

1994

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Recommended Citation

Oettinger, Philip H. "National Discretion: Choosing CoCom's Successor and the New Export Administration Act." American University International Law Review 9, no. 2 (1994): 559-595.

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NATIONAL DISCRETION: CHOOSING COCOM'S SUCCESSOR AND THE NEW EXPORT ADMINISTRATION ACT

Philip H. Oettinger*

INTRODUCTION

The demise of communism in the former Soviet Union¹ and Eastern Europe² has enlarged significantly the number of business opportunities available to U.S. companies. Since World War II, the Coordinating Committee for Multilateral Export Controls (CoCom or Coordinating Committee)³ has regulated the flow of "strategic goods and technology"⁴ to the countries aligned with the former Soviet Union. The Coor-

* J.D. Candidate, May 1994, Washington College of Law, The American University. This Comment is dedicated to my parents, Peter and Marlys Oettinger, for their confidence in me over the years. The author also wishes to thank Michelle Sue Miyake for her tireless editing efforts in seeing this piece, as well as many others, to completion.

1. See *The Cocom Cooperation Forum on Export Controls is Meeting Today in Paris, What Can We Say?*, E.B. Press Guidance, Nov. 23, 1992 (on file with *The American University Journal of International Law & Policy*) (defining the former Soviet Union as the New Independent States, including: Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan).

2. See *id.* (defining the former Eastern European communist countries as Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, and Romania).

3. See Richard T. Cupitt, *The Future of CoCom*, in EXPORT CONTROLS IN TRANSITION 232, 233-35 (Gary K. Bertsch & Steven Elliott-Gower eds., 1992) (noting that the Coordinating Committee for Multilateral Export Controls (CoCom or Coordinating Committee) consisted of the following countries: Australia, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States); Stephen D. Kelly, *Curbing Illegal Transfers of Foreign-Developed Critical High Technology from CoCom Nations to the Soviet Union: An Analysis of the Toshiba-Kongsberg Incident*, 12 B.C. INT'L & COMP. L. REV. 183, 183 n.6 (1989) (identifying CoCom as an international organization comprised of Western nations that seek to regulate the exchange of critical technology).

4. See Cecil Hunt, *Multilateral Cooperation in Export Controls—The Role of CoCom*, 14 U. TOL. L. REV. 1285, 1287-88 (1983) (defining "strategic goods and technology" as items that significantly contribute to the military capability of pro-

minating Committee members created CoCom after World War II to protect themselves from the threat of communism.⁵ CoCom's purpose was to maintain a North Atlantic Treaty Organization (NATO) edge in defense technology to counterbalance the Warsaw Pact countries' superior conventional military forces.⁶ To maximize the number of CoCom members, the framers designed it as an informal agreement containing only weak enforcement mechanisms.⁷

CoCom generally succeeded in limiting the flow of sensitive technology to the East.⁸ Soviet-initiated "false flag" or "front" operations illus-

scribed destination countries and adversely affect the security of member states).

5. See Gary K. Bertsch & Steven Elliott-Gower, *Introduction*, to EXPORT CONTROLS IN TRANSITION, *supra* note 3, at 1 (discussing the formation of CoCom as a response to the Cold War and as a way to delay communist acquisition of advanced military goods and technology).

6. See Kelly, *supra* note 3, at 188 (stating that the United States relied on the creation of a technological edge over the former Soviet Union to ensure national security and to develop a plan for military policy); Daniel J. Fitzpatrick, *Of Ropes, Buttons, and Four-By-Fours: Import Sanctions for Violations of the CoCom Agreement*, 29 VA. J. INT'L L. 249, 252-53 (1988) (noting that since the initiation of the Cold War the former Soviet Union's conventional forces significantly outnumbered those of the West). For this reason, the West has relied on a slight advantage in technology to guarantee national security. *Id.* The former Soviet Union and Eastern Europe, however, consistently tried to overcome this technological superiority through commercial trade and espionage. *Id.*

7. See Wende A. Wrubel, Comment, *The Toshiba-Kongsberg Incident: Shortcomings of CoCom, and Recommendations for Increased Effectiveness of Export Controls to the East Bloc*, 4 AM. U. J. INT'L L. & POL'Y 241, 253 (1989) (criticizing CoCom enforcement mechanisms as insufficient to prevent the former Soviet Union from acquiring Western technology and explaining the basis for gentlemen's agreements). States form gentlemen's agreements when they impose moral or political commitments rather than legal ones. *Id.* at 246 n.20. Under this type of agreement, parties assume voluntary commitments to refrain from performing certain acts or commit to performing others. *Id.* The parties to such an agreement expect each other to abide by the commitment without formally binding themselves to enforce violations. *Id.* As an example of a gentlemen's agreement, CoCom regulations lacked strong enforcement measures and therefore were easy to avoid. *Id.* at 252. The enforcement mechanisms mandated by CoCom consist chiefly of an Import Certificate/Delivery Verification (IC/DV) system and an "end user check." *Id.* at 253; see *infra* Part I (explaining the mechanics behind the IC/DV system and describing how an end user check functions). By requiring an exporter to obtain IC/DV documents, CoCom members hoped that the importing country's government would be better able to detect diversion. Hunt, *supra* note 4, at 1294. In addition to the IC/DV system, another enforcement mechanism involved sharing information on the illegal diversion of goods to proscribed countries. *Id.*

8. See Bertsch & Elliott-Gower, *supra* note 5, at 1 (stating that the CoCom

trate the success of CoCom in controlling exports directly to prohibited countries.⁹ This general success, however, cannot be attributed to the equal efforts of all CoCom members. The export control system employed by the United States was much more stringent than those employed by other CoCom members.¹⁰ As a result, U.S. businesses paid a disproportionate price in the Cold War effort to safeguard the West's sensitive technology.¹¹

system helped to maintain a technological lead in the West). The West is estimated to be 10 years ahead of the former Soviet Union and Eastern Europe in computer technology. *Id.* 10 COMM. DAILY 5, May 16, 1990, available in LEXIS, NEWS Library, ARCNWS File (concluding that CoCom rules successfully limited the amount of high technology that leaked through to the former Soviet Union and Eastern Europe).

9. See James 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, 565 (1984) (defining "false flag" or "front" operations as the establishment of dummy businesses primarily in Japan and Western Europe for the purpose of diverting Western technology to communist countries). As soon as the front company successfully obtained the goods, it exported them to the former Soviet Union and its former Warsaw Pact allies. *Id.* In 1982 and 1983, the former Soviet Union diverted Digital Equipment Corporation's VAX 11/782 computer and the Perkin-Elmer Micralign 200's. *Id.* Although the former Soviet Union shipped the VAX 11/782 to Sweden from New York, via South Africa and West Germany, Swedish and West German authorities intercepted it upon U.S. detection. *Id.* Regarding the Micralign 200, two U.S.-made microcircuitry machines were sold to a Swiss company, Favag, S.A., which subsequently sold them to another Swiss company. *Id.* Upon final shipment to Paris, the machines disappeared, and authorities now believe the Soviets have possession of them. *Id.*

10. See Fitzpatrick, *supra* note 6, at 282 n.185 (comparing the U.S. export controls system to that of other former CoCom members and concluding that a lack of surveillance on the sale of goods and technology to third party countries has resulted in U.S. reexport controls). See also Susan F. Rasky, *What is Good for Security May be Bad for Business*, N.Y. TIMES, Oct. 18, 1987, at 5 (concluding that the United States assesses technology transfers with more scrutiny than other former CoCom members). The danger to U.S. businesses is that many countries will "design out" (i.e., deliberately not plan to use) U.S. products when they can acquire similar products elsewhere with fewer problems, even if the cost is higher. *Id.*

11. See NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING AND INSTITUTE OF MEDICINE, *FINDING COMMON GROUND* 166 (1991) (advocating the harmonization of export control lists and enforcement among former CoCom members to level the playing field for U.S. businesses that have long operated at a competitive disadvantage); U.S. Dept. of State, Bureau of Public Affairs, *U.S. Exports: Strategic Technology Controls*, GIST, June 17, 1992 (asserting that former CoCom countries should cooperate in three major areas: 1) publishing national control lists of embargoed equipment and enacting effective export control systems; 2) considering proposed

Since the demise of communism in the former Soviet Union and Eastern European countries, the export control system has changed rapidly.¹² CoCom members dissolved the organization at the end of March 1994.¹³ The successor regime to CoCom will focus on preventing arms

exports of specific embargoed items from member countries to proscribed countries; and 3) harmonizing national licensing practices for strategic exports and coordinating export control enforcement activities); DAVID J. RICHARDSON, *SIZING UP U.S. EXPORT DISINCENTIVES* 125-32 (1993) (estimating the cost of export controls at \$10 to \$20 billion and the loss of jobs at 200,000 to 400,000).

12. See Gary Milhollin, *A Look at Selling Self-Destruction: The Perils of Perry & Co.*, WASH. POST, Feb. 6, 1994, at C3 (discussing the change in position within the Department of Defense (Defense Department) on dual-use controls). Under Presidents Reagan and Bush, export control proponents could rely on the Defense Department to support controls on dual-use technology. *Id.* Presently, however, the Clinton administration's Secretary of Defense, William Perry, views export controls as ineffective in controlling the transfer of dual-use technology. *Id.* While maintaining controls on the transfer of military goods and technology, the Defense Department has launched a counter-proliferation initiative. *Id.* A counter-proliferation policy focuses on high technology responses to situations where proliferation already has occurred, instead of attempting to prevent it through the use of diplomacy and export controls. *Id.*

Compare TRADE PROMOTION COORDINATING COMMITTEE, *TOWARD A NATIONAL EXPORT STRATEGY: REPORT TO THE U.S. CONGRESS*, Sept. 30, 1993, at 57 (identifying the threshold for exports of computers to most destinations at 12.5 Millions of Theoretical Operations per Second (MTOPS) and that for supercomputers at 195 MTOPS) with *Hearings Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs*, 103d Cong., 2d Sess. 11-12 (Feb. 24, 1994) [hereinafter *EAA Hearings 2*] (statement of Barry Carter, Acting Undersecretary for the Bureau of Export Administration, Department of Commerce (Commerce Department)) (announcing a rule that will raise the threshold level to 1,000 MTOPS for computers to most destinations and 1,500 MTOPS for supercomputers). Computers and electronics comprise 69% of U.S. export licenses. TRADE PROMOTION COORDINATING COMMITTEE, *supra*, at 58 (representing that in fiscal year 1993, computer and electronic licenses were worth \$40 billion of a total export license value of \$58 billion).

13. *Export Controls*, DAILY REP. FOR EXECUTIVES, Jan. 31, 1994, available in LEXIS, NEWS Library, CURNWS File [hereinafter *Export Controls*] (stating that the dramatic changes in world politics mandate the reexamination of the Export Administration Act of 1979 (EAA) and CoCom); *Hearings Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs*, 103d Cong., 2d Sess. 2 (Feb. 3, 1994) [hereinafter *EAA Hearings 1*] (statement of Christopher A. Padilla, Chairman of the Export Controls Working Group of the National Association of Manufacturers (NAM)) (emphasizing that without export control reform, CoCom may dissolve into a system of nationally regulated unilateral controls); *U.S. Ends Cold War Controls on Telecommunications*, 14 COMM. DAILY 3, Apr. 1, 1994, available in LEXIS, NEWS Library, CURNWS File (reporting on the

and nuclear proliferation.¹⁴ CoCom's successor will not have a static list of target countries¹⁵ and will rely primarily on the discretion of each nation in controlling exports to "rogue states."¹⁶ Because the United States maintains the most stringent export control system, however, leaving export controls to national discretion risks the danger that U.S. businesses will continue to pay a disproportionate price of efforts to prevent arms and nuclear proliferation.¹⁷ This fear has led U.S. businesses to propose their version of a new Export Administration Act (new EAA) to help ensure that they no longer will have to compete at a disadvantage.¹⁸

Part I of this Comment describes the history of the CoCom system. Part II establishes the framework for the domestic export control system under the Export Administration Act of 1979 (EAA or current EAA).¹⁹

disbanding of CoCom and the elimination of export controls on telecommunications and computer equipment to China, Russia, and other former communist countries).

14. See *Export Controls: U.S. Allies Still at Odds over Details of New Post-CoCom Regime*, Official Says, Int'l Trade Daily (BNA), Feb. 1, 1994, available in LEXIS, NEWS Library, CURNWS File [hereinafter *U.S. Allies Still at Odds*] (reporting that at a meeting during November 1993, at the Hague, U.S. allies agreed to create a new organization that would prohibit the sale of sensitive dual-use items and armaments to countries of serious concern); *U.S. Allies Agree to Work to Set Up Post-CoCom Export Regime by October*, Int'l Trade Daily (BNA), Apr. 1, 1994, available in LEXIS, NEWS Library, CURNWS File (reporting on former CoCom member plans to establish a new regime by the fall of 1994).

15. See *U.S. Allies Still at Odds*, *supra* note 14 (noting that the replacement organization will focus on the behavior of suspect states rather than on a permanent set of enemies).

16. See Lally Weymouth, *Good News for Rogue States*, WASH. POST, Feb. 4, 1994, at A19 (listing the "rogue states" as Iran, North Korea and Syria); *U.S. Allies Still at Odds*, *supra* note 14 (listing the current target countries as Iran, Iraq, Libya, and North Korea).

17. See *EAA Hearings 1*, *supra* note 13, at 2 (testimony of Dr. Paul Freedenburg, International Trade Consultant for Baker and Botts, L.L.P.) (stating that under a system of national discretion, U.S. unilateral controls may cost companies market share while allowing proscribed end users to obtain goods elsewhere).

18. See H.R. 3412, 103d Cong., 1st Sess. (1994) (stating that the proposed recommendations include: multilateral consensus on a core list of proscribed items; a sunset provision for unilateral controls; a license-free zone for new regime members; stronger and broader foreign availability provisions; agency consolidation; a faster licensing process; and judicial review).

19. The Export Administration Act of 1979 (EAA), Pub. L. No. 96-72, 93 Stat. 503 (codified as amended in scattered sections of 50 U.S.C. app. §§ 2401-2420 (1988)). Additional export restrictions are provided by the Trading With the Enemy Act of 1917, 50 U.S.C. app. §§ 1-44 (1988), the International Emergency Economic

Part III analyzes the success CoCom had in controlling the export of sensitive technology to proscribed countries by reviewing three case studies—the Toshiba-Kongsberg incident,²⁰ the availability of prohibited products in the Cyril Bath case,²¹ and the sale of prohibited products to aid Iraqi military development.²² Despite CoCom's success, Part III demonstrates that CoCom has had greater impact on regulation in the United States than in Europe or Japan, at a higher cost to U.S. business-

Powers Act, 50 U.S.C. §§ 1701-1706 (1988), the Nuclear Non-Proliferation Act, 22 U.S.C. §§ 3201-3282 (1988), the Development and Control of Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1988), and the Promotion of Export Trade Act, 15 U.S.C. §§ 4001-4053 (1988).

20. See Beverly Crawford, *Changing Export Controls in an Interdependent World: Lessons from the Toshiba Case for the 1990s*, in EXPORT CONTROLS IN TRANSITION, *supra* note 3, at 249, 264-78 (stating that the Toshiba case involved the sale of computerized milling machines to the former Soviet Union by Toshiba Machine Company of Japan); *infra* notes 82-86 and accompanying text (discussing the Toshiba incident).

21. See Wrubel, *supra* note 7, at 252 n.62 (indicating that this case highlights the inadequacies of CoCom); *infra* notes 98-106 and accompanying text (describing the lost sale of metal-forming presses by Cyril Bath Co. to ABC-Loire due to different levels of domestic CoCom regulation enforcement).

22. KENNETH R. TIMMERMAN, THE DEATH LOBBY 32 (1991). French products sold to Iraq include Armat, Exocet, HOT, Magic, Martel, and Milan missiles; Alouette, Gazelle, and Super Puma helicopters; Tiger G radar; AMX 30-GCT howitzers; and a reactor capable of making nuclear bombs. *Id.* British companies aided the Iraqi airforce with sales of high-level security systems, microwave transmitters, and military training. *Id.* at 340-41. West German companies contributed heavily to Iraq's chemical weapons development by building state-of-the-art pesticide plants that were later used for the production of poisonous gas. *Id.* at 147. In addition, German companies exported an estimated 20 tons of potassium hydrogen fluoride, 1,000 tons of thionyl chloride, 60 tons of phosphorus oxychloride, 150 tons of isopropyl alcohol, and 5 tons of hydrogen fluoride, all of which were assumed to have been used in the "pesticide" plants to create poisonous gas. *Id.* at 148.

In addition to sales by British, French, and West German companies, U.S. companies also aided Iraq in its military development. *U.S. Government Controls on Sales to Iraq: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. 7-8 (1990) [hereinafter *Iraqi Hearings*] (statement of Gary Milhollin, Director of the Wisconsin Project on Nuclear Control). To assess the total level of aid given to Iraq in developing its defensive capability, experts must include indirect sales to Iraq. *Id.* Indirect sales occur when U.S. companies sell to countries that later resell those products to Iraq. *Id.* For example, a U.S. company exported seven large rocket casings from Chicago to Brazil in 1990 to help build Intercontinental Ballistic Missiles (ICBMs). *Id.* All Brazilian-made rockets, however, were converted into missiles and sold to Iraq or Libya. *Id.* This conversion benefitted Iraq's space programs, including missiles targeted at U.S. troops. *Id.*

es.²³ Part IV proposes a model for the multilateral export control regime under CoCom's successor. Part V reviews two bills currently pending before Congress, H.R. 3412 and S. 1902, that will form the basis of the new EAA. Part VI concludes that Congress not only should pursue multilateral consensus on the prohibition of certain goods and technology to rogue states, but also should maintain the availability of unilateral controls while reforming the national licensing process.²⁴

I. HISTORY OF MULTILATERAL CONTROLS UNDER COCOM

After the conclusion of World War II, the United States and its NATO allies recognized the need to prohibit the transfer of strategic goods and technology to communist countries to ensure national security.²⁵ On January 1, 1950, Western allies signed an agreement to develop a set of regulations to govern the flow of high technology to communist countries.²⁶ This agreement resulted in the creation of

23. See NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 18-20 (noting that the major areas affecting U.S. businesses are unilateralism, a lack of selectivity in developing and managing control lists, and a lack of fairness and efficiency in the U.S. export control process). The study also examined the effect of export controls on specific U.S. industrial sectors, including advanced materials, commercial aircraft and jet engines, and computers. *Id.* at 20-25. The findings of the study include the suffocating effect of unilateral controls on U.S. commerce and the detrimental effect export controls have on initial outlays for research and development (R&D). *Id.* at 21.

24. The scope of this Comment will not include an examination of controls for the following: chemical weapons instituted by the Australia Group; missiles required by the Missile Technology Control Regime; or nuclear materials handled by the Nuclear Suppliers Group.

25. Wrubel, *supra* note 7, at 244. See Hunt, *supra* note 4, at 1286-87 (discussing the initiation of the export control system as beginning with a Consultative Group consisting of export officials from Belgium, France, Italy, Luxembourg, the Netherlands, and the United Kingdom). The members of the Consultative Group created CoCom concurrently to deal, unlike the Consultative Group, with export controls on a daily basis. *Id.* Within a few years, the policy level Consultative Group ceased to meet, and CoCom emerged as an organization that supervised export controls on both an administrative and policy making level. *Id.*

26. Wrubel, *supra* note 7, at 245. To strengthen CoCom, Congress passed sanctions called the Mutual Defense Assistance Control Act of 1951 (the Battle Act), 22 U.S.C. §§ 1611-1613 (1951), *superseded by* the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (1988). *Id.* The Battle Act refused U.S. aid to countries not complying with the prohibitions on the transfer of strategic goods and technology to communist nations. *Id.* at 245 n.15. See Joseph Edward Gregory, *Controlling the Transfer of Militarily Significant Technology: CoCom After Toshiba*, 11 FORDHAM INT'L L.J. 863, 870 (1988) (explaining that the problem with the Battle Act was that

CoCom,²⁷ an informal body that was responsible for overseeing the administration of export controls to which member countries agreed unanimously.²⁸

Based in Paris, CoCom was comprised of representatives from each of the member countries.²⁹ Its main objective was to formulate an embargo policy to restrict the export of products and technology that would enhance significantly the military capabilities of the communist countries.³⁰ CoCom accomplished its objective by maintaining a series of

its influence was short-lived). As European nations moved towards economic self-sufficiency, the influence that the United States had over their export controls decreased. *Id.* at 870 n.60. No longer could the United States use economic aid as a bargaining chip to ensure that nations abided by CoCom regulations. *Id.*

27. See Fitzpatrick, *supra* note 6, at 251 n.9 (noting that the North Atlantic Treaty Organization (NATO) members established CoCom in secrecy and that it is therefore unlikely that any formal agreement was written). The statute establishing U.S. participation in CoCom is 50 U.S.C. § 2404(i) (1988), which urges the President to negotiate with Coordinating Committee members. *Id.*

28. *U.S. Exports: Strategic Technology Controls*, *supra* note 11, at 1. CoCom worked as an informal agreement that was not based on any executive agreement or treaty. *Id.* Members voted and took action only upon unanimous agreement. *Id.* See Plousadis, *supra* note 9, at 589-90 (indicating that many proponents of reform have argued that the members of CoCom should have elevated it to treaty level to provide for greater enforcement). *Contra* Interview with the Director of CoCom Affairs, of the State Department, Washington, D.C. (Jan. 6, 1993). Some experts say that the very strength of CoCom was its ability to exist as an informal agreement and still achieve, to a high degree, its stated objectives. *Id.* A formal process might have discouraged new members from joining and encouraged existing members to leave when the costs of membership outweighed the benefits provided. *Id.*

29. See *CoCom to List Products that Need Licenses for Export*, COMPUTERGRAM INT'L, May 24, 1991, available in LEXIS, NEWS Library, ARCNWS File (stating that CoCom operated out of the U.S. Embassy in Paris); *Watanabe Says Japan Wants to Coordinate New Arms Regime*, Japan Econ. Newswire, Feb. 27, 1992, available in LEXIS, NEWS Library, ARCNWS File (indicating that the U.S. Embassy in Paris served as the contact point for CoCom).

30. See Hunt, *supra* note 4, at 1288 (commenting on the offensive use of CoCom as a policy of economic warfare against the former Soviet Union and Eastern Europe at the height of the Cold War). *Id.* CoCom initially imposed embargoes on both basic industrial and military goods, subscribing to the belief that basic industrial goods would support an economic base from which a powerful military state could emerge. *Id.* CoCom policy reflected a gradual evolution towards selectively controlling the transfer of technology that had potential military application. *Id.* By delaying communist acquisition of advanced technology, the West preserved a technological gap and retained a lead-time on strategic goods and technology. *Id.* The United States Government has characterized strategic goods and technology as those products from which communist countries might extract technology of military significance; those

prohibited export lists: an International Atomic Energy List; an International Munitions List; and an International List of Dual-Use Items (Dual-Use List).³¹ The Dual-Use List generated the most controversy because it prohibited the export of items that have civilian applications due to the possibility of military use.³² In addition to formulating an embargo policy on certain products, CoCom representatives met weekly to consider exceptions to its prohibitions.³³ If verification of civilian

products of military significance where there exists a deficiency in the proscribed destinations; and those products used in peacetime for the production, development, and use of arms. *Id.*

31. See Hunt, *supra* note 4, at 1288-91 (noting that the International Dual-Use List included dual-use items not present on either of the two other lists). The domestic equivalent of the CoCom List of Dual-Use Items, with additional items, was the Commerce Control List. 15 C.F.R. § 799.1 (Supp. No. 1) (1993). Similarly, the U.S. Munitions List roughly corresponded to the International Munitions List. *Id.* § 770 (Supp. No. 2) (1993). Critics of the export control process have pointed to disparities between the CoCom and domestic lists that allowed foreign companies to supply products prohibited by U.S. controls to communist countries. NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 172. To differentiate between CoCom regulations and U.S. imposed unilateral controls, the Commerce and Defense Departments designated CoCom regulations with national security implications as "NS". 15 C.F.R. § 799.1 (Supp. No. 1) (1993). Items proscribed for foreign policy reasons had a "FP" designation. *Id.*

32. See Christopher K. Davis, *Export Controls: New CoCom Measures on High-Technology Exports*, 29 HARV. INT'L L.J. 547, 548 (1988) (stating that the United States received little cooperation in its effort to tighten export controls from Western European countries, because they viewed trade with the former Soviet Union and Eastern Europe as economically beneficial and not as destructive to national security interests); Rasky, *supra* note 10, at 5 (quoting a German diplomat as saying that the Pentagon, in prohibiting U.S. exporters from selling many dual-use goods, had exceeded what was realistically enforceable). The controversy over dual-use items is best illustrated by the following example. Rasky, *supra* note 10, at 5. Consider a \$10,000 music synthesizer containing a \$500 computer disk drive. *Id.* The prevailing position in the United States Government is that the Commerce Department should prohibit the sale of the synthesizer to the Soviet Union because selling the disk drive is prohibited. *Id.* Because the Soviets could remove the computerized part, the product, by Defense Department standards, would have a clear military application. *Id.* Some former CoCom members question prohibiting the sale, claiming that communist countries would not bother buying a product to extract one-twentieth of its value. *Id.*

33. Hunt, *supra* note 4, at 1292-94. Exception requests became fairly numerous in the last couple of years of CoCom. *Id.* In the 1970s, CoCom exceptions were valued at less than 1% of total products exported from CoCom countries to controlled destinations. *Id.* From 1970 to 1978, that figure substantially increased to roughly 1,000 exception cases, the value of which was estimated at \$200 million. *Id.* On average, the United States submitted about half of all exception cases and CoCom

"end use"³⁴ existed, CoCom could agree to waive the generally applicable restrictions for a particular transaction.³⁵

A common method for assuring that dual-use products were not diverted to communist countries was through the Import Certificate/Delivery Verification (IC/DV) system.³⁶ Under the IC/DV system, CoCom required the importer's government to issue a delivery verification statement and an import statement assuring that the importer would receive the product and would not reexport it without the prior approval of the appropriate officers of the importer's government.³⁷ Another accepted method for ensuring the non-military use of dual-use items included an "end user check," whereby the recipients of the product declared its intended end use and pledged that they would not illegally divert or reexport the item to a proscribed country.³⁸ CoCom officials had the discretion to accept any of these guarantees in determining whether they should grant an exception and also could take into consideration other economic, military, or political factors.³⁹

denied 2% to 4% of all requests. *Id.*

34. See NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 357 (defining "end use" as the application or purpose for which a purchaser will use technical data or controlled commodities).

35. Hunt, *supra* note 4, at 1292-94. Delay in evaluating CoCom exception requests proved a significant problem, and the main offender was the United States. *Id.* The delay in processing created tension between the United States and other CoCom members who suspected a deliberate U.S. ploy to gain commercial advantage for U.S. businesses. *Id.* Other countries claimed that the delay was due to the cumbersome review process of the U.S. export control system. *Id.* The latter problem was the more likely explanation. *Id.*

Congress imposed processing deadlines by statute in 1979, but these deadlines only applied to export license applications under the EAA and, therefore, were not relevant for purposes of evaluating another country's exception request. *Id.* at 1293 & 1293 n.33. In recent years, good faith efforts to accelerate the evaluation by the United States of requests submitted by other Cocom members improved performance and relations. *Id.*

36. Hunt, *supra* note 4, at 1294. See *supra* note 7 and accompanying text (describing the policy behind the IC/DV mechanism as a means of enforcing CoCom restrictions).

37. Hunt, *supra* note 4, at 1294.

38. Wrubel, *supra* note 7, at 253.

39. Hunt, *supra* note 4, at 1291. An exporter initiated the process of exception evaluations by filing an application for a validated license with the Commerce Department's Bureau of Export Administration (BXA). *Id.* at 1292. Within 10 days, the BXA informed the applicant as to whether the exporter had to submit an application to a multilateral review process. *Id.* The application was first reviewed by the

II. THE DOMESTIC EXPORT CONTROL SYSTEM UNDER THE EXPORT ADMINISTRATION ACT OF 1979 (AS AMENDED)

The United States regulates its exports pursuant to the general provisions of the EAA, as amended by the Export Administration Amendments Act of 1985.⁴⁰ Under the current EAA, the President has the power to prohibit the export of certain products for foreign policy or national security reasons.⁴¹ The President, however, rarely exercises this authority. Instead, the Secretary of Commerce utilizes executive power to require licenses for most exports.⁴² To implement the EAA, Export

United States Government, which decided whether it should deny the application based on national discretion. *Id.* If there was no basis for domestic denial, BXA forwarded the application to CoCom with the U.S. request for an exception and an explanation as to why CoCom should grant it. *Id.* CoCom usually decided on the request within 18 days, but in the absence of a decision CoCom could extend its evaluation period for two weeks. *Id.* An exception to CoCom regulations required a unanimous decision. *Id.*

40. The Export Administration Amendments Act of 1985 (EAAA), Pub. L. No. 99-64, 99 Stat. 120 (codified as amended in scattered sections of 50 U.S.C. app. §§ 2401-2420 (1988 & Supp. IV 1992)). See Peter S. Malloy, *Controls on the Export of Militarily Sensitive Technology: National Security Imperative or U.S. Industry Impediment*, 18 RUTGERS COMPUTER & TECH. L.J. 841, 852-53 (1992) (describing the major changes the EAAA made to the EAA). The EAAA allows companies to export goods that previously required a validated license to controlled countries without such a license if the former CoCom members do not prohibit the transaction. *Id.* The EAAA also allows for exports to non-CoCom nations if they enter into an agreement with the United States on terms similar to those it has with former CoCom members. *Id.* The final major change concerned a shift in the burden of proof for a foreign availability showing. *Id.* Whereas the EAA required direct evidence of foreign availability, the EAAA requires the Commerce Department to accept a written representation of foreign availability supported by reasonable proof, unless the Commerce Department shows sufficient evidence to the contrary. *Id.*; see *infra* notes 52-56 and accompanying text (describing the concept of foreign availability).

41. 50 U.S.C. app. §§ 2404(a), 2405(a) (1988). These sections of the statute provide authority such that:

[I]n order to carry out the policy set forth . . . the President may, in accordance with the provisions of this section, prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States . . .

Id.

42. See Kelly, *supra* note 3, at 198, 198 n.122 (stating that the Secretary of Commerce exercises executive power granted by 50 U.S.C. app. §§ 2403(a), (e), 2409(a), to require either a general or validated license for the export of goods). See generally EVAN R. BERLACK ET AL., *COPING WITH U.S. EXPORT CONTROLS* 39-57

Administration Regulations (EAR) require the Department of Commerce (Commerce Department) and the Department of Defense (Defense Department) to generate control lists of products prohibited from export to proscribed countries.⁴³ The Defense Department maintains a list entitled

(1988) (discussing general and validated licensing procedures). A general license involves the broad grant of authority by the Commerce Department for certain products to all exporters and to all or most destinations. Iain S. Baird, *Export Licensing from "A" to "Z"*, 109 BUS. AM. 12, 12-13 (1988). Most U.S. exports are shipped using general licenses and an application is not required for their use. *Id.* at 13. Goods requiring general licenses include such items as goods imported for display at U.S. exhibitions or trade fairs; shipments of particular non-Naval petroleum commodities; and certain technical data. *Id.*

A validated license is defined as a specific grant of authority to a particular exporter from the Commerce Department for the purpose of exporting a good to a specific destination. *Id.* Generally, validated license applications are good for two years and are considered on a case-by-case basis. *Id.* Certain special licenses also are available for multiple transactions to a range of distributors. *Id.* With the exception of U.S. territories and possessions and Canada, most exports require either a validated or general export license. *Id.*

43. 50 U.S.C. app. § 2404 (c)(1), (d)(1)-(2) (1988). Section 2404(c)(1), regarding the "[Commerce] Control [L]ist," provides that:

(1) The Secretary shall establish and maintain, as part of the control list, a list of all goods and technology subject to export controls under this section. Such goods and technology shall be clearly identified as being subject to controls under this section.

Id.

Section 2404(d), regarding "militarily critical technologies," provides:

(1) The Secretary [of Commerce], in consultation with the Secretary of Defense, shall review and revise the list established pursuant to subsection (c), . . . for the purpose of insuring that export controls imposed under this section cover and (to the maximum extent consistent with the purposes of this Act) are limited to militarily critical goods and technologies and the mechanisms through which such goods and technologies may be effectively transferred.

(2) The Secretary of Defense shall bear primary responsibility for developing a list of militarily critical technologies. In developing such list, primary emphasis shall be given to —

- (A) arrays of design and manufacturing know-how,
- (B) keystone manufacturing, inspection, and test equipment,
- (C) goods accompanied by sophisticated operation, application, or maintenance know-how, and
- (D) keystone equipment which would reveal or give insight into the design and manufacture of a United States military system, which are not possessed by, or available in fact from sources outside the United States to, controlled countries and which, if exported, would permit a significant advance in a military system or any such country.

Id.

the Munitions List,⁴⁴ that contains products with specific military applications such as artillery and guided missiles.⁴⁵ The Commerce Department also has a Commerce Control List (CCL), that contains items having dual uses.⁴⁶ Items on the CCL are meant for civilian use, but countries could adapt the high technology components contained within them for military purposes.⁴⁷ The CCL is much more extensive than the former CoCom Dual-Use List, which has led U.S. businesses to criticize the CCL as an imposition of unilateral controls.⁴⁸

The disparity in controls at the national level among different major exporting countries raises a classical policy debate on which position the United States should adopt now that the Cold War has ended.⁴⁹ Proponents of unilateral controls believe the United States should continue to set the example and work to raise other countries' standards to those of the United States.⁵⁰ On the other hand, critics argue that if proscribed countries can purchase products from countries other than the United States, there is no reason to maintain a high level of export control on those products.⁵¹

To eliminate restrictions on products available elsewhere, Congress

44. 15 C.F.R. § 770 (Supp. No. 2) (1993).

45. *Id.*

46. *Id.* § 799.1 (Supp. No. 1) (1993).

47. *See id.* (listing examples of dual-use goods as including certain batteries, cameras, cellular phones and radio technology, crucibles, cylindrical tubing, fingerprint equipment, live horses, modems, scuba gear, terrain contour mapping equipment, software for protection against viruses, weaving machines, and wind tunnels).

48. *See* Wrubel, *supra* note 7, at 248 n.37 (stating that in 1989 there were 214 controlled items, only 124 of which coincided with the former CoCom list). *See also* Rasky, *supra* note 10, at 5 (citing an example where IBM wanted to sell an advanced computer to a Soviet-controlled West German company). The Defense Department blocked the sale, and the West German company then bought an identical model from the Japanese company, Hitachi. *Id.*

49. *See* Rasky, *supra* note 10, at 5 (noting different approaches that the United States could take). One approach would involve maintaining a unilateral approach with the hope that other former Cocom members would conform their export control policies to those presented by the United States. *Id.* The other, more realistic approach, involves ending unilateral restrictions on products where foreign availability exists. *Id.*; *see also* NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 19-20 (advocating an end to unilateral controls that have failed to raise other nations to our standards).

50. Rasky, *supra* note 10, at 5.

51. Rasky, *supra* note 10, at 5; *see* NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 19-20 (proposing that Congress dispense with unilateral controls that do not have the prospect of changing the standards in other countries within a short time period).

enacted foreign availability provisions⁵² as part of the EAA and established a monitoring office.⁵³ Contrary to this congressional mandate, the Commerce Department rarely utilizes foreign availability data to review the CCL and Munitions List, because the assessment costs are expensive and contentious.⁵⁴ Furthermore, whenever the President makes a determination to keep certain products on the lists despite foreign availability, he is required to negotiate with those countries to eliminate the transfer of that product to proscribed countries.⁵⁵ Because negotiations could

52. 50 U.S.C. app. §§ 2404 (f), 2405 (h) (1988). Section 2404 (f)(1)(A) provides: (A) The Secretary, in consultation with the Secretary of Defense and other appropriate Government agencies and with appropriate technical advisory committees established pursuant to subsection (h) of this section, shall review, on a continuing basis, the availability to controlled countries, from sources outside the United States, including countries which participate with the United States in multilateral export controls, of any goods or technology the export of which requires a validated license under this section. In any case in which the Secretary determines, in accordance with procedures and criteria which the Secretary shall by regulation establish, that any such goods or technology are available in fact to controlled countries from such sources in sufficient quantity and of comparable quality so that the requirement of a validated license for the export of such goods or technology is or would be ineffective in achieving the purpose set forth in subsection (a) of this section, the Secretary may not, after the determination is made, require a validated license for the export of such goods or technology during the period of such foreign availability, unless the President determines that the absence of export controls under this section on the goods or technology would prove detrimental to the national security of the United States.

50 U.S.C. app. § 2404(f)(1)(A) (1988).

53. 50 U.S.C. app. § 2404(f)(6) (1988). The Office of Foreign Availability is responsible for collecting and analyzing all information necessary for the Secretary to make determinations of foreign availability. *Id.*

54. NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 172.

55. 50 U.S.C. app. § 2404(f)(4)(A) (1988). This section states:

(A) In any case in which export controls are maintained under this section notwithstanding foreign availability, on account of a determination by the President that the absence of the controls would prove detrimental to the national security of the United States, the President shall actively pursue negotiations with the governments of the appropriate foreign countries for the purpose of eliminating such availability. No later than the commencement of such negotiations, the President shall notify in writing the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Foreign Affairs of the House of Representatives that he has begun such negotiations and why he believes it is important to national security that export controls on the goods or technology involved be maintained.

Id.

last indefinitely, foreign availability provisions do not automatically guarantee an end to unilateral controls.⁵⁶

The EAA and the EAR also regulate the export of critical technology without any guarantee that other countries will control their exports in a similar manner.⁵⁷ First, as mentioned previously, the EAA allows the President to institute export controls for foreign policy reasons.⁵⁸ Foreign policy controls often result in unilateral sanctions because other countries will not restrict sales of prohibited items if they disagree with a particular foreign policy objective.⁵⁹ Second, regardless of whether a

56. See *Foreign Availability Under the Export Administration Act: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 101st Cong., 1st Sess. 1-2 (1989) [hereinafter *Foreign Availability Hearings*] (statement of Representative Sam Gejdenson, Chairman of the Subcommittee) (stating that the most notable problems with the foreign availability determinations are bureaucratic delays and a lack of clear and unambiguous criteria on which to base a determination). Bureaucratic delays have in some cases resulted from the need to obtain assessments from the Defense Department. *Id.* at 10 (statement of Stephen Hadley, Assistant Secretary for International Security Policy, Defense Department). A seller must file an application for an export license with the Commerce Department. *Id.* at 9. If the product in question raises national security issues, however, the Defense, Energy, and State Departments must give assessments before the Commerce Department grants the license. *Id.* at 10. This interagency process often results in delays that the Government could avoid by making one agency responsible for the entire process. *Id.* The problem with this recommendation is that the export of sensitive technology is too important to leave to the discretion of one agency. *Id.* Therefore, a multiagency referral process is necessary to ensure that checks exist to protect national security interests. *Id.*

A lack of clear and unambiguous criteria on which to base foreign availability determinations often has allowed the Defense Department to criticize the Commerce Department determinations as based on unsound evidence and analysis. *Id.* at 9. To avoid arriving at different conclusions, representatives from the Commerce, Defense, and State Departments have made a greater effort to define common criteria for what constitutes foreign availability. *Id.* at 9. Under the EAA, the Commerce Department has the authority to approve an application for a license even if the Defense Department determines that the Commerce Department should not grant it. 50 U.S.C. app. § 2409(f)(1) (1988). The Secretary of Defense can, however, recommend to the President that he deny the export of a certain good or technology. *Id.* § 2409(g)(1). The President then becomes the final arbiter of the dispute between the Commerce and Defense Departments. *Id.* § 2409(g)(2).

57. *Foreign Availability Hearings*, *supra* note 56, at 9.

58. 50 U.S.C. app. § 2405(a) (1988); see *supra* note 41 (providing authority for export controls based on foreign policy considerations).

59. See *EAA Hearings 1*, *supra* note 13, at 8 (statement of Dr. Paul Freedenberg) (recounting the damage foreign policy controls had on a U.S. machine tool company following sanctions levied in 1979 on the Kama River truck plant lo-

good or technology is prohibited from export, under the EAR, exporters must apply for a license if they know that an end user to whom they are exporting is involved with a biological, chemical, missile, or nuclear program.⁶⁰ Third, where products or technology listed on the CCL originated in the United States, the EAA restricts reexport by any foreign company situated in countries not formerly members of CoCom.⁶¹ The EAA coverage is broad because it affects products assembled or partially made with U.S. components.⁶² The reexport provision also requires ex-

cated in the former Soviet Union). Because of the inability to supply spare parts or service their machines, the U.S. company became known as an unreliable supplier in a market it previously had dominated. *Id.* Even without hope of changing a targeted country's behavior, removal of a unilateral foreign policy sanction is next to impossible under current law, because it signals a weakened commitment towards changing the wrongful practices of the target government. *Id.* (testimony of Boyd J. McKelvain, National Foreign Trade Council Representative, in response to questioning by Senator Sasser, Chairman of the Subcommittee on International Finance and Monetary Policy); Report by the President's Export Council Subcommittee on Export Administration, Nov. 24, 1993, at 2 (discussing the distancing effect of export controls and expressing concern for costs incurred by U.S. businesses). *But see id.*, at 4 (statement of Dr. Thomas H. Karas, Senior Associate of International Security Commerce Program, Office of Technology Assessment) (arguing that maintaining foreign policy controls allows the Executive Branch flexibility for unforeseen circumstances where the Government may want to act but could not if EAA legislation prohibited it).

60. *See EAA Hearings 1*, *supra* note 13, at 6 (statement of Dr. Thomas H. Karas) (explaining that it does not seem unreasonable for an exporter who discovers this knowledge to pass it on to the United States Government). Most firms prefer not to contribute to the pursuit of mass-destruction weapons. *Id.* Moreover, industry concerns of unfairness are exaggerated in that the Commerce Department has not penalized any firm for failure to comply with this regulation and the costs of compliance are negligible. *Id.* *But see id.* (statement of Christopher A. Padilla) (arguing that the "know or is informed" rule improperly shifts the burden of intelligence gathering from the government to exporters).

61. 15 C.F.R. § 774.1 (1993). The U.S. reexport policy has generated animosity from other CoCom members who view it as extraterritorial in nature. Wrubel, *supra* note 7, at 251. Adversity to reexport controls arises most frequently in connection with unilateral U.S. foreign policy objectives and when complex application takes place involving rules for components, parts, and technical data. NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 173.

62. 50 U.S.C. app. § 2404(m) (1988). This provision provides:

Export controls may not be imposed under this section, or under any other provision of law, on a good solely on the basis that the good contains parts or components subject to export controls under this section if such parts or components —

- (1) are essential to the functioning of the good,
- (2) are customarily included in sales of the good in countries other than

porters located in former CoCom nations to apply to the Commerce Department for a reexport license before reexporting products to former non-CoCom countries.⁶³ Finally, the EAA provisions apply to foreign subsidiaries controlled by U.S. companies, regardless of whether the products originated in the United States.⁶⁴

Although broad, the extraterritorial scope of EAA does not reach to technological developments made by foreign companies located in foreign countries.⁶⁵ Theoretically, the EAA does not place reexport controls on companies in countries with adequate export control systems.⁶⁶ The Commerce Department has interpreted "adequate export control system" strictly, however, and despite pressure for a license-free zone by former CoCom members, it still requires the licensing of exports to almost every country.⁶⁷

controlled countries, and

(3) comprise 25 percent or less of the total value of the good, unless the good itself, if exported, would by virtue of the functional characteristics of the good as a whole make a significant contribution to the military potential of a controlled country which would prove detrimental to the national security of the United States.

Id.

63. 15 C.F.R. § 774.2 (1993); *see also* NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 66, 173 (stating that the United States is the only former CoCom country that requires permission for the reexport of goods and technology from former CoCom member countries where the goods were originally exported from the United States).

64. Kelly, *supra* note 3, at 200.

65. *See* 50 U.S.C. app. § 2404(a)(5)(A) (granting no authority to regulate goods or technology where American components or services comprise less than 25% of total value).

66. Kelly, *supra* note 3, at 200.

67. *See* Plousadis, *supra* note 9, at 584, 588 (stating that the Commerce Department has opposed eliminating licenses to former CoCom members, because it would lose a check on a good's initial export and a method of tracing goods thereafter). Arguments in favor of creating a license-free zone include that the number of applications for exports to CoCom countries approaches 25,000 per year and dispensing with these applications would ease significantly the burden on export control officials. *Id.* at 587-88. Furthermore, if members created a license-free zone within CoCom, U.S. exporters still would be required to give notice to the Secretary, and should a situation arise in which the Secretary believes a license requirement is warranted, § 106(b) of H.R. 3231 gives the Secretary the discretion to require one. *Id.*

But see id. at 584 (discussing the position of the opponents to a license-free zone). Opponents argue that without licenses the number of violations would increase. *Id.* The existence of a licensing process ensures compliance with export control regulations because manufacturers of prohibited goods and technology will not attempt to apply for a license. *Id.* Moreover, the licensing process is essential to initiating a

III. THE DISPARATE IMPACT ON U.S. BUSINESSES

Although CoCom managed to curb the flow of sensitive technology to proscribed countries,⁶⁸ it had minimal success in harmonizing export control enforcement among member nations.⁶⁹ CoCom's failure to harmonize export control enforcement occurred primarily because of differing philosophies between the United States and former CoCom members.⁷⁰ The United States adopted the position at that time that trade with the Soviet Union was concessionary⁷¹ and that it should manipulate international commerce to advance foreign policy goals.⁷² Under the U.S. rationale, export controls were an effective way to limit the economic development of the former Soviet Union.⁷³ Japan and the Western European countries, however, established an economically beneficial relationship with the former Soviet Union and Eastern Europe.⁷⁴ The leaders of these countries believed that the domestic restrictions of the United States were an overreaction to the perceived communist threat.⁷⁵ Furthermore, they viewed restrictions on many dual-use prod-

paper trail that would track efforts at diversion. *Id.*

68. See *supra* notes 8-9 and accompanying text (describing the success CoCom had in preventing the flow of sensitive goods and technology).

69. Davis, *supra* note 32, at 547. See Wrubel, *supra* note 7, at 253 (stating CoCom enforcement measures did not successfully stop the flow of sensitive technology to former communist countries).

70. Kevin F. Quigley and William J. Long, *Export Controls: Moving Beyond Economic Containment*, WORLD POL'Y J. 165 (Winter 1990), reprinted in *The Reauthorization of the Export Administration Act: Hearings and Markup Before the House Comm. on Foreign Affairs and its Subcomms. on Arms Control, International Security and Science, and International Economic Policy and Trade*, 101st Cong., 2nd Sess. 77-99 (1990). Whereas the United States viewed CoCom restrictions as a tool of containment, the West German Government viewed it as a means of stabilizing an East-West relationship. *Id.* at 83. Like the United States, West Germany supported restrictions on the flow of sensitive technology to the former communist countries but they interpreted those restrictions liberally. *Id.*

71. See *id.* (stating that the United States used trade leverage to contain communism); Davis, *supra* note 32, at 547 (indicating that a concessionary trade policy is characterized by a willingness to modify trade policy abruptly to achieve foreign policy goals).

72. Davis, *supra* note 32, at 547.

73. Davis, *supra* note 32, at 547.

74. Davis, *supra* note 32, at 548.

75. See Plousadis, *supra* note 9, at 577 (stating that former CoCom members generally had a more relaxed attitude towards export controls than did the United States).

ucts as unreasonable because end use most often remained civilian.⁷⁶ Moreover, under a cost-benefit analysis, many U.S. restrictions created significant costs in terms of foregone business opportunities while producing relatively minor national security benefits.⁷⁷

Three case studies of export control violations—the Toshiba Machine Company's⁷⁸ computerized milling machines sale,⁷⁹ the Cyril Bath Company's lost contract,⁸⁰ and the sale of advanced technology to Iraq⁸¹—demonstrate that export control systems in Western Europe and Japan historically have been much weaker than those established by the United States. Unless the regime succeeding CoCom and the new EAA make progress on obtaining multilateral controls or eliminate unilateral controls altogether, U.S. businesses will continue to operate under a more stringent export control system and, therefore, compete at a disadvantage.

A. TOSHIBA MACHINE COMPANY'S SALE TO THE FORMER SOVIET UNION

In the 1987 Toshiba case, Toshiba Machine Company of Japan (Toshiba) sold computerized milling machines to the Soviet Union.⁸² The Soviet Union allegedly purchased the machines for the rough milling of ship propellers but, instead, the machines enabled the Soviets to

76. See *supra* note 32 and accompanying text (providing an example of diverging views on dual-use goods).

77. Frank Gaffney, *German Profits Uber [Over] Allies*, WASH. TIMES, Sept. 4, 1990, at C1 (criticizing the German Government's subordination of export control principles to the promotion of business and money making).

78. See Wrubel, *supra* note 7, at 254 n.74 (describing the Toshiba Machine Company as a subsidiary of Toshiba Corporation). Toshiba sells products ranging from televisions and video cassette recorders to nuclear power plant equipment. *Id.* It employs more than 120,000 employees, is valued at more than \$17.5 billion, and is the largest electronic conglomerate in Japan. *Id.*

79. See Crawford, *supra* note 20, at 264-78 (discussing Toshiba's illegal technology sale to the former Soviet Union); Wrubel, *supra* note 7, at 253-57 (providing factual background to the Toshiba-Kongsberg incident); Gregory, *supra* note 26, at 864-67 (discussing the Toshiba incident).

80. See Wrubel, *supra* note 7, at 252 n.62 (detailing the Cyril Bath case); *infra* notes 98-106 (describing the loss of a sale to a French company due to different levels of domestic enforcement of CoCom regulations).

81. See generally TIMMERMAN, *supra* note 22 (describing the contributions of various governments to Iraq's military development).

82. Crawford, *supra* note 20, at 266.

improve the ability of their nuclear submarines to evade radar.⁸³ When coupled with advanced computer equipment purchased from Norway's Kongsberg Trading Company,⁸⁴ the machines made the Soviet submarines quieter.⁸⁵ The export to the Soviet Union of both products violated CoCom regulations and cost the United States millions of dollars in strategic military advantage.⁸⁶

To a large extent, Toshiba is responsible for the violation of CoCom regulations because it misrepresented the products sold to obtain an export license.⁸⁷ Nevertheless, no official in Japan's Ministry of International Trade and Industry (MITI) questioned the transaction.⁸⁸ In part, this oversight was due to the large volume of applications processed in proportion to the number of export control employees.⁸⁹ After the incident, Japan increased the number of export officials in MITI to ameliorate this problem.⁹⁰

83. Crawford, *supra* note 20, at 267.

84. See *Toshiba Sanctions Expire*, DEFENSE NEWS, Jan. 13, 1992, at 2, available in LEXIS, NEWS Library, ARCNWS File (finding that Kongsberg Trading Co. of Tokyo is the subsidiary of Kongsberg Vaaperfabrikk of Norway). Sanctions imposed by the Japanese Government affected both the parent and the subsidiary. *Id.*

85. Crawford, *supra* note 20, at 267.

86. See Kelly, *supra* note 3, at 184 n.11 (citing a Defense Department estimate that it would cost one billion dollars for new electronic techniques capable of tracking the quieter submarines, citing an estimate by Representative Hunter of the House Armed Services Committee that R&D would cost \$30 billion to regain previously held advantages in submarine technology, and noting that the House Armed Services Committee added \$113 million for advanced submarine R&D to the 1987 defense budget in response to the Toshiba-Kongsberg sales).

87. Gregory, *supra* note 26, at 865 (stating that the Japanese Ministry of International Trade and Industry (MITI) granted the export permit under the assumption that the export of the TDP 70/110, an item not in violation of CoCom regulations, was the actual item that the exporter would deliver).

88. Gregory, *supra* note 26, at 865; see Crawford, *supra* note 20, at 267 (finding that Japan's export control system at the time of the sale, relied heavily on "self-regulation," which meant that the Government expected the firms not to export products that were on the national list of embargoed goods). MITI officials had a mandate to nurture Japanese industries and not to restrict exports. *Id.* In addition, the Trade Administration Bureau, which was in charge of overseeing export controls, was understaffed. *Id.* Moreover, MITI officials did not have access to the kind of expertise needed to consider competently whether products had military applications. *Id.* In sum, the combination of these factors rarely, if ever, led Japanese officials to question a company's decision to export a product, believing instead that the company would police itself. *Id.*

89. Crawford, *supra* note 20, at 267.

90. Wrubel, *supra* note 7, at 260, 260 n.111.

A small-sized export control staff was not the only problem with MITI's export control program. For example, due to a lack of domestic enforcement, few incentives existed to encourage companies to abide by the system.⁹¹ In the aftermath of the Toshiba incident, the Japanese parliament approved legislation that increased penalties for export violations.⁹² Additionally, the parliament sent a strong message to any company contemplating future violations by barring Toshiba from trading with former communist countries for one year.⁹³ Similar to the actions by the Japanese Government, the Norwegian Government took swift action against the Kongsberg Trading Company. It closed down the Kongsberg Trading Company and prosecuted the manager of the company for providing false information to licensing officials.⁹⁴ Moreover, the Government of Norway passed more stringent export control legislation providing for random internal checks, increased penalties, and a greater number of export control officials.⁹⁵ Although the reactions of both the Japanese and Norwegian Governments were commendable, they came too late to stop a substantial weakening of NATO security.⁹⁶ In making changes to their export control programs, these Governments responded only after international pressure from other CoCom members.⁹⁷ Accordingly, the illegal sale of milling machines by Toshiba and the sale of advanced computer equipment by Kongsberg Trading Company to the Soviet Union illustrates Japan's and Norway's failure to control the

91. Crawford, *supra* note 20, at 268 (stating that MITI's ability and willingness to police sales are limited, and that Toshiba had little reason to believe that MITI would discover and prosecute the illicit transaction).

92. Crawford, *supra* note 20, at 274.

93. Crawford, *supra* note 20, at 268. See generally GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* (2d ed. 1990) (discussing the implementation and effectiveness of sanctions).

94. Wrubel, *supra* note 7, at 258.

95. See Wrubel, *supra* note 7, at 258 (stating that the Norwegian Government proposed new laws that would increase the number of licensing personnel by 50%).

96. See Crawford, *supra* note 20, at 265 (stating that the Reagan administration blamed Toshiba's sale for undercutting America's Anti-Submarine Warfare advances and threatening the security of the West at sea); see also *supra* note 86 and accompanying text (discussing the estimated loss of advanced technology).

97. See Crawford, *supra* note 20, at 273 (discussing negotiating strategies used to get Japan to tighten its export controls). Congressional leaders also talked of tough sanctions and symbolically smashed a radio made by Toshiba on the Capitol steps. *Id.* at 265. The reactionary nature of Japan's imposition of a one-year ban on exports made by Toshiba was confirmed when the Japanese lifted the ban on products to China and imposed a mere \$15,000 fine. *Id.*

distribution of strategic goods and technology.

B. CYRIL BATH'S LOST CONTRACT

In the 1979 Cyril Bath case, the Cyril Bath Company of Cleveland, Ohio (Cyril Bath) won one out of ten contracts to supply metal-forming presses to the Soviet Union.⁹⁸ A French company, ACB-Loire, received the other nine contracts.⁹⁹ Because the Soviets could use the metal-forming presses to manufacture airplane wings, the United States denied Cyril Bath its application for an export license.¹⁰⁰ Cyril Bath demonstrated foreign availability of the presses by French manufacturers under the other nine contracts and won a reversal.¹⁰¹ In compliance with CoCom regulations, the United States submitted an exception request to CoCom for approval of the sale.¹⁰² CoCom denied the exception because the French would not admit to selling comparable presses to the Soviets.¹⁰³ CoCom initiated an investigation leading to the discovery that the French had supplied the Soviets with comparable machines.¹⁰⁴ By the time that CoCom approved the sale by Cyril Bath, nearly three years had passed and the Soviets already had acquired French presses.¹⁰⁵ Cyril Bath, therefore, lost the sale, and ACB-Loire and the French Government benefitted.¹⁰⁶

98. Maxwell Glen, *Exporting Technology—Can Trade and National Security Coexist?*, NAT'L J., Aug. 18, 1979, at 1370, 1374.

99. *Id.*

100. *Id.*; see Wrubel, *supra* note 7, at 252 n.62 (indicating that the metal-forming presses were of military significance to the former Soviet Union's aeronautics industry).

101. Glen, *supra* note 98, at 1374; *Russia's Secret Weapon: U.S. Technology*, U.S. NEWS & WORLD REP., Mar. 17, 1980, at 51, 52; Wrubel, *supra* note 7, at 252 n.62.

102. Glen, *supra* note 98, at 1374; Wrubel, *supra* note 7, at 252 n.62.

103. Wrubel, *supra* note 7, at 252 n.62; see Glen, *supra* note 98, at 1374 (stating that the French denied that the metal-forming presses were designed to produce airplane wings).

104. Glen, *supra* note 98, at 1374; see Wrubel, *supra* note 7, at 252 n.62 (stating that the French had made the sales without seeking CoCom approval).

105. *Russia's Secret Weapon: U.S. Technology*, *supra* note 101, at 52; Glen, *supra* note 98, at 1374.

106. See Wrubel, *supra* note 7, at 252 n.62 (stating that French disregard for CoCom controls resulted in member annoyance with CoCom procedures and the loss of a sale to a U.S. business).

C. IRAQ ACQUIRES ADVANCED MILITARY TECHNOLOGY

Recent events in the Middle East represent another example of export control failure. In the Persian Gulf War, U.S. soldiers fought against military technology manufactured by Western nations.¹⁰⁷ Allied pilots bombed facilities housing advanced Western computer equipment.¹⁰⁸ Allied troops also faced biological, chemical, and conventional weapons with destructive capabilities enhanced by Western technology.¹⁰⁹

Although U.S. companies assisted Iraq's development of military technology,¹¹⁰ French and West German companies supplied the most

107. See *supra* note 22 and accompanying text (describing products sold by the French to Iraq). Additional products included: broadcasting networks, car assembly plants, defense electronics factories, desalinization plants, fertilizer plants, gas liquefaction complexes, a navy yard, a new airport, petrochemical plants, a subway system, and telecommunications systems. TIMMERMAN, *supra* note 22, at 32. The United States also contributed to the military development of Iraq through supplies of biological viruses, gas-turbined engines, navigational radar, and sophisticated computers. Gloria Borger, et al., *When the Enemy Is Us*, U.S. NEWS & WORLD REP., Feb. 18, 1991, at 36. Hewlett Packard sold computers to Iraq, and Lummus Crest, a New Jersey firm, built a petrochemical plant that it claims cannot be used to manufacture weapons. *Id.* at 37.

108. Gloria Borger et al., *supra* note 107, at 36.

109. *Id.* See Igor Reichlin et al., *Iraq's Silent Allies in its Quest for the Bomb*, BUS. WK., Jan. 14, 1991, at 50 (warning of Iraq's determination to acquire Western technology for nuclear bombs as well as biological, chemical, and conventional weapons). Iraq acquired 40 pounds of weapons-grade uranium from France and the former Soviet Union. *Id.* Iraq also has crude detonators. *Id.* It has acquired more than 350 tons of yellowcake, which is uranium ore milled into a fine powder and pressed into briquets, from Nigeria and Portugal. *Id.* To create a nuclear device, Saddam Hussein must enrich the uranium. *Id.* He needs an enrichment plant, therefore, which would mix fluorine with the yellowcake and then send the gaseous mixture through over 100 sophisticated gas centrifuges arranged in cascades. *Id.* The extremely corrosive mixture created then is converted into uranium oxide, a metal powder, that further becomes shaped into a nuclear bomb charge. *Id.*

The German Government stopped Vereinigte Aluminum Werke, a German company, from exporting large-size aluminum pipes that Saddam Hussein could have used in creating an enrichment plant. *Id.* But authorities discovered that Inwako of Germany supplied ring magnets to stabilize centrifuge rotors; H & H Metalfarm of Germany delivered numerically controlled lathes to cut specialty steels; Britain's Swift-Levick sold magnets to the Iraqis; and Veeco, a company from Plainview, New York sold vacuum pumps for a conversion plant. *Id.* Finally, MAN Technology, a German company, sold a highly classified design of a centrifuge system. *Id.* Every transaction brought Saddam Hussein closer to building a nuclear bomb. *Id.*

110. See *infra* note 113 and accompanying text (stating that U.S. and U.K. compa-

equipment and technical expertise.¹¹¹ French and West German enterprises sold high technology equipment and plans to Iraq for biological, chemical, and nuclear weapons projects.¹¹² The West German Government implicitly supported the actions of its companies through weak enforcement of existing restrictions.¹¹³

These three examples demonstrate that the French, Japanese, and West German Governments have been slow to bring charges against violators of CoCom restrictions and have imposed only nominal penalties on those guilty of violating national export legislation.¹¹⁴ This history of permissive export controls and weak enforcement by some CoCom nations lends credibility to concerns that leaving export control to national

nies aided in Iraqi development, but their participation did not reflect an overall pattern of weak export control enforcement).

111. Gaffney, *supra* note 77, at C1. The Germans are responsible for at least three major projects that jeopardized global security. *Id.* The first involves Pilot Plant, a German corporation, which sold Hussein two laboratories for chemical weapons production. *Id.* The second implicates H & H Metalform, which allegedly sold Iraq the technology that enabled the country to build enrichment plants for weapons-grade uranium. *Id.*; see *supra* note 109 and accompanying text (describing the H & H Metalform product sold). The final project resulted in the sale of uranium in various forms by a company named Nukem. Gaffney, *supra* note 77, at C1. See also *supra* notes 22 and 107 (discussing the French contribution to Iraqi development). The French also signed a Franco-Iraqi Nuclear Cooperation Treaty with Iraq, which committed the French Government to training 600 nuclear technicians from Iraq. TIMMERMAN, *supra* note 22, at 33.

112. See *supra* notes 107-111 and accompanying text (discussing the French and German contributions to Iraqi military development).

113. See Reichlin et al., *supra* note 109, at 51 (supporting a general feeling that although it is true that U.S. and U.K. companies were guilty of contributing to the buildup in Iraq, the failure of export enforcement in Germany represents a greater pattern of relaxed attitude to enforcement of CoCom regulations and domestic export controls). *Id.* German export officials admit that their department was a sieve for determined operators. *Id.* The 80 bureaucrats that worked at the Federal Export Office often sided with German businesses. *Id.* The feeling was that export officials should construe any doubtful transactions for the benefit of business interests over national security. *Id.*

114. See *supra* note 97 and accompanying text (noting that the Japanese Government initially imposed swift and serious action against Toshiba by preventing it from trading with communist countries for one year but later lifted the ban and imposed a mere \$15,000 fine); Wrubel, *supra* note 7, at 252 n.62 (stating that the French refused to admit that their companies violated CoCom prohibitions on metal-forming presses even after a U.S. investigation had proven foreign availability); see also *supra* note 113 and accompanying text (discussing the lack of strong enforcement by the German Export Control Department).

discretion will result in a competitive disadvantage for U.S. businesses.¹¹⁵

IV. THE NEW REGIME—COCOM'S SUCCESSOR

Whether U.S. businesses will continue to compete at a competitive disadvantage depends, in part, on the successor organization to CoCom. CoCom's successor will not target any static group of countries but instead will focus on preventing the acquisition of certain products that aid in military development.¹¹⁶ This new regime will rely primarily on national discretion to achieve its goals.¹¹⁷ National discretion allows each member country to implement its own export control system to meet the new regime's rules. Most likely, the new regime will operate in a manner similar to the Australia Group and the Missile Technology Control Regime.¹¹⁸ Like CoCom, these organizations operate on gentlemen's agreements and have a list of proscribed goods and technologies.¹¹⁹

Unlike CoCom, however, there will not be a regular meeting schedule, an established secretariat, a prenotification requirement,¹²⁰ or veto power.¹²¹ Thus, without veto power, the United States will lack the means to block the export of goods or technology to countries in violation of the new regime's rules.¹²² Also, unlike CoCom, its successor will operate informally and lack tight rules concerning licensing procedures.¹²³ Therefore, the rapidity and efficiency with which a country processes an export license may determine which companies, foreign governments and firms select as sellers.¹²⁴

115. See *supra* note 17 and accompanying text (stating that a more stringent export control system in the United States will cause its businesses to lose market share without stopping the availability of the same products from other sources).

116. *International Finance, Clinton Pledges Further Aid to Russia as Yeltsin Vows Reforms will Continue*, Daily Rep. for Executives, Jan. 18, 1994, available in LEXIS, NEWS Library, ARCNWS File.

117. See *Export Controls*, *supra* note 13 (stating that the new regime will focus on preventing weapons-related proliferation through a *modus operandi* of national discretion).

118. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Dr. Paul Freedenberg).

119. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Dr. Paul Freedenberg).

120. See *Weymouth*, *supra* note 16, at A19 (explaining that members of the new regime will no longer have to pre-notify other members before shipping exports).

121. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Dr. Paul Freedenberg).

122. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Dr. Paul Freedenberg).

123. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Dr. Paul Freedenberg).

124. See *EAA Hearings*, *supra* note 13, at 1 (statement of Derrel De Passe, Vice

V. THE NEW EXPORT ADMINISTRATION ACT

In addition to CoCom's successor, whether the competitiveness of U.S. businesses will improve depends on changes in domestic export control legislation. The current EAA will expire in June 1994.¹²⁵ Accordingly, Congress has made the passage of a new EAA a top priority.¹²⁶ Two bills will serve as starting points for the new EAA's development. With support from the National Association of Manufacturers (NAM),¹²⁷ Representatives Toby Roth (R-Wis.) and James L. Oberstar (D-Minn.) have introduced H.R. 3412.¹²⁸ Senators Donald W. Riegle, Jr. (D-Mich.) and Jim Sasser (D-Tenn.) have introduced the Clinton administration's proposal for a new EAA in S. 1902.¹²⁹

A. THE ROTH/OBERSTAR BILL—H.R. 3412

H.R. 3412 makes several fundamental changes in the export of goods and technology. First, although H.R. 3412 maintains the availability of unilateral controls, it institutes a six-month sunset provision¹³⁰ on sanctions, unless the President upgrades the situation to a total economic embargo, or unless Congress adopts a joint resolution supporting executive action.¹³¹ Under the current EAA, the President may institute unilateral controls for foreign policy or national security reasons without defining a fixed time for rescission.¹³² In support of a strict time limit

President of Varian Associates, Inc.) (stating that bureaucratic delays in the licensing process turn foreign buyers away from U.S. suppliers and discourage small- to medium-sized businesses from exporting their products).

125. *EAA Hearings*, *supra* note 13, at 1 (opening statement of Jim Sasser, Chairman of the Senate Banking Subcommittee on International Finance and Monetary Policy).

126. *EAA Hearings*, *supra* note 13 (opening statement of Jim Sasser).

127. *See EAA Hearings 1*, *supra* note 13, at 2 (statement of Christopher A. Padilla) (stating that H.R. 3412 embodies a proposal fashioned by industry); NATIONAL ASSOCIATION OF MANUFACTURERS, *MANUFACTURING LEADS THE WAY 4* (on file with *The American University Journal of International Law and Policy*) (defining NAM as the representative for more than 12,000 member companies that comprises 85% of the American manufacturing industry).

128. H.R. 3412, 103d Cong., 1st Sess. (1993).

129. S. 1902, 103d Cong., 2d Sess. (1994).

130. H.R. 3412 § 5(a), at 47; *see* NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 360 (defining "sunset provision" as "a clause mandating the periodic review and automatic termination of an export restriction unless its continued inclusion on a control list has been rejustified and agreed upon").

131. H.R. 3412 § 5(b), at 54-63.

132. *See supra* notes 41, 58-59 and accompanying text (citing the authority for

on unilateral controls, U.S. industries argue that their proposal maintains executive discretion while encouraging the Government to seek multilateral agreement.¹³³ In the event that the United States cannot obtain multilateral agreement on economic sanctions, this provision ensures that businesses will not have to compete at a disadvantage for longer than 180 days, unless one of the two statutory exceptions is met.¹³⁴

Critics of the sunset provision note that at certain times the United States may wish to prevent the export of a good or technology regardless of the position of other countries.¹³⁵ Sunset provisions deny the President flexibility and discretionary power that these unforeseen occasions may require.¹³⁶ Additionally, critics assert that reducing foreign availability may take longer than six months.¹³⁷ Placing a six-month limit on unilateral controls forces the President to give up pursuing multilateral controls instead of allotting more time to persuade other countries to adopt similar sanctions.¹³⁸

Second, H.R. 3412 creates a license-free zone among new regime members.¹³⁹ Under this system, exporters would not need a license for dual-use goods and technology exported to members of the new regime.¹⁴⁰ Supporters of a license-free zone assert that requiring export licenses for these products unnecessarily burdens exporters, consumes Commerce Department resources that are better allocated elsewhere, and does little to create goodwill among countries with adequate export control programs.¹⁴¹ Critics of this provision prefer the current process, however, because the existence of a system prevents certain companies from cheating.¹⁴² They note that the Commerce Department re-

foreign policy and national security controls and discussing the implementation of unilateral sanctions).

133. *EAA Hearings 1*, *supra* note 13, at 4-5 (statement of Christopher A. Padilla).

134. H.R. 3412 § 5(a)(2)(A), at 47.

135. *EAA Hearings 1*, *supra* note 13, at 4 (statement of Dr. Thomas H. Karas).

136. *EAA Hearings 1*, *supra* note 13, at 2-3 (statement of Dr. Thomas H. Karas).

137. *EAA Hearings 1*, *supra* note 13, at 4 (statement of Dr. Thomas H. Karas).

138. *See EAA Hearings 1*, *supra* note 13 (statement of Dr. Thomas H. Karas) (explaining that success in obtaining multilateral controls comes slowly sometimes and efforts to keep trying, rather than quit entirely, are appropriate).

139. H.R. 3412 § 4(d), at 39-45.

140. *Id.*

141. Plousadis, *supra* note 9, at 588; *see* NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 120-22 (discussing the movement of the European Community to a license-free zone and recommending its adoption among former CoCom partners).

142. *EAA Hearings 1*, *supra* note 13, at 5 (testimony of Henry D. Sokolski) (responding to a question on the utility of export control paperwork posed by Chairman

ceives most of its diverted product and tracking information from license applications.¹⁴³ Without license applications, critics argue that more companies will cheat and the Commerce Department will lose control over exported products.¹⁴⁴

H.R. 3412 also provides for a reduction in the Dual-Use List of prohibited exports and instead focuses on preventing the sale of choke-point technologies.¹⁴⁵ Choke-point technologies are products essential to the proliferation of missile delivery systems or weapons of mass destruction.¹⁴⁶ Supporters of this provision claim that reducing the Dual-Use List to essential items will allow countries to build "higher fences around a smaller yard,"¹⁴⁷ thereby making it more likely that the new regime will achieve multilateral controls on specific items.¹⁴⁸ In the process of revising the Dual-Use List, the working group would involve private industries to a much greater extent than they have in the past.¹⁴⁹ Private industries would provide helpful insight and serve to build a consensus for supporting export controls in certain limited areas.¹⁵⁰ Opponents of the bill agree that Congress and the agencies should shorten the Dual-Use List, provided that they can identify and stop the transfer of choke-point technologies.¹⁵¹

Sasser by stating that the existence of a system deters some exporters from cheating).

143. *EAA Hearings 1*, *supra* note 13, at 2 (testimony of Henry D. Sokolski).

144. *EAA Hearings 1*, *supra* note 13, at 2 (testimony of Henry D. Sokolski) (arguing for an inter-agency referral process to detect objectionable exports and arguing against a system triggered only by honest disclosure); *see supra* note 67 and accompanying text (discussing the role of export licensing documents in creating a paper trail and discouraging illegal exporting).

145. H.R. 3412 § 4(d), at 39-46; *EAA Hearings 1*, *supra* note 13, at 4 (statement of Christopher A. Padilla) (predicting that the negotiations under CoCom's successor will lead to a shorter list of multilateral controls).

146. *EAA Hearings 1*, *supra* note 13, at 7 (statement of Dr. Paul Freedenberg).

147. Fabio Del Bergiolo, *Reshape CoCom for the '90's: Unified Internal Rules Can Guide Policies on Exports*, DEF. NEWS, Nov. 11, 1991, available in LEXIS, NEWS Library, ARCNWS File; *Go Slowly with CoCom Changes*, DEF. NEWS, June 4, 1990, available in LEXIS, NEWS Library, ARCNWS File.

148. *EAA Hearings 1*, *supra* note 13, at 4 (statement of Christopher A. Padilla) (asserting that international negotiations will lead to a consensus on a "short-list" of choke-point goods and technologies).

149. NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 174.

150. NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 174.

151. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Henry D. Sokolski) (asserting that the use of sophisticated transshipment schemes for dual-use items makes it difficult to guard against the transfer of choke-point technologies without increasing the number of checks within the system).

The fourth major change H.R. 3412 proposes to the current EAA is judicial review of agency action.¹⁵² Under the current EAA, Commerce Department decisions regarding export license approval or denial are final because they are exempted from the Administrative Procedure Act's (APA) judicial review provision.¹⁵³ Critics of the current system argue that although there are strong arguments in favor of the exemption¹⁵⁴ such as administrative efficiency and limitations on financial resources, disallowing judicial review compromises fairness and inhibits change.¹⁵⁵ They feel, therefore, that Congress should implement limited judicial review as a check on agency behavior out of fairness to individual exporters whose applications for an export license are denied by the Commerce Department.¹⁵⁶ Supporters of the current exemption, however, state that judicial review is costly¹⁵⁷ and unnecessary in light of the small number of licenses that the Commerce Department denies.¹⁵⁸ Moreover, they assert that the Executive Branch must maintain

152. H.R. 3412 § 8(c), at 108-12.

153. 50 U.S.C. app. § 2412 (1988). Administrative Procedure and Judicial Review provides:

(a) Exemption

Except as provided in section 11(c)(2) and subsection (c) of this section, the functions exercised under this Act are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5, United States Code.

(b), (c) & (d) [Omitted]

(e) A determination of the Secretary, under section 10(f) of this Act, to deny a license may be appealed by the applicant to an administrative law judge who shall have the authority to conduct proceedings to determine only whether the item sought to be exported is in fact on the control list. Such proceedings shall be conducted within 90 days after the appeal is filed. Any determination by an administrative law judge under this subsection and all materials filed before such judge in the proceedings shall be reviewed by the Secretary, who shall either affirm or vacate the determination in a written decision within 30 days after receiving the determination. The Secretary's written decision shall be final and is not subject to judicial review. Subject to the limitations provided in section 12(c) of this Act, the Secretary's decision shall be published in the Federal Register.

Id.

154. See ARTHUR EARL BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* 594-97 (1989) (discussing the benefits and detriments of judicial review).

155. *Id.*

156. Franklin D. Cordell for John L. Ellicott, *Judicial Review Under the Export Administration Act of 1979: Is it Time to Open the Courthouse Doors to U.S. Exporters?*, reprinted in NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 321-35.

157. *Id.* at 327.

158. See *EAA Hearings 1*, *supra* note 13, at 9, 13 (statement of Dr. Thomas H.

discretion over all export applications for foreign policy and national security reasons.¹⁵⁹

H.R. 3412 also proposes streamlining the licensing process and centralizing agency review under the Commerce Department. Under the current system it is common for licensing evaluations to take from three to five months.¹⁶⁰ The bill supported by NAM reduces the time for license evaluation to thirty days.¹⁶¹ According to one expert, this time limit is not unreasonable if agencies would conduct simultaneous reviews of the license application by computer.¹⁶² H.R. 3412 also proposes centralizing the day-to-day license application operations under the Commerce Department's Bureau of Export Administration (BXA).¹⁶³ The NAM believes that consolidating the review of license applications in one agency will increase efficiency without compromising security.¹⁶⁴ To ensure that the Commerce Department takes the other agencies' concerns into consideration, H.R. 3412 proposes a policy setting and dispute resolution board comprised of officials from the Commerce, Defense, Energy, and State Departments.¹⁶⁵ Critics of agency consolidation, however, state that there is no way to ensure that the Commerce Department takes each agency's concerns into account without having all interested Departments involved in the process of review.¹⁶⁶ Moreover, as the interdependency among defense, energy, environment, technology, and trade increases, more agencies, not fewer, will have valid concerns about the evaluation of licenses.¹⁶⁷ One expert, however, has noted that the existence of more agencies in the review process does not necessari-

Karas) (stating that export license denials do not have a significant impact on the total export picture and providing a graph depicting a decline in denials of export licenses since 1989).

159. Cordell, *supra* note 156, at 327-29.

160. NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 93.

161. H.R. 3412 § 7(c), at 92-98.

162. EAA Hearings 1, *supra* note 13, at 9 (statement of Henry D. Sokolski).

163. H.R. 3412 § 6(a), at 63-68.

164. EAA Hearings 1, *supra* note 13, at 6-7 (statement of Christopher A. Padilla); NATIONAL ACADEMY OF SCIENCES, *supra* note 11, at 190-91.

165. H.R. 3412 § 6(b), at 68-70.

166. Interview with an Officer of the Bureau of Political and Military Affairs of the State Department, Washington, D.C. (Jan. 20, 1994).

167. EAA Hearings 1, *supra* note 13, at 7-10 (statement of Henry D. Sokolski) (suggesting that as proliferators rely on more complex schemes of transshipment more interagency referral is necessary to prevent the spread of chemical and nuclear weapons).

ly have to result in a longer processing time.¹⁶⁸ State-of-the-art computers, simultaneous agency review, and fewer intermediate meetings will satisfy both security concerns and business interests.¹⁶⁹

B. THE ADMINISTRATION'S BILL—S. 1902

The Commerce, Defense, and State Departments are united behind the Clinton administration's proposal for the new EAA.¹⁷⁰ The administration's bill maintains the availability of unilateral controls but subjects them to a new discipline.¹⁷¹ Before implementing unilateral controls, this bill requires the Secretary of Commerce to conduct an economic cost/benefit analysis on the proposed controls.¹⁷² To further the new discipline, this bill also requires an annual review of each item controlled,¹⁷³ as well as a report to Congress specifying the purpose

168. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Henry D. Sokolski).

169. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Henry D. Sokolski).

170. *See EAA Hearings 2*, *supra* note 12, at 1 (opening statement of Senator Jim Sasser, Subcommittee Chairman) (commending the administration for presenting a unified position on the proposed EAA). *But see* Weymouth, *supra* note 16, at A19 (indicating that there is a difference of opinion among agency officials over dual-use controls, and criticizing Secretary of Defense William Perry for favoring rapid decontrol of dual-use goods and technologies).

171. *EAA Hearings 2*, *supra* note 12, at 7 (statement of Barry Carter); *id.* at 6-7 (statement of Lynn Davis, Undersecretary for International Security Affairs, Department of State) (defending the availability of unilateral controls to respond to situations of terrorism, human right abuses, and regional instability).

172. *EAA Hearings 2*, *supra* note 12, at 7; S. 1902 § 5(b), at 28-32. In evaluating the advantages and disadvantages of proposed unilateral controls the President must consider the following statutory criteria:

1) compatibility with overall United States foreign policy objectives toward the target country, 2) the likely reactions of other nations, 3) foreign policy gains to be realized, 4) economic costs to be incurred, 5) the likelihood of changing the behavior of the target country, 6) the ability to deny access by the target country to the controlled items, and 7) the likelihood of establishing multilateral cooperation.

EAA Hearings 2, *supra* note 12, at 7 (statement of Barry Carter).

173. S. 1902 § 5(a)(5), at 28; *EAA Hearings 2*, *supra* note 12, at 8 (statement of Barry Carter). In conducting the annual review, the President will only renew or extend unilateral export controls if they are likely to continue to:

make substantial progress toward achieving the intended purpose of 1) changing, modifying, or constraining the undesirable conduct or policies of the target country or countries, 2) denying the target country access to controlled items from all sources, 3) substantially assisting efforts to achieve multilateral cooperation to deny the target country unconstrained access to controlled items, or 4) promoting the foreign policy purpose of avoiding actions that significantly and

for each export control.¹⁷⁴ In the event that an export control does not meet the statutorily imposed criteria, the bill calls for elimination of that control.¹⁷⁵ Finally, the bill requires publication of all controls in the Federal Register.¹⁷⁶ The administration claims that the above requirements create an effects test that will eliminate ineffective controls, and will preclude controls whose only purpose is to express disapproval by the United States of another country's actions or policies.¹⁷⁷

Like H.R. 3412, the administration's version of the EAA streamlines the export licensing system, increases the transparency of the process, and concentrates on preventing the flow of choke-point technology.¹⁷⁸ It does not, however, create a license-free zone among new regime members.¹⁷⁹ Moreover, whereas H.R. 3412 limits the export licensing process to thirty days,¹⁸⁰ the administration's proposal allows for a maximum of ninety days.¹⁸¹ In addition to decreasing the license evaluation period, the administration's bill also establishes conflict resolution procedures with stringent time limits.¹⁸² If agencies differ over the evaluation of a license application referred to them by the Commerce Department, S. 1902 first provides for an interagency committee selected by the Secretary of Commerce to attempt to resolve the dispute.¹⁸³ In the event that the committee cannot find a solution, they must refer the matter to the President no later than ninety days following the initial filing.¹⁸⁴

directly support the proliferation of weapons of mass destruction, terrorism, human rights abuses, or regional instability.

EAA Hearings 2, supra note 12, at 8 (statement of Barry Carter).

174. S. 1902 § 5(e), at 33-35.

175. S. 1902 § 5(b), at 28-32.

176. *EAA Hearings 2, supra* note 12, at 7 (statement of Lynn Davis) (providing for the identification of unilateral controls by regulation).

177. *EAA Hearings 2, supra* note 12, at 9 (statement of Barry Carter).

178. See S. 1902 § 3(2)(B), at 13 (restricting "the export of items that would make a significant contribution to the military potential of countries that would prove detrimental to the national security and foreign policy of the United States").

179. See generally S. 1902 § 8, at 84-95 (maintaining the license application process without exception for exports to former CoCom member countries).

180. H.R. 3412 § 7(c), at 92-98.

181. S. 1902 § 8(d), (g), at 89-90, 92-94.

182. *EAA Hearings 2, supra* note 12, at 12 (statement of Barry Carter) (noting the administration bill's provision for the escalation of cases in dispute to senior policy levels).

183. S. 1902 § 8(c)(5), (d), at 88-90.

184. *Id.* § 8(d), at 89-90.

Other provisions in the administration's bill address the complexity and bureaucracy of the export control system.¹⁸⁵ The bill's remedies include: the creation of a high level policy coordinating committee to communicate better to officials and exporters the goals of the export control system;¹⁸⁶ the elimination of unintended overlaps between lists of prohibited items;¹⁸⁷ the promotion of electronic filing;¹⁸⁸ and the centralization of export control functions within each agency while maintaining separate agency review.¹⁸⁹

The administration's bill stops short of providing the remedy of judicial review for agency decisionmaking. The bill requires the Secretary of Commerce to establish a procedure whereby an applicant can appeal the Commerce Department's denial of an export license application or other agency action.¹⁹⁰ If agency action fails to conform to the time limits established by the statute, the bill allows the applicant to file a petition with the Secretary of Commerce.¹⁹¹ If, after twenty days, the agency has not brought the application into conformity, the applicant may bring an action in district court to compel the agency to abide by the time limits.¹⁹² In addition to remedies for time limit violations, exporters also may petition the Secretary of Commerce if they are unfairly impacted.¹⁹³ According to the statute, unfair impact results when foreign availability exists,¹⁹⁴ or U.S. businesses are either subjected to ineffec-

185. *EAA Hearings 2*, *supra* note 12, at 10 (statement of Barry Carter) (asserting that the administration, business community, and Congress agree that the current export control system is characterized by costly and lengthy processing times).

186. *EAA Hearings 2*, *supra* note 12, at 6 (statement of Lynn Davis) (suggesting comprehensive annual reports as a means of communicating this information).

187. *EAA Hearings 2*, *supra* note 12, at 6 (statement of Lynn Davis).

188. *EAA Hearings 2*, *supra* note 12, at 6 (statement of Lynn Davis) (stating that there are now over 100 companies submitting licenses electronically).

189. *EAA Hearings 2*, *supra* note 12, at 6 (statement of Lynn Davis) (noting that the State Department has centralized its functions into one bureau).

190. S. 1902 § 8(h)(1), at 94.

191. *Id.* § 8(h)(2), at 94.

192. *Id.* § 8(h)(3), at 94-95.

193. *Id.* § 5(k), at 48-59. An exporter can petition the Secretary of Commerce on any one of three bases: foreign availability, ineffective controls, and competitive disadvantage. *Id.* § 5(k)(2). In addition, the Secretary of Commerce may conduct an evaluation on his own initiative. *Id.*

194. *Id.* § 5(k)(2)(A), at 49. Foreign availability is present when, "[t]he controlled item is available in fact in sufficient quantity and comparable quality to the proposed countries of export or end users from sources outside the United States so that the requirement for a validated license is or would be ineffective in achieving the purpose of the control." *Id.* See *EAA Hearings 2*, *supra* note 12, at 11 (statement of Barry

tive export controls,¹⁹⁵ or forced to operate at a competitive disadvantage.¹⁹⁶

S. 1902 states a clear preference for multilateral export controls and supports a strong multilateral regime.¹⁹⁷ It also harmonizes sanctions¹⁹⁸ for the transfer of weapons and strengthens enforcement of all sanctions.¹⁹⁹ Finally, S. 1902 retains the anti-boycott provisions of

Carter) (incorporating the concept of "forward-looking" into foreign availability determinations to keep pace with the rate of technological innovation).

195. S. 1902 § 5(k)(2)(B), at 49. Controls are ineffective when "[t]he controlled items are so widely available in the United States that the Government cannot enforce the controls effectively, unless the Secretary has reliable evidence that the controls have been effective in denying such target destination access to the controlled items originating in the United States." *Id.*

196. *Id.* § 5(k)(2)(C), at 49-50. Companies act at a competitive disadvantage when:

- (i) Differences between the export control policies or procedures of the United States and that of governments of foreign suppliers effectively has placed or will place the United States exporter at a near-term commercial disadvantage vis-a-vis its competitors abroad; or
- (ii) Changes to the domestic control lists of the United States and foreign governments result in similar items being controlled differently thus resulting in a competitive disadvantage.

Id.

197. *Id.* § 3(3)-(7), at 13-15 (advocating in the policy statement section, that the United States Government and members of CoCom's successor should: focus on items truly critical to control objectives, increase membership of multilateral regimes, and harmonize member countries' licensing practices).

198. *Id.* §§ 12A, 12B, at 137-69. S. 1902 makes sanctions on the sale of prohibited exports more consistent, responsive, and stronger. *EAA Hearings 2, supra* note 12, at 15-16 (statement of Barry Carter). The administration's bill:

expand[s] chemical and biological weapons (CBW) activity to include contributions to any CBW program, not just those of terrorist or rogue states, to include the knowing provision of services or participation in financial transactions involving a target program; expand[s] mandatory sanctions to include export, import and government procurement bans; expand[s] the sanctionable activity scope to include the knowing provision of services to a target program; expand[s] the consultation provisions of existing law to the missile area; revise[s] the waiver standard to include the considerations of important U.S. economic interests in proceeding with sanctions; provide[s] for multilateral sanctions to replace unilateral sanction[s] where the President finds them to be more effective.

Id.

199. S. 1902 §§ 9, 10, at 95-116; *EAA Hearings 2, supra* note 12, at 15-16 (statement of Barry Carter). S. 1902 strengthens enforcement of export controls by: providing greater authority for undercover operations; increasing penalties; utilizing for-

the current EAA²⁰⁰ and maintains the inclusion of short supply controls.²⁰¹

VI. RECOMMENDATIONS

The new export control regime creates an incentive for countries to adopt the least restrictive system. Without multilateral controls, it is unlikely that countries will achieve the goal of slowing or stopping the proliferation of arms and nuclear weapons. Moreover, in the absence of multilateral controls, foreign availability will render unilateral controls ineffective in preventing targeted countries from receiving proscribed goods and technology.²⁰² This situation will create pressure for the United States to reduce its level of export control regulation to that of the country with the least restrictive system. Such negative harmonization will likely undermine the goals of the new regime. The Clinton administration, therefore, must insist on multilateral controls to ensure that the goals of the new regime are met. National discretion alone will not produce the desired result of effective management over the distribution of sensitive goods and technology.

In formulating the new export control system, Congress must recognize the need to maintain some flexibility to allow for an effective Executive Branch response to unforeseen situations. H.R. 3412 does not appear to preserve executive discretion sufficiently. After six months, the only executive alternative to the "sunsetting" of unilateral controls is the enactment of a total embargo.²⁰³ H.R. 3412's other alternative, requiring the President to obtain a joint resolution from both houses of Congress, is strictly a legislative prerogative and does not preserve executive

feitures; providing additional inspections, searches, and seizures; and issuing denial orders. *Id.*

200. S. 1902 § 7, at 76-84; *EAA Hearings 2*, *supra* note 12, at 17 (statement of Barry Carter).

201. S. 1902 § 6, at 62-76. The President can avail himself of short supply controls to restrict items the export of which would excessively drain the country of scarce resources. *Id.* § 3(2)(D). Short supply controls also allow the President to work to secure the removal of restrictions placed by foreign countries on goods that would have a serious inflationary impact, cause a serious domestic shortage, or influence the foreign policy of the United States. *Id.*

202. *EAA Hearings 1*, *supra* note 13, at 2 (statement of Christopher A. Padilla) (predicting that under an export control system that relies on national discretion, foreign competitors will sell anything to anyone).

203. H.R. 3412 § 5(b), at 54-63.

discretion.²⁰⁴ On the other hand, S. 1902 may not go far enough in protecting U.S. business interests, by requiring an annual review, an economic analysis, an effectiveness test, and a periodic report from the Secretary of Commerce to Congress for each export control. The better approach is a compromise provision that assures businesses that the Secretary of Commerce rarely, if ever, will impose unilateral controls.

Although not a provision of S. 1902, a license-free zone among new regime members would avoid unnecessary paperwork and allow for the tracking of strategic goods and technology without compromising global security, only if coupled with a multilateral standard destination control statement.²⁰⁵ Under a license-free zone the number of exporters desiring judicial review would decline. For those cases remaining, an appeals process within the Commerce Department would suffice. Congress should not leave national security concerns to the judiciary.²⁰⁶

A shorter list of prohibited goods and technology is desired by all interested parties, provided that it succeeds in preventing the flow of choke-point technologies. Regarding items not on the short list, both bills recommend that the Clinton administration should make streamlining their application process to non-regime members a goal of the new EAA. Nevertheless, the process should not become centralized under the Commerce Department's BXA, because of other agency concerns. To address the concerns of U.S. industries, Congress should enact stringent time limits for review and include checks to ensure that the ninety day allowance under S. 1902, if enacted, does not become the standard time the Commerce Department takes for processing licenses. Moreover, Congress should mandate computerization of the licensing process, and require simultaneous review of all license applications where referral is necessary.

CONCLUSION

CoCom effectively limited the flow of sensitive military technology to the former Soviet Union and Eastern Europe, despite weak enforcement by other countries, and due largely to considerable burdens on U.S. businesses.²⁰⁷ Because the Cold War has ended, the Clinton administra-

204. *Id.*

205. Wrubel, *supra* note 7, at 271. A standard destination control statement would replace all shipping documents generated at the national level. *Id.*

206. Cordell, *supra* note 156, at 328-29 (discussing the merits of judicial review for export licensing).

207. See *supra* notes 70, 77, 113-14 and accompanying text (demonstrating the

tion and Congress have begun to formulate a new export control strategy, comprised of a new EAA and CoCom's successor.²⁰⁸ In drafting the new EAA, Congress should avoid implementing a system that encourages the use of unilateral action to prevent proliferation. In addition to working towards multilateral controls on a shorter list of prohibited items, Congress and the administration must revamp the domestic export control system to make it easier for U.S. businesses to sell in other countries.

If the Clinton administration and Congress are committed to improving the competitiveness of U.S. businesses,²⁰⁹ they should not hinder exports in their effort to prevent arms and nuclear proliferation.²¹⁰ The balance between strengthening an economy and ensuring national security is often a delicate one. Finding the correct balance is among the administration's most difficult and important challenges.

existence of less stringent export control systems adopted by former CoCom allies).

208. See *supra* Parts IV-V (discussing CoCom's successor and the new EAA).

209. See generally TRADE PROMOTION COORDINATING COMMITTEE, *supra* note 12 (discussing ways to make U.S. businesses more competitive and better exporters); LAURA D'ANDREA TYSON, WHO'S BASHING WHOM? TRADE CONFLICT IN HIGH TECHNOLOGY INDUSTRIES (1992) (advocating Government activism to promote U.S. competitiveness in high technology sectors and recommending the strengthening of multilateral rules governing high technology trade).

210. TYSON, *supra* note 209, at 54.