearings on H.R. 3231*, 98th Cong., 1st Sess. 9-12 (report submitted by Mr. Price, Committee on Armed Services) (describing the MCTL and its relationship with the CCL); Weyhrauch, *supra* note 30, at 209. The MCTL covers a broad spectrum of technologies, not all militarily significant, that include computers, telecommunications, laser technology, and nuclear equipment. *Id.* at 210.

40. *See* Weyhrauch, *supra* note 30, at 210-11 (stating that the United States Customs Service began Operation Exodus in response to the Reagan administration's effort to stem the illegal export of United States technology to the Soviet Union). Operation Exodus accomplishes its main objectives through the seizure of critical technology illegally exported and the disruption of groups and individuals responsible for these illegal exports. *Id.* Under Operation Exodus, customs agents, inspectors, patrol officers, and other Customs personnel concentrate on stemming the illegal outflow of critical technology through United States ports of exit. *Id.* Exodus agents spot shipments that require further investigation and then refer them to the proper authorities for inspection. *Id.* By targeting high-risk commodities and those companies who export them, Exodus investigators can focus on discovering criminal conspiracies. *Id.* at 212.

41. *See* Buchan, *Technology Transfer to the Soviet Bloc*, 7 WASHINGTON Q. 131 (1984) [hereinafter *Technology Transfer*] (describing the historical division between the United States and its allies in trying to harmonize export embargoes). The Western allies and Japan maintain that the imposition of greater export controls will seriously affect their economies. *Id.* at 133. For example, in 1982, Western Europe exported 69.1% of its goods to the Soviet Union. *Id.* On the whole, East-West trade accounts for only 1.7% of United States exports and 0.4% of United States imports, while this same trade made up 2-6% of the total trade figures of the larger European countries and anywhere from 10-25% for certain neutral countries. *Id.* Additionally, Western Europe and Japan find it difficult to agree on the need for tightening up export controls due in part to the inability of the Department of Defense to determine the overall monetary cost to the West of illegal technology diversion to the Soviet Union. *Id.* at 132.

42. Sternheimer, *East-West Technology Transfer: Japan and the Communist Bloc* 76 THE WASH. PAPERS 12, 14 (1980). Since 1967 the United States has required export licenses for 625 categories of goods, yet 70% of these goods were not on the Cocom list. *Id.*; *see also* *Cocom Limitations*, *supra* note 10, at 131 (describing the attitude of some authorities that it is impossible to obtain general agreement in Cocom on which nonmilitary technologies the Committee needs to control).

4. Types of Export Licenses in the United States

In the United States, the majority of goods and technical data are exported under general licenses, such as "General Destination" licenses.⁴³ United States exporters must obtain a Validated License if technical data or high technology items do not qualify for a General License.⁴⁴ Recently, the United States has increased the number of general licenses for those commodities destined for export to the Soviet Union, Eastern Europe, and the People's Republic of China.⁴⁵

To export an item to the Soviet Union that appears on the Cocom list, an exporter must submit an "exception request."⁴⁶ If the United States knows or has reason to believe that a listed commodity is not destined for military use and that the Soviet Union will not divert the commodity to the military sector, the United States may relax the embargo restrictions.⁴⁷ If a member government allows the sale, it must first obtain an exception to the embargo from Cocom.⁴⁸

43. See U.S. DEP'T OF COMMERCE, A BASIC GUIDE TO EXPORTING 51 (1986) [hereinafter GUIDE TO EXPORTING] (stating that a General License constitutes a broad grant of authority by the government to all exporters for certain classifications of commodities); Weyhrauch, *supra* note 30, at 209 (stating that exports that only require a general license do not require individual applications or any specific licensing document).

44. See GUIDE TO EXPORTING, *supra* note 43, at 51 (stating that a Validated License gives a particular exporter a specific grant of authority to export a particular product). A Validated License is granted on a case-by-case basis for either a particular transaction or for a certain length of time. *Id.*

45. See U.S. DEP'T OF COMMERCE, DOING BUSINESS WITH CHINA 21 (1983) (stating that in June of 1983, the Commerce Department changed the status of China from Country Group P to Country Group V). The new regulations offer more liberal treatment for such products as computers, microcircuits, and electronic manufacturing and testing equipment exported to China. *Id.* See also Letterman, *United States Regulation of High-Technology Exports*, 20 INT'L LAW. 1147, 1161 (1986) (listing the seven country group classifications, designated by the letters Q, S, T, V, W, Y, and Z, by which foreign countries are separated for export control purposes). Communist countries are usually contained in Country Groups Q, W and Y. *Id.* Country Group V is a "catchall" group containing most of the other noncommunist countries, plus a few "Marxist" states, including The People's Republic of China. *Id.*

46. Hunt, *supra* note 11, at 1285-86. Under Cocom rules, a decision on an exception request must be made eighteen days after it is submitted with a two week rescheduling period if no decision is reached. *Id.* An exception request, in order to be approved, must receive unanimous agreement by the member countries. *Id.*

47. See Letterman, *supra* note 45, at 1178 (arguing that restricting the export of United States goods and technical data that is readily available to controlled countries from non-United States sources places the United States exporters in a poor competitive position). For this reason, there is a "foreign availability" exception to United States high-tech export controls. *Id.* Any export license applicant may reserve the right to claim the foreign availability exception. *Id.*

48. BALANCING THE NATIONAL INTEREST, *supra* note 12 at 142-43 (explaining that if a Cocom member State wishes to export a restricted good, it must obtain an exception by the unanimous consent of the other Members).

Exception requests are reviewed with regard to the sensitivity of the item concerned.⁴⁹ Cocom members must unanimously approve the request before an exception is granted.⁵⁰ In some circumstances, an exporter in another country must obtain specific approval from the Department of Commerce before reexporting products and technical data with United States origin to another foreign country.⁵¹ The United States is the only Cocom member that imposes reexport controls.⁵² One problem with the United States reexport control system stems from the extraterritorial application of United States standards to United States subsidiaries, goods, and data. These reexport controls often create suspicion between the United States and its allies.⁵³ This is because some members of Cocom view the United States practice of reexport controls as an infringement on their sovereignty.⁵⁴

49. *Western Security*, *supra* note 14, at 25. The less sensitive goods that comprise approximately half of the goods on the industrial dual-use list are considered national discretion items. *Id.* Cocom allows national governments to decide themselves whether to allow the sale of these goods. *Id.* Generally when a country proposes to sell a certain quantity or value of listed goods, the government must contact Cocom for approval. *Id.* Those goods in the latter half of the sensitivity list do not require Cocom permission for export licensing. *Id.* Exception requests are required for the sale of goods to embargoed destinations. *Id.*

50. *Id.*

51. 15 C.F.R. § 374 (1988). Reexport controls may include finished end-products and, in some instances, parts and components originating in the United States. *Id.* The foreign country must apply to the Department of Commerce for a reexport license if the item is one that needs a Validated License for shipment from the United States to a foreign country. *Id.* In the case where a foreign manufactured product contains 20% or less of controlled parts originating in the United States, a reexport license is not needed for export to Western countries. *Notice of Proposed Rulemaking: Revision of Controls on Foreign Products Incorporating U.S. Origin Parts, Components, and Materials*, 51 Fed. Reg. 24,533-24,535 (1986).

52. BALANCING THE NATIONAL INTEREST, *supra* note 12, at 123. Western European countries claim that the United States extraterritorial application of United States law under the guise of military security is nothing less than technological imperialism. *Id.*

53. Bingham & Johnson, *supra* note 16, at 906. Because of the inefficiency of its licensing process, the United States does not deal expeditiously with the exception requests of its Cocom partners. *Id.* These delays create tension within Cocom because allies of the United States suspect that such delays give the United States a commercial advantage. *Id.* Accord Marcuss & Richard, *Extraterritorial Jurisdiction in the United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANS-NAT'L L. 439, 439-40 (1981) (suggesting that a nation that tries to apply its laws to the activities of another nation is often met with hostility).

54. *The Export Administration Act: Hearings Before the Subcomm. on International Economic Policy of the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. 45 (1983); *President's Special Report on Multilateral Export Controls* 61, 67, 69-71, reprinted in *The Export Administration Act: Agenda for Reform: Hearings Before the Subcomm. on International Relations of the House Comm. on Foreign Affairs*, 95th Cong., 2d Sess. 52 (1978); Marcuss & Richard, *supra* note 53, at 439-40 (noting that the extraterritorial application of United States trade laws has created global tensions).

The representatives to Cocom are diplomatic and technical experts in dealing with the export control system.⁵⁵ Delegates to Cocom are usually diplomats of modest rank specializing in commercial affairs.⁵⁶ During the negotiations on the contents of the embargo lists, expert teams from the Departments of Defense and Commerce may assist the national representatives from the United States.⁵⁷

B. ENFORCEMENT OF COCOM REGULATIONS

Because Cocom is a voluntary organization, it has limited capability as a multilateral enforcement mechanism.⁵⁸ Responsibility for the enforcement of Cocom-based controls lies with each member's national government, customs authorities, and police forces.⁵⁹ Additionally, there are no provisions for international sanctions against members who do not comply with Cocom embargoes.⁶⁰ Cocom decisions, therefore, function as non-binding recommendations to member governments that impose no international legal obligation to embargo any of the listed items.⁶¹ It is not difficult for the participating countries to evade Cocom regulations because each country determines whether or not to bring a given export before Cocom for its approval.⁶² Moreover, until the

55. *Cocom Limitations*, *supra* note 10, at 115.

56. *Id.*

57. Comment, *Soviet Diversion of United States Technology: The Circumvention of Cocom and U.S. Reexport Controls, and Proposed Solutions*, 7 *FORD. INT'L L.J.* 561, 569 (1984).

58. Branting, *Reconciliation of Conflicting Goals in the Export Administration Act of 1979 - A Delicate Balance*, 12 *L. & POL'Y INT'L BUS.* 415, 445 (1980); Hunt, *supra* note 11, at 1294.

59. *Western Security*, *supra* note 14, at 24. Diversion of Cocom controlled goods through nonmember nations to embargoed destinations is a serious problem. *Id.* For example, non Cocom members such as Sweden, Austria, and Switzerland provide important avenues of diversion for Cocom list items and act as direct sources for some products on the Cocom list for purchase by the Soviet Union and other Communist countries. *Id.*

60. Kiernan, *The Export Administration Act Amendments of 1983: Foreign Availability of Controlled Goods and Technology*, 11 *J. LEGIS.* 292, 304 (1984).

61. *Cocom Limitations*, *supra* note 10, at 119.

62. Bingham & Johnson, *supra* note 16, at 906. The Cyril Bath case illustrates some major problems associated with Cocom. *Id.* at 905. In 1976, the Cyril Bath Company, a United States manufacturer of machine tools, applied for an export license to ship ten metal-forming presses to the Soviet Union. *Id.* Initially, the United States government denied the license on the grounds that the machinery posed a strategic significance to the Soviet aeronautics industry. *Id.* Subsequently, the United States government reversed itself on the basis of foreign availability of the item from France and submitted the case to Cocom. *Id.* Investigations revealed that the French exported these machines without ever seeking Cocom approval. *Id.* Cocom refused to grant the exception to the Cyril Bath Company on the grounds that the French never admitted to supplying comparable machines to the Soviet Union. *Id.* The French disregard for Cocom controls on this technology highlights member annoyance with Cocom proce-

Toshiba incident, the United States overlooked evasions of these controls by its allies in order to avoid any pressure that might lead to the demise of Cocom.⁶³

1. Enforcement Mechanisms

A Cocom subcommittee on enforcement exchanges information on national enforcement procedures to improve the effectiveness of the Cocom export embargoes.⁶⁴ Additionally, several enforcement mechanisms are built into the Cocom regulations. The Import Certificate/Delivery Verification (IC/DV) is one precaution against any diversion of controlled dual-use products to Communist countries.⁶⁵ The IC/DV is an export documentation system that requires the recipient's government to issue an import statement and a delivery verification statement assuring that the importer will receive the goods and that the goods will not be reexported without approval from the importer's governmental authorities.⁶⁶ Other precautionary measures include conducting an "end-user" check⁶⁷ to demand from the recipient a declaration of the intended end-use and a pledge that such item will not be reexported to a proscribed country⁶⁸ or illegally diverted.⁶⁹ These enforcement mechanisms, however, have ultimately proved insufficient to completely prevent the Soviet Union from acquiring desirable Western technology.

II. THE TOSHIBA-KONGSBERG INCIDENT

A. FACTUAL BACKGROUND

The Toshiba-Kongsberg incident began when the Soviet Union received covert information from the espionage ring led by convicted spy John A. Walker Jr.⁷⁰ and his family. The Walker espionage operation

dures and resulted in the Soviets obtaining arguably sensitive technologies while the United States company lost a sale on equipment that may have been adjudged an exception. *Id.*

63. *Id.* at 906.

64. Hunt, *supra* note 11, at 1294.

65. *Id.*

66. *Id.*

67. BALANCING THE NATIONAL INTEREST, *supra* note 12, at 138.

68. *Id.*

69. *Id.*

70. Chaze & Kaylor, U.S. NEWS & WORLD REP., June 15, 1987, at 38. John Walker pleaded guilty in 1985 to passing Navy secrets to the KGB. *Id.* The information the Walkers divulged to the Soviets enabled Moscow to decipher top-secret traffic on submarine tactics that is significant for acoustic detection capabilities. *Id.* There are two distinct sounds that are created when a submarine propeller moves through the water; the first is cavitation which is created when propeller blades cause pressure

warned the Soviet Union that the United States could accurately track Soviet submarines through excessive propeller noise.⁷¹ Having acquired this information, the Soviet Union searched the West for the machine tools necessary to produce a quieter submarine propeller blade.⁷²

Early in 1980, the Soviet foreign trade organization, Tekmashimport, contacted Wako Koeki, a small Japanese trading firm with offices in Moscow.⁷³ Negotiations in Moscow began when Wako Koeki approached Toshiba Machine,⁷⁴ who agreed to provide the necessary high technology equipment.⁷⁵ Toshiba Machine admitted that it used its standard export broker, C. Itoh & Company, to avoid raising the suspicion of the Japanese export licensing officials.⁷⁶ In addition, the Japanese firms solicited the help of a Norwegian company, Kongsberg Trade.⁷⁷ Kongsberg Trade agreed to provide the computer equipment necessary to run the machines as well as the propeller design and production software.⁷⁸

changes in seawater. Sanger, *A Bizarre Deal Diverts Vital Tools to Russians*, N.Y. Times, June 12, 1987, at A1, D9. The second distinctive sound consists of blade tonals caused as the propeller cuts through the wake created by appendages in the submarine's hull. *Id.* at D9. An acoustics expert and professor of Ocean engineering, Ira Dyer, noted the importance of submarine propeller noise. *Id.* He said that "[o]ne watt of acoustical energy coming out of the propeller of a submarine in the Strait of Gibraltar can be heard off the coast of Virginia." *Id.*

71. See Chaze & Kaylor, *supra* note 69, at 38 (stating that the Soviets have overcome deficiencies in their propeller system from information acquired by United States Navy submariner John Walker's spy ring).

72. Peterson, *Toshiba Aided Soviets With Sub Technology*, Detroit News, Apr. 28, 1987, at 1, reprinted in 133 CONG. REC. S8991 (daily ed. June 30, 1987) (explaining that once the Soviet Union learned of the extent of United States detection capabilities they proceeded to purchase Western technology in order to produce quieter propeller blades).

73. 133 CONG. REC. S8992 (daily ed. June 30, 1987) (statement of Sen. Shelby [hereinafter Shelby Statement]).

74. Peterson, *supra* note 71, at 1 (stating that Toshiba Machine Corporation is a subsidiary of Toshiba Corporation). Toshiba Corporation is the largest electronic conglomerate in Japan, selling more than 5,000 consumer and industrial products ranging from VCRs and television sets to computerized machine tools and nuclear power plant equipment. *Id.* There are more than 120,000 world-wide employees of Toshiba Corporation, with nearly 70,000 of them located outside Japan. *Id.* In 1985, Toshiba's assets were in excess of \$17.5 billion. *Id.*

75. Sanger, *supra* note 69, at A1. Toshiba's catalogue contained an MBP-110 propeller milling machine worth \$4 million to \$5 million. *Id.* The Soviet Union desired this particular model due to its nine independently controllable axes. *Id.* This feature enabled the milling machine to construct highly sophisticated propellers. *Id.*

76. Shelby Statement, *supra* note 72, at S8993.

77. Peterson, *Norwegian Defense Firm Stops Sales to Communist Nations*, Detroit News, June 18, 1987, at 3. Kongsberg Trade is a state-owned defense company and a division of the Norwegian firm Kongsberg Vaapenfabrik. *Id.*

78. See Fossli, *Oslo Threat To Links With Nato*, Fin. Times, July 2, 1987, at 6 (arguing that Kongsberg Vaapenfabrik violated Cocom regulations when it exported numerical control systems to the Soviet Union); see also Sanger, *supra* note 69, at D9

During 1981, the parties negotiated five separate contracts.⁷⁹ The first contract between Tekmashimport and C. Itoh & Company provided for the delivery of four unspecified milling machines as well as providing for service and spare parts for five years.⁸⁰ The second contract between Kongsberg Trade and Tekmashimport provided for the purchase of an NC-2000 numerical controller, which is the computer that guides the milling machines, and an additional service agreement.⁸¹ In a third contract between Kongsberg Trade and Toshiba Machine, Kongsberg agreed to supply the numerical controllers to Toshiba Machine for installation in the MBP-110 propeller milling machine, before shipment by C. Itoh to the Soviet Union.⁸² The fourth and fifth contracts committed Kongsberg Trade and Toshiba to pay Wako Koeki a finder's fee for orchestrating the arrangements.⁸³

To obtain the necessary export licenses for these contracts, both Toshiba and Kongsberg submitted a false-end certificate indicating that the machines contained only two axes instead of nine and that their final destination was a civilian facility located in Leningrad.⁸⁴ When the United States learned of the illegal shipments and complained, the Japanese and Norwegians investigated and discovered that Toshiba and Kongsberg had engaged in a series of deceptive transactions.⁸⁵ Furthermore, American officials learned that the Toshiba-

(stating that the Soviet Union arranged for the purchase of the computer technology from Bernhard John Green, a 49-year-old British national, who acted as Kongsberg Trade's sales manager).

79. Shelby Statement, *supra* note 72, at S8993 (stating that five separate contracts were negotiated to provide the sophisticated equipment).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. See *A Leak That Could Sink The U.S. Lead In Submarines*, BUS. WK., May 18, 1987, reprinted in 133 CONG. REC. S8991 (daily ed. June 30, 1987) (stating that some of the equipment was actually installed at a naval shipyard on the Baltic Sea near Leningrad).

85. See *Technology Transfer*, *supra* note 43, at 146 (stating that the Japanese Ministry of International Trade and Industry (MITI) is authorized to regulate the transfer of technology to other nations). Export licensing in Japan is the sole prerogative of (MITI). *Id.* There are no interagency boards or committees that oversee its operation. *Id.* *Suspicion Falls Also On MITI Staff Members, Cocom Violation: Memo Suggesting "Evading of Prescriptions,"* Yomiuri, May 28, 1987, at 27 (discussing that in the course of applying for export approval, Toshiba Machine officials personally influenced staff members of MITI). In addition, a memo written by MITI to Toshiba described ways that the company could evade the Cocom provisions. *Id.* The memo provided a detailed and concrete explanation by a MITI staff member on the application of the Cocom procedures and special points to be noted. *Id.*; see also Chandler, *Bright Lights, Big MITI*, NEW REPUBLIC, Aug. 31, 1987, at 12 (suggesting that MITI staff members may have advised Toshiba executives on ways to circumvent the Cocom regulations). On May 19, 1981, Toshiba applied to MITI for a permit to ship a TDP

Kongsberg sale of giant computer controlled milling machines was not a one-time occurrence.⁸⁶ For instance, the United States Embassy in Tokyo revealed that in 1984 Toshiba had once again exported four five-axis numerically controlled giant propeller making machines to the Soviet Union.⁸⁷

70/110 machine that was not listed in Toshiba's sales brochures. *Id.*; see also Sanger, *supra* note 69, at A1 (stating that Toshiba declared that the machine it wished to export was limited to two axes, and so falls within the Cocom specifications, and that it was intended for use in an electric power utility in Leningrad). None of the export control inspectors of MITI questioned the license. *Id.* Likewise, none of the Japanese officials discovered that the machine ultimately shipped was not the one listed on the export permit. *Id.*; see also *Soviet Technical Engineers Were Also Invited To Visit Plants and to Check on Machines*, Nihon Keizai, July 1, 1987, at 27 (stating that over a period of eighteen months, engineers from both Japan and Norway returned to the Soviet Union six times to install the four milling machines). Toshiba Machine invited Soviet technical engineers to Japan to confirm the performance of these processing machines. *Id.* Soviet technical engineers visited Japan four times, over a period that coincided with the time of the exports of the four milling machines. *Id.* The group of technical engineers from the Soviet Union checked the processing machines that they ordered and held consultations with technical experts of the Toshiba Machine Company. *Id.*; see also Sanger, *supra* note 69, at A1 (stating that the equipment shipments, the falsified export licenses, and the visits between Leningrad and Japan were apparently undetected by Western intelligence agencies until 1985). There is no consensus on how the United States and Japan ultimately discovered the leak. *Id.* Japanese officials contend that the news was leaked in December of 1985, when Kazuo Kamugai, the Moscow office manager of the Wako Koeki trading firm, told an official of Wako and Toshiba Machine that he would disclose the story of the illegal exports unless someone paid him to remain silent. *Id.* When he did not receive any money, he allegedly wrote a letter to Cocom uncovering the illegal sale. *Id.* The United States subsequently received this information. *Id.* Pentagon officials, on the other hand, maintain that rather than a letter, they received a series of clues that led them to discover the deception and link the Japanese and Norwegians to the illegal sale. *Id.* The incident did not become public knowledge until a Detroit newspaper printed the story on April 27, 1987. Shelby Statement, *supra* note 72, at S8993.

86. See 133 CONG. REC. S8372 (daily ed. June 19, 1987) (statement of Sen. Helms) (calling the Toshiba and Kongsberg history a "pattern of betrayal"); see also Sanger, *supra* note 69, at A1 (stating that the managers of Toshiba Machine burned any incriminating documents in their files when the United States and Japan discovered the diversion and also renamed any high-tech equipment that would tend to make export officials suspicious). In another incident, Japan was investigated for selling high technology products in violation of Cocom regulations. *Id.* This incident similarly involved the sale of nine-axis-type numerically-controlled propeller-making machinery to the Soviet Union. *Id.*

87. *Toshiba Broke Cocom Rules in 1984 Also*, Mainichi Daily News, June 19, 1987, at 1, reprinted in 133 CONG. REC. S8372 (daily ed. June 19, 1987). The five-axis milling machines are the second largest of the propeller-making machines Toshiba manufactured after the nine-axis machines. *Id.* While United States officials previously thought that the Soviet Union used Toshiba's nine-axis machines to make submarine propellers, they now believe that the Soviet Union used the five-axis machines to make submarine propellers and the nine-axis machines to make aircraft carriers. *Id.*

B. SIGNIFICANCE OF THE INCIDENT

Both the United States and the Soviet Union believe that submarines are the weapon that will dictate which superpower controls vital sea lanes in any future military exchange.⁸⁸ Each year, both the United States and the Soviet Union spend billions of dollars constructing submarines and developing anti-submarine warfare tactics.⁸⁹ Although the United States still retains a lead over the Soviet Union in submarine technology,⁹⁰ the Soviet Union has acquired Western submarine technology illegally and has significantly narrowed this lead.⁹¹ In what is referred to as "the most harmful transfer of militarily sensitive technology in over a decade,"⁹² the Soviet Union is now able to manufacture quieter submarine propellers because of the equipment received from the Japanese and the Norwegian companies.⁹³ One Pentagon official estimated that as a result of this illegal transfer, the Soviet Union gained seven to ten years in propeller development and that the United States will need to spend approximately \$25 to \$30 billion in anti-submarine warfare development over the next fifteen to twenty years to counteract the Soviet gains.⁹⁴

88. See Chaze & Kaylor, *supra* note 69, at 36 (stating that each superpower is spending billions of dollars to build a new generation of submarine that is faster, quieter, stronger, and deadlier).

89. *Id.* (noting that both the Soviet Union and the United States are committed to better antisubmarine tactics in an effort to tip the scales in the struggle to control the seas).

90. *Id.* at 37 (stating that the United States now has 96 nuclear attack submarines as well as 37 strategic submarines). By comparison, the Soviets have 350 submarines, including 265 attack and cruise-missile vessels. *Id.* One hundred and forty-one of these submarines are posted to the Soviet Northern Fleet. *Id.* The United States has spent in excess of \$1.4 billion to design a new class of attack submarine, the SSN-21 Seawolf, which the navy predicts will be the world's deadliest and stealthiest when it puts to sea at the end of 1994. *Id.*

91. *Id.* at 38 (noting that Adm. Lee Baggett, United States commander of NATO's Atlantic forces, conceded that the lead of the United States in submarine defenses has shrunk dramatically). In addition to the illegal acquisition of Western secrets, the Soviet Union has made new submarine advances on its own. *Id.* New Soviet attack submarines, named Mike, Sierra, and Akula, are 100 times quieter than the older Soviet submarines. *Id.*

92. *Id.* at 42.

93. See Wilson, *Soviets Score Silent Success in Undersea Race with the United States*, Wash. Post, July 17, 1987, at A1 (stating that firms in Japan and Norway were suspected as the culprits in aiding the Soviet Union to produce quieter propellers able to avoid detection).

94. Sneider, *Japan Disputes U.S. View of Damage Done by Toshiba Sale*, Christian Sci. Monitor, July 20, 1987, at 11. See 133 CONG. REC. S9001 (daily ed. June 30, 1987) (statement of Sen. Helms) (stating that prior to this betrayal of the Western Alliance, NATO antisubmarine warfare specialists could pick up the sounds of Soviet submarines from 200 miles away, or roughly the distance from Washington to New York). After the Toshiba incident, the distance decreased to 10 miles. *Id.* This is more

III. RESPONSES TO THE INCIDENT

A. RESPONSE IN NORWAY

In the aftermath of the Toshiba-Kongsberg incident, the government of Norway has expressed concern over the loss of strategic technology and the desire to address the problem.⁹⁶ Upon learning of Kongsberg's involvement in the sale, the Norwegian government closed down Kongsberg Trading Company, including its Moscow office, and terminated all software and hardware support activities for equipment already delivered.⁹⁶ Norway also barred those individuals who participated in the illegal sales to the Soviet bloc, whether or not directly involved in the case, from any future employment by Kongsberg.⁹⁷ Moreover, the Norwegian government filed criminal charges against the manager of the Kongsberg Trading Company for providing false information to the Norwegian licensing authorities.⁹⁸

Furthermore, the government initiated a formal review of all Kongsberg export licenses issued since 1970.⁹⁹ Additionally, the Norwegian government proposed a new comprehensive export control law.¹⁰⁰ Provisions of the new law upgrade the Norwegian licensing system immediately to include random checks of internal company procedures, to increase the number of licensing personnel by approximately 50 percent,

than enough to allow the Soviet ballistic missile submarines to evade detection on the open sea. *Id.*; see also Auerbach, *Another High-Tech Sale to Soviets by Toshiba Reported*, Wash. Post, June 20, 1987, at C2 [hereinafter *Another High-Tech Sale*] (stating that the cost of modifying United States detection equipment to pick up the quieter Soviet submarines could run to more than \$10 billion). Pentagon officials estimate the cost to the United States at between \$25 and \$30 billion to recapture the level of superior capabilities once enjoyed by United States submarines. *Id.*

95. *Toshiba-Kongsberg Technology Diversion Case: Hearings before the Subcom. on International Finance and Monetary Policy of the Comm. on Banking, Housing and Urban Affairs*, 100th Cong., 1st Sess. 3 (1987) [hereinafter *Technology Diversion Hearings*]; DeYoung, *Norway Irked by U.S. View on High-Tech Sale*, Wash. Post, July 19, 1987, at A17.

96. See Fossli, *supra* note 77, at 6 (stating that the government of Norway announced that it plans to reorganize Kongsberg as a defense equipment corporation). The company is not allowed to have any future dealings commercial or otherwise, with any Soviet bloc country. *Id.* At present, Kongsberg has a development contract through the Norwegian Navy, with the United States Navy, to supply Penguin missiles to the United States military). Should Kongsberg lose this contract, it could also lose other military markets including Australia, Canada, and Spain which would prove disastrous to the company. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Fossli, *supra* note 77, at 6. The new control law in Norway proposes to extend the statute of limitations for export control violations from two to ten years, increase penalties and fines against firms and individuals, and apply export controls to transfer of services, technologies, and products. *Id.*

and to alert Norwegian customs officials to planned exports in order to permit shipment checks as well as for the seizure of additional Kongsberg documents on "suspicion of illegal acts."¹⁰¹

B. RESPONSE IN JAPAN

On May 15, 1987, soon after Prime Minister Yasuhiro Nakasone of Japan learned of the incident, two top executives¹⁰² of Toshiba Corporation¹⁰³ resigned in acknowledgment of the company's embarrassment over the sale of sensitive technology to the Soviet Union by one of its subsidiaries.¹⁰⁴ Additionally, the president and three other executives of Toshiba Machine resigned and two of the company's employees were arrested after the disclosure of the sales.¹⁰⁵ The charges against the Toshiba executives were all based on violations of the Foreign Exchange and Foreign Trade Control Law of Japan.¹⁰⁶

The Japanese government prohibited C. Itoh, one of Japan's largest trading companies, from exporting any machine tools to the Soviet bloc for three months beginning May 22, 1987.¹⁰⁷ The Japanese government

101. *Id.*

102. Walters, *Two Top Toshiba Executives Quit Over Soviet Sales*, L.A. Times, July 2, 1987, at 1. The two Toshiba executives who resigned were Chairman Shoichi Saba and President Sugiichiro Watari. *Id.* The resignations were viewed by the Japanese public as serious setbacks to Toshiba, the third largest manufacturer of electrical equipment in Japan. *Id.*

103. *Japan Was Alerted To Toshiba's Exports To Soviet*, Baltimore Sun, July 3, 1987, at D1. Toshiba Corporation is the parent corporation of Toshiba Machine Corporation. *Id.*; Walters, *supra* note 102, at 1. The Toshiba Corporation earns approximately 10% of its sales in the United States and its market share in the United States is approximately \$2.3 billion. *Id.* The Toshiba Corporation sold an estimated \$4 billion worth of goods to the United States last year. *Japan Vows Noninterference in U.S. Drive to Bar Toshiba*, Wash. Post, July 3, 1987, at 63.

104. Walters, *supra* note 102, at 1. The Chairman of Toshiba said that his resignation was not prompted by any action taken in the Senate or by pressure from either the Japanese or United States governments. *Id.* Resignation is considered the highest form of apology and expression of regret in the Japanese system. *Id.* In Japan, it is not uncommon for the heads of corporations to resign when the company experiences serious problems. *Id.*

105. *Id.* The resignations of Toshiba Chairman Shoichi Saba and President Sugu Chero Wakani were a solemn acknowledgement of the company embarrassment over sales of sensitive technology to the Soviet Union by one of its subsidiaries. *Id.*

106. Japanese Cabinet Decides to Tighten Penalties For Multilateral Export Controls Violations, 4 Int'l Trade Rep. (BNA) 979 (Aug. 5, 1987) [hereinafter Japanese Cabinet Decides to Tighten Penalties].

107. *Id.* at 7. The Japanese government imposed several administrative measures against Toshiba Machine Company, C. Itoh & Company, and Wako Kocki for their role in the diversion. *Id.* One of the measures enjoined Toshiba Machine from all commerce with 14 countries of the Soviet bloc for one year beginning on May 22, 1987. *Id.* In addition, the Japanese government prohibited the company from delivering any goods, providing any spare parts, and servicing equipment in Cocom proscribed destinations. *Id.* at 8. The government prohibited the company from engaging in commer-

also amended the Foreign Exchange and Foreign Trade Control Law of Japan in an effort to tighten penalties for violations of Cocom rules¹⁰⁸ and formed an additional high level strategic goods export council to evaluate the shipment of suspect high technology items.¹⁰⁹ Additionally, many Japanese companies have voluntarily begun to hire outside counsel to conduct extensive investigations of their companies for other possible Cocom violations.¹¹⁰ Japan also offered to double the size of its export-licensing staff and to increase its financial contributions to Cocom.¹¹¹ Furthermore, the United States and Japan agreed to exchange teams of visiting export control experts to help raise the quality of the Japanese export control system to that of the United States.¹¹²

This incident differs from prior illicit transfers of dual-use technology by the Japanese to Soviet-Bloc countries.¹¹³ What makes the

cial contracts of any kind with Cocom proscribed countries during the one year period. *Id.* Moreover, the Japanese government prohibited C. Itoh, Japan's largest trading company, from exporting any machine tools to proscribed destinations for three months. *Id.* The government issued a letter of reprimand to Wako Koeki for its role in the diversion. *Id.* See *Technology Diversion Hearings*, *supra* note 95, at 4 (stating that MITI proposes to extend the one-year ban on shipments by Toshiba Machine Company to three years).

108. *Japanese Cabinet Decides to Tighten Penalties*, *supra* note 106, at 979. The amendment increases the jail penalties for Cocom violators from three to five years and increases the time for administrative sanctions from one to three years. *Id.* The amendment also requires MITI approval for exports of 178 items and technologies embargoed for national security reasons to East bloc countries. *Id.* In addition, the Foreign Ministry proposes to adopt the responsibility of enforcing controls on exports of sensitive items. *Id.* Before, MITI had the sole responsibility of controlling such items. *Id.*

109. *Id.* at 980. The purpose of the strategic goods export council is to review all applications for exports to Soviet bloc nations involving high-level computers, machine tools, semiconductor manufacturing equipment, and nuclear energy-related equipment. *Id.*

110. *Id.* at 980. Major Japanese trading companies started to develop their own internal systems to prevent similar Cocom violations. *Id.* For instance, in August of 1987, Nissan Motors established a committee designed to prevent Cocom violations of exports to the Soviet bloc. *Id.*

111. See Cullison, *Japan to Brief U.S. on Efforts to Curb Export Violations*, Wash. Post, July 14, 1987, at 5 (stating that MITI also plans to double the number of its Cocom regulation inspectors, bringing the number up to 80 from the current 34 by April); Lachica, *Japanese Move to Appease U.S. In Toshiba Case*, Wall St. J., July 17, 1987, at 16 [hereinafter *Japanese Move to Appease*] (stating that Japan has pledged to increase its financial contributions to the multilateral export-control agency); accord *Keeping Our Technology*, *supra* note 22, at 16 (stating that Norway has only six officials overseeing its export-licensing system). The United States has 488 officials in the Office of Export Licensing of the Department of Commerce. *Id.* In addition, more than one hundred people in the Departments of State, Defense, and Energy are involved in this type of monitoring of export licenses. *Id.*

112. *Japanese Move to Appease*, *supra* note 111, at 16.

113. See generally Sternheimer, *supra* note 42, at 17-18 (discussing previous incidents of illicit transfers of militarily significant technology by Ishikawajima-Harima Heavy Industries (IHI)). For example, MITI ignored Cocom restrictions in the case of the "floating dock" involving IHI and the Soviet Union. *Id.* IHI sold the Soviets a

Toshiba-Kongsberg case unique is not only the size of the transaction, but also the fact that there was no effort to disguise the destination of the equipment by sending it through third countries. From the outset of the incident, Toshiba Corporation instead maintained that few Toshiba Machine employees knew the true power or use of the equipment shipped to the Soviet Union and that officials at the parent company were completely unaware of the transaction.¹¹⁴

IV. THREE POSSIBLE RESPONSES TO THE TOSHIBA-KONGSBERG INCIDENT

The most serious threat to Cocom as a viable safeguard of Western security is the deliberate evasion of Cocom procedures by its member nations.¹¹⁵ The Toshiba-Kongsberg diversion of sensitive technology to the Soviet Union illustrates the weakness of Cocom and the need for improvement of its enforcement mechanisms. To assess the potential for increasing Cocom's effectiveness in light of the most recent Soviet illegal acquisition of highly sensitive technology, this Comment discusses three different responses: 1) a unilateral response to the incident by the United States; 2) a bilateral remedy; and 3) an attempt at increasing the effectiveness of Cocom through various multilateral channels.

A. UNILATERAL RESPONSE BY THE UNITED STATES

1. *The Garn Amendment*

When the United States Congress learned of the Toshiba-Kongsberg sale of sophisticated marine technology to the Soviet Union, many members proposed strong action against the two companies who violated Cocom regulations.¹¹⁶ Following the incident, both the House and the Senate presented a number of bills designed to sanction Toshiba

\$48.6 million floating dock with a lifting capacity of 80,000 tons; the largest such dock in the Soviet Union. *Id.* The sale of this dock had significant military implications. *Id.* The Japanese Defense Agency suggested that the dock could be used for military purposes, but MITI disregarded this advice and allowed the license to stand. *Id.*

114. Sanger, *supra* note 69, at A1.

115. Bingham & Johnson, *supra* note 16, at 906.

116. See *Toshiba Bashing*, Wall St. J., July 2, 1987, at 18 (stating that when the United States learned of the diversion, ten members of the House of Representatives smashed Toshiba radios with sledgehammers on the lawn of the Capitol); Chandler, *supra* note 84, at 12 (stating that the Japanese inserted a full-page advertisement in newspapers across the country apologizing for the illegal sale). *Id.*; *Technology Diversion Hearings*, *supra* note 95, at 1-2 (statement of Sen. Sarbanes) (stating that the Toshiba-Kongsberg incident represents one of the most egregious diversions of high technology products to the Soviet Union).

and Kongsberg.¹¹⁷ Senator Jake Garn proposed an amendment to the trade bill¹¹⁸ in an attempt to close the American market to any foreign

117. See Strobel, *Toshiba Tie to U.S.S.R. Deepens, Alarms Hill*, Wash. Times, June 19, 1987, at 2 (discussing a number of bills calling for sanctions against Toshiba and Kongsberg); Lachica, *U.S. Asks Allies To Curb Exports to Soviet Union*, Wall St. J., June 22, 1987, at 22 (discussing congressional threats to ban Toshiba and Kongsberg from United States markets for two years or more); see e.g. H.R. 2948, 100th Cong., 1st Sess. (1987) (prohibiting the Department of Defense from purchasing any product manufactured or assembled by Toshiba America, Toshiba Corp., or any of its affiliates or subsidiaries); H.R. 2241, 100th Cong., 1st Sess. (1987) (prohibiting the importation of all goods from Toshiba Corporation or any of its affiliates or subsidiaries into the United States). Under this Act, the Secretary of Defense may not enter into any contracts with these two companies. *Id.* Another bill proposed by Representative Donald Lukens (R. Ohio) would allow a two year "adjustment period" to enable American companies the opportunity to find alternative suppliers. *Id.*; H.R. 2731, 100th Cong., 1st Sess. (1987) (prohibiting any federal agency from procuring goods from firms that have jeopardized the national security of the United States); H.R. 2698, 100th Cong., 1st Sess. (1987) (prohibiting any goods produced by the Toshiba Corporation of Japan, the Kongsberg Vaapenfabrik Company of Norway, or their subsidiaries, from entering, or withdrawing from any warehouse for consumption into the customs territory of the United States for a five-year period); H.R. 2948, 100th Cong., 1st Sess. (1987) (prohibiting the Department of Defense from purchasing any product manufactured or assembled by Toshiba America Inc., or Toshiba Corporation for the purpose of resale of such product in a military exchange store); H.R. 3000, 100th Cong., 1st Sess. (1987) (prohibiting the Department of Defense from purchasing any product manufactured or assembled by Toshiba America, Inc., Toshiba Corp., or the Kongsberg Vaapenfabrik Company of Norway or their subsidiaries); H.R. 3020, 100th Cong., 1st Sess. (1987) (prohibiting the Department of Defense from purchasing Penguin Antiship missiles); accord H.R. 3026, 100th Cong., 1st Sess. (1987) (imposing sanctions against persons who violate regulations issued by any country pursuant to the Cocom agreement if the violation substantially enhances East-bloc capabilities in critical technologies); H.R. 3047, 100th Cong., 1st Sess. (1987) (providing for annual review by the President to determine the extent to which each participating country in Cocom is complying with the Cocom transfer provisions); H.R. 3079, 100th Cong., 1st Sess. (1987) (prohibiting the Secretary of Defense from entering into contracts with the Toshiba Corporation and Kongsberg Vaapenfabrik); S. 1639, 100th Cong. 1st Sess. (1987) (prohibiting the export of defense or defense related goods by persons using the services of trading companies that have violated export controls promulgated by Cocom); Amendment 355 to H.R. 3, 100th Cong., 1st Sess. (1987) (prohibiting the importation of products of the Toshiba Corporation and Kongsberg Vaapenfabrik); S. 1399C, 100th Cong., 1st Sess. (1987) (prohibiting the importation of products of the Toshiba Corporation or the Kongsberg Vaapenfabrik or any of its direct affiliates or subsidiaries into the United States); 133 CONG. REC. S8998 (daily ed. June 30, 1987) (statement of Rep. Garn) (proposing to amend H.R. 3 by attaching Amendment 359). This amendment is more commonly referred to as the Garn Amendment. *Id.* It will help protect United States national security by penalizing companies that divert advanced technology to the Soviet Union and the Eastern Bloc. *Id.*

118. 133 CONG. REC. S8998 (daily ed. June 30, 1987). The Senate rejected an amendment by Senator Richard C. Shelby (D. Ala.), H.R. 1399, that sought to implement a permanent ban on all Toshiba and Kongsberg sales in the United States. Auerbach, *Senate Approves Two-Year Ban On Toshiba's Sales in U.S.* Wash. Post, July 1, 1987, at 1. The vote was 78 to 19 against the Shelby amendment. *Id.*; Sneider, *Japan Disputes U.S. View of Damage Done By Toshiba Sale*, Christian Sci. Monitor, July 20, 1987, at 11. The Garn Amendment was incorporated into the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

firm that sells significant military technology to Warsaw Pact nations.¹¹⁹ If enacted, this penalty would amount to the stiffest sanction ever imposed for violations of export control rules in the history of Cocom.¹²⁰

Specifically, the Garn Amendment applies mandatory sanctions against Toshiba and Kongsberg.¹²¹ The sanctions prohibit imports from these two companies for not less than two years nor more than five years.¹²² The amendment bans imports from the parent companies, their affiliates, and the subsidiaries of the companies involved with the technology diversion.¹²³ In addition, the sanctions preclude Toshiba and Kongsberg from contracting with any department, agency, or instrumentality of the United States government.¹²⁴ There is also a prohibition of importation into the United States of any goods produced by Toshiba, Kongsberg, or by firms that violate Cocom regulations.¹²⁵ The amendment, however, allows the President to make exemptions in certain instances.¹²⁶ Additionally, under the proposed bill, the President may, after consultation with Congress, limit the scope of the sanctions with regard to coverage of the parent, affiliate, subsidiary, and successor companies of the foreign person who violated the Cocom regulations.¹²⁷

One section of the Garn Amendment deals with the establishment of

119. 133 CONG. REC. S8997 (daily ed. June 30, 1987). Co-sponsors of the Garn Amendment included Senators Heinz, Proxmire, Helms, D'Amato, Dixon, Glenn, McCain, DeConcini, and Hatch. *Id.*

120. *Id.*

121. Amendment 359 to H.R. 3, 100th Cong., 1st Sess., reprinted in 133 CONG. REC. S8996 (1987). There are two separate parts to this amendment, one to punish Toshiba Corporation and Kongsberg Vaapenfabrik specifically, and a second part that makes the amendment applicable to future occurrences of illegal technology diversions. *Id.* The amendment contains severable sections in the event that a court finds the section applicable to Toshiba and Kongsberg unconstitutional. *Id.*

122. *Id.* § a.

123. *Id.* § b.

124. *Id.* § b(1).

125. *Id.* § b(2).

126. See 133 CONG. REC. S8996 § c (daily ed. June 30, 1987) (stating that the President is not required to apply sanctions in certain situations). Exemptions may apply to the procurement of defense articles or defense services; to existing contracts or subcontracts; where the company or individual in question is a sole source supplier of that essential defense article, or where such goods are vital to the national security of the United States. *Id.* Additionally, there is no requirement that the President apply sanctions to imports shipped under contracts signed before May 1, 1987, to spare parts and component parts, to routine servicing and maintenance of products already supplied, or to information and technology may be exempt from any sanctions. *Id.* § c(2).

127. *Id.* § d. This amendment requires the President to report to Congress within six months after the enactment of this Act should sanctions be levied against Toshiba Corporation and Kongsberg Vaapenfabrik and semi-annually on the status of any other sanctions that are applied in the future. *Id.* § e.

greater multilateral cooperation between the members of the Cocom Coordinating Committee.¹²⁸ This section provides that the President shall negotiate with members of the Coordinating Committee and with other countries to achieve greater national security through export controls.¹²⁹ Moreover, the final section of the Garn Amendment provides for government to government discussions regarding compensation to the United States from the company or individual in violation of Cocom.¹³⁰ The amendment provides that increased costs of research, development, and the procurement of new defensive systems should determine the amount of compensation required by the diversion of critical military technology to East bloc countries.¹³¹

2. *Response to the Garn Amendment*

The Reagan administration firmly opposes the legislation imposing sanctions against Toshiba and Kongsberg for their role in the diversion of sophisticated technology to the Soviet Union.¹³² The administration believes that if the United States takes punitive action against these two firms, other countries may take similar actions against the United States in retaliation.¹³³ In addition, the Reagan administration believes that unilateral sanctions may potentially weaken the Coordinating Committee because members may be more reluctant to continue their participation in the organization if the United States alone punishes them for what it decides are infractions of Cocom rules and regulations.¹³⁴

Shortly after the introduction of this legislation, several of the largest and most influential corporations in the United States began a concerted lobbying effort to block the proposed Garn Amendment.¹³⁵ Like-

128. *Id.* § 7.

129. *Id.* Pursuant to the Garn Amendment, the following standards of cooperation are suggested to achieve greater national security for the United States and its Allies: high quality review of license applications; publication of control lists and education of the public to the need for better controls; coordination of licensing and enforcement efforts among members, uniform interpretation of controls; appreciation by the Coordinating Committee of the seriousness of violations of national security export controls; improved channels of information sharing; implementation of a standard destination control statement on all shipping documents accompanying controlled items; and effective enforcement cooperation at the working level. *Id.*

130. *Id.* § 8.

131. *Id.*

132. *Administration Firmly Opposed to Toshiba Sanctions Legislation, Freedenberg Says*, 4 Int. Trade Rep. (BNA) 1009 (Aug. 12, 1987) [hereinafter *Administration Opposed to Toshiba Sanctions*].

133. *Id.*

134. *Id.*

135. See Rasky, *Top U.S. Corporations Lobbying Against Curb On Toshiba Im-*

wise, they argue that companies contend that the ban on imports of Toshiba Corporation products may cost United States businesses billions of dollars.¹³⁶ Likewise, the ban may also cause thousands of American workers to lose their jobs.¹³⁷ Moreover, American companies realize that their relationships with Toshiba and other foreign high technology companies are so complex and intertwined that there is virtually no way to avoid serious and widespread economic damage if the United States imposes unilateral sanctions.¹³⁸

Because this diversion did not specifically involve any United States goods or technology, this reinforces the notion that the United States cannot pursue export controls unilaterally.¹³⁹ The seriousness of this incident for Western security underscores the need for cooperation between the United States and its Cocom partners.¹⁴⁰ The effective control of technology through a voluntary mechanism such as Cocom depends entirely on the cooperation of all its members to ensure uniform enforcement of its principles.¹⁴¹

The Toshiba-Kongsberg diversion was not a marginal violation of Cocom export controls.¹⁴² The diversion was a transaction that fell

ports, N.Y. Times, Sept. 14, 1987, at 1 [hereinafter *U.S. Corporations Lobby Against Toshiba Curb*] (stating that the companies who would be affected by this legislation include American Telephone & Telegraph, General Electric, Hewlett-Packard, Honeywell, IBM, Motorola, Rockwell, United Technologies, and Xerox).

136. *Id.* The ban would also apply to Kongsberg Vaapenfabrik, but Kongsberg sells almost no goods in the United States. *Id.* at D12.

137. *See* Vieth, *Toshiba Import Ban Expected to Have Little Impact on U.S. Units*, L.A. Times, July 2, 1987, at IV-1 (stating that Toshiba employs about 4,000 American workers, including an estimated 1,200 in California, 650 in Tennessee, 520 in Texas, 260 in New Jersey and 200 in Illinois). The largest United States subsidiary is Toshiba America Corporation of New York which accounts for \$1.5 billion of Toshiba's United States sales and 2,300 of its American employees. *Id.*

138. *See U.S. Corporations Lobby Against Curb On Toshiba Imports*, *supra* note 135, at D12 (noting that Apple Computer said that the proposed legislation would affect it because the printer for its desktop publishing system is made under a sole-source arrangement with Toshiba); *see also* COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION, *THE UNITED STATES CAN RESPOND TO THE DIVERSION OF TECHNOLOGY TO THE SOVIET UNION BY SUBSIDIARIES OF KONGSBERG AND TOSHIBA WITHOUT UNNECESSARILY HARMING THE UNITED STATES COMPUTER AND BUSINESS EQUIPMENT INDUSTRY*, at 3.

139. *Technology Diversion Hearings*, *supra* note 95, at 10 (statement of Sen. Dixon).

140. *Id.*

141. *See* Plousadis, *Soviet Diversion of United States Technology: The Circumvention of Cocom and United States Reexport Controls, and Proposed Solutions*, 7 *FORDHAM INT'L L.J.* 561, 589-90 (1984) (stating that the purpose of the Cocom treaty is to enlist greater member nation cooperation in preventing diversions, and this cannot be achieved through United States unilateral policy making). Cocom member states are reluctant to elevate Cocom to treaty status, therefore, greater use of persuasion is needed to obtain member cooperation. *Id.*

142. *See Technology Diversion Hearings*, *supra* note 95, at 13 (statement of Dr.

squarely within a category of high technology transfers where all parties agree that enforcement of export controls is absolutely necessary.¹⁴³ This is an ideal case to demonstrate to Cocom members that the United States is justified in pressing for rigorous enforcement of uniform standards. Unilaterally imposed sanctions in the immediate aftermath of the Toshiba-Kongsberg diversion, however, might weaken new incentives for multilateral cooperation.¹⁴⁴ It is not possible for the United States to substitute its own enforcement for Cocom in all cases.¹⁴⁵ This is especially true in cases where a foreign company does not have significant dealings with the United States and diverts sensitive technology.¹⁴⁶ The United States should approach the enforcement of export controls with care when such unilateral attempts at enforcement can harm foreign nationals.¹⁴⁷ Except when used as a temporary measure, the application of unilateral controls undermines the incentive of the allies to develop a sound basis for multilateral restrictions.¹⁴⁸ Unilateral controls may actually undermine attempts at coordinating a multilateral effort to control significant military items and, as a result, may actually strengthen the Soviet Union militarily.¹⁴⁹

United States export laws do not reach violations of Japanese export controls or violations of Cocom controls by Japanese citizens selling goods or technology that are wholly of foreign origin.¹⁵⁰ Moreover, even if Cocom were to be considered a treaty, the United States does not have authority under international law to enforce treaty obligations

Paul Freedenberg, Assistant Secretary of Commerce for Trade Administration) (stating that the Toshiba-Kongsberg diversion was one of the most significant cases of technology diversion over the last decade with profound deleterious effects on the strategic posture of the United States).

143. Sanger, *A Bizarre Deal Diverts Vital Tools to Russians*, N.Y. Times, June 12, 1987, at 1.

144. *Technology Diversion Hearings*, *supra* note 95, at 5 (statement of E. Allen Wendt, Senior Representative for Strategic Technology Policy).

145. *Id.*

146. *Id.* at 3.

147. 134 CONG. REC. S10,729 (daily ed., Aug. 3, 1988) (statement of Sen. Bradley).

148. *East/West Economic Relations: Hearing Before the Subcomm. on International Economic Policy of the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 9 (1981) (statement of Lawrence Brady, Assist. Secretary for Trade Admin., Dept. of Commerce).

149. See Root, *Trade Controls That Work*, 52 FOREIGN POL'Y 68, 69 (1984) (stating that the use of unilateral sanctions has slowed the entire process of establishing effective multilateral controls over militarily significant items, and has pushed Western bickering into the open, further enhancing the Soviet position).

150. 15 C.F.R. § 374 (1988). The United States maintains the right to control goods of United States origin which are subject to reexport controls. *Id.*

against private Japanese persons.¹⁵¹ Additionally, attempts to penalize foreign private entities in these circumstances may set a precedent whereby other Cocom members could ban imports in the future from the United States companies that violate United States export control laws or other United States statutes with foreign implications.¹⁵²

Therefore, before taking the extraordinary step of imposing economic penalties against foreign companies violating foreign law, the United States should first ensure that non-United States perpetrators of diversions are punished as contemplated in the international legal system by the countries with direct jurisdiction, Japan and Norway.¹⁵³ Japanese individuals and companies who violate export control restrictions should receive the same treatment as United States individuals and corporations. In the United States it is the responsibility of the Department of Commerce to administer sanctions against American violators.¹⁵⁴ Therefore, the United States should withhold sanctions against Japan until the Department of Commerce determines that the response from the Japanese is deficient. A determination by the Secretary of Commerce that Japanese sanctions already imposed are less rigorous than United States sanctions for the same violation may indicate the need for further sanctions by the United States.

If the foregoing conditions are not met and the United States does impose sanctions, these sanctions are meaningful only if imposed against those directly responsible.¹⁵⁵ In the present case, there is no evidence that Toshiba Machine's parent company, Toshiba Corporation, either participated in or had knowledge of Toshiba Machine's sale of proscribed equipment to the Soviet Union.¹⁵⁶ Moreover, in the

151. See Lauterpacht, *International Law and Human Rights*, 27-29 (1973), reprinted in INTERNATIONAL LAW MATERIALS, *supra* note 20, at 355 (stating that international treaty obligations cannot be enforced against private individuals).

152. *Administration Opposed to Toshiba Sanctions*, *supra* note 132, at 1009.

153. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1965) (limiting a states jurisdiction to prescribe law with respect to persons or entities located in another state when the exercise of such jurisdiction is unreasonable); see also *Overkill Could Backfire*, Chicago Sun-Times, July 6, 1987, at 21 (stating that any punishment should be imposed by the countries whose companies were responsible).

154. See 1986 EAA REPORT, *supra* note 28, at 1 (stating that the Department of Commerce employs the Office of Export Enforcement to investigate and report violations of export controls).

155. 134 CONG. REC. S10,729 (daily ed. Aug. 3, 1988) (statement of Sen. Bradley).

156. See Auerbach, *Another High-Tech Sale*, *supra* note 93, at C2 (stating that the Toshiba Corporation of Japan should not be held liable for the transgressions of a subsidiary). Although the chairman and the president of the parent corporation resigned, there is no indication to date that they were responsible for the violations. *Id.*; see also 134 CONG. REC. S10,728 (daily ed. Aug. 3, 1988) (noting that there is no

Toshiba-Kongsberg diversion case it is unlikely that the parent company will realize any derivative profits from the transaction because sanctions already imposed by Japan will lead to millions of dollars of losses for Toshiba Machine.¹⁵⁷

United States law generally does not charge an unknowing parent corporation for the conduct of its subsidiary.¹⁵⁸ There is no reason why the United States should depart from this doctrine in its attempts to punish the consequences of private foreign violations of foreign law or international agreements.¹⁵⁹ Before the United States attempts to initiate any action in the area of import restrictions, efforts to more accurately identify those who are actually culpable are justifiable. Specifically, sanctions should issue against Toshiba Machine and any other affiliates that have participated in the transaction or helped to conceal the violation.¹⁶⁰

If the United States decides to punish Japanese and Norwegian companies through import restraints, it should not penalize American companies that rely on Toshiba Corporation or its subsidiaries for parts and supplies.¹⁶¹ Trade sanctions could have a serious detrimental effect on American consumers of Toshiba products.¹⁶² A flat ban on Toshiba im-

credible evidence that Toshiba Corporation knew or participated in activity taken by Toshiba Machine). *But see The Toshiba Case And Transfer of High Technology* (WETA FM Radio NPR Network, radio broadcast, June 27, 1987) (statement by Bill Busenberg, reporter from London) (suggesting that Japanese press reports indicated that company and MITI officials knew they were dealing with KGB agents, and so did the Trade Ministry, but all ignored the warning signs and allowed the sale to go through).

157. *See Toshiba Probing Soviet Deal*, Chicago Tribune, June 25, 1987, § 3, at 2 (stating that the Defense Department has recently said that it will stop approving contracts with Toshiba Corporation). This decision will cost Toshiba hundreds of millions of dollars. *Id.*; *see also* Lachica, *U.S. Temporarily Suspends Authority of Toshiba, Kongsberg To Ship U.S. Goods*, Wall St. J., July 8, 1987, at 15 (stating that the Pentagon has postponed a decision about whether to allow Toshiba to bid to supply United States "lap top" computers to the Air Force).

158. *See* H. HENN & J. ALEXANDER, A TREATISE ON THE LAWS OF CORPORATIONS, 355 § 148 (3d ed. 1983 ed. & Supp. 1986) (stating that the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent may own all the shares of the subsidiary). If there is evidence that a parent corporation has utilized its subsidiary to evade liability, United States law allows the complainant to press its claim against the parent corporation. *Id.*

159. Rosenblatt, *Toshiba Executives Unaware of Sale to Soviets*, Wash. Post, Sept. 10, 1987, at E4.

160. *U.S. Corporations Lobby Against Curb on Toshiba Imports*, *supra* note 135, at D12.

161. CONFERENCE REPORT ON H.R. 3, OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, *reprinted in* 134 CONG. REC. H1863, H2092 (daily ed. April 20, 1988) [hereinafter TRADE BILL CONFERENCE REPORT].

162. *See Toshiba Bashing*, *supra* note 116, at 18 (arguing that rather than using this incident for further trade bashing, the United States should try to pressure the two

ports would force United States assembly lines to shut down for months, years, or perhaps indefinitely, causing thousands of United States workers to lose their jobs.¹⁶³ Even where other sources may be available, factors of cost and quality could have a serious impact upon the competitiveness of American companies.¹⁶⁴ At the very least, United States manufacturers should be granted a transition period of twenty-four months from the date of enactment in order to obtain alternative sources of technology.¹⁶⁵

B. BILATERAL NEGOTIATIONS

One proposal designed to improve the effectiveness of the export control system is for the United States to seek compensation for the diversion of militarily critical technologies to the Soviet bloc from the government of the individual or firm that took part in the illegal diversion.¹⁶⁶ Because both Japan and Norway failed to enforce Cocom regulations,¹⁶⁷ the United States should seek compensation from these countries. The United States may insist that both Norway and Japan share in the costs of improving the underwater detection systems of the United States or restore in some manner the capability the United States lost as a result of the illegal diversion.¹⁶⁸ Instead of holding the government of the companies accountable for the added defense cost, the United States could calculate the incremental cost of accelerating their programs to compensate for the Soviet advances in advanced mill-

countries to negotiate toward the common defense).

163. See *U.S. Corporations Lobby Against Toshiba Curb*, *supra* note 135, at A1 (arguing that although a ban against Toshiba imports is designed to punish Toshiba, it will in fact do great economic harm to leading American companies for whom Toshiba is a principle supplier); Rasky, *U.S. Seen Easing Stance on Toshiba*, *N.Y. Times*, July 20, 1987, at D1 (explaining that American companies have pressured Congress not to ban Toshiba products because sanctions would prove detrimental to those companies).

164. *U.S. Corporations Lobby Against Toshiba Curb*, *supra* note 135, at D12.

165. *Procurement and National Security Act of 1987: Hearings on H.R. 2731 Before the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs*, 100th Cong., 1st Sess. 2 (1987) (statement of Rep. John G. Rowland).

166. See 133 CONG. REC. S8997 (daily ed. June 30, 1987) (partial extract of amendment proposed to the Export-Administration Act of 1979 and the Export-Administration Amendment Act of 1985 proposed by Senator Garn) (suggesting greater cooperation between the United States President and Cocom member states to protect United States national security).

167. Peterson, *supra* note 71, at 1 (elaborating on the debate that violators of Cocom regulations should face tougher penalties).

168. TRADE BILL CONFERENCE REPORT, *supra* note 161, at H2093 (providing that in the case of mandatory sanctions, the Secretary of Defense must determine the costs of restoring United States military preparedness).

ing machine technology.¹⁶⁹

In addition, the President could initiate bilateral negotiations with the government of Norway and Japan to secure compensation from their governments in the form of money, expanded defense programs, or participation in joint anti-submarine warfare programs.¹⁷⁰ To maximize leverage for such compensation, the United States could suspend sanctions against the foreign companies involved until an attempt at bilateral negotiations is made.¹⁷¹ Such attempts to resolve disputes over Cocom violations bilaterally may also lead to greater mutual trust and understanding between Cocom members and thus produce a more effective system of export controls.¹⁷²

C. MULTILATERAL RESPONSE TO THE INCIDENT

One alleged systemic problem that reduces Cocom's effectiveness is the inadequate harmonization of national efforts to control illicit technology transfers.¹⁷³ In the wake of the Toshiba-Kongsberg incident, it is vital that Cocom members take multilateral action to improve harmonization and enhance licensing controls and enforcement.¹⁷⁴ For instance, license evaluations must include both a detailed technical analysis of the equipment proposed for export and end-user checks.¹⁷⁵ Cocom must continually update the list of embargoed goods to remove goods that become widely available for sale in the West and to add newly

169. 133 CONG. REC. S8998 (daily ed. June 30, 1987). The Garn Amendment allows the President to initiate discussions with the firm or individual and its national government regarding compensation in an amount proportionate to the cost of research and development of new defensive systems. *Id.*

170. *See* 133 CONG. REC. S8995 (daily ed. June 30, 1987) (statement of Sen. Garn) (maintaining that the United States provides the Japanese with most of its national defense needs, while Japan devotes less than 1% of its gross national product to defense); *accord Toshiba Bashing*, *supra* note 116, at 18 (stating that the Japanese Constitution renounces the right to use military force). As a result, Japan spends only 1% of its gross national product on "self-defense." *Id.* Similarly, Norway does not allow any foreign troops or nuclear weapons on its soil during peacetime. *Id.* Norway also does not allow allied military exercises any closer than 500 miles from its Arctic border with the Soviet Union. *Id.*

171. TRADE BILL CONFERENCE REPORT, *supra* note 161, at H2093 (mandating that in any case which sanctions are applied, the President must consult with the violator's government to seek remedial action).

172. 134 CONG. REC. S8998 (daily ed. June 30, 1987) (statement of Sen. Garn).

173. *See* Kiernan, *supra* note 60, at 304 (stating that Cocom success in preventing the transfer of technology is seriously undermined by its informal structure).

174. *Technology Diversion Hearings*, *supra* note 95, at 14 (statement of Dr. Paul Freedenberg, Assistant Secretary of Commerce for Trade Administration).

175. *See* 15 C.F.R. § 385 (1982) (stating that list changes may take into account technological advances and the availability of particular goods to controlled nations from sources outside of Cocom).

invented sensitive goods.¹⁷⁶

The Cocom members must coordinate their laws for punishing offenders of Cocom rules. Cocom members must impose stiff fines for companies that violate the rules and long jail sentences for employees who falsify documents. In Japan and Norway, extension of the statute of limitations for this type of crime would help to deter violations.¹⁷⁷ For instance, the Norwegian police allowed the statute of limitations on the diversion to expire, and, as a result, some Kongsberg employees potentially implicated in the machine tool shipments were not prosecuted.¹⁷⁸ The threat of criminal prosecution can act as a powerful deterrent to unscrupulous business practices. The number of violative technology transfers would diminish if all Cocom countries agree to treat willful export control violations as serious criminal offenses.

The United States has proposed that Cocom establish a separate multilateral military committee to oversee establishment of the list of sensitive military goods.¹⁷⁹ Representatives from each member country's Defense Ministry would be included in this military committee.¹⁸⁰ These military experts would assist in developing criteria for identifying strategic technology transfers.¹⁸¹ To date, only France and the United States have export licensing controls that include formal provisions for military advice and review.¹⁸² Establishment of these committees would provide a military analysis essential for greater reliability and enforcement of the Cocom regulations.

In addition to the formulation of a military committee, Cocom must tighten its requirements for the shipment of strategic goods. For instance, Cocom should adopt a standard destination control statement for all shipping documents accompanying strategic commodities.¹⁸³

176. *Come On, Cocom*, THE ECONOMIST, July 7, 1987, at 18.

177. Lachica, *U.S. Asks Allies To Curb Exports To Soviet Union*, Wall St. J., June 22, 1987, at 22. Norway intends to lengthen the statute of limitations on export violations to ten years from the current two. *Id.*

178. *Id.*

179. *See id.* (stating that the Reagan administration prefers to improve the security of Western technology through allied cooperation rather than through trade sanctions imposed by Congress).

180. *See Sternheimer, supra* note 42, at 17 (stating that in Japan MITI predominantly controls export licensing). Currently, there are no interagency boards or committees in Japan to oversee export licensing. *Id.* The Ministry of Foreign Affairs and the Ministry of Finance play very minor roles in this area. *Id.* The security and strategic considerations are minimized; therefore, the Japanese Defense Agency also has an insignificant role in export controls. *Id.*

181. *See id.* (stating that because MITI is responsible for export licensing, security and strategic considerations, the Japanese Defense Agency is given minimal attention).

182. *Cocom Limitations, supra* note 10, at 128.

183. Statement of Dr. Paul Freedenberg, Assistant Secretary of Commerce for

This would enable customs inspectors to more readily identify commodities that are controlled to certain specified destinations and track the movement of these goods.¹⁸⁴ Increased accountability of sensitive technology will reduce the possibility of evasion of Cocom controls.¹⁸⁵

Cocom nations must create greater multilateral cooperation with non-Cocom countries such as Sweden, Austria, and Switzerland to restrict the flow of sensitive technology through these channels.¹⁸⁶ These countries provide important avenues for diversion of Cocom list items and are major Soviet alternative and direct sources for some items on the Cocom list.¹⁸⁷ "Multilateral cooperation" should imply the future denial of strategic technology from the United States and other Western countries to any nation that allows strategic technology to be passed on to Communist nations.

The United States must emphasize the need for its allies to expand their current export licensing agencies to include more staff officials.¹⁸⁸ The Japanese export control staff currently consists of thirty customs officials and the Norwegian staff consists of six, while the United States maintains an export control staff of 620 officials.¹⁸⁹ The Cocom allies need to improve their institutions responsible for restricting the flow of militarily sensitive technology to the Soviet Union.¹⁹⁰ It is imperative that they staff their export control ministries with personnel trained to distinguish between exports that are permitted under the Cocom regulations and those that are not.¹⁹¹ Moreover, on-site inspections of high-

Trade Administration, *reprinted in Technology Diversion Hearings, supra* note 95, at 15.

184. *Id.*

185. *Id.*

186. *Western Security, supra* note 14, at 24.

187. *See id.* (stating that diversion of controlled goods through neutral European countries which are not now members of Cocom, and are not ever likely to join Cocom, creates obvious tensions).

188. *Come On, Cocom*, THE ECONOMIST, July 11, 1987, at 18. *See* Japan to Double Cocom Enforcement Staff, 4 Int'l Trade Rep. (BNA) (July 8, 1987) 877 (stating that MITI proposes to double the number of inspectors regulating exports).

189. *Keeping Our Technology, supra* note 22, at 1. Japan has thirty people overseeing 200,000 licenses annually; twenty of these were added only after the Toshiba case became public. *Id.* Norway has only six officials in its office of export licensing. *Id.* In comparison, the United States has more than quadrupled the number of personnel involved in export control over the past decade. *Id.*; *Technology Diversion Hearings, supra* note 95, at 45 (statement of Dr. Paul Freedenberg, Assistant Secretary of Commerce for Trade Administration). The United States government utilizes 620 licensing, inspection and enforcement officials and spends about \$37 million per year on its export control system. *Id.*

190. *Technology Diversion Hearings, supra* note 95, at 14 (statement of Dr. Paul Freedenberg, Assistant Secretary of Commerce for Trade Administration).

191. Lachica, *Japanese Move to Appease U.S. in Toshiba Case*, Wall. St. J., July 17, 1987 at 16 (noting that the United States and Japan will exchange teams of visit-

tech manufacturers are necessary.

Multilateral export controls need to focus more on critical technologies that transfer vital design and manufacturing know-how instead of simply regulating end-products.¹⁹² In practical terms this means that controls must be implemented at the source of production rather than at national borders.¹⁹³ The United States must cooperate with its allies to detect the methods the Soviet Union uses to steal Western technology.¹⁹⁴ Once these channels are identified, the export control personnel of every Cocom country should be alerted to potential diversions. Moreover, both industry and government should communicate more effectively with each other in an attempt to accurately track the changing nature of strategic technology.

CONCLUSION

The avarice of a Japanese and a Norwegian company and their respective governments' lack of adequate supervision of sensitive military exports has seriously undermined Western security. Toshiba and Kongsberg covertly violated the established standards that govern the operation of the Coordinating Committee for Multilateral Export Control. These companies diverted advanced milling machinery that has enabled the Soviet Union to develop much quieter submarine propellers.

Cocom's main weakness lies in its lack of enforcement mechanisms. The seriousness of this diversion reinforces the notion that the United States cannot pursue export controls unilaterally. This incident illustrates that a commitment by all of Cocom is necessary to make multilateral controls uniformly effective. The proposed imposition of unilateral United States sanctions against these companies, however, is not the most productive way to achieve greater enforcement. The Toshiba diversion illustrates that all members of Cocom should commit themselves to make multilateral controls uniformly effective. Other Cocom member states must strengthen their export control systems and improve enforcement in their own countries. The United States must work with its allies on a joint control regime that is credible and workable to prevent future diversions of this nature. The Toshiba-Kongsberg incident serves as a lesson that much work remains before the West can maintain control over the sensitive technology upon which its very survival depends.

ing experts to help raise the quality of Japanese export control personnel).

192. See *Bucy Report*, *supra* note 7, at 1 (stating that the transfer of design and manufacturing know-how is of overwhelming importance to our national security).

193. *Id.* at 3.

194. *Technology Diversion Hearings*, *supra* note 95, at 15 (statement of Dr. Paul Freedenberg, Assistant Secretary of Commerce for Trade Administration).