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## Soviet Diversion of United States Technology: The Circumvention of Cocom and the United States Reexport Controls, and Proposed Solutions

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# Soviet Diversion of United States Technology: The Circumvention of Cocom and the United States Reexport Controls, and Proposed Solutions

James Plousadis

## **Abstract**

This Note examines the Soviet diversions of United States technology and suggests possible countermeasures. Part I examines diversions and their impact on United States national security. Parts II and III review present United States and Western export and reexport controls and the problems with these controls. Parts IV and V introduce and evaluate proposals offered to modify Western export policy to stop, or at least to impede, Soviet diversions.

SOVIET DIVERSION OF UNITED STATES  
TECHNOLOGY: THE CIRCUMVENTION  
OF COCOM AND UNITED STATES REEXPORT  
CONTROLS, AND PROPOSED SOLUTIONS

*The inherent contradiction of capitalism is that it develops rather than exploits the world. The capitalistic economy plants the seeds of its own destruction in that it diffuses technology and industry, thereby undermining its own position.*

—V.I. Lenin\*

INTRODUCTION

Since World War II, the United States has maintained national security through technological superiority in strategic and tactical weapons, offsetting the Soviet Union's numerical advantage in nuclear and conventional arms.<sup>1</sup> This qualitative superiority stems from the United States lead in scientific and technological development.<sup>2</sup> The Soviet Union has sought to neutralize this ad-

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\*DEFENSE SCIENCE Bd. TASK FORCE, U.S. DEP'T OF DEFENSE, AN ANALYSIS OF EXPORT CONTROL OF U.S. TECHNOLOGY—A DOD PERSPECTIVE at i (1976) (quoting Vladimir I. Lenin), reprinted in *Extension of the Export Administration Act: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 243 (1976).

1. See *Transfer of United States High Technology to the Soviet Union and the Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 3 (1982) (statement of Sen. Nunn) [hereinafter cited as *Transfer of United States High Technology*]; CENT. INTELLIGENCE AGENCY REP., SOVIET ACQUISITION OF WESTERN TECHNOLOGY 1 (1982) [hereinafter cited as CIA REPORT], reprinted in *Transfer of United States High Technology*, supra, at 7-23. By 1982, the Soviet Union had stockpiled more than 2350 ballistic missiles containing over 6300 warheads with a combined throw weight, or payload, equivalent to over 11.2 million pounds of explosives. Conversely, the United States possessed 1700 missiles equipped with approximately 7200 warheads with a total throw weight of over four million pounds. Gelb, *U.S. Forging a New Concept for Curbing Strategic Arms*, N.Y. Times, May 2, 1982, at 1, col. 5, at 16, col. 4. But "[w]hile the Soviet Union leads in pounds of throw weight, they do not use it efficiently. The United States, on the other hand, through miniaturization and advanced technology, has increased the overall effectiveness of the throw weight at its disposal." R. ALDRIDGE, *FIRST STRIKE!: THE PENTAGON'S STRATEGY FOR NUCLEAR WAR* 55 (1983).

2. While the United States and other Western nations have enjoyed scientific and technological superiority over the Russians and the Soviets since the time of Peter the Great, R. MASSIE, *PETER THE GREAT: HIS LIFE AND WORLD* 232 (1981), there is evidence that this lead has been whittled down in recent years through the activities of Soviet intelligence agencies: "Soviet acquisition of computer and microelectronic technology over the past decade has

vantage by acquiring United States and other Western technology through both legal and illegal means.<sup>3</sup> Most of the Western military technology acquired by the Soviets<sup>4</sup> has been gathered through the activities of the KGB<sup>5</sup> and the GRU.<sup>6</sup> In addition to their espionage activities, these organizations have established "dummy" business enterprises that divert<sup>7</sup> high technology from the West to the Soviet Union.<sup>8</sup>

These "dummy" business operations circumvent<sup>9</sup> both United States reexport controls established under the Export Administra-

allowed the Soviets to reduce the U.S. lead in these technologies from 10 to 12 years in the mid-1960's to the present 3 to 5 years." 129 CONG. REC. H7459 (daily ed. Sept. 26, 1983) (statement of Rep. Courter).

3. See CIA REPORT, *supra* note 1, at 2-3; S. REP. No. 664, 97th Cong., 2d Sess. 9-11 (1982) (statement of Dr. Jack Vorona, Director, Science and Tech. Info., Defense Intelligence Agency). Dr. Vorona lists six Soviet methods for obtaining U.S. technology: publicly disseminated U.S. government publications, student exchanges, scientific exchanges, establishment of marketing and manufacturing companies within the United States, espionage, and diversions. Of these, the latter two constitute the illegal means of acquisition. *Id.* at 2-3; see also *infra* note 32 (discussing problems with legal means).

4. See *Transfer of United States High Technology*, *supra* note 1, at 235-36 (statement of Adm. Bobby R. Inman, former Deputy Director, Cent. Intelligence Agency); CIA REPORT, *supra* note 1, at 1. Admiral Inman notes that the Soviets have acquired 70% of the militarily related technology from the West through Soviet and Eastern bloc intelligence services. *Transfer of United States High Technology*, *supra* note 1, at 235-36. Most of the remainder was acquired through legal purchases and study of publicly disseminated publications. *Id.* Student and scientific exchanges accounted for a very small number of significant acquisitions. *Id.* See CIA REPORT, *supra* note 1, at 3.

5. The letters KGB are an acronym for *Komitet Gosudarstvennoi Bezopasnosti* (Committee of State Security). Kohan, *The KGB*, TIME, Feb. 14, 1983, at 30. The KGB can best be described as the Soviet Union's secret police, performing a role similar to the Gestapo and the SS in Nazi Germany; it is the Communist Party's political action arm comprised of the party elite. See *id.* at 30-33. Having no direct counterpart in the United States, the KGB's role encompasses that of the CIA, FBI, National Security Agency, Secret Service, Customs Service and Border Patrol. See *id.* at 30. The number of agents within the KGB is estimated at 700,000. *Id.*

6. The letters GRU are an acronym for *Glavnoye Razvedyvatelnoye Upravleniye* (Chief Intelligence Directorate of the Soviet Military). The GRU often assists the KGB in its operations. See *id.* at 33.

7. See CIA REPORT, *supra* note 1, at 3. In discussing the Soviet acquisition of Western technology the term "diversion" is used in two different contexts. *Id.* The first, which may be called territorial diversion, involves the establishment of dummy corporations by Soviet operatives in the West who fraudulently purchase U.S. technology directly from the United States or repurchase it from U.S. allies and then ship those items to the Soviet Union. *Id.* The second, which may be deemed commodity diversion, involves the diversion of a particular commodity from a civilian to a military application. *Id.* The first type of diversion is the subject of this Note.

8. See *infra* text accompanying notes 13-35.

9. See CIA REPORT, *supra* note 1, at 2.

tion Act of 1979<sup>10</sup> (EAA) and multilateral strategic export controls established among the United States and its allies through the Coordinating Committee of the Consultative Group on Export Controls<sup>11</sup> (COCOM). The resulting diversion erodes the United States' qualitative superiority in military science and technology and consequently threatens the collective security of the Western nations.<sup>12</sup>

This Note examines the Soviet diversions of United States technology and suggests possible countermeasures. Part I examines diversions and their impact on United States national security. Parts II and III review present United States and Western export and reexport controls and the problems with these controls. Parts IV and V introduce and evaluate proposals offered to modify Western export policy to stop, or at least to impede, Soviet diversions.

### I. SOVIET DIVERSIONS

The Soviet Union's diversions of United States high technology are accomplished primarily through its KGB and GRU.<sup>13</sup> The number of KGB and GRU operatives devoted to covert acquisition of Western technology increased significantly during the 1970's.<sup>14</sup> By 1982, these agencies employed several thousand technology "collection officers."<sup>15</sup> Additionally, when operating in Western Europe, Soviet agents often cooperate with intelligence agencies of other Eastern bloc nations.<sup>16</sup>

The Soviet Union circumvents United States and Western export controls through the use of "false flag" or front operations.<sup>17</sup>

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10. 50 U.S.C. app. §§ 2401-2420 (1976 & Supp. III 1979).

11. See *infra* notes 36-53 and accompanying text.

12. See *infra* text accompanying notes 28-35.

13. See *supra* text accompanying notes 4-6.

14. CIA REPORT, *supra* note 1, at 2.

15. *Id.*

16. *Transfer of United States High Technology*, *supra* note 1, at 37-54; See CIA REPORT, *supra* note 1, at 2, 3, 6; *Six Now Expelled in Belgian Espionage*, N.Y. Times, Aug. 25, 1983, at A5, col. 5.

17. See *Transfer of United States High Technology*, *supra* note 1, at 4; CIA REPORT, *supra* note 1, at 2-3; 129 CONG. REC. H7459 (daily ed. Sept. 26, 1983) (statement of Rep. Courter); *Kohan*, *supra* note 5, at 42; Kessler, *High Tech Piracy*, Wall St. J., Feb. 15, 1984, at 1, col. 1; Vinocur, *A Trail of Western Technology is Followed to the K.G.B.'s Door*, N.Y. Times, July 25, 1983, at A1, col. 4; Farnsworth, *Washington Watch: Smuggling Technology*, N.Y. Times, June 28, 1982, at D2, col. 1; Rositzke, *Industry and the KGB*, N.Y. Times, July 22, 1981, at A23, col. 2. For a description of the Soviet's State Committee on Science and Technology (GKNT), which is charged with determining what types of technology the KGB

Soviet agents establish dummy business enterprises that fraudulently purchase United States technology legally obtained by foreign firms, chiefly in Western Europe and Japan.<sup>18</sup> Once the Soviet "front" company has purchased the desired goods, it ships them to the Soviet Union or another Eastern European bloc nation.<sup>19</sup> While most diversions occur in Western Europe, some are attempted by, or at the instigation of, Soviet agents in the United States.<sup>20</sup>

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and GRU will attempt to divert, *see* CIA REPORT, *supra* note 1 at 2; 129 CONG. REC. H7459 (daily ed. Sept. 26, 1983) (statement of Rep. Courter).

18. *See* Kohan, *The KGB*, TIME, Feb. 14, 1983, at 42.

19. For descriptions and illustrations of Soviet procedures, *see* CIA REPORT, *supra* note 1, at 3; Kohan, *supra* note 5, at 41-42; Kessler, *supra* note 17, at 1, col. 1; Vincour, *supra* note 17, at A1, col. 4; Lindsey, *U.S. Gaining in Efforts to Stem Loss of High Technology Industrial Secrets*, N.Y. Times, Apr. 30, 1983, at 9, col. 1; The Department of Commerce's indications of potential diversions were submitted for the record by Representative Roth, 129 CONG. REC. H7454 (daily ed. Sept. 26, 1983):

#### INDICATIONS OF POTENTIAL ILLEGAL EXPORTS

Listed below are some of the "red flag" indications that signal possible illegal exports or diversions. The listing is not exhaustive; it is provided by the Department of Commerce, Office of Export Enforcement, as an aid to further public awareness and the private sector's effort to combat illegal exportation of U.S. technology.

1. Customer's/purchasing agent's reluctance to provide *end-use of end-user information*;

2. Performance/design requirements *incompatible with destination country resources* or environment, or with consignee's line of business;

3. Stated end-use incompatible with the customary or known *industrial applications* for the equipment being purchased;

4. Stated end-use incompatible with consignee's *line of business*;

5. Stated end-use incompatible with the technical *capability of the consignee or destination country*;

6. Customer willingness to pay cash for a large value item or order;

7. Little or no customer business background information available;

8. Apparent lack of customer familiarity with the commodity's performance/design characteristics or uses;

9. Customer's/purchasing agent's declination of installation or service contracts that are normally accepted similar transactions;

10. Ill-defined delivery dates or the use of delivery locations inconsistent with the type of commodity or established practices;

11. Use of freight forwarders as ultimate consignees;

12. Use of intermediate consignee(s) whose location/business is incompatible with purported end-user's nature of business or location;

13. Packaging or packing requirements inconsistent with shipping mode and/or destination; and

14. Evasive responses to questions regarding any of the above as well as whether equipment is for domestic use, export or reexport.

*Id.*

20. *See Transfer of United States High Technology*, *supra* note 1, at 26, 37, 54, 57, 94-96, 122-24, 434; CIA REPORT, *supra* note 1, at 5; S. REP. No. 664, *supra* note 3, at 11, 12-13,

In 1982 and 1983, major cases of attempted Soviet diversions involved the Digital Equipment Corporation's VAX 11/782 computer and the Perkin-Elmer Micralign 200's.<sup>21</sup> In an elaborate effort to circumvent United States and COCOM controls, the VAX 11/782 was shipped from New York via South Africa and West Germany to Sweden.<sup>22</sup> United States authorities learned that the VAX 11/782, used for computer production, electromagnetic design, and structural analysis, was to be diverted to the Soviet Union.<sup>23</sup> At the request of the United States, components of the VAX 11/782 were seized by West German<sup>24</sup> and Swedish<sup>25</sup> authorities.

In the Micralign 200 case, two United States-made machines that manufacture microcircuitry were sold to a Swiss company, Favag, S.A.<sup>26</sup> Favag immediately resold them to another Swiss company, Eler Engineering. The machines were subsequently shipped to Paris where they suddenly vanished. They are now believed to be in Soviet possession.<sup>27</sup>

Soviet diversions of United States high technology are significant because they constitute a serious threat to United States national security as well as the collective security of our allies.<sup>28</sup> When

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23-25; Zonderman, *Policing High-Tech Exports*, N.Y. Times, Nov. 27, 1983, § 6 (Magazine), at 100; *U.S. Jury Indicts 5 for Exporting Computer Equipment to Bulgaria*, N.Y. Times, Nov. 6, 1983, at 44, col. 1; *Export Trial Stymied by Departure*, N.Y. Times, May 19, 1983, at D19, col. 1; *U.S. Investigates Selling of Technology to Soviet*, N.Y. Times, Feb. 25, 1981, at A15, col. 1.

21. See *infra* text accompanying notes 22-27.

22. For the VAX 11/782 story as it developed, see Werner, *U.S. Has Bonn Stop Soviet-Bound Computer*, N.Y. Times, Nov. 15, 1983, at A1, col. 3; Burks, *Moscow-Bound Computer Is Seized*, N.Y. Times, Nov. 21, 1983, at A3, col. 1; *Swedes Seize 2d Shipment of Equipment*, N.Y. Times, Nov. 25, 1983, at A3, col. 4; *Last Minute Bust in Hamburg*, TIME, Nov. 28, 1983, at 34; *Computer Programs Headed for Soviet Seized by Swedes*, N.Y. Times, Nov. 29, 1983 at A11, col. 1. See also *Transfer of United States High Technology*, *supra* note 1, at 71, 74, 76, 78-80; Kessler, *supra* note 17 at 1, col. 1. (description of the activities of Richard Mueller and his partner, Volker Nast, who are believed to have been responsible for the attempted diversion of the VAX 11/782).

23. See *supra* note 22.

24. *Id.*

25. *Id.*

26. See *infra* note 27.

27. See Kohan, *supra* note 5, at 41; Vinocur, *supra* note 17, at A6, col. 6. For instances of other, less well-documented diversions, see CIA REPORT, *supra* note 1, at 2, 6; 129 CONG. REC. H8272 (daily ed. Oct. 18, 1983) (statement of Rep. Hunter); Farnsworth, *supra* note 17, at D2, col. 1; *supra* note 18 and accompanying text.

28. See CIA REPORT, *supra* note 1, at 1.

the Soviet Union acquires United States technical hardware and data with "dual uses,"<sup>29</sup> its military development is accelerated at a far lower research and development expense.<sup>30</sup> This reduces the United States "lead time" in military technology and consequently undermines United States defense posture.<sup>31</sup>

In recent years the Soviets have managed, legally<sup>32</sup> and illegally, to acquire United States technology relating to computers, microelectronics, signal processing, manufacturing, communications, laser guidance and navigation, structural materials, propul-

29. "Dual use" technology is "technology developed or manufactured in the United States by the private sector mainly for commercial purposes but which in the hands of the Soviets or another adversary can have military applications threatening U.S. national security." S. REP. NO. 664, 97th Cong., 2d Sess. 35 (1982). See *Transfers of United States Technology*, *supra* note 1, at 4; Zonderman, *supra* note 20, at 102. Zonderman states:

Although the United States Government has always restricted the sale of patently military technology to the Russians, the 1970's were the decade of the semiconductor, when the lines between commercial and military electronic products became hopelessly blurred. The same basic semiconductors and integrated circuits that go into video games also go into missile-guidance systems. The same small computer that can be used by an American moving company to make sure a vanload of household goods gets from Cleveland to Boston can also be used by a Russian commander to make sure a division of soldiers gets from Odessa to Prague. Military planners envision the day when the laser technology that is now able to fuse detached retinas will also be capable of disabling enemy communications satellites.

*Id.* at 125.

30. This proposition assumes that the Soviets are capable of producing such goods in sufficient quantity and of comparable quality. Such an assumption is generally, though not always, valid. See *infra* note 31 and accompanying text.

31. See *Transfer of United States High Technology*, *supra* note 1, at 113, 158; CIA REPORT, *supra* note 1, at 10; 129 CONG. REC. H7459 (daily ed. Sept. 26, 1983) (statement of Rep. Courter); Vinocur, *The KGB Goes on the Offensive and The West Begins Striking Back*, N.Y. Times, July 24, 1983, at 9, col. 1; Taubman, *Expulsions Tied to Fear of Technology Leaks*, N.Y. Times, Apr. 24, 1983, § 1, at 8, col. 1; Kessler, *supra* note 17, at 1, col. 1; *supra* note 1-2 and accompanying text.

32. Legal means of Soviet acquisition of U.S. technology include student/scientific exchanges, study of publicly disseminated scientific and technical literature, and trade. See *Transfer of United States Technology*, *supra* note 1, at 29, 111; CIA REPORT, *supra* note 1, at 1. While such legal means account for only 30% of the Soviet acquisitions of Western technology, see *Transfer of United States High Technology*, *supra* note 4, at 235-36 (statement of Adm. Bobby R. Inman, former Deputy Director, Cent. Intelligence Agency), evidence of Soviet deceit is present even here. In student exchanges, Soviet participants are often not students but actual scientists and technicians. Also, while "American exchange students . . . might come to the Soviet Union to study Dostoyevski . . . Soviet students [do] not go to the United States to study Faulkner. Their main purpose in the United States [is] to obtain American technology." *Id.* at 31 (statement of "Joseph Arkov," an assumed name of a former Soviet engineer).



sion, acoustical and electro-optical sensors, and radars.<sup>33</sup> This know-how has been applied chiefly to Soviet ballistic missile, aircraft, and tactical weapons systems.<sup>34</sup> United States intelligence sources and other observers believe these operations will continue well past the 1980's.<sup>35</sup>

## II. REEXPORT CONTROLS

### A. COCOM

In 1949, the United States and six of its European allies established the Coordinating Committee of the Consultative Group<sup>36</sup> on Export Controls (COCOM) to monitor and control the exchange of strategic commodities with the Soviet bloc.<sup>37</sup> By 1983, COCOM membership included Japan and all of the NATO countries except

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33. CIA REPORT, *supra* note 1, at 6-9.

34. *Id.* See Taubman, *supra* note 31, at 8, col. 1. See also 129 CONG. REC. H7462 (daily ed. Sept. 26, 1983) (statement of Rep. Solomon) (noting the similarity of technology used in the U.S. Sidewinder air-to-air missile with that of the Soviet Atoll missile used to down KAL Flight 007).

35. See CIA REPORT, *supra* note 1, at 11-15; Rositzke, *Industry and the KGB*, N.Y. Times, July 22, 1981, at A23, col. 2; Farnsworth, *supra* note 17, at D2, col. 1 (quoting John M. Waller, Jr., Assistant Secretary of the Treasury for Enforcement and Operations). See also Taubman, *supra* note 31, at 8, col. 1 (citing the CIA's opening of the Technology Transfer Assessment Center, a new office within the Agency to monitor diversions).

36. Berman & Garson, *United States Export Controls — Past, Present, and Future*, 67 COLUM. L. REV. 791, 834-40 (1967) [hereinafter cited as Berman & Garson, *Export Controls*]. The six allies were the United Kingdom, France, Italy, the Netherlands, Belgium, and Luxembourg. *Id.* at 834-35. Following France's military withdrawal from NATO and its refusal to appoint a new chairman of the Consultative Group, the Group itself ceased to exist. U.S. COMPT. GEN., EXPORT CONTROLS: THE NEED TO CLARIFY POLICY AND SIMPLIFY ADMINISTRATION 7 (1979) [hereinafter cited as COMPT. GEN. NO. 2]; AM. ENTER. INST., PROPOSALS FOR REFORM OF EXPORT CONTROLS FOR ADVANCED TECHNOLOGY 5 (1979) [hereinafter cited as AEI PROPOSALS].

37. See *The Export Administration Act: Hearings Before the Subcomm. on International Economic Policy of the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. 45 (1983) [hereinafter cited as EAA '83]; *Transfer of United States High Technology*, *supra* note 1, at 157; *Export Licensing: COCOM List Review Proposals of the United States: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 2d Sess. 1 (1978) [hereinafter cited as COCOM List Review]; *Extension of the Export Administration Act: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 133, 174 (1976) [hereinafter cited as Ext. EAA]; CIA REPORT, *supra* note 1, at 2 n.2; DEP'T OF COM., EXPORT ADMINISTRATION ANNUAL REPORT FY 1980, at 9 (1981); COMPT. GEN. NO. 2, *supra* note 36, at 2, 7; PRESIDENT'S SPECIAL REPORT ON MULTILATERAL EXPORT CONTROLS 1 (1978) [hereinafter cited as PRESIDENT'S REPORT], reprinted in *The Export*

Iceland and Spain.<sup>38</sup> The original participants agreed to formulate a multilateral embargoed commodity list<sup>39</sup> under which each member nation would restrict the export and, in the case of United States goods, the reexport from its territory of listed goods.<sup>40</sup>

The agreement requires that the embargo list be reviewed by COCOM members every three or four years.<sup>41</sup> Each member may submit "original proposals," "counter proposals," and "revised proposals" to list-review proceedings.<sup>42</sup> Inclusion of an item on the COCOM list requires the unanimous consent of COCOM members.<sup>43</sup> While all COCOM proceedings are conducted in secret,<sup>44</sup>

*Administration Act: Agenda for Reform: Hearings Before the Subcomm. on International Relations of the House Comm. on Foreign Affairs*, 95th Cong., 2d Sess. 52 (1978); DEFENSE SCIENCE BD. TASK FORCE, U.S. DEP'T OF DEF., AN ANALYSIS OF EXPORT CONTROL OF U.S. TECHNOLOGY—A DOD PERSPECTIVE 18 (1976) [hereinafter cited as THE BUCY REPORT], reprinted in *Ext. EAA*, *supra*, at 243; U.S. COMPT. GEN., THE GOVERNMENT'S ROLE IN EAST-WEST TRADE 26 (1976) [hereinafter cited as COMPT. GEN. NO. 1], reprinted in *Ext. EAA*, *supra*, at 19; 19TH BATTLE ACT REPORT 2 (1966); STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 1ST SESS., A BACKGROUND STUDY ON EAST-WEST TRADE 4, 41 (Comm. Print 1965); 129 CONG. REC. H8344 (daily ed. Oct. 19, 1983) (statement of Rep. Kramer); AEI PROPOSALS, *supra* note 36, at 4; Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970's and 1980's*, 65 MINN. L. REV. 739, 807 (1981) [hereinafter cited as Abbott, *Linking Trade*]; Bingham & Johnson, *A Rational Approach to Export Controls*, 57 FOREIGN AFF. 894, 903-04 (1979); Note, *Reconciliation of Conflicting Goals of the Export Administration Act of 1979*, 12 LAW & POL'Y INT'L BUS. 415, 417, 455 (1980) [hereinafter cited as Note, *Reconciliation*].

38. The 15 COCOM members are Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. CIA REPORT, *supra* note 1, at 2 n.2. DEP'T OF COM., *supra* note 37, at 9.

39. In addition to the strategic commodity embargo list with which this Note is concerned, COCOM also maintains a munitions list and an atomic energy list through which the member nations monitor and control the export of such items from their respective countries. See *Ext. EAA*, *supra* note 36, at 174; Berman & Garson, *Export Controls*, *supra* note 36, at 835.

40. See *supra* note 38.

41. *COCOM List Review*, *supra* note 37, at 1; DEP'T OF COM., *supra* note 37, at 19; PRESIDENT'S REPORT, *supra* note 37, at 1; Note, *Reconciliation*, *supra* note 37, at 432.

42. Under list review procedure, a member nation may submit "original proposals" four months in advance; "counterproposals" 45 days in advance; and "revised proposals" at any time during the 10 month review period, provided at least two members agree to the submission. PRESIDENT'S REPORT, *supra* note 37, at 1-2. See *COCOM List Review*, *supra* note 37, at 81 (statement of William Barraclough, Deputy Assistant Secretary for Int'l Trade Pol'y, Dep't of State).

43. See *Ext. EAA*, *supra* note 37, at 174; STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 1ST SESS., A BACKGROUND STUDY ON EAST-WEST TRADE, 5, 41 (Comm. Print 1965).

44. See *COCOM List Review*, *supra* note 37, at 1; Bingham & Johnson, *supra* note 37, at 904.

the criteria used for including items on the COCOM list have been described in public hearings as including: "(1) whether the items constitute weapons or equipment for their production; (2) whether the items incorporate unique technical know-how of military significance; and (3) whether the items represent materials in deficient supply in relation to military potential in the communist countries."<sup>45</sup> It is important to note that COCOM does not have formal treaty status. Compliance with the determinations of the group as a whole is voluntary as COCOM has no enforcement powers.<sup>46</sup>

Once an item has been placed on the COCOM list, any member nation wishing to permit the export of such item from within its borders to the Soviet bloc must submit an "exception request" to COCOM.<sup>47</sup> To obtain an exception, the nation sends its COCOM delegate<sup>48</sup> an exception request application. If accepted by the delegate,<sup>49</sup> it is transcribed into the COCOM format, translated into French, and then distributed to the other delegates.<sup>50</sup> COCOM rules provide for exception request decisions within 18 days of submittal to the delegates.<sup>51</sup> An automatic grace period of two weeks and additional extensions at the discretion of the submitting member nation may lengthen the period of review.<sup>52</sup> After each delegate has made a decision, COCOM issues an "advisory opinion" to the submitting government in which the application is either approved or denied.<sup>53</sup>

### 1. United States Participation Through EDAC

United States participation in COCOM is coordinated by the Economic Defense Advisory Committee (EDAC), which consists of representatives from the Departments of State, Defense, Commerce, and the Treasury, the Nuclear Regulatory Commission, and

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45. Bingham & Johnson, *supra* note 37, at 904.

46. See 19TH BATTLE ACT REPORT 2 (1966); 129 CONG. REC. H8341 (daily ed. Oct. 19, 1983) (statement of Rep. Courter); Bingham & Johnson, *supra* note 37, at 904.

47. See PRESIDENT'S REPORT, *supra* note 37, at 2-3, 5; COMPT. GEN. NO. 1, *supra* note 37, at 32, 34; Bingham & Johnson, *supra* note 37, at 904.

48. *Ext. EAA*, *supra* note 37, at 134-35 (statement of Arthur T. Downey, Deputy Assistant Secretary for East-West Trade, Dep't of Com.).

49. *Id.* The delegate may, for political reasons, refuse the application.

50. *Id.*

51. COMPT. GEN. NO. 2, *supra* note 36, at 11.

52. *Id.*

53. *Id.* at 10.

the Central Intelligence Agency.<sup>54</sup> EDAC's primary responsibilities are deciding which items on the United States Commodity Control List (CCL)<sup>55</sup> will be submitted to COCOM for inclusion on COCOM's list,<sup>56</sup> soliciting approval for United States companies' exception requests, and receiving fellow members' exception requests.<sup>57</sup> The criterion used by EDAC in considering exception requests to non-Soviet bloc destinations is whether the commodity is likely to be diverted to a proscribed destination.<sup>58</sup> Also considered are the known reliability of the consignee, the intended use of the equipment, and the appropriateness of the equipment for that use.<sup>59</sup>

Applications for United States approval of exception requests are processed by the State Department, Bureau of Economic Affairs, Office of East-West Trade (Office).<sup>60</sup> The Office forwards the request to EDAC's Working Group I (WG I) where the request is evaluated.<sup>61</sup> The application may also be initially considered in EDAC's Executive Committee.<sup>62</sup> Should these groups disagree, the request will be sent to the deputy assistant secretary level,<sup>63</sup> and then possibly to EDAC<sup>64</sup> itself. In the event of further disagreement, the application may be referred to the National Security Council's Under Secretaries Committee.<sup>65</sup> Should this committee fail to agree to grant the exception request, the application is reviewed by the President.<sup>66</sup>

54. *COCOM List Review*, *supra* note 37, at 74 (statement of William Root, Director, Office of East-West Trade, Dep't of State); *COMPT. GEN. NO. 1*, *supra* note 37, at 34.

55. *See infra* notes 72-74 and accompanying text.

56. *COMPT. GEN. NO. 1*, *supra* note 37, at 32, 34.

57. *Id.*

58. *Ext. EAA*, *supra* note 37, at 137 (statement of Arthur T. Downey, Deputy Assistant Secretary for East-West Trade, Dep't of Com.).

59. *Id.*

60. *See COMPT. GEN. NO. 2*, *supra* note 36, at 10; *COMPT. GEN. NO. 1*, *supra* note 37, at 30-31.

61. *See COMPT. GEN. NO. 2*, *supra* note 36, at 10; *COMPT. GEN. NO. 1*, *supra* note 37, at 34.

62. *See COMPT. GEN. NO. 2*, *supra* note 36, at 10.

63. *See COMPT. GEN. NO. 2*, *supra* note 36, at 10, 29. The deputy assistant secretary level is referred to as "sub-EDAC." *Id.*

64. "EDAC" is comprised of those at the assistant secretary levels of the member agencies. *Id.*

65. *See COMPT. GEN. NO. 1*, *supra* note 37, at 32, 34.

66. *See COMPT. GEN. NO. 2*, *supra* note 36, at 29; *COMPT. GEN. NO. 1*, *supra* note 37, at 30-31, 34.

Another major responsibility of WG I is development of United States COCOM list proposals with the advice of the Executive Committee.<sup>67</sup> In formulating such proposals, WG I consults Technical Advisory Committees (TAC's),<sup>68</sup> comprised of industry and government technicians and Technical Task Groups (TTG's),<sup>69</sup> made up of government advisory personnel.

### B. *United States Controls: The EEA and Regulations*

The Export Administration Act (EAA) is the United States' single most important export control law.<sup>70</sup> The purpose of the EEA is, inter alia, to protect United States national security by monitoring and restricting exports of United States goods and technical data while minimizing adverse impact on United States business interests and the balance of trade.<sup>71</sup> Under the EAA, the Secretary of Commerce (Secretary) establishes and maintains the CCL.<sup>72</sup> With the

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67. See COMPT. GEN. NO. 2, *supra* note 36, at 19; COMPT. GEN. NO. 1, *supra* note 37, at 34.

68. Export Administration Act of 1979, 50 U.S.C. app. § 2404(h) (Supp. III 1979). See COMPT. GEN. NO. 2, *supra* note 36, at 20; COMPT. GEN. NO. 1, *supra* note 37, at 45. The present system includes TAC's covering telecommunications equipment, computer systems, computer peripherals and components, electronic instrumentation, and semiconductors and semiconductor manufacturing and test equipment. *COCOM List Review*, *supra* note 37, at 80.

69. See *COCOM List Review*, *supra* note 37, at 76-80; COMPT. GEN. NO. 2, *supra* note 36, at 19. The present system includes TTG's covering metalworking machinery, chemicals, metals, transportation equipment, telecommunications equipment, avionics and navigation equipment, semiconductor equipment, electronic instrumentation and components, photographic equipment, computers, military equipment, and atomic energy equipment. *CO-COM List Review*, *supra* note 37, at 79-80.

70. See Hoya, *U.S. Export Licensing*, in *AMERICAN-SOVIET TRADE: A JOINT SEMINAR ON THE ORGANIZATIONAL AND LEGAL ASPECTS* 98 (1976). The EAA is the successor to the Export Control Act of 1949, ch. 11, 63 Stat. 7, amended by 50 U.S.C. app. §§ 2021-2032 (1976 & Supp. III 1979). See Berman & Garson, *U.S. Export Controls*, *supra* note 36, at 791-804.

71. See Export Administration Act of 1979, 50 U.S.C. app. § 2402(2)(A) (1976 & Supp. III 1979); EAA '83, *supra* note 37, at 1; *Transfer of United States High Technology*, *supra* note 1, at 2; *COCOM List Review*, *supra* note 37, at 98 (statement of Stanley J. Marcuss, Deputy Assistant Secretary for Indus. and Trade, Dep't of Com.); COMPT. GEN. NO. 2, *supra* note 37, at 1; 129 CONG. REC. H8259 (daily ed. Oct. 18, 1983) (statement of Rep. Roth); 129 CONG. REC. H7451, H7453, H7457 (daily ed. Sept. 26, 1983) (statements of Reps. Bonker, Zablocki, Bereuter); 15 C.F.R. § 370.1(a)(3) (1983); Note, *Reconciliation*, *supra* note 37, at 415; Zonderman, *supra* note 20, at 125.

72. Export Administration Act of 1979, 50 U.S.C. app. § 2403(b) (1976 & Supp. III 1979). See also 15 C.F.R. § 399 (1983) (text of CCL).

advice of the Secretary of Defense,<sup>73</sup> the Secretary catalogues militarily critical technologies; the export of which is denied to countries that threaten United States national security.<sup>74</sup>

The Secretary is also empowered to promulgate export administration regulations.<sup>75</sup> Under the Act, Congress requires that, in issuing regulations to carry out national security controls, the Secretary pay "particular attention . . . to . . . the need to take effective measures to prevent the reexport of critical technologies from other countries to countries that pose a threat to the security of the United States."<sup>76</sup> Pursuant to that directive, the Secretary has formulated section 374.1 of the Export Administration Regulations<sup>77</sup> (Regulations). Under section 374.1 no person may, without a Commerce Department license, reexport a commodity from the nation to which it was initially exported or export such commodity from the United States with the knowledge that it will be reexported.<sup>78</sup> Section 374.1 applies to finished United States goods,<sup>79</sup> United States component parts,<sup>80</sup> and "United States-origin" technical

73. Export Administration Act of 1979, 50 U.S.C. app. § 2404(d)(1), (d)(2) (Supp. III). See also Note, *Export Controls: Restrictions on the Export of Critical Technologies*, 22 HARV. INT'L L.J. 411, 411-14 (1981) (discussion of the Defense Department's role in the formulation of the CCL).

74. See Export Administration Act of 1979, 50 U.S.C. app. § 2404(a)(1) (1976 & Supp. III 1979).

75. See *id.* § 2403(e); 15 C.F.R. §§ 368-399 (1983).

76. Export Administration Act of 1979, 50 U.S.C. § 2404(a)(3) (1976 & Supp. III 1979).

77. 15 C.F.R. §§ 368-399 (1983).

78. The regulation provides:

Unless the reexport of a commodity previously exported from the United States has been specifically authorized in writing by the Office of Export Administration prior to its reexport, or is authorized under the permissive reexport provisions of § 374.2, or is otherwise authorized under any other provision of the Export Administration Regulations, no person in a foreign country (including Canada) or in the United States may:

(a) Reexport such commodity directly or indirectly, in whole or in part, from the authorized country(ies) of ultimate destination; or

(b) Export such commodity from the United States with the knowledge that it is to be reexported, directly or indirectly, in whole or in part, from the authorized country(ies) of ultimate destination.

15 C.F.R. § 374.1 (1983).

79. See *id.*; Hoya, *supra* note 70, at 98-99.

80. See *supra* note 78.

data.<sup>81</sup> The President is authorized to enforce<sup>82</sup> these reexport controls by prohibiting or curtailing "the export of any goods or technology subject to the jurisdiction of the United States or exported by

81. *Id.* Technical data is defined as:

[I]nformation of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. The data may take a tangible form, such as a model, prototype, blueprint, or an operating manual; or they may take an intangible form such as technical service.

15 C.F.R. § 379.1(a) (1983).

Unlicensed reexports of technical data are also prohibited:

Unless specifically authorized by the Office of Export Administration, or otherwise authorized under the provisions of paragraph (b) of this section, no person in the United States or in a foreign country may:

(1) Reexport any technical data imported from the United States, directly or indirectly, in whole or in part, from the authorized country(ies) of ultimate destination;

(2) Export any technical data from the United States with the knowledge that it is to be reexported, directly or indirectly, in whole or in part, from the authorized country(ies) of ultimate destination; or

(3) Export or reexport to Country Group P, Q, W, Y, Z, or Afghanistan any foreign produced direct product of U.S. technical data, or any commodity produced by any plant or major component thereof that is a direct product of U.S. technical data, if such direct product or commodity is covered by the provisions of § 379.4(f) or § 379.5(e)(1) or (2).

15 C.F.R. § 379.8 (1983). See Hoya, *supra* note 70, at 98-99; *supra* note 71.

82. While the enforcement of the Export Administration Act has been left to the Commerce Department, the recent fanfare given to Operation Exodus, see *generally Transfer of United States High Technology*, *supra* note 1, at 194-98, 206-14; Zonderman, *supra* note 20, at 103, a Customs Service program of export inspection and interdiction, has led to calls for the transfer of enforcement to the Customs Service. See *Transfer of United States High Technology*, *supra* note 1, at 97-99, 199; S. REP. NO. 664, 97th Cong., 2d Sess. 36-40 (1982). Supporters of such a transfer cite the myriad of overseas contacts developed by Customs, see 129 CONG. REC. H7706, 7709 (daily ed. Sept. 29, 1983) (statements of Reps. Hutto and Courter), the success of Operation Exodus, see 129 CONG. REC. H7706 (daily ed. Sept. 29, 1983) (statement of Rep. Hutto), and the weakness of the Commerce Department's Compliance Division, which is presently responsible for the enforcement of U.S. export and reexport controls. See *Transfer of United States Technology*, *supra* note 1, at 82-91; COMPT. GEN. NO. 2, *supra* note 36, at 50-59. Those who oppose such a transfer, see e.g., S. REP. NO. 664, 97th Cong., 2d Sess. 40-41 (1982) (statement of Lawrence J. Brady, Assistant Secretary for Trade Admin., Dep't of Com.), believe that only Commerce is competent to evaluate the national security significance of interdicted technology, see 129 CONG. REC. H7708 (daily ed. Sept. 29, 1983) (statement of Rep. Frenzel), and that Operation Exodus was a failure. *Id.* A House bill, H.R. 3231, would retain Commerce as the primary enforcement agency of the Export Administration Act, while relegating Customs to a minor role. H.R. 3231, 98th Cong., 1st Sess. § 103, 129 CONG. REC. H7698, H7699 (daily ed. Sept. 29, 1983). A Senate bill, S. 979, would install Customs as the major enforcement agency of the EAA while reducing Commerce to a subsidiary role. S. 979, 98th Cong., 1st Sess. § 10 (1983). For discussion of the other relevant provisions of H.R. 3231 and S. 979, see *infra* notes 161-63, 175-86, 194-96, 197-199 and accompanying text.

any person subject to the jurisdiction of the United States.”<sup>83</sup> The United States has attempted to apply these reexport controls to subsidiaries and affiliates of United States companies abroad that reexport United States goods, parts or data.<sup>84</sup>

The Secretary has promulgated regulations to implement section 374.1.<sup>85</sup> For example, section 374.3<sup>86</sup> requires full disclosure of the identity of all parties in interest to each transaction. Regulation 368<sup>87</sup> describes an Import Certificate/Delivery Verification (IC/DV) system under which foreign importers certify to their respective governments that they will not reexport United States goods except in accordance with their own nation's export control.<sup>88</sup> All COCOM members participate in the IC/DV system.<sup>89</sup>

83. Export Administration Act of 1979, 50 U.S.C. app. § 2404(a)(1) (1976 & Supp. III 1979). The Act broadly defines a “United States person” as including “any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern.” *Id.* § 2415(2) (emphasis added). See also *infra* notes 84, 148-51 and accompanying text (discussion of the validity of the “controlled in fact” definition).

84. See COMPT. GEN. NO. 1, *supra* note 37, at 28-29. The most well known case in recent years involved Dresser France, a subsidiary of Dresser Industries, a Dallas-based corporation organized under Delaware corporation law. See generally Recent Developments, *Export Controls—Challenge to the Validity of Department of Commerce Regulations Restricting the Export of Oil and Gas Equipment and Technology to the Soviet Union—Temporary Restraining Order Denied*. Dresser Industries v. Baldrige, No. 82-2385 (D. D.C. filed Aug. 23, 1982), 18 TEXAS INT'L L.J. 203 (1983) [hereinafter cited as Recent Development, *Export Controls*]. In retaliation for Soviet involvement in the imposition of martial law in Poland, President Reagan, in June 1982, banned the export and reexport of oil and gas equipment, goods, and technology to the Soviet Union produced abroad by foreign firms owned or controlled in fact by U.S. companies. *Id.* at 203. This ban specifically included products made abroad by U.S. subsidiaries utilizing U.S. technical data. See 47 Fed. Reg. 27,250 (1982). Dresser France, a corporation organized under French law, who had previously contracted with Soviet foreign trade organizations for the sale of such goods, sought, and was denied, a temporary restraining order against the ban. Dresser Indus. v. Baldrige, No. 82-2385 (D.D.C. filed Aug. 23, 1982). Although the ban was formulated for foreign policy reasons and therefore did not constitute an example of the national security controls at issue in this Note, compare Export Administration Act of 1979, 50 U.S.C. app. § 2405 (1976 & Supp. III 1979) (foreign policy controls) with *id.* § 2404 (national security controls), the Dresser case is illustrative of the broad reach of section 2415. Despite the fact the Dresser transaction took place entirely in France and involved only French and Soviet parties, Dresser France was still considered by U.S. authorities to be controlled in fact by its U.S. parent. See Recent Developments, *Export Controls, supra*, at 203-08; *infra* notes 136, 148-50.

85. See, e.g., *infra* text accompanying notes 86-89.

86. 15 C.F.R. § 372.3(A) (1983). See also *id.* § 372.3(b)(2) (the ultimate consignee or end-user of U.S. goods may not be a freight forwarder or forwarding agent).

87. *Id.* § 368 (1983). See Berman & Garson, *Export Controls, supra* note 36, at 839-40 (1967).

88. 15 C.F.R. § 368.1(a) (1983).

89. 15 C.F.R. § 375.3 (1983). See generally 25TH BATTLE ACT REPORT 40-53 (1973) (summarizing the national control systems of COCOM countries).



Reexport license applications are administered by the Advisory Committee on Export Policy (ACEP), an organization remarkably similar to EDAC in both form and function.<sup>90</sup> Generally, reexport license applications are received by the Department of Commerce, Office of Export Administration, Operations Division (Division).<sup>91</sup> The Division screens the applications for completeness.<sup>92</sup> Applications deemed complete are then forwarded to ACEP's Operating Committee where the bulk of application evaluation and decision making occurs.<sup>93</sup> The Operating Committee may also consult other agencies such as the Departments of Defense, State, and Energy and NASA for special information needed in the evaluation process.<sup>94</sup> If the Operating Committee fails to reach a unanimous decision to grant a reexport license, the application is forwarded to the deputy assistant secretary level.<sup>95</sup> If further disagreements ensue, the application is successively referred to ACEP itself,<sup>96</sup> the Export Administration Review Board,<sup>97</sup> and then, if necessary, to the President.<sup>98</sup>

### III. PROBLEMS WITH THE PRESENT COCOM ARRANGEMENT

#### A. COCOM

##### 1. Differing Attitude

Reexport control problems among COCOM nations stem in large part from differing attitudes of the United States and its allies regarding the use of economic sanctions.<sup>99</sup> COCOM's European

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90. See COMPT. GEN. No. 1, *supra* note 37, at 31-35; see also *supra* text accompanying note 54 (EDAC form and function). Like EDAC, ACEP is made up of representatives from the Department of State, Department of Defense, the Nuclear Regulatory Commission, the Treasury Department, and the Central Intelligence Agency. See COMPT. GEN. No. 1, *supra* note 37, at 32-37.

91. COMPT. GEN. No. 2, *supra* note 36, at 36.

92. *Id.*

93. See COMPT. GEN. No. 2, *supra* note 36, at 35, 37; see also *Ext. EAA, supra* note 37, at 161-62 (statement of Dr. Shields, Deputy Assistant Secretary, Int'l Econ. Affs., U.S. Dep't of Def.) (specific questions considered in determining whether the export of goods or technology will significantly increase the military capability of the controlled country); COMPT. GEN. No. 1, *supra* note 37, at 32-33 (ACEP structure and procedure).

94. COMPT. GEN. No. 2, *supra* note 36, at 34-35.

95. See COMPT. GEN. No. 2, *supra* note 36, at 35-36. This review level is generally known as "sub-ACEP." *Id.*

96. See *id.* at 35. ACEP review takes place at the assistant secretary level. *Id.*

97. See *id.* Board review occurs at the secretary level. *Id.*

98. See *id.*; COMPT. GEN. No. 1, *supra* note 37, at 32-33.

99. See *infra* text accompanying notes 100-07.

members, as well as Japan, have always depended more heavily than the United States on international trade to sustain their economies.<sup>100</sup> Thus, these COCOM members have often been more reluctant than the United States to proscribe exports to the Soviet bloc.<sup>101</sup> Due to its post-war dominance as an economic power, the United States was temporarily able to persuade its allies to comply with its export control policy.<sup>102</sup> This "persuasion" was accomplished through the Battle Act,<sup>103</sup> enacted in 1964, which restricted United States aid to nations that exported strategic items to the Communist bloc. However, the economic reemergence of the Western nations and Japan increased their ability to compete with the United States in the export market.<sup>104</sup> Moreover, the growing volume of trade with the Soviet bloc minimized dependence on U.S. aid, destroying the efficacy of the Battle Act.<sup>105</sup> These economic developments, reinforced by the European nations' historic patterns of trade with the East,<sup>106</sup> have led many United States officials to openly question the strength of our allies' commitment to COCOM.<sup>107</sup>

Inclusion of a commodity on the COCOM list requires the unanimous consent of COCOM members.<sup>108</sup> Thus, if any member nation takes the position that the sale of an item would not be significantly detrimental to Western security, then that item will not be included on the COCOM list. As a result, COCOM member nations are free to sell any goods controlled unilaterally by other COCOM member nations, and unilateral attempts to control technology not on the COCOM list are useless where foreign availability exists.<sup>109</sup>

100. See Brigham & Johnson, *supra* note 37, at 905-06. Note, *Reconciliation*, *supra* note 37, at 445.

101. See Berman & Garson, *Export Controls*, *supra* note 36, at 841.

102. See AEI PROPOSALS, *supra* note 36, at 4; Berman & Garson, *Export Controls*, *supra* note 36, at 834-36.

103. 22 U.S.C. §§ 1611-1613d (1964), *superseded by* Export Administration Act of 1979, 50 U.S.C. app. § 2416(e) (1976 & Supp. III 1979); *see also* Berman & Garson, *Export Controls*, *supra* note 36, at 836-38 (discussing effect of the Battle Act).

104. See COMPT. GEN. NO. 2, *supra* note 36, at 8; Abbott, *Linking Trade*, *supra* note 37, at 804; Note, *Reconciliation*, *supra* note 37, at 417.

105. See COMPT. GEN. NO. 2, *supra* note 36, at 8.

106. See *id.* Bingham & Johnson, *supra* note 37, at 906.

107. See H.R. REP. NO. 190, 95th Cong., 1st Sess. 20 (1977); THE BUCY REPORT, *supra* note 37, at 19; COMPT. GEN. NO. 1, *supra* note 37, at 46.

108. See *supra* note 43 and accompanying text.

109. See Note, *The Export Administration Act of 1979: An Examination of Foreign Availability of Controlled Goods and Technologies*, 2 Nw. J. INT'L L. & Bus. 179, 185, 188

Generally, the United States' COCOM partners have a more relaxed attitude than the United States toward export control.<sup>110</sup> The restrictive United States attitude is evidenced by its disapproval of nations that make available for transfer goods that the United States has unilaterally excluded from export to the Soviet Union.<sup>111</sup> COCOM's foreign availability problems are exacerbated by the fact that Sweden, Austria, and Switzerland—three significant importers of United States technology—do not belong to COCOM.<sup>112</sup> These nations are under no multilateral obligation to restrict the sale of high-technology goods to the Soviet bloc.<sup>113</sup>

## 2. The Problem of Enforcement

Another problem within COCOM is the low priority given to the enforcement of COCOM controls by member nations.<sup>114</sup> Although this passivity is difficult to substantiate in light of the secrecy surrounding COCOM proceedings,<sup>115</sup> United States officials believe our COCOM allies ought to devote more funds and manpower to COCOM control enforcement.<sup>116</sup> In addition, the United

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(1980) [hereinafter cited as Note, EAA]. Foreign availability also makes the imposition of U.S. trade sanctions for foreign policy reasons similarly troublesome as seen in the difficulty the United States encountered in attempting to enlist allied cooperation to thwart Soviet construction of the Urengoi pipeline. See Abbott, *Linking Trade*, *supra* note 37, at 795-96, 800-10 (1981); Goldman, *Why an Embargo Might Backfire*, N.Y. Times, Aug. 21, 1983, § 3, at 2, col. 3. See also Farnsworth, *U.S. Lifts Its Curb On Sale to Soviet of Pipeline Gear*, N.Y. Times, Aug. 21, 1983, § 1, at 1, col. 6; Taylor, *Caterpillar Greets U.S. Move; Sees Little Immediate Effect*, N.Y. Times, Aug. 21, 1983, § 1, at 16, col. 3 (effects on Caterpillar Corp. of unilateral U.S. sanctions on the sale of pipeline gear to the Soviets by U.S. companies in spite of foreign availability).

110. See *supra* text accompanying notes 100-07.

111. See *supra* note 100.

112. See *supra* note 38.

113. See Abbott, *Linking Trade*, *supra* note 37, at 807-08 (1981). See also H.R. REP. NO. 190, 95th Cong., 1st Sess. 20 (1977) (notes the business advantage accruing to these nations from their nonmembership in COCOM).

114. See PRESIDENT'S REPORT, *supra* note 37, at 5; H.R. REP. 190, 95th Cong., 1st Sess. 20 (1977); COMPT. GEN. NO. 1, *supra* note 38, at 43; 129 CONG. REC. H8272 (daily ed. Oct. 18, 1983) (statement of Rep. Hunter); see also 129 CONG. REC. H7454 (daily ed. Sept. 26, 1983) (statement of Rep. Roth that in recent years the entire West German Federal Office of Trade and Commerce was staffed by only 146 civil servants); Lachica, *U.S. Worries Its High-Tech Gear Reaches Communists Via Canada*, Wall St. J., Mar. 14, 1984, at 34, col. 1 (noting U.S. discontent with Canada's enforcement of export controls).

115. See Bingham & Johnson, *A Rational Approach to Export Controls*, 57 FOREIGN AFFAIRS 894, 904 (1979).

116. See *supra* note 114.

States considers the ultimate consignee end-use information required by COCOM member nations to be inadequate.<sup>117</sup> Most of those nations require only assurances by the seller as to the purchaser's end use.<sup>118</sup>

### 3. Evasion of Exception Request Procedures by COCOM Members

The most serious threat to COCOM as a viable safeguard of Western security is the deliberate evasion of COCOM procedures by member nations.<sup>119</sup> COCOM controls are circumvented by member nations that do not file exception requests or ignore the denial of requests, permitting surreptitious export of goods.<sup>120</sup> The most infamous of these incidents involved the Cyril Bath Co., a United States machine tool manufacturer. Its request for permission to export metal-forming presses to the Soviet Union was denied by France.<sup>121</sup> A French company, Loire-ACB, was already shipping similar presses to the Soviets without notice to COCOM.<sup>122</sup>

### 4. United States COCOM Proposals Considered Too Restrictive

Most United States officials believe that other COCOM member nations are not sufficiently restrictive in the number and types of high technology items they are willing to control.<sup>123</sup> In contrast, the other member nations consider United States export controls, as embodied in the CCL and consequently included in United States COCOM list proposals, too restrictive.<sup>124</sup> The close scrutiny and

117. See COMPT. GEN. NO. 1, *supra* note 37, at 44; H.R. REP. NO. 190, 95th Cong., 1st Sess. 20 (1977).

118. See *supra* note 117.

119. See *infra* text accompanying notes 120-22.

120. See, e.g., *Export Licensing: Foreign Availability of Stretch Forming Presses, Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. (pt. I) 1-19 (1977) [hereinafter cited as *Export Licensing*]; Bingham & Johnson, *supra* note 37, at 905.

121. See *Export Licensing*, *supra* note 120, at 1-19; AEI PROPOSALS, *supra* note 36, at 12; Bingham & Johnson, *supra* note 37, at 905.

122. Bingham & Johnson, *supra* note 37, at 905.

123. See *supra* text accompanying notes 100-07.

124. See *Extension and Revision of the Export Administration Act of 1979, Hearings and Markup Before the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. (pt. II) 4

excessive complexity<sup>125</sup> of United States export control policy has resulted in failure by the United States to meet COCOM exception request deadlines.<sup>126</sup> Such failure has led to charges that the United States has intentionally delayed or denied approval to further its own commercial interests.<sup>127</sup>

### B. *Extraterritorial Application of United States Controls*

The major problem with United States reexport controls stems from their extraterritorial application to United States subsidiaries, goods and data.<sup>128</sup> This practice, prompted by the ineffectiveness of COCOM restrictions,<sup>129</sup> is viewed by COCOM allies as an infringement of their sovereignty.<sup>130</sup> This reaction is neither novel nor exclusively limited to export controls.<sup>131</sup> Extraterritorial application of the Export Control Act was a source of conflict between COCOM allies prior to the EAA<sup>132</sup> and similar difficulties persist in the antitrust field.<sup>133</sup>

The United States justifies its extraterritorial application of export controls by reference to the nationality principle, which

(1979); *COCOM List Review*, *supra* note 37, at 111 (statement of Rep. Bingham); *Ext. EAA*, *supra* note 37, at 164; *COMPT. GEN. NO. 2*, *supra* note 36, at 9-10; *PRESIDENT'S REPORT*, *supra* note 37, at 3; Note, *Reconciliation*, *supra* note 37, at 445; *see also* Bingham & Johnson, *supra* note 37, at 902. (characterizing the entire export-licensing process as inefficient, overencompassing and entrenched).

125. *See infra* note 152-60 and accompanying text.

126. *See* *COMPT. GEN. NO. 2*, *supra* note 36, at 11 (during the period from January-June 1977, the United States decided only 41 of 202 requests within 18 days and another 31 within the two week extension).

127. *See* *COMPT. GEN. NO. 1*, *supra* note 37, at 47; Note, *Reconciliation*, *supra* note 37, at 445; *see also* *Ext. EAA*, *supra* note 37, at 175; *COMPT. GEN. NO. 2*, *supra* note 36, at 11; *PRESIDENT'S REPORT*, *supra* note 37, at 3 (citing the charges that the United States uses the embargo for its commercial advantage).

128. *See infra* note 130 and accompanying text.

129. *See supra* notes 100-27 and accompanying text.

130. *See* *EAA '83*, *supra* note 37, at 61, 67, 69, 70-71; *PRESIDENT'S REPORT*, *supra* note 37, at 4; Abbott, *Linking Trade*, *supra* note 37, at 840-42; Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 *COLUM. J. TRANSNAT'L L.* 439, 439-40 (1981); Norman, *EC Urges U.S. Lawmakers Not to Extend Export-Control Rules to Foreign Nations*, *Wall St. J.*, Mar. 16, 1984, at 31, col. 5.

131. *See infra* text accompanying notes 132-33.

132. *See* Berman & Carson, *Export Controls*, *supra* note 36, at 867-76.

133. *See* 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 4.01 (2d ed. 1981).

confers jurisdiction<sup>134</sup> based on residence and other connections with United States companies.<sup>135</sup> Thus, a firm owned or controlled in fact by a United States company may be subject to such controls even though that subsidiary or affiliate is organized or incorporated under foreign laws, has its principal place of business in a foreign nation, and conducts most of its business abroad.<sup>136</sup> Application of the nationality principle to export controls has been justified on the ground that the right to impose conditions on the reexport of technology is inherent in the power to completely control all exports.<sup>137</sup> United States courts have generally accepted the nationality principle.<sup>138</sup> Thus, in *F.T.C. v. Compagnie de Saint-Gobain-Pont-à-Mousson*,<sup>139</sup> the court reiterated the traditional approach to extraterritorial application of United States laws: A "clear congressional intent"<sup>140</sup> that statutes and regulations be applied extraterritorially must be found before such application will be judicially sanctioned.<sup>141</sup>

Extraterritorial application of export controls may also be analyzed according to the approach adopted in *Timberlane Lumber Co. v. Bank of America*,<sup>142</sup> which requires a weighing of the United States and foreign interests.<sup>143</sup> Application of the *Timberlane* approach, however, has been limited almost exclusively to an analysis of the extraterritorial application of United States antitrust laws.<sup>144</sup>

134. The term "jurisdiction" as used here includes not only the authority to prescribe sanctions but also the authority to enforce them. See Mann, *The Doctrine of Jurisdiction in International Law*, in 1 *RECUEIL DES COURS* 1, 127-128 (1964).

135. See I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303 (3d ed. 1979); Marcuss & Richard, *supra* note 130, at 443.

136. See *supra* note 84 and accompanying text.

137. Marcuss & Richard, *supra* note 130, at 478.

138. See *RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 402 comments b, c (Tent. Draft No.2, 1981).

139. 636 F.2d 1300 (D.C. Cir. 1980).

140. *Id.* at 1304.

141. See *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *F.T.C. v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1304 (D.C. Cir. 1980); *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1032 (N.D. Ohio 1981).

142. 549 F.2d 597 (9th Cir.1976).

143. *Id.* at 613-14. Cf. *RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES* § 40 (1962). "Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction. . . ." *Id.*

144. See *Recent Developments, Export Controls*, *supra* note 84, at 208.

Other COCOM nations protest the application of United States reexport controls within their borders against companies they consider domestic business enterprises.<sup>145</sup> They argue that the lack of corresponding controls in their own national export laws prohibits application of United States export controls.<sup>146</sup> These nations have occasionally defeated prosecution of violators by refusing to extradite.<sup>147</sup> The International Court of Justice also rejected the reliance by the United States on the nationality principle in *Barcelona Traction, Light and Power Co.*<sup>148</sup> In *Barcelona*, the court held that a corporation's nationality is determined by its place of and the location of its registered office.<sup>149</sup> This holding conflicts with the EAA's definition of the "United States person" as including "any foreign subsidiary or affiliate . . . controlled in fact"<sup>150</sup> by a United States company.<sup>151</sup>

### C. Dual Licensing Cases

A final problem regarding the policing of reexports of United States technology involves the interaction of COCOM and United States controls, otherwise known as the "dual licensing" cases.<sup>152</sup> Such cases arise when an exporter from a COCOM member nation wishes to reexport a United States good also on the COCOM list.<sup>153</sup>

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145. See EAA '83, *supra* note 37, at 61, 67, 69, 70-71; PRESIDENT'S REPORT, *supra* note 37, at 4; Abbott, *Linking Trade*, *supra* note 37, at 841; Marcuss & Richard, *supra* note 130, at 439-40; Norman, *supra* note 130, at 31, col. 5.

146. Unlike the United States, these countries do not have reexport controls. See THE BUCY REPORT, *supra* note 37, at 20; 25TH BATTLE ACT REPORT 40-54 (1972); Baker & Bohlig, *The Control of Exports—A Comparison of the Laws of the United States, Canada, Japan, and the Federal Republic of Germany*, 1 INT'L LAW. 163, 187-91 (1967); Note, *Reconciliation*, *supra* note 37, at 445, 447; Note, EAA, *supra* note 109, at 192.

147. See Palmer, *Problems of Enforcement of National Security Export Controls Involving Illegal Conduct Abroad*, in *Transfer of U.S. High Technology*, *supra* note 1, at 75-77.

148. (*Belg. v. Spain*), 1970 I.C.J. 1 (Judgment of Feb. 5).

149. *Id.* at 41-44 (nationality for purposes of diplomatic convention).

150. Export Administration Act of 1979, 50 U.S.C. app. § 241(2) (1976 & Supp. III 1979) (emphasis added). See *supra* note 78 and accompanying text.

151. While the United States generally seeks to reconcile conflicts between its federal law and international law, *Paquete Habana*, 175 U.S. 677, 700 (1900), the Export Administration Act illustrates how U.S. federal law supersedes international law where the two are irreconcilable. See *The Over The Top*, 5 F.2d 838, 842 (D. Conn. 1925). See generally Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1315-34 (1983) (discussion of these principles as applied to the Dresser Industries case).

152. See COMPT. GEN. NO. 1, *supra* note 37, at 34.

153. See *id.*

In this instance, the exception request of that company's government must be considered by both EDAC (regarding the granting of COCOM exception request)<sup>154</sup> and by ACEP (to receive a validated United States reexport license).<sup>155</sup> Though the groups have virtually the same membership<sup>156</sup> and consider the same factors,<sup>157</sup> EDAC usually considers the exception request only after ACEP review.<sup>158</sup> This dual review adds months to the lengthy process of obtaining a United States decision on an exception request<sup>159</sup> and leads to charges that such reviews are redundant and symptomatic of the complexity of United States controls.<sup>160</sup>

#### IV. PROPOSALS

##### A. COCOM

One of the three major proposals to alter COCOM is to elevate the group to the status of a formal treaty organization.<sup>161</sup> Such an elevation would impress upon all signatories the importance of national security controls.<sup>162</sup> Opponents of a COCOM treaty believe it would be counterproductive because it could lead to the destruction of COCOM if other members are unwilling to conclude a formal treaty.<sup>163</sup>

154. *See supra* text accompanying notes 47, 57.

155. *See supra* text accompanying notes 78, 90.

156. *See Ext. EAA, supra* note 37, at 176 (statement of Rep. Downey).

157. *See* COMPT. GEN. NO. 1, *supra* note 37, at 34.

158. *Id.*

159. *See* COMPT. GEN. NO. 2, *supra* note 38, at 11.

160. *See id.* at iii, 16.

161. Representative Jim Courter (R.-N.J.), among the most prominent and influential backers of the measure, sponsored an amendment to H.R. 3231. *See supra* note 82. The Courter Amendment would require the President to attempt to upgrade the status of the COCOM agreement through negotiations with our COCOM allies. *See* 129 CONG. REC. H8341-42, H8343 (daily ed. Oct. 19, 1983) (statement of Rep. Courter). While the Courter Amendment was rejected, 129 CONG. REC. H8346 (daily ed. Oct. 19, 1983), the Senate bill to amend the Export Administration Act, S. 979, 98th Cong., 1st Sess. § 5(25) (1983), would require the President to negotiate the establishment of a COCOM treaty. *Id.* *See EAA '83, supra* note 37, at 46.

162. *See* 129 CONG. REC. H8341-42 (daily ed. Oct. 19, 1983) (statement of Rep. Courter).

163. *See EAA '83, supra* note 37, at 46 (statement of Kenneth W. Dam, Deputy Secretary of State); PRESIDENT'S REPORT, *supra* note 37, at 4. *See also* Bingham & Johnson, *supra* note 37, at 904, (European sensitivity to pressure from the left may be the cause of those COCOM members' unwillingness to conclude a treaty).



It has also been proposed that the United States abolish EDAC.<sup>164</sup> This idea has been prompted by the fact that all exception requests considered by EDAC require ACEP licenses.<sup>165</sup> Also, EDAC and ACEP have the same membership<sup>166</sup> and consider the same factors regarding export licenses and exception requests.<sup>167</sup> Proponents of this measure argue that, in addition to avoiding redundancy, centralizing exception requests and export licenses within ACEP would provide for greater administrative accountability.<sup>168</sup>

The major obstacle to eliminating EDAC is the Department of State's resistance to relinquishing its role in making foreign policy recommendations concerning the export control system.<sup>169</sup> Since a Department of State representative is EDAC's chairperson,<sup>170</sup> the Department fears that abolition of EDAC would eliminate the use of export licenses and exception request approvals or denials as diplomatic tools.<sup>171</sup>

A final proposal has been that COCOM eliminate the secrecy shrouding its list and proceedings.<sup>172</sup> Although COCOM members believe that confidentiality permits maintenance of more effective controls,<sup>173</sup> critics contend that secrecy is maintained for the benefit of European member nations, who are sensitive to domestic pressure from the left, and for the United States, whose representatives fear the backlash created by the public anger at their government's acquiescence in the lax COCOM control system.<sup>174</sup>

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164. See COMPT. GEN. No. 2, *supra* note 36, at vi, 16; Note, *Reconciliation*, *supra* note 37, at 448.

165. This is because all COCOM list items are generally included in the U.S. CCL. See COMPT. GEN. No. 1, *supra* note 37, at 34.

166. See *supra* note 156 and accompanying text.

167. See *supra* note 157 and accompanying text.

168. See COMPT. GEN. No. 2, *supra* note 37, at 31, 42; see also Bingham & Johnson *supra* note 37, at 902, (characterizing the entire export-licensing process as inefficient, overencompassing and entrenched).

169. See *Ext. EAA*, *supra* note 37, at 176 (statement of Maynard W. Glitman, Deputy Assistant Secretary, Int'l Trade Pol'y, Dep't of State).

170. See COMPT. GEN. No. 1, *supra* note 37, at 34.

171. See *supra* note 169.

172. See *COCOM List Review*, *supra* note 37, at 68 (calls to eliminate COCOM secrecy).

173. DEP'T OF COM., *supra* note 37, at 12 (1981).

174. See Bingham & Johnson, *supra* note 37, at 904.

B. *United States Controls*

## 1. Decontrol Exports to COCOM Nations

One of the three major proposals to modify United States controls is to decontrol the export of all goods to COCOM nations.<sup>175</sup> Section 106(b) of H.R. 3231<sup>176</sup> would provide for the elimination of the export license requirement for United States exports to overseas<sup>177</sup> COCOM member nations.<sup>178</sup> Proponents of this measure stress that only 6 export licenses have been denied for exports to COCOM member nations out of 75,000 requests during the period 1981-1983.<sup>179</sup> Further, supporters of section 106(b) point to its exception clause, which allows the Secretary to require export licenses for exports to end-users suspected of diverting United States goods, as an adequate safeguard against subsequent diversions.<sup>180</sup> Moreover, in lieu of a license, a notification provision requires exporters to notify the Secretary of their exports.<sup>181</sup>

Opponents of section 106(b) believe that its passage into law would eliminate any initial check on exports from the United States since there is no requirement that notice of export be given *prior* to shipment.<sup>182</sup> Thus, the United States would lose the traceable "paper trail" needed to determine whether the goods are eventually being diverted.<sup>183</sup> Opponents of the measure also argue that the reason for the limited number of denials is that the vast majority of prospective importers of United States goods in COCOM member nations are careful to comply with United States requirements;

175. See *infra* text accompanying notes 176-81.

176. H.R. 3231, 98th Cong., 1st Sess. § 106(b), 129 CONG. REC. H7699 (daily ed. Sept. 29, 1983).

177. Most exports from the United States to Canada require no export license and thus would not be affected by passage of section 106(b). 15 C.F.R. § 370.3 (1983). *But cf.* Lachica, *supra* note 114, at 34, col. 1 (U.S. officials warn Canada of possible revocation of Canada's exemption from licensing requirements). It is important to note, however, that the reexports of U.S. goods and data from Canada do require an export license. 15 C.F.R. § 374.1 (1983); *supra* note 78.

178. See *supra* note 38.

179. See 129 CONG. REC. H8262 (daily ed. Oct. 18, 1983) (statement of Rep. Bonker).

180. See 129 CONG. REC. H8263, H8268 (daily ed. Oct. 18, 1983) (statements of Reps. Bonker and Frenzel).

181. See 129 CONG. REC. H8263 (daily ed. Oct. 18, 1983) (statement of Rep. Bonker).

182. See 129 CONG. REC. H8262-63 (daily ed. Oct. 18, 1983) (statement of Rep. Hunter); 129 CONG. REC. H7454 (daily ed. Sept. 26, 1983) (statement of Rep. Roth).

183. See EAA '83, *supra* note 37, at 46.

compliance is guaranteed only because the importers know that the United States strictly scrutinizes their applications.<sup>184</sup> Removing the licensing requirement, they contend, would facilitate diversions,<sup>185</sup> while relegating all policing of diversions to already understaffed COCOM agencies.<sup>186</sup>

## 2. Reducing the Scope of the CCL

A second proposal has been to reduce the number of items on the United States CCL in order to permit more effective policing of the most significant ones.<sup>187</sup> This proposal would also have an amelioratory effect on the COCOM control system since a reduced number of items on the CCL would naturally lead to a reduction in United States proposals for additions to the COCOM list.<sup>188</sup> The Bucy Report,<sup>189</sup> a 1976 analysis of United States export controls by a government-business task force, recommended that the United States narrow its export-control policy in order to concentrate on critical technologies, and incorporate those changes into the COCOM list.<sup>190</sup> In defining "critical technologies" the Bucy Report establishes guidelines that: (1) advocate the control of design and manufacturing know-how, as opposed to finished products;<sup>191</sup> (2) concentrate on "active" transfers, i.e. transfers of technology in which the interaction between East and West may be most intense, as opposed to "passive" transfers;<sup>192</sup> and (3) concentrate on technology that represents a "revolutionary," as opposed to an "evolutionary," advance to the receiving nation.<sup>193</sup> Although the Bucy Report

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184. See 129 CONG. REC. H8265-66 (daily ed. Oct. 18, 1983) (statement of Rep. Roth).

185. *Id.*

186. *Id.*; see *supra* note 114.

187. See, e.g., Zonderman, *supra* note 20, at 132 (calls by observers to reduce CCL's scope).

188. See PRESIDENT'S REPORT, *supra* note 37, at 5; Bingham & Johnson, *supra* note 37, at 907.

189. See *supra* note 37.

190. See THE BUCY REPORT, *supra* note 38, at 15-16, 19, 20. See also 129 CONG. REC. H7452, H7456, H7460 (daily ed. Sept. 26, 1983) (statements of Reps. Bonker, Roth, and Mica) (voicing support of critical technologies approach); Zonderman, *supra* note 20, at 125, 132 (discussion of *Bucy Report*).

191. THE BUCY REPORT, *supra* note 37, at 1-2.

192. *Id.* at 4.

193. *Id.* at 9.

has not been widely implemented by policy makers,<sup>194</sup> section 106(n) of H.R. 3231 embodies the Report's essence. It provides for the elimination from the CCL of goods controlled solely because they contain microprocessors that cannot be altered to perform alternative functions.<sup>195</sup> Such products remain controlled despite the wide availability of microprocessors worldwide.<sup>196</sup>

### 3. United States Retaliatory Ban on Imports

The third proposal, included in section 9(7) of S. 979, would allow the President to ban imports from foreign companies that violate COCOM controls, provided that such sanctions are approved by COCOM.<sup>197</sup> Proponents of this measure believe that the ban will provide COCOM with an effective enforcement mechanism while offsetting the pecuniary gain of companies that violate COCOM controls.<sup>198</sup> Opponents of section 9(7) contend that other COCOM member nations may view the new sanctions as another extraterritorial application of export controls.<sup>199</sup>

194. While no specific reason for the *Bucy Report's* quasi-rejection has been voiced, many "hard-liners"—those who believe a tightening of export controls is necessary to protect U.S. technology—consider the *Bucy Report* too liberal in its control relaxation. See Zonderman, *supra* note 20, at 102. But compare Export Administration Act of 1979, 50 U.S.C. § 2404(d)(2) (1976 & Supp. III 1979) (detailing Secretary of Defense's role in defining "militarily critical technologies") with THE BUCY REPORT, *supra* note 37, at 1 (partial incorporation of *Bucy Report* into section of Export Administration Act).

195. H.R. 3231, 98th Cong., 1st Sess. § 106(n), 129 CONG. REC. H7700 (daily ed. Sept. 29, 1983).

196. See Bingham & Johnson, *supra* note 20, at 902.

197. S. 979, 98th Cong., 1st Sess. § 9(7) (1983), amended by Amendment No. 2743, 130 CONG. REC. S1719 (daily ed. Feb. 27, 1984).

198. See S. REP. NO. 170, 98th Cong., 2d Sess. 18-19 (1983); 130 CONG. REC. S1719-20 (daily ed. Feb. 27, 1984) (statement of Sen. Heinz). See also 129 CONG. REC. H7461 (daily ed. Sept. 26, 1983), H7714-15 (daily ed. Sept. 29, 1983) (statements of Rep. Snowe supporting the inclusion of a section 9(7)-like provision into H.R.3231).

199. See 130 Cong. Rec. S1716-17 (daily ed. Feb. 27, 1984) (statement of Sen. Danforth); Norman, *supra* note 130, at 31, col. 5. A final major proposal described in H.R. 3231, § 108, 129 CONG. REC. H7700 (daily ed. Sept. 29, 1983), would prohibit the Secretary from requiring validated licenses for the export of goods available in foreign markets six months after the President begins talks which fail to eliminate foreign availability. *Id.* Supporters argue that such a law would exclude from the CCL goods that are no longer of strategic importance and are available in foreign markets. See 129 CONG. REC. H7456, H7463 (daily ed. Sept. 26, 1983) (statements of Reps. Berman and Zschau). Opponents contend that six months is insufficient time to conclude these negotiations and may result in the inability of the United States to restrict U.S. exporters who are selling high technology which should still

## V. PROPOSED SOLUTIONS

The United States should immediately implement the following four-step program: elimination of EDAC, decontrol of exports to COCOM member nations, reductions in the CCL, and establishment of a retaliatory ban against foreign companies that violate COCOM controls.

### A. Abolishing EDAC

By abolishing EDAC the United States would eliminate the redundancy of EDAC and ACEP review.<sup>200</sup> Further, this would provide for greater accountability in formulating export control policy by centralizing policy-making in a single organization.<sup>201</sup> Most importantly, elimination of EDAC would enable the United States to speed up its consideration of COCOM member nation export license and exception requests,<sup>202</sup> the delay of which is a constant source of friction within COCOM.<sup>203</sup> Those who oppose such a measure by claiming it strips the United States of an effective foreign policy tool<sup>204</sup> fail to realize the uselessness of United States controls in the face of foreign availability.<sup>205</sup> Thus, by accommodating COCOM allies with an efficient method of processing license and exception requests, the United States would be fostering greater cooperation between all COCOM member nations while receiving enhanced COCOM involvement in preventing diversions.<sup>206</sup>

### B. Decontrolling Exports to COCOM Member-Nations

By decontrolling exports to COCOM member nations, the United States would reduce Commerce Department paperwork by

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be controlled. See 129 CONG. REC. H7794 (daily ed. Sept. 30, 1983) (statement of Rep. Solomon); 129 CONG. REC. H7455, H7461-62 (daily ed. Sept. 26, 1983) (statements of Reps. Roth, Snowe, and Solomon). Although this provision bears on national security controls, its prospective effects on Soviet diversions would be negligible.

200. See *supra* text accompanying notes 164-67.

201. See *supra* text accompanying note 168.

202. See *supra* text accompanying note 126.

203. See *supra* text accompanying note 127.

204. See *supra* text accompanying note 169.

205. See *supra* note 109 and accompanying text.

206. See COMPT. GEN. No. 2, *supra* note 36, at 15.

eliminating approximately 25,000 license applications each year.<sup>207</sup> Claims that the United States would lose a check on a good's initial export<sup>208</sup> and a method of tracing goods after their export<sup>209</sup> are ill-conceived. Should a situation arise when the Secretary believes a license requirement is warranted, section 106(b) of H.R. 3231 gives the Secretary the discretion to require one.<sup>210</sup> Additionally, exporters must always give notice of exports to the Secretary.<sup>211</sup> Before implementing such decontrol, however, Congress should expressly specify that notice of export be given *prior* to shipment.<sup>212</sup> In addition to reducing paperwork, decontrol would provide other substantial benefits to the United States. First, decontrol would create goodwill within COCOM.<sup>213</sup> Also, decontrol would enable Commerce to reallocate its resources in order to better police suspected diversions.<sup>214</sup>

### C. *Reductions in the CCL*

By modifying the CCL to include only critical technology the United States would enable the Commerce Department to shift its resources toward the monitoring of suspected diversions.<sup>215</sup> Critics who fear that a reduction in the breadth of the CCL would result in an excessively relaxed export-control posture should take note of the present policy, which restricts the availability of the most elementary microprocessors.<sup>216</sup> Such an unrealistic policy should be remedied by modification of the CCL, including the passage of section 106(n) of H.R. 3231.<sup>217</sup> This would satisfy COCOM allies, who would be required to handle fewer applications for exception requests,<sup>218</sup> and whose companies would have to apply for fewer reexport licenses.<sup>219</sup>

207. See *supra* text accompanying note 179.

208. See *supra* text accompanying note 182.

209. See *supra* text accompanying note 183.

210. H.R. 3231, 98th Cong., 1st Sess. § 106(b), 129 CONG. REC. H7689 (daily ed. Sept. 29, 1983).

211. See 129 CONG. REC. H8263 (daily ed. Oct. 18, 1983) statement of Rep. Bonker).

212. See *supra* text accompanying note 182.

213. See 129 CONG. REC. H8263 (daily ed. Oct. 18, 1983) (statement of Rep. Mica).

214. See 129 CONG. REC. H8264 (daily ed. Oct. 18, 1983) (statement of Rep. Mica).

215. See 129 CONG. REC. H8262 (daily ed. Oct. 18, 1983) (statement of Rep. Bonker).

216. See Bingham & Johnson, *supra* note 37, at 902.

217. See *supra* text accompanying notes 194-96.

218. See *supra* text accompanying notes 187-88.

219. See *supra* text accompanying note 78.

#### D. *Establishment of a Retaliatory Ban*

As the final step in the proposed program, the United States should ban imports from foreign companies that violate COCOM controls.<sup>220</sup> This would provide COCOM with an enforcement mechanism, albeit unilateral in nature, which would force exporters engaged in diversions to weigh the gain from a sale to the Soviet bloc against the loss of all future sales in the United States.<sup>221</sup> These sanctions should not be considered as a further extraterritorial application of export controls<sup>222</sup> because these sanctions must be approved by a majority of COCOM member nations.<sup>223</sup>

#### E. *A Prospective Fifth Step*

The United States should also attempt to gradually implement the conclusion of a COCOM treaty<sup>224</sup> and the elimination of COCOM secrecy.<sup>225</sup> Elevation of COCOM to treaty status, with the obligations of the signatories formally established, would firmly impress upon all COCOM member nations the importance of export controls to collective security.<sup>226</sup> However, the present unwillingness of other COCOM member nations to enter into such a treaty suggests that the United States should move slowly in this area.<sup>227</sup> The purpose of the COCOM treaty is to enlist greater COCOM cooperation in preventing diversions; this objective will be achieved not through United States petulance but by reminding our COCOM allies of United States concessions made regarding EDAC, United States exports to COCOM, and the CCL.<sup>228</sup>

Abolishing COCOM secrecy would subject COCOM proceedings to public scrutiny and thus have the effect of imposing greater standards of public accountability on COCOM member nations.<sup>229</sup>

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220. See S. 979, 98th Cong., 1st Sess. § 9(7) (1983), amended by Amendment No. 2743, 130 CONG. REC. S1719 (daily ed. Feb. 27, 1984).

221. See S. REP. NO. 170, 98th Cong., 1st Sess. 19 (1983).

222. See *supra* text accompanying note 199.

223. S. 979, 98th Cong., 1st Sess. § 9(7) (1983), amended by Amendment No. 2743, 130 CONG. REC. S1719 (daily ed. Feb. 27, 1984).

224. See *supra* text accompanying notes 161-63.

225. See *supra* text accompanying notes 172-74.

226. See 129 CONG. REC. H8341-42 (daily ed. Oct. 19, 1983) (statement of Rep. Courter).

227. See *supra* text accompanying note 163.

228. See *supra* text accompanying note 200-19.

229. See *supra* text accompanying note 168.

Although most members of COCOM, including the United States, favor the maintenance of COCOM's confidentiality on national security grounds,<sup>230</sup> others contend that such secrecy serves only to protect the governments of COCOM member nations from the criticism that would almost certainly ensue from public scrutiny of COCOM proceedings.<sup>231</sup> The national security justification for COCOM secrecy is illusory since the Soviets and their allies are well aware of which goods they are being denied. The United States should attempt to persuade the rest of COCOM to eliminate the secrecy surrounding it in the hope that public awareness of the laxity of COCOM control enforcement will yield demands for greater measures to prevent diversions.<sup>232</sup>

#### F. *Additional Prospects*

In addition to the favored proposals already discussed, two more must be added. First, the United States should enter into negotiations with Austria, Sweden, and Switzerland in order to stop the massive flow of United States technology diverted through those non-COCOM nations.<sup>233</sup> Through such negotiations, the United States should attempt either to enlist the three nations in COCOM, or to achieve bilateral agreements more protective of United States national security interests.<sup>234</sup> Second, the United States should refrain from applying its export controls extraterritorially, except for national security reasons.<sup>235</sup> This will soothe the COCOM allies angered over previous such applications, while en-

230. See DEP'T OF COM., EXPORT ADMINISTRATION ANNUAL REPORT FY 1980, at 12 (1981).

231. See *supra* text accompanying note 174.

232. See Bingham & Johnson, *supra* note 20, at 904.

233. See *supra* text accompanying notes 22-27, 112-13. See also Noble, *Exporter Is Fined \$3 Million By U.S.*, N.Y. Times, Apr. 28, 1984, at 1, col. 5 (diversion of radar system to Soviet Union by Swedish firm); Kohan, *The KGB*, TIME, Feb. 14, 1983, at 42 (statement of U.S. high technology executive that "[i]f every piece of equipment shipped to Vienna stayed there, the city would sink").

234. See also Lachica, *Reagan Institutes Export Controls System That Could Speed Up Technology Trade*, Wall St. J., Mar. 26, 1984, at 8, col. 2; Lachica, *New U.S. Technology Export Guidelines Broaden Pentagon's License Review Role*, Wall St. J., Mar. 22, 1984, at 10, col. 1 (noting establishment of new administrative guidelines that will allow the Department of Defense the right to review export licenses of sensitive technology to Austria, Switzerland, and Sweden in order to prevent Soviet diversions).

235. See *supra* text accompanying notes 128-33.



gendering greater COCOM cooperation to prevent Soviet diversions.<sup>236</sup> Further, the goodwill generated among foreign COCOM members will, in light of the ineffectiveness of United States foreign policy sanctions, greatly outweigh any possible harm to United States interests.<sup>237</sup>

### CONCLUSION

In order to maintain Western security, the United States and its COCOM allies must preserve the West's scientific and technological superiority over the Soviet bloc. The recommended proposals would do this by limiting the success of Soviet diversions of United States technology through a four-pronged approach. The proposed steps would, first, concentrate on the control of only critical technology; second, modify United States export control policy in order to engender greater COCOM cooperation; third, impress upon COCOM allies the importance of export controls to Western security; and fourth, provide economic disincentives to violators of export controls. While it is unrealistic to believe that Soviet diversions of United States technology can be completely thwarted, the United States and its COCOM allies can significantly impede them by implementing the proposed policies. This would preserve the technological "lead time" on which Western security depends.

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236. *Id.*

237. *See supra* note 109.