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Deregulating Dual-Use Exports to Russia: Is U.S. National Security at Risk?

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Abstract

This Note examines whether the current initiatives to deregulate export controls on computer and telecommunications to Russia pose threats to U.S. national security. Part I reviews the development of unilateral and multilateral controls that prevented the exportation of dual-use commodities to the former Soviet Union. Part II describes the current political and economic situation in Russia. Part II then discusses recent deregulation and pending legislation in the U.S. Congress that would further reduce the controls on computer and telecommunications exports to Russia. Part II also sets forth the arguments for and against deregulation. Part III argues that the instability in Russia warrants the continued restriction of dual-use technology to Russia in order to protect U.S. surveillance efforts and prevent the Russian government from using the technology for military purposes. This Note concludes that the United States must devise an export policy toward Russia that balances the need to eliminate export controls that are hindering U.S. economic competitiveness with U.S. security interests.

DEREGULATING DUAL-USE EXPORTS TO RUSSIA: IS U.S. NATIONAL SECURITY AT RISK?

Rochelle M. Tarlowe*

INTRODUCTION

During the Cold War,¹ in order to protect its security interests, the United States sought to restrict exports of dual-use commodities² to the Soviet Union.³ To further this objective, the United States and its allies⁴ formed the Coordinating Committee for Multilateral Export Control ("COCOM").⁵ Each COCOM member nation implemented COCOM's regulations through its own export control system.⁶ In the United States, export controls are governed by the Export Administration Act ("EAA").⁷

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1. See KARL W. RYAVEC, *UNITED STATES-SOVIET RELATIONS* 46 (1989). The Cold War was a period of rivalry between the United States and the Soviet Union during which each nation attempted to weaken the other without waging an outright war. *Id.* The term is broadly used to define U.S.-Soviet Relations. *Id.* at 47.

2. See Philip H. Oettinger, Comment, *National Discretion: Choosing COCOM's Successor and the New Export Administration Act*, 9 AM. U.J. INT'L L. & POL'Y 559, 567 (1994). Dual-use commodities are items that have civilian uses but also have military applications. Machine tools, computers, telecommunications, lasers, electronics equipment, and aerospace equipment are examples of controlled dual-use commodities. 15 C.F.R. § 799.1 (Supp. 1 1994).

3. John F. McKenzie, *Implementation of the Core List of Export Controls: Computer and Software Controls*, 5 SOFTWARE L.J. 1 (1992). The policy of restricting exports that could prove to be detrimental to the national security of the United States is codified in the Export Administration Act. 50 U.S.C. app. § 2402(2)(A) (1988 & Supp. V 1993).

4. 15 C.F.R. § 770.2 (1994). The members of the Coordinating Committee for Multilateral Export Controls were Australia, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States. *Id.*

5. See WILLIAM J. LONG, *U.S. EXPORT CONTROL POLICY: EXECUTIVE AUTONOMY VS. CONGRESSIONAL REFORM* 17 (1989). COCOM was founded in 1949 as an international effort to control the transfer of defense technologies to potential enemy nations. *Id.* COCOM was not established through any formal treaty. Cecil Hunt, *COCOM and Other International Cooperation in Export Control*, in *COPING WITH EXPORT CONTROLS* 1988, at 109, 112 (PLI Comm. L. & Practice Course Handbook Series No. 453, 1988). Export controls are implemented subject to unanimous consent by all COCOM members. *Id.* COCOM controlled strategic exports to the Soviet Union, Hungary, Bulgaria, Czechoslovakia, Poland, East Germany, Romania, Albania, North Korea, Mongolia, Vietnam, and the People's Republic of China. *Id.* at 112-13.

6. PAUL B. STEPHAN III ET. AL., *INTERNATIONAL BUSINESS AND ECONOMICS LAW AND POLICY* 422 (1993) [hereinafter *INTERNATIONAL TRADE*].

7. 50 U.S.C. app. §§ 2401-2420 (1988 & Supp. V 1993). The EAA restricts exports based on national security, foreign policy, and short supply concerns. *Id.* §§ 2404-2406.

The fall of the Soviet government in December 1991⁸ prompted U.S. technological industries to criticize controls on dual-use exports such as computers and telecommunications equipment to Russia.⁹ Supporters of U.S. business interests asserted that eliminating export restrictions to the former Soviet Union would create investment opportunities while assisting in the development of democracy and capitalism in the region.¹⁰ Furthermore, they argued, controls did not protect U.S. security interests because the controlled exports were available to Russia from sources other than the United States.¹¹

With the disbanding of COCOM in March 1994, former members were free to regulate export controls unilaterally.¹² U.S. President Bill Clinton thereafter modified licensing requirements to permit exports of certain telecommunications and computer equipment previously prohibited for export to Rus-

The EAA subjects exports to licensing requirements. *INTERNATIONAL TRADE*, *supra* note 6, at 422. Pursuant to the EAA the Department of Commerce issues control lists for restricted exports. *Id.* In addition to the EAA, the Arms Export Control Act limits the export of military technology. *Id.*; 22 U.S.C. § 2778 (1988 & Supp. V 1993).

8. See Francis X. Clines, *End of the Soviet Union; Gorbachev, Last Soviet Leader, Resigns; U.S. Recognizes Republics' Independence*, N.Y. TIMES, Dec. 26, 1991, at A1 (reporting on resignation of Soviet leader Mikhail S. Gorbachev, and formation of Commonwealth of Independent States consisting of Russia and ten other former Soviet Republics).

9. See *Export Controls on Advanced Telecommunications: Hearing Before the Subcomm. on Economic Policy, Trade and Environment of House Comm. on Foreign Affairs*, 103d Cong., 1st Sess. 14-15 (1993) [hereinafter *Telecommunications Hearings*] (testimony of Robert Allen, Chairman of the Board and Chief Executive Officer, AT&T) (testifying that Cold War export controls will jeopardize billions of dollars in telecommunications sales to Russia); see also *Rewriting the Export Administration Act: Hearing before the Subcomm. on Economic Policy, Trade, and Environment of the House Comm. on Foreign Affairs*, 103d Cong., 1st Sess. 73 (1993) [hereinafter *EAA Hearings*] (testimony of Dr. Paul Freedenberg, of Baker & Botts, L.L.P., on Behalf of Computer and Business Equipment Manufacturers Association) (advocating new U.S. export policy that recognizes changes in U.S. relations with Russia and pace of technological change).

10. *Telecommunications Hearings*, *supra* note 9, at 13-16; see Shahid Alam, *Restructuring the United States' Export Legislation for the Post-Cold War Era*, 18 FLETCHER F. WORLD AFF. 137, 143 (1994) (stating United States should respond to Russian President Boris Yeltsin's request to obtain Western technology).

11. See Peter S. Malloy, *Controls on the Export of Military Sensitive Technology: National Security Imperative or U.S. Industry Impediment?*, 18 RUTGERS COMPUTER & TECH. L.J. 841, 842 (1992) (arguing United States should not limit exports that are available to controlled destinations from other nations).

12. *Export Controls: U.S. Lifts Curbs on High-Tech Exports Including Telecom Equipment, Computers*, 11 Int'l Trade Rep. (BNA) No. 14, at 530 (Apr. 6, 1994) [hereinafter *U.S. Lifts Curbs*]. The dissolution of COCOM left all licensing decisions of former members to "national discretion." *Id.*

sia.¹³ In addition, members of the U.S. Congress seek to amend the EAA to eliminate many of the remaining controls on dual-use exports to Russia.¹⁴

While U.S. businesses support legislation to deregulate export controls on dual-use technology to Russia¹⁵ critics of deregulation argue that relaxing export controls will harm U.S. security interests.¹⁶ After the collapse of the Soviet Union, the Russian government has experienced difficulties in maintaining economic and political stability.¹⁷ Meanwhile, Russia still possesses a vast nuclear arsenal.¹⁸ Opponents of deregulation assert that exporting advanced computer and telecommunications equipment will hinder the ability of the United States to monitor Russia¹⁹ while providing a potential ultra-nationalist Russian

13. *Id.* President Clinton eliminated controls on all but the most sophisticated telecommunications equipment and certain computer equipment. *Id.* The deregulations were implemented through the creation of the "GLX," a new general license. 15 C.F.R. § 771.20 (1994).

14. *See* H.R. 2912, 103d Cong., 1st Sess. (1993); H.R. 3431, 103d Cong., 1st Sess. (1993); H.R. 3627, 103d Cong., 1st Sess. (1993); H.R. 3534, 103d Cong., 1st Sess. (1993); H.R. 3937, 103d Cong., 2d Sess. (1994); S. 1617, 103d Cong., 1st Sess. (1993); S. 1820, 103d Cong., 2d Sess. (1994); S. 1838, 103d Cong., 2d Sess. (1994) (seeking to amend EAA to deregulate telecommunications and computer exports to Russia and other nations).

15. *See, e.g., EAA Hearings, supra* note 9, at 107 (testimony of Boyd McKelvie, Senior Manager for International Trade Regulation, International Law and Policy, General Electric Company) (complementing legislators who have proposed bills to eliminate export controls on telecommunications and computers).

16. *See* Juan P. Morillo, *The Clinton Administration's New National Export Policy*, 25 LAW & POLICY INT'L BUS. 1113, 1120-22 (1994) (enumerating threats deregulation of export pose to national security).

17. *See U.S. Policy Toward the New Independent States: Hearing Before the House Comm. on Foreign Affairs*, 103d Cong., 2d Sess. 1 (1994) [hereinafter *Policy Toward NIS*] (statement of Hon. Lee H. Hamilton [D-IN], Chairman of Comm. on Foreign Affairs) (stating influence of ultra-nationalists in Russian parliament and economic setbacks in Russia); *see also* Stephen F. Cohen, *Clinton's Yeltsin, Yeltsin's Russia*, NATION, Oct. 10, 1994, at 373 (commenting on Yeltsin's unpopularity among Russian people).

18. *Current and Projected National Security Threats to the United States and Its Interests Abroad: Hearing Before the Senate Select Comm. on Intelligence*, 103d Cong., 2d Sess. 22-23 (1994) [hereinafter *Security Hearings*] (prepared statement of Lt. Gen. James R. Clapper, Jr., USAF, Director, Defense Intelligence Agency). The Russian government maintains 27,000 nuclear warheads. *Id.*

19. *See* Christopher A. Padilla, *The Telecommunications Core List: A Study in Dual Personality*, in COPING WITH EXPORT CONTROLS 1992, at 111, 116 (PLI Comm. L. & Practice Course Handbook Series No. 606, 1992) [hereinafter *Dual Personality*] (stating U.S. National Security Agency has been opposed to exporting telecommunications technology to Russia because modernized network would make it more difficult to gather intelligence through wiretapping).

leader with the technologies to enhance Russia's military capabilities.²⁰

This Note examines whether the current initiatives to deregulate export controls on computer and telecommunications to Russia pose threats to U.S. national security. Part I reviews the development of unilateral and multilateral controls that prevented the exportation of dual-use commodities to the former Soviet Union. Part II describes the current political and economic situation in Russia. Part II then discusses recent deregulation and pending legislation in the U.S. Congress that would further reduce the controls on computer and telecommunications exports to Russia. Part II also sets forth the arguments for and against deregulation. Part III argues that the instability in Russia warrants the continued restriction of dual-use technology to Russia in order to protect U.S. surveillance efforts and prevent the Russian government from using the technology for military purposes. This Note concludes that the United States must devise an export policy toward Russia that balances the need to eliminate export controls that are hindering U.S. economic competitiveness with U.S. security interests.

I. EXPORT CONTROLS ON DUAL-USE ITEMS FROM THE COLD WAR UNTIL THE FALL OF THE SOVIET UNION

Prior to the Cold War, modern day export controls only existed during wartime.²¹ The decline of U.S.-Soviet relations following World War II²² led the United States to implement exten-

20. See *Security Hearings*, *supra* note 18, at 22 (stating that political power of ultranationalist Vladimir Zhirinovskiy is cause for concern); see also Paul H. Nitze, *Foreward: International Security in a New World*, 81 *Geo. L.J.* 481, 483-84 (1994) (asserting Russia's political instability and potential to 'make mischief in trouble spots worldwide' raises cause for concern).

21. Raymond J. Waldmann, *Trade and Technology Transfer: Constraints and Limitations*, in *NATIONAL SECURITY LAW 1138* (John Norton Moore et. al. eds. 1990). Modern day wartime export controls began with the Trading with the Enemy Act of 1917. *Id.*; 50 U.S.C. app. §§ 1-44 (1988 & Supp. V 1993). The act prohibits trading with any individual, partnership, corporation, resident, or government of any nation with which the United States is at War. *Id.* § 3.

22. See ROBERT F. BYRNES, *U.S. POLICY TOWARD EASTERN EUROPE AND THE SOVIET UNION* 16 (1989). In 1945-47, the first two years following World War II, the United States attempted to maintain friendly relations with the Soviet Union. *Id.* As Soviet power spread into Eastern Europe, thereby threatening Western Europe, however, the

sive peacetime export restrictions.²³ Beginning in 1949, the United States limited the flow of goods and technology to the Soviet Union²⁴ and, in conjunction with its allies,²⁵ established export controls on a multilateral level.²⁶ Since 1949, U.S. export laws were revised on repeated occasions.²⁷ In 1991, the United States and COCOM responded to the fall of communism in Eastern Europe by revising the list of controlled commodities and controlled destinations.²⁸

A. *The Establishment of Cold War Export Restrictions*

In 1949, the U.S. Congress passed the Export Control Act²⁹ ("ECA"), the first comprehensive export law enacted in the United States to restrict the exportation of commercial goods and technology.³⁰ The ECA was primarily instituted to control exports to the Soviet Union and other communist nations that might harm U.S. security interests.³¹ Although the ECA was

United States sought to contain the Soviet threat through unifying the Western countries. *Id.*

23. Waldmann, *supra* note 21, at 1138-39. The Export Control Act of 1949 restricted exports on goods and technology. Ch. 11, 63 Stat. 7 (1949) (codified as amended at 50 U.S.C. §§ 2021-2023 (expired 1969)). The Mutual Defense Act of 1951 permitted the State Department to enter into multilateral agreements to prevent goods from reaching the Soviet Union. Ch. 575, 65, Stat. 644 (1951) (codified as amended 22 U.S.C. §§ 1611-1613). The Mutual Security Act of 1954 allowed the State Department to control arms exports. Ch. 936, 68, Stat. 832 (1954) (codified as amended at 22 U.S.C. §§ 1750-1753a (repealed 1961)).

24. Export Control Act, ch. 11, 63 Stat. 7 (1949) (codified as amended at 50 U.S.C. §§ 2021-2023 (expired 1969)). The Export Control Act gave the President the authority to "prohibit or curtail the exportation from the United States, its Territories, and possessions, of any articles, materials, or supplies, including technical data except under such rules and regulations as he shall prescribe." *Id.*

25. *See supra* note 4 (listing members of COCOM).

26. L.J. KUTTEN & B.C. MURPHY, AN OVERVIEW OF UNITED STATES EXPORT CONTROLS 4 (1989) [hereinafter OVERVIEW OF EXPORT CONTROLS]. In the 1950's the United States and its allies established COCOM to control exports to communist countries. *Id.*

27. *See id.* at 4-5 (enumerating amendments to Export Administration Act during 1970's and 1980's).

28. McKenzie, *supra* note 3, at 2. The United States amended the Commerce Control List to comply with the multilaterally agreed to deregulations. *See* 15 C.F.R. § 799.1 (Supp. 1 1994) (deregulating export controls to Poland, Hungary, and Czech Republic).

29. Ch. 11, 63 Stat. 7 (1949) (codified as amended at 50 U.S.C. §§ 2021-2023 (expired 1969)).

30. OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at 3-4.

31. *Id.* "The Congress hereby declares that it is the policy of the United States to use export controls to the extent necessary . . . to exercise the necessary vigilance over export from the standpoint of their significance to the national security." Export Con-

drafted to expire in 1951,³² Congress repeatedly renewed the ECA until 1969.³³

To prevent strategic exports from reaching the Soviet Union on a multilateral level, the United States, with its allies, organized COCOM in 1949.³⁴ Based in Paris, COCOM operated as an informal trade control coordinating mechanism.³⁵ Each member nation provided representation at weekly COCOM meetings.³⁶ COCOM representatives established the criteria for the controls, developed embargo lists, and coordinated enforcement efforts among the member nations.³⁷

One of COCOM's central purposes was to devise export controls for dual-use commodities, software, and technical data to the Soviet Union and its allies.³⁸ COCOM's Industrial List served to restrict exports of such commodities that had both military and civilian applications.³⁹ The Industrial List was then incorporated into each COCOM member nation's own export control system.⁴⁰

B. *The Export Administration Act and Regulatory Provisions*

In the United States, dual-use exports are governed by the Export Administration Act ("EAA") of 1979⁴¹ and its subsequent amendments.⁴² The EAA of 1979 evolved from the ECA of

trol Act, ch. 11, 63 Stat. 7. The ECA also controlled goods in short supply and restricted goods that furthered foreign policy objectives. *Id.* Short supply controls enabled the United States to make the transition from a wartime to a peacetime economy and to rebuild the European economies. OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at 3-4.

32. Ch. 11, 63 Stat. 7, 9.

33. Waldmann, *supra* note 21, at 1138; *see* Ch. 83, 65 Stat. 43 (1951); Ch. 116, 67 Stat. 62 (1953); Ch. 473, 70 Stat. 407 (1956); Pub. L. No. 85-466, 72 Stat. 220 (1958); Pub. L. No. 86-464, 74 Stat. 130 (1960); Pub. L. No. 87-515, 76 Stat. 127 (1962); Pub. L. No. 89-63, 79 Stat. 209 (1965); Pub. L. No. 91-35, 83 Stat. 42 (1969); Pub. L. No. 91-59, 83 Stat. 101 (1969); Pub. L. No. 91-105, 83 Stat. 169 (1969) (all renewing ECA).

34. LONG, *supra* note 5, at 17.

35. Hunt, *supra* note 5, at 112. COCOM was not organized or governed by any formal treaty or international agreement. *Id.*

36. *Id.*

37. *Id.*

38. McKenzie, *supra* note 3, at 1-2.

39. *Id.* at 2.

40. *Id.*

41. Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. app. §§ 2401-2420 (1988 and Supp. V 1993)).

42. Pub. L. No. 99-64, Stat. 120 (1985) (codified as amended at 50 U.S.C. §§ 2401-

1949.⁴³ Pursuant to the EAA, the U.S. Department of Commerce⁴⁴ issues and enforces export controls.⁴⁵

1. The Export Administration Act of 1979 and its Legislative Antecedents

In 1969, the U.S. Congress passed the first Export Administration Act.⁴⁶ Promulgated during a period of detente between the United States and the Soviet Union,⁴⁷ the Export Administration Act of 1969 sought to control only exports that could make strategic military contributions thereby harming national security.⁴⁸ In addition, the Export Administration Act of 1969 recognized that overbroad export controls impair the interests of U.S. businesses to export their goods abroad.⁴⁹

In 1976, the relaxation of export controls to the Soviet Union was countered by the Department of Defense Science Board through its release of the *Bucy Report*.⁵⁰ In order to control the diminishing technological advantage of the United States over communist countries, the *Bucy Report* urged the re-

2420); Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 50 U.S.C. §§ 2401-2420).

43. See OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at 3-5 (discussing various revision of U.S. export legislation since 1949).

44. OFFICE OF THE FEDERAL REGISTER, THE UNITED STATES GOVERNMENT MANUAL 158 (1994). The Department of Commerce, under the supervision of the Secretary of Commerce, is responsible for promoting international trade, U.S. competitiveness in the world economy, and technological advancement. *Id.* The Department of Commerce is part of the executive branch of the U.S. government, with the Secretary of Commerce serving as a member of the President's cabinet. *Id.*

45. See 50 U.S.C. app. § 2403 (requiring Secretary of Commerce to issue licenses and establish control lists).

46. The Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (codified as amended at 50 U.S.C. app. §§ 2401-2413 (expired 1979)).

47. OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at 4. The relaxation of export controls was also motivated by other COCOM nations feeling less threatened by the Soviets. Waldmann, *supra* note 21, at 1139.

48. 50 U.S.C. app. § 2402(2)(A).

49. *Id.* § 2401(6).

50. DEFENSE SCIENCE BOARD TASK FORCE ON EXPORT OF U.S. TECHNOLOGY, AN ANALYSIS OF EXPORT CONTROL OF U.S. TECHNOLOGY - A DOD PERSPECTIVE, *reprinted in Transfer of Technology and the Dresser Industries Export Licensing Actions: Hearing Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 95th Cong., 2d Sess. 33-89 (1978). J. Fred Bucy, Chairman of the Defense Science Task Force on Export of U.S. Technology, led the investigation that yielded the findings in the Department Of Defense's report. *Id.* at 37-38.

tion of U.S. export controls over technology,⁵¹ recommending strict controls over costly research and manufacturing information.⁵² The *Bucy Report* also introduced the concept of military critical technologies.⁵³

The EAA of 1979⁵⁴ replaced the Export Administration Act of 1969 as the primary export control legislation.⁵⁵ As documented in the Export Administration Act of 1969,⁵⁶ the policy of the United States was to consider the effect of export controls on U.S. businesses, limiting only exports that were essential to U.S. security.⁵⁷ Meanwhile, the United States sought to prevent communist countries from gaining access to sophisticated technology.⁵⁸ To address the competing objectives of increasing technological exports to promote economic growth and the desire to restrict communist access to advanced technologies,⁵⁹ the EAA of 1979 required the Department of Defense to establish a specialized control list entitled the Military Critical Technologies List.⁶⁰

2. Regulatory Measures and Licensing Provisions

To implement the EAA, the Department of Commerce issued the Export Administration Regulations ("EAR").⁶¹ Within

51. *Id.* at 47-48. The report stressed that exporting technological designs and manufacturing expertise pose the greatest security concerns. *Id.* at 51.

52. *Id.* at 59-64. The report recommended the retention of export controls to maintain U.S. lead time in the development of strategic capabilities. *Id.* at 64.

53. Peter Swan, *A Road Map to Understanding Export Controls: National Security in a Changing Global Environment*, 30 AM. BUS. L.J. 607, 622 (1993). The EAA of 1979 sought to prevent the export of military critical technologies. *Id.*

54. P.L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. app. §§ 2401-2420 (1988 and Supp. V 1993)).

55. Swan, *supra* note 53, at 621.

56. See *supra* notes 46-49 and accompanying text (noting Export Administration Act of 1969 recognized negative impact export controls has on U.S. businesses).

57. 50 U.S.C. app. § 2402(2)(A).

58. Swan, *supra* note 53, at 622.

59. *Id.*

60. 50 U.S.C. app. § 2404(d). In establishing the Military Critical Technologies list, the Secretary of Commerce is required to consult the Secretary of Defense. *Id.* § 2404(d)(1). The Secretary of Defense is primarily responsible for determining if particular item is a military critical technology, placing emphasis on arrays of design, manufacturing know-how, keystone design, and keystone equipment. *Id.* § 2404(d)(2). The Military Critical Technologies list is then integrated into the Commerce Control List. *Id.* § 2404(d)(4).

61. 15 C.F.R. §§ 730-799 (1994). The United States controls exports through the Export Administration Regulations. OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at

the Department of Commerce, the Bureau of Export Administration ("BXA") maintains and enforces the EAR.⁶² The central provision of the EAR is the Commerce Control List ("CCL").⁶³ The CCL includes all commodities controlled by the Department of Commerce and indicates whether, and to what extent, a commodity is controlled.⁶⁴ The CCL regulates exports by categorizing dual-use commodities,⁶⁵ establishing country groups,⁶⁶ and indicating the reason for the control.⁶⁷

Based on the CCL categorization, an export may require either a general or a validated license, issued by the BXA.⁶⁸ A general license does not require written authorization.⁶⁹ Conversely, a validated license⁷⁰ requires documentation.⁷¹ In addition, an exporter must apply for a validated license.⁷² The BXA

7. The EAR focus on transactions involving the actual shipping of goods or technology from the United States to another country. *Id.*

62. Kimberly S. Dyslin, *Reform of the Multilateral Export Control Mechanism For the Twenty-First Century: Redefining "The Enemy" and "War"*, 10 B.U. INT'L L.J. 1, 14 (1992). The BXA maintains the Commerce List which incorporates all items subject to export controls. 15 C.F.R. § 799.1(a).

63. 15 C.F.R. § 799.1 (Supp. 1). The Commerce Control List was formerly called the Commodity Control List. McKenzie, *supra* note 3, at 3. Unlike the Commodity Control List, the new Commerce Control List integrated all the commodities, software, and technical data that are subject to export controls. *Id.*

64. OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at 11. The CCL corresponded with the COCOM's Industrial List. INTERNATIONAL TRADE, *supra* note 6, at 422. The CCL, however, was much more extensive than the Industrial List. Oettinger, *supra* note 2, at 571.

65. 15 C.F.R. § 799.1 (Supp. 1). The CCL is divided into ten categories: (1) Materials; (2) Materials Processing; (3) Electronics; (4) Computers; (5) Telecommunications and Cryptography; (6) Sensors; (7) Avionics and Navigation; (8) Marine Technology; (9) Propulsion Systems and Transportation Systems; and (10) Miscellaneous Items. *Id.* § 799.1.

66. See The Commerce Control List and How to Use It, 15 C.F.R. § 799.1 (explaining how country's are divided into groups represented by the letters Q, S, T, V, W, Y, Z). Russia is represented by the letter Y. OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at 11.

67. 15 C.F.R. § 799.1(d)(1)(iii). Controls may be implemented for national security, foreign policy, short supply, and other purposes. *Id.* Two letter symbols are used to indicate the reason for the control. *Id.* For example, "NS" indicates a commodity is controlled for national security purposes. *Id.*

68. Dyslin, *supra* note 62, at 15.

69. 15 C.F.R. § 771.1.

70. *Id.* § 772.2. Validated licenses may be granted for a specific export, project, distribution, or chemical or biological equipment. *Id.* § 772.2(b).

71. *Id.*

72. 15 C.F.R. § 772.4. Applications for validated licenses require detailed disclosure. *Id.*

then reviews each application, granting a validated license on a case by case basis.⁷³

3. Subsequent Amendments to the EAA of 1979

In 1985, the Export Administration Amendments Act⁷⁴ amended the EAA to eliminate export controls on goods freely available from sources outside the United States.⁷⁵ In determining the level of availability of a particular commodity from non-U.S. sources, the foreign availability provision of the EAA⁷⁶ requires the Secretary of Commerce to consider cost, quantity, quality, durability, and reliability in obtaining the commodity from other sources.⁷⁷ Three options are available if it is determined that the prohibited export is available from sources outside the United States: the license requirement may be dropped, the President may maintain the control notwithstanding availability from non-U.S. sources, or the President may submit the matter to COCOM for multilateral review.⁷⁸ The President's power to retain the export restriction is contingent on the President actively pursuing negotiations with the appropriate nations to eliminate such availability.⁷⁹ If negotiations are not successful within six months, the commodity will no longer require a validated license absent a presidential extension, up to twelve months, which is granted based on progress in the negotiations and the detriment to national security.⁸⁰

73. Malloy, *supra* note 11, at 852.

74. Pub. L. No. 99-64, 99 Stat. 120 (1985) (codified as amended at 50 U.S.C. app. §§ 2401-2420 (1988 & Supp. V 1993)).

75. 50 U.S.C. app. § 2403(c). This section states:

In accordance with the provisions of this Act, the President shall not impose export controls for foreign policy or national security purposes on the export from the United States of goods or technology which he determines are available without restriction from sources outside the United States in sufficient quantities and comparable in quality to those produced in the United States so as to render the controls ineffective in achieving their purposes, unless the President determines that adequate evidence has been presented to him demonstrating that the absence of such controls would prove detrimental to the foreign policy or national security of the United States.

Id.

76. *Id.* § 2404(f).

77. *Id.* § 2404(f)(3)(A).

78. *Id.* § 2404(f)(3)(B).

79. *Id.* § 2404(f)(4)(A).

80. *Id.* § 2404(f)(4)(B).

The Omnibus Trade and Competitiveness Act of 1988⁸¹ ("OTCA") further liberalized export controls under the EAA.⁸² OTCA eliminated authorization requirements for exports to COCOM countries and countries with export control practices comparable to COCOM nations.⁸³ OTCA also refined the procedure for determining if a controlled commodity was available for sources outside the United States.⁸⁴ Moreover, OTCA restricted imposing export controls on a product solely because it contains parts or components subject to control so long as the part is essential to the function of the product, the part was incorporated in the product when it is sold, and the part comprises twenty-five percent or less of the product's value.⁸⁵

C. Enforcement of Export Controls

U.S. enforcement mechanisms were effective in limiting dual-use exports to Russia.⁸⁶ Other COCOM nations, however, failed to prevent critical technology from reaching the former Soviet Union.⁸⁷ Despite these deviations, multilateral export controls, for the most part, impaired the Soviet Union's ability to obtain advanced dual-use technologies.⁸⁸

81. Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 50 U.S.C. app. §§ 2401-2420 (1988 & Supp. V 1993)).

82. See Swan, *supra* note 53, at 624-25 (discussing how OTCA relaxed export controls).

83. 50 U.S.C. app. § 2404(b)(2).

84. Pub. L. No 100-418, § 2418, 102 Stat. 1107, 1352 (1988) (amending 50 U.S.C. app. § 2404(f)).

85. *Id.* § 2422, 102 Stat. at 1358 (amending 50 U.S.C. app. § 2404(m)). If the part would make a significant contribution to the military potential of a controlled country, a license could be required. *Id.*

86. See LONG, *supra* note 5, at 2 (explaining how licensing requirements have prevented goods and technology from reaching nations whose national security policies are adverse to those of United States in addition to controlling exports of goods and technology to allied nations).

87. See Oettinger, *supra* note 2, at 577-80 (highlighting events of the Toshiba-Kongsberg affair where goods and technology shipped from Japan and Norway to Soviet Union enabled Soviet Union to advance its nuclear submarine capabilities); see also Christopher K. Davis, *Export Controls: New COCOM Measures on High-Technology Exports*, 29 HARV. INT'L L.J. 547, 548 (1988) (commenting that United States received little support from Western European nations and Japan in controlling exportation of sensitive technology to Soviet Union).

88. GARY K. BERTSCH & STEVEN ELLIOTT-GOWER, INTRODUCTION TO EXPORT CONTROLS IN TRANSITION I (1992). In 1992, Western nations estimated to be ten years ahead of the former Soviet Union in technological developments. *Id.*

1. U.S. Enforcement Mechanisms

In the United States, once the BXA issues a license, the licensee is strictly accountable for the use.⁸⁹ Every person involved with the export transaction is responsible for effecting the export and properly using the terms and conditions of the license.⁹⁰ A licensee may not: (i) act with knowledge to deceive; (ii) intend to export illegally; (iii) misrepresent facts; (iv) alter or modify an export license or permit its unauthorized use; or, (v) traffic or advertise the export control document.⁹¹ Any violation of the EEA or its regulations can trigger civil penalties.⁹² A licensee who knowingly or willfully violates export regulations may be subject to criminal punishment.⁹³

2. Multilateral Enforcement

Unlike the United States, COCOM lacked the legal basis to enforce controls.⁹⁴ As COCOM was not established through a formal treaty or agreement,⁹⁵ even when COCOM members agreed unanimously to a specific control, the control required ratification by each nation to gain legal effect.⁹⁶ In the process of ratification, each nation was permitted to act in accordance with its domestic policy.⁹⁷

COCOM, however, did have some mechanisms of enforcement.⁹⁸ Primarily, the Import Certificate/Delivery Verification ("IC/DV") attempted to ensure that exports between COCOM

89. 15 C.F.R. § 787.9 (1994).

90. 15 C.F.R. § 772.1(c).

91. OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at 68.

92. 15 C.F.R. § 787.1(b)(3) (1991). Civil penalties up to US\$10,000 may be administered for general violations. *Id.* Violations of national security controls is subject to penalties of up to US\$100,000. *Id.*

93. *Id.* § 787.1(a). A person who knowingly violates the EEA or any regulation is subject to a fine up to five times the value of the exports involved or US\$50,000 which every is greater, or imprisonment up to five years or both. *Id.* § 787.1(a)(i). A person who willfully violates any provision of the EEA is subject to fines five times the value of the export up to US\$1 million (US\$250,000 for an individual), or up to ten years of imprisonment, or both. *Id.* § 787.1(a)(ii).

94. *See* Hunt, *supra* note 5, at 118 (stating that COCOM was structured so that each member nation was responsible for enforcing export controls).

95. *Id.* at 112.

96. *Id.*

97. Dyslin, *supra* note 62, at 14.

98. *See* Hunt, *supra* note 5, at 116 (noting COCOM members attempted to prevent diversions of technology through implementing Import Certification/Delivery Verification system).

nations were not diverted to controlled countries.⁹⁹ Under the IC/DV system, an importer government was required to issue a statement that the goods would not be diverted to another country without approval.¹⁰⁰ After the export took place, the importer government then released a delivery verification.¹⁰¹

COCOM members, nevertheless, failed to harmonize export controls among its member nations.¹⁰² Finding the U.S. restrictions over protective in relation to the threat of communism,¹⁰³ Japan and Western European countries permitted the export of certain dual-use technologies to the Soviet Union which were prohibited for export in the U.S.¹⁰⁴ The competing views between the United States and its COCOM allies caused U.S. businesses to lose financial opportunities without preventing certain technology from reaching communist nations.¹⁰⁵

3. The Toshiba-Kongsberg Incident and the U.S. Response

COCOM's weakness in controlling high-technology exports to the Soviet Union was highlighted by the Toshiba-Kongsberg incident.¹⁰⁶ In 1982 to 1984 the Toshiba Machine Company of Japan sold computerized milling machines to the Soviet

99. *Id.* at 116. In the United States, the IC/DV verification procedure was incorporated into the EAR. 15 C.F.R. § 775 (1994).

100. *Id.* § 775.3(a)(1).

101. *Id.* § 775.3(a)(2).

102. Oettinger, *supra* note 2, at 576. The lack of harmonization was due to the diverging view between the United States and other COCOM nations regarding trade with the Soviet Union and its allies. Davis, *supra* note 87, at 547-48. The United States viewed export controls as a means of limiting economic development in Soviet Union while Western European nations sought to establish an economically beneficial trade relationship with the Soviet Union. *Id.*

103. Oettinger, *supra* note 2, at 576.

104. *Id.* at 576-77. Many COCOM members other than the United States found restrictions on dual-use commodities unreasonable because the products had primarily civilian applications. *Id.* Since the fall of communism in the Soviet Union, Japan and European nations have exported dual-use technologies to the former Soviet Union more frequently than the United States. Alam, *supra* note 10, at 145.

105. Oettinger, *supra* note 2, at 576-77. For example, in 1979, Cyril Bath, a U.S. company, lost a contract to the Soviet Union because the United States complied with COCOM standards while France deviated from COCOM standards and provided the Soviet Union with the controlled commodity. *See id.* at 580 (describing Cyril Bath incident).

106. Davis, *supra* note 87, at 548-49. Following the Toshiba-Kongsberg incident, COCOM members agreed to implement tougher penalties for violations of export controls. *Administration Officials Hail COCOM Parley as Success, Citing Progress in Enforcement*, 5 Int'l Trade Rep. (BNA) No. 5, at 134-35 (Feb. 3, 1988).

Union¹⁰⁷ while the Soviets obtained the numerical controller for the machines from the Kongsberg Trading company of Norway.¹⁰⁸ Both of these exports to the Soviet Union violated COCOM regulations.¹⁰⁹ The combined purchase enabled the Soviet Union to enhance the capabilities of its nuclear submarines to evade radar.¹¹⁰ This COCOM violation cost the United States billions of dollars to match the advances of the Soviets.¹¹¹

In response to the Toshiba-Kongsberg incident, the U.S. Congress enacted the Multilateral Export Control Enhancement Amendments Act of 1988¹¹² ("MECEAA") as an addition to the EAA.¹¹³ Pursuant to the MECEAA, a person who violates a multilateral export restriction, which results in the substantial enhancement¹¹⁴ of a controlled country's capabilities, is subject to sanctions for a two to five year period.¹¹⁵ Even if the violation does not meet the substantial enhancement test, the President is granted the discretion to impose sanctions for up to five years.¹¹⁶ Another provision of MECEAA provides the United States with a

107. Clyde Haberman, *Japan Fines Toshiba Unit for Sales to Soviet*, N.Y. TIMES, Mar. 23, 1998, at D14.

108. See Ralph Kinney Bennett, *The Toshiba Scandal: Anatomy of a Betrayal*, READER'S DIG., Dec. 1987, at 95, 97 (discussing how Soviet Union obtained controllers from Kongsberg).

109. Oettinger, *supra* note 2, at 578. Both Japan and the Toshiba Company were largely responsible for this COCOM violation. *Id.* Toshiba misrepresented the capacity of the milling machines to obtain the license from the Japan's Ministry of International Trade and Industry ("MITI"). *Id.* Due to the large volume of export applications, MITI did not question the transaction. *Id.* Following this incident both Norway and Japan established more stringent export control regulations. *Id.* at 579.

110. See Spencer L. Kenner & Mark A. Russell, *The Toshiba Sanctions Provision: Its Constitutionality and Impact on COCOM*, 1989 B.Y.U. L. REV. 623, 623-24 & n.6 (1989) (explaining how both products used together create quiet submarine propellers, which allowed Soviet Union to build submarines that can move undetected).

111. See 134 CONG. REC. S14,927 (daily ed. Oct. 6, 1988) (statement of Sen. Heinz) (stating Toshiba diversion will cost United States between US\$8 and 100 billion to repair loss in military advantage over Soviet Union).

112. Pub. L. No. 100-418, §§ 2441-2447, 102 Stat. 1107, 1364-70 (1988) (codified as amended at 50 U.S.C. app. § 2410a (1988 & Supp. V 1993)).

113. Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 50 U.S.C. app. §§ 2401-2420). The Multilateral Export Control Enhancement Amendments Act was part of the Omnibus Trade Competitiveness Act. *Id.*; see *supra* notes 81-85 and accompanying text (discussing OTCA amendments to EAA).

114. 50 U.S.C. app. § 2410a(a)(2). A substantial enhancement is determined by the President, on the advice of the National Security Council. *Id.*

115. *Id.* § 2410a(a). The sanctions bar the violating company from selling to any U.S. federal agency and prohibit importing into the United States. *Id.* § 2410a(b).

116. *Id.* § 2410a(h).

civil remedy for damages for the cost of enhancing the U.S. military to match the advances of nations threatening U.S. security interests.¹¹⁷

D. *The Commerce Control List of 1991*

In 1990, responding to the fall of communism in Eastern Europe,¹¹⁸ COCOM nations relaxed export controls of dual-use commodities such as computers and telecommunication equipment to the Soviet Union and Eastern European countries.¹¹⁹ In 1991, COCOM members enacted a new Industrial List ("Core List") enumerating the commodities, software and technical data that remained subject to export controls.¹²⁰ The United States adopted the Core List in the form of amendments to the EAR and the CCL.¹²¹

The new list instituted various changes.¹²² In contrast to earlier controls, Poland, Hungary, and Czechoslovakia were granted favorable consideration for all controlled exports.¹²³ COCOM members concluded that the development of democratic political systems and market economies in these countries, in addition to the severance of military ties with the Soviet Union, diminished the need to deny them access to Western technology.¹²⁴ Under the new CCL, however, export controls to the former Soviet Union on high technology equipment re-

117. *Id.* § 2410a(i)(k).

118. See Robert G. Kaiser, *The Miracle of 1989*, WASH. POST, Dec. 24, 1989, at C01 (commenting on fall of communism in all Eastern European nations and Baltic States).

119. McKenzie, *supra* note 3, at 2. These relaxation of export controls were then implemented in the United States. 15 C.F.R. §§ 776, 778, 779, 799 (1994). These changes relaxed export controls on computers above the level of personal computers and mass-marketed software. John F. McKenzie, *Relaxation of U.S. Controls on Computer and Software Exports*, COMPUTER LAW., Sept. 1990, at 17, 18.

120. *Id.* at 2-3.

121. 15 C.F.R. § 799.1 (Supp. 1); see McKenzie, *supra* note 3, at 2-3 (stating United States adopted COCOM's new Core List).

122. McKenzie, *supra* note 3. The Industrial List was restructured, dividing controlled dual-use commodities into ten categories and then subdividing them into five separate product groups. *Id.* at 4-5. In addition, a new measure of computer performance was introduced. *Id.* at 8.

123. *Id.* at 7.

124. *Id.* Poland, Czechoslovakia, and Hungary were granted these deregulations because these countries were deemed to have made the most progress toward establishing capitalist, democratic governments. *Id.*

mained.¹²⁵

II. *THE IMPLEMENTATION AND PENDING LEGISLATION TO DECONTROL DUAL-USE EXPORTS TO RUSSIA*

Following the fall of the Soviet Union in December 1991, the United States continued to impose controls on exports to Russia.¹²⁶ In April 1994, coinciding with the disbanding of COCOM, President Clinton eliminated the validated license requirement for most telecommunication and certain computer exports to Russia.¹²⁷ In order to implement further deregulation, members of the U.S. Congress seek to amend the EAA to prohibit controls on computer and telecommunication exports to Russia.¹²⁸ Support for this legislation rests on the economic opportunities in Russia and the reduced threat Russia poses to U.S. security interests.¹²⁹ Critics of this legislation, however, argue that decontrolling dual-use exports invite threats to national security.¹³⁰

A. *The Current Political and Economic Situation in Russia*

Central to the debate over deregulating exports is the current political and economic situation in Russia.¹³¹ Russia has exhibited positive signs toward the development of capitalism and democracy,¹³² but there are growing anti-democratic factions in

125. See *Dual Personality*, *supra* note 19, at 114 (stating new core list failed to liberalize controls on high-technology export to Russia).

126. See Christopher A. Padilla, *Telecommunications Export Controls: Last Vestige of the Cold War*, in *COPING WITH EXPORT CONTROLS* 1993, at 285, 287-90 (PLI Comm. L. & Practice Course Handbook Series No. 675, 1993) [hereinafter *Cold War Controls*] (stating that United States and other COCOM nations still maintained most of Cold War export controls to Russia).

127. See *U.S. Lifts Curbs*, *supra* note 12, at 530 (reporting on disbanding COCOM on March 31, 1994 and elimination of certain dual-use U.S. export restrictions to Russia).

128. See *supra* note 14 (listing bills seeking to amend the EAA to decontrol export restrictions on dual-use technology to Russia and other nations).

129. See Alam, *supra* note 10, at 143 (advocating that demise of Russian threat should yield increase in technological trade between United States and Russia).

130. Morillo, *supra* note 16, at 1120. President Clinton has been criticized for emphasizing increasing exports to create jobs at the expense of national security, especially with regard to the relaxation of dual-use exports such as computers and telecommunications. *Id.*

131. See Alam, *supra* note 10, at 143 (stating that rationale for controlling exports to Russia should be revised in light of political and economic developments in Russia).

132. See Adi Ignatius, *The Russian Market Takes on New Luster*, *WALL ST. J.*, July 11,

the Russian Parliament.¹³³ In addition, the Russian government continue to experience economic instability¹³⁴ and wide-spread corruption.¹³⁵

1. Encouraging Developments in Post-Soviet Russia

The new Russian government has made significant steps toward establishing a democracy.¹³⁶ Elections, held on December 12, 1993, created a Russian Parliament,¹³⁷ establishing a genuine political system in Russia for the first time in one hundred years.¹³⁸ In order to further the transition to a democratic government, members of the Russian Parliament are participating in a cooperation program with their counterparts in the U.S. Congress to learn more about the democratic process.¹³⁹

The transition from a communist to a capitalist economy is also progressing.¹⁴⁰ In 1991, the Russian government established a legal basis for private businesses in Russia.¹⁴¹ Since then, the Russian government has implemented legislation that encourages the development of private business.¹⁴² As of Janu-

1994, at A1 (reporting on progress in stabilizing Russian economy and decision of Russian President Boris Yeltsin to continue economic reforms).

133. See *Policy Toward NIS*, *supra* note 17, at 1 (statement of Hon. Lee H. Hamilton) (noting that Ultra-Nationalist Party is largest party bloc in Russia).

134. See Dimitri K. Simes, *The Cold Peace*, WASH. POST, July 17, 1994, at CO5 (reporting Russia continues to face declining production and rising trade deficit).

135. See COMMISSION ON SECURITY AND COOPERATION IN EUROPE, IMPLEMENTATION OF THE HELSINKI ACCORDS: CRIME AND CORRUPTION IN RUSSIA (1994) [hereinafter CRIME AND CORRUPTION IN RUSSIA] (describing how organized crime has penetrated Russian economy and political arena).

136. See Carla Ann Robbins & Barbara Rosewicz, *Reaching Out: U.S. hopes to Move Moscow Into the West Through Deeper Ties But Courting Russia's Elites In Military and Industry Entail Significant Risks*, WALL ST. J., Dec. 13, 1993, at A1 (reporting that in December, 1993 Russia approved a new constitution and held elections for first time since fall of Soviet Union).

137. *Policy Toward NIS*, *supra* note 17, at 43 (statement of Hon. Strobe Talbott, Ambassador-at-Large and Special Advisor to the Secretary of State for the New Independent States).

138. *Id.* at 49 (prepared statement of Hon. Strobe Talbott).

139. *Id.*

140. See *Russian Economic Development: Hearing Before the Subcomm. on International Development, Finance, Trade, and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 103d Cong., 1st Sess. 3-4 (1993) (statement of Dmitri Bednyakov, Mayor, Nizhny Novgorod) (describing laws implemented to help further economic reform in Russia).

141. *Id.* at 3.

142. *Id.* at 3-4. In December 1992, it became possible to register a business enter-

ary 1994, forty percent of the Russian economy was privatized,¹⁴³ and one-fourth of the labor force was employed in the private sector.¹⁴⁴

In addition, the Russian economy is beginning to stabilize.¹⁴⁵ Price controls were freed on more than ninety percent of goods and services,¹⁴⁶ thereby decreasing shortages and stabilizing the ruble.¹⁴⁷ Inflation has also dropped significantly.¹⁴⁸ Moreover, the increasing number of U.S. companies willing to pursue business ventures in Russia exhibits Russia's positive investment climate.¹⁴⁹

Russia has also pursued external policies that comply with U.S. interests.¹⁵⁰ Pursuant to a request by the U.S. government, the Russian government rescinded a sale of ballistic missile rockets to India.¹⁵¹ The Russian government is also working with President Clinton to establish the Partnership for Peace, a post-cold war security structure in Europe.¹⁵²

2. Political and Economic Concerns in Today's Russia

Despite the positive steps toward democracy and capitalism, political and economic instability persists in Russia today.¹⁵³ In addition to the constant opposition from ultra-nationalists and

prise in a Russian post office. *Id.* at 3. Furthermore, there are no local taxes on business. *Id.* at 4.

143. *Policy Toward NIS*, *supra* note 17, at 25 (testimony of Hon. Strobe Talbott, Ambassador-at-Large). In order to further privatization, several Russian businessmen have visited the United States to receive training and education. *Id.*

144. *Id.* at 50 (prepared statement of Hon. Strobe Talbott).

145. See Ignatius, *supra* note 132 (noting that inflation is down and non-Russian investment in Russia is increasing).

146. *Policy Toward NIS*, *supra* note 17, at 50 (prepared statement of Hon. Strobe Talbott).

147. Abram Bergson, *Russia's Economic Reform Muddle*, *CHALLENGE*, Sept.-Oct. 1994, at 56.

148. Ignatius, *supra* note 132. Tight monetary policies reduced the annual rate of inflation in Russia by 700%. *Id.*

149. *Id.*

150. See *Policy Toward NIS*, *supra* note 17, at 55-58 (prepared statement of Hon. Strobe Talbott) (noting encouraging developments in Russian external policy). One encouraging development is the agreement between the United States, Russia, and Ukraine to remove all nuclear weapons from the Ukraine. *Id.* at 56-57.

151. *Id.* at 34.

152. *Id.* at 6.

153. See *id.* at 1 (statement of Hon. Lee Hamilton [D-Ind.], Chairman of House Comm. on Foreign Affairs) (commenting that Ultra-Nationalist Party is largest party bloc in Russia and Russian economy has suffered serious setbacks).

defiant communists,¹⁵⁴ fewer and fewer Russian democrats are offering Yeltsin their support.¹⁵⁵ Yeltsin's policies have caused many Russians to be fearful of democracy and a free-market economy.¹⁵⁶ Since Yeltsin declared war on the Republic of Chechnya,¹⁵⁷ his approval rating has decreased to eight percent.¹⁵⁸ Due to the war with Chechnya, Yeltsin also lost the support of two key Russian democratic leaders.¹⁵⁹

Many Russians view Yeltsin as an authoritarian leader who has preserved the Soviet ruling class.¹⁶⁰ Because many Yeltsin appointees are also fearful of losing power, division within his inner-circle has grown over how to handle his unpopularity.¹⁶¹ One faction is pushing for early elections in the hope that the opposition will not find support behind one leader, while the other faction suggests Yeltsin should reject implementing a democratic government and become an authoritarian leader.¹⁶² After refusing to hold elections in 1994, Yeltsin is looking for ways to postpone the elections scheduled for 1996.¹⁶³

The extent of the political instability is highlighted by the popularity of ultra-nationalist Vladimir V. Zhirinovskiy.¹⁶⁴ In the

154. Cohen, *supra* note 17. Ultra-nationalists see Yeltsin as a puppet of the United States who plotted the breakup of Soviet Union. *Id.*

155. *Id.* Since the Russian armed response in the secessionary republic of Chechnya, Yeltsin's support from liberals has dwindled. Fred Hiatt, *Yeltsin Faces a Risky Road to Recovery*, WASH. POST, Jan. 22, 1995, at A20.

156. *Id.*

157. See Claudia Rosett, *Cold Winter: Fighting In Chechnya Is Isolating Yeltsin, Jeopardizing Reform, But a Coup in Russia Appears Less Likely Than Chaos, The Military Grumbles*, WALL ST. J., Jan. 1, 1995, at A1 (reporting on Russian war with Chechnya, which began in December 1994 and has cost thousands of lives on both sides). Chechnya, a Muslim republic 900 miles from Moscow, declared its independence from Russia in 1991. Jan Cienski, *Russia's Renegade Republic*, U.S. NEWS & WORLD REP., Sept. 12, 1994, at 26. In July 1994, after repeated kidnappings by Chechen terrorists, Russia attempted to remove the leader of Chechnya, setting the stage for a civil war. *Id.*

158. Hiatt, *supra* note 155, at A20. Even prior to the war in Chechnya, Yeltsin was only preferred by 14-20% of those Russians surveyed. Cohen, *supra* note 17, at 373.

159. Lee Hockstader, *Ex-Allies See Yeltsin Jumping Democracy's Foundership*, WASH. POST, Jan. 1, 1995, at A28. Former acting prime minister, Yegor Gaidar, and former finance minister, Boris Fyodorov, both key officials in furthering economic reform, ceased to support Yeltsin following his decision to send troops to Chechnya. *Id.*

160. Cohen, *supra* note 17, at 373.

161. *Id.*

162. *Id.*

163. *Id.* Yeltsin's ally, Vladimir Shumeiko, chair of the Russian parliament's upper chambers, suggests the tenure of both the legislature and the president should extend until 1998. Simes, *supra* note 134, at CO5.

164. *Policy Toward NIS*, *supra* note 17, at 1 (statement of Hon. Lee Hamilton).

December 1993 elections, Zhirinovskiy's Ultra-Nationalist Party emerged as the largest bloc in the Russian government.¹⁶⁵ Zhirinovskiy's agenda includes eliminating Western investment in Russia and rebuilding Russia's defense industry.¹⁶⁶

In addition, remnants of the communist regime remain in Russia.¹⁶⁷ Although the KGB¹⁶⁸ was dismantled following the failed coup against former Soviet leader Mikhail Gorbachev in 1991, Russia's new Ministry of Security is run by many of the same people who headed the KGB.¹⁶⁹ Like the KGB, the Ministry of Security intends to perform counter-surveillance activities.¹⁷⁰ Moreover, former KGB officers are involved in building the Russian economy.¹⁷¹ Through their ties to the Russian economy, ex-KGB agents pursuing commercial ventures can travel freely in Western countries.¹⁷²

Continuing economic instabilities also open doors for ultra-nationalists and extremists to gain control.¹⁷³ Industrial production continues to decline, nearly twenty-six percent in 1994,¹⁷⁴ and although there are more products in the stores, most are produced outside Russia.¹⁷⁵ According to Central Bank Director Victor Geraschenko, Russia's enormous trade deficit is the real

165. *Id.*

166. Peter Galuska, *A Rabid Nationalist Spoils Yeltsin's Day*, *BUS. WK.*, Dec. 27, 1993, at 56.

167. See Jeffery Trimble, *New Act, Old Tricks: Dismantled After the Failed Soviet Coup, the KGB is Flourishing in Boris Yeltsin's Russia*, *U.S. NEWS & WORLD REP.*, Feb. 8, 1993, at 42 (reporting on KGB influence remaining in Russia).

168. See GORDON B. SMITH, *SOVIET POLITICS CONTINUITY AND CONTRADICTION* 163 (1988). The KGB was one of the three "uniformed services" in the Soviet political system responsible for weapons and intelligence gathering technology, and controlling information that was vital to the Soviet government. *Id.* The KGB performed domestic and international intelligence activities. *Id.* at 170-71. There were several hundred thousand KGB employees working as guards, informants, officer workers, and border troops. *Id.* at 171.

169. Trimble, *supra* note 167, at 42.

170. *Id.* In the 1993 December Congress, People's Deputies Security Minister Victor Barannikov stated that his ministry will thwart "subversive activities of Western secret services." *Id.*

171. *Id.*

172. *Id.*

173. See *Policy Toward NIS*, *supra* note 17, at 54 (prepared statement of Hon. Strobe Talbott) (urging U.S. government to continue to aid in developing Russia's economy because economic stability is necessary to produce political stability and counter anti-democratic political movements).

174. Simes, *supra* note 134, at CO5.

175. *Id.*

threat to the Russian economy.¹⁷⁶ In 1993, foreign investment in Russia totalled less than US\$1.5 billion, while Russian capital abroad totalled US\$10 to US\$15 billion.¹⁷⁷

Further instabilities exist because the Russian economy is increasingly influenced by organized crime.¹⁷⁸ Corruption developed in Russia as a result of the economic crisis that followed the fall of the Soviet Union.¹⁷⁹ Seventy percent of Russian businesses are connected in some way to organized crime.¹⁸⁰ Corrupt activities have created a society where street gangs, extortion, private armies, and armed guards are prevalent.¹⁸¹ In addition, major U.S. companies are hesitant to invest in Russia as organized crime threatens the security of U.S. capital and personnel.¹⁸²

Organized crime has also penetrated Russian politics by financing elections and undermining the electoral process.¹⁸³ Corrupt officials have slowed the adoption of anti-corruption and banking laws.¹⁸⁴ The rise in criminal activities has also led some of the Russian people to favor an authoritarian form of government as Russia was virtually crime free before the attempt

176. *Id.*

177. *Id.*

178. CRIME AND CORRUPTION IN RUSSIA, *supra* note 135, at 4. (statement of Dr. Louise Shelley of American University Department of Justice, Law, and Society).

179. Michael A. Leeden, *With Today's Outlook, Aid Won't Help Russia*, INSIGHT ON THE NEWS, Sept. 26, 1994, at 20. The political upheaval eliminated the Russian banks' abilities to conduct international business, as they could not make hard-currency transfers in a timely fashion because the ruble was not freely convertible. *Id.* This caused the Russian economy to become a primitive cash system in which the Ruble became the currency for launderers in exchange for Russians gaining a more stable currency. *Id.* Later criminals from Western countries began purchasing raw materials in large volumes in exchange for hard currency. *Id.*

180. CRIME AND CORRUPTION IN RUSSIA, *supra* note 135, at 12 (statement of Stephen Handelman, Associate Fellow at the Harriman Center of Columbia University). Small bankers and retailers cannot operate without being connected to the Mafia. Simes, *supra* note 134, at CO5. Due to the volume of criminal activity, the figures indicating the rise in privatization in Russia are not reflective of a genuine restructuring. *Id.* In many cases, Russians who have received privatization rights have been forced to surrender their property rights to organized crime gangs. CRIME AND CORRUPTION IN RUSSIA, *supra* note 135, at 6 (statement of Dr. Louise Shelly).

181. Leeden, *supra* note 179, at 20.

182. CRIME AND CORRUPTION IN RUSSIA, *supra* note 135, at 4 (statement of Dr. Louise Shelly).

183. *Id.* at 3. In 1993 more than 1500 Russian government officials were charged with serious corruption and another 4500 cases were brought to trial. *Id.* at 11 (statement of Stephen Handelman).

184. *Id.* at 3 (statement of Dr. Louise Shelly).

to transform to a democratic political system began.¹⁸⁵

Yeltsin has also asserted a nationalistic external policy that is at odds with U.S. interests.¹⁸⁶ In early 1994, Russia declared its opposition to Eastern European countries joining NATO.¹⁸⁷ Furthermore, Yeltsin has stressed the desire to have Russian defense contractors market their products abroad,¹⁸⁸ to control peacekeeping in the former Soviet territories,¹⁸⁹ and to defend ethnic Russians living in former Soviet republics such as the Baltic States and Kazakhstan.¹⁹⁰ Russian Foreign Minister, Andrei Kozyrev, stated that the assertive Russian foreign policy is merely rhetoric to satisfy the increasingly nationalist opinion.¹⁹¹ At the same time, the Kremlin has expressed to the Russian people that the West, while not an enemy, is not a friend either.¹⁹²

B. *U.S. Decontrol Initiatives Since the Fall of COCOM*

Despite the current political and economic instabilities in Russia,¹⁹³ export deregulations were implemented by the Commerce Department through the issuance of unrestricted licenses for exports to the former Soviet Union.¹⁹⁴ Pursuant to the EAA, the Executive Branch has the power to administer these regulatory changes without amending the EAA or subjecting control modifications for congressional review.¹⁹⁵ In conjunction with

185. *Id.* at 5-6.

186. See Sonni Efron, *Yeltsin Shows Hard Edge on Foreign Policy*, L.A. TIMES, Feb. 25, 1994, at 8 (enumerating Russian external policies at odds with U.S. policies).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* According to Alexei Pushkov, deputy editor of the Moscow News, Russia "represents not just a regional . . . but a truly Eurasian superpower with considerable opportunities to influence the situation in nearby regions, including the Balkans, the Middle East, and the Korean peninsula." Simes, *supra* note 134, at CO5.

191. *Id.*

192. *Id.*

193. See *supra* notes 153-92 and accompanying text (enumerating barriers limiting development of capitalism and democracy in Russia).

194. 15 C.F.R. § 771.20 (1994). This provision established the "GLX," a license that permits the exportation of previously proscribed commodities to Russia without prior approval by the BXA. *Id.* This license is also available for exports to Eastern European countries and China. *Id.*

195. See LONG, *supra* note 5, at 10-11 (discussing how Congress, pursuant to the EAA, left implementation of export controls to President and Department of Commerce); see also 50 U.S.C. app. § 2403(b) (1988 & Supp. V 1993) (delegating responsibility of maintaining control lists to Secretary of Commerce).

the reduction of export controls, the Clinton Administration has pursued an agenda that seeks to establish an entirely new export policy toward Russia.¹⁹⁶

1. Regulatory Changes in Export Controls

In April of 1994, the Department of Commerce issued a new general license¹⁹⁷ ("GLX"), which enables U.S. exporters to ship previously restricted telecommunications equipment to Russia without the need for prior approval by the U.S. government.¹⁹⁸ The GLX encompasses commodities currently listed in the advisory notes of the CCL that indicate a likelihood of approval for export to the former Soviet Republics.¹⁹⁹ The GLX, however, is not available for items subject to missile technology, nuclear proliferation, or foreign policy controls and only encompasses exports to civil end users²⁰⁰ for civilian uses.²⁰¹

The GLX also enables U.S. companies to export high-speed digital computers to Russia with a composite theoretical performance²⁰² ("CTP") of up to 1000 million theoretical opera-

196. See Morillo, *supra* note 16, at 1113 (discussing September 1993, Trade Promotion Committee Report, which revealed President Clinton's new export strategy, which included eliminating export controls to revive national economy). In addition, the Deputy Assistant Secretary of State for Export Controls said the United States would like Russia to become a founding member of the new multilateral export regime. *Export Controls: U.S., Allies, Set to Launch New Regime, but Russian Membership Still Uncertain*, 11 Int'l Trade Rep. (BNA) No. 42, at 1634 (Oct. 26, 1994) [hereinafter *Launching New Regime*]. Furthermore, the United States signed a memorandum of understanding with Russia to work toward establishing a global information system. *High Technology: U.S. Signs Understanding with Russia on Global Information Infrastructure*, 11 Int'l Trade Rep. (BNA) No. 32, at 1249 (Aug. 10, 1994) [hereinafter *GII Memorandum*].

197. 15 C.F.R. § 771.20 (1994).

198. *AT&T Big Winner as White House Lifts Telecom Export Bans*, REP. ON AT&T, Apr. 11, 1994, available in Westlaw, Allnews Database. The GLX is a blanket license that enables all but the most sophisticated telecom hardware to be exported to Russia. *Id.*

199. 15 C.F.R. § 771.20(b). Telecommunications equipment and technology likely to be approved in the advisory notes of the CCL include optical fiber communication cables, optical fiber test equipment, digital radio equipment, and telecommunications software. *Id.* § 799.1 (Supp. 1).

200. See H.R. 3937, 103d Cong., 2d Sess. § 116, at 227 (1994) (defining end user as person located outside United States who is true party in interest in actually receiving export for intended use of item as represented by export license applicant).

201. 15 C.F.R. § 771.20(c).

202. See *id.* § 799.1 (Supp. 3). The composite theoretical performance of a computer measures the speed at which a computer performs computational operations in terms of million of theoretical operations per second. *Id.*

tions per second ("MTOPS").²⁰³ Previously, computers with a CTP greater than sixty-seven MTOPS were restricted for export to Russia.²⁰⁴ In addition, the definition of a supercomputer was amended.²⁰⁵ Supercomputers require a validated license for shipment to any destination.²⁰⁶ Formerly, a supercomputer was any computer with a CTP of 195 or more MTOPS,²⁰⁷ but the term was amended to include only computers with 1500 or more MTOPS.²⁰⁸

2. Recent U.S. Policies Toward Russia

In addition to licensing deregulations, the United States has exhibited a willingness to include Russia as a member of the new multilateral control regime to replace COCOM.²⁰⁹ Prior to the dissolution of COCOM, the member nations agreed to form a new multilateral export control regime.²¹⁰ As COCOM's successor has yet to form,²¹¹ negotiations over control lists and targeting particular countries continue,²¹² but the greatest obstacle in-

203. TRADE PROMOTION COORDINATING COMMITTEE, NATIONAL EXPORT STRATEGY, ANNUAL REPORT TO THE U.S. CONGRESS 30-31 (1994) [hereinafter TPCC REPORT].

204. *Commerce Publishes Regulations Implemented Further Computer Decontrols*, U.S. DEPT. OF COMMERCE NEWS, Feb. 24, 1994, at 1 [hereinafter *Commerce Report*]. Earlier in 1994, computers with a CTP of up to 260 MTOPS were eligible for a general license for export to Russia. *Id.*

205. *Id.*

206. 15 C.F.R. § 776.11.

207. *Commerce Report*, *supra* note 204.

208. 15 C.F.R. § 776.11(a).

209. *Launching New Regime*, *supra* note 196, at 1634. Martha C. Harris, Deputy Assistant Secretary of State for Export Controls, seeks to include Russia as a founding member of the new multilateral export control regime. *Id.*

210. *Export Controls: U.S., Allies Still at Odds Overs Substance of New Post-COCOM Regime*, *Official Says*, 11 Int'l Trade Rep. (BNA) No. 5, at 175-76 (Feb. 2, 1994). Like COCOM, the new regime will prevent the proliferation of sensitive dual-use technology but the new regime will not focus on a static set of enemies. *Id.* at 176. The new regime will be called the New Multilateral Export Control Arrangement. *Export Controls: U.S., Allies Fail to Agree on Bringing Russia Into New Export Control Regime*, 12 Int'l Trade Daily (BNA) No. 1, at 5 (Jan. 4, 1995) [hereinafter *Russia in New Regime*]. Countries such as Poland, Romania, and Czech Republic are expected to join the new regime. *Id.* at 6.

211. *See id.* (indicating negotiations among countries establishing new export control regime will continue in 1995 and that no deadline for forming organization has been set).

212. *Export Controls: U.S. Allies Firm Up List of Exports To Be Curbed Under Post-COCOM Regime*, 11 Int'l Trade Rep. (BNA) No. 49, at 1922 (Dec. 14, 1994) [hereinafter *Allies Firm Up List*]. The United States and its allies have tentatively agreed on a list of commodities that will be controlled under the new regime. *Id.* Allies are also close to an agreement on how to prohibit exports to 'pariah' countries. *Id.* at 1922-23.

volves Russian membership in the new regime.²¹³ While the United States would like to have Russia to join the regime, U.S. President Clinton has indicated Russian membership is contingent on Russia rescinding a weapon sales contract with Iran dating back to 1988.²¹⁴

A further indication of change in the U.S.-Russia export relationship was exhibited in July 1994, when the United States and Russia signed a Memorandum of Understanding on the Development of the Global Information Infrastructure²¹⁵ ("GII") and also agreed on a work plan for future cooperation on telecommunication policy and technical assistance.²¹⁶ The objective of the GII is to integrate local, national, and regional networks to facilitate a global sharing of information, creating a global information marketplace.²¹⁷ The GII memorandum expresses the intentions of the United States and Russia to achieve a global information infrastructure through the mutual exchange of information on objectives.²¹⁸ Deregulating export controls on information technology is necessary to bring the GII to fruition.²¹⁹

In addition, the policy of the United States since 1992 has been to encourage U.S. trade and investment in Russia through

213. *Russia in New Regime*, *supra* note 210, at 5.

214. *Launching New Regime*, *supra* note 196, at 1634. The United States and Russia, however, are working toward an agreement on this issue. See *Russia in New Regime*, *supra* note 210, at 5. Russia agreed to forego future arms sales to Iran, but the United States is concerned about the 1988 contract between Iran and Russia, which is still in effect. *Id.*

215. MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES OF AMERICA AND THE RUSSIAN FEDERATION ON THE GLOBAL INFORMATION INFRASTRUCTURE INITIATIVE (1994).

216. *GII Memorandum*, *supra* note 196, at 1249. The GII was first outlined by U.S. Vice-President Al Gore in March 1994 at the World Telecommunications Development Conference in Buenos Aires. *Id.*

217. *Id.*

218. *Id.* The Memorandum also acknowledges the principles of the GII: private investment, competition, open access to the network, appropriate regulation, and universal service. *Id.*

219. See *Broadcasting & Telecommunications Russia and USA Sign Memorandum on Information Resources*, RUSSIA EXPRESS-PERESTROIKA, Sept. 12, 1994, available in Westlaw, Allnews Database (stating that dissolution of COCOM and removal of export controls were necessary to provide Russia with necessary equipment and databases to further U.S.-Russia agreement). All these exports are necessary to develop Russia's information highway, as Russia is currently relying on 1950's technology. *Cold War Controls*, *supra* note 126, at 290.

the U.S.-Russia Business Development Committee.²²⁰ U.S. agencies such as the Overseas Private Investment Corporation²²¹ ("OPIC") help U.S. firms develop business in Russia.²²² In 1994, OPIC issued US\$10 million in political risk insurance to enable U.S. West, a U.S. telecommunications firm, to invest in upgrading telephone services in Russia.²²³

C. Pending Legislation

Members of the U.S. Congress have also sought to revise U.S. export laws toward Russia.²²⁴ Several bills introduced in the House of Representatives²²⁵ and the Senate²²⁶ seek to amend the EAA to deregulate export controls on dual-use equipment and technology beyond what the Clinton Administration has already instituted.²²⁷ This legislation has received much attention as President Clinton and the U.S. Congress are committed to amending the Export Administration Act in 1995.²²⁸

1. Telecommunication and Computer Export Control Amendments

In August of 1993, Representative Ron Wyden [D-OR] introduced House Bill 2912²²⁹ to amend the control list provision

220. TPCC REPORT, *supra* note 203, at 80-81. The Business Development Committee interacts with more than twenty U.S. government agencies, in addition to the business community, to establish programs and activities to increase trade with Russia. *Id.*

221. INTERNATIONAL TRADE, *supra* note 6, at 252. The Overseas Private Investment Corporation ("OPIC") is a quasi-independent U.S. government corporation that supports international economic undertakings. *Id.* OPIC primarily insures U.S. investments in developing countries. *Id.*

222. TPCC REPORT, *supra* note 203, at 81.

223. *Id.* U.S. West also constructed a cellular communications network in St. Petersburg that is expected to generate exports. *Id.*

224. *See supra* note 14 (listing legislation in Congress seeking to revise EAA to deregulate controls on dual-use technology to Russia and other nations).

225. H.R. 2912, 103d Cong., 1st Sess. (1993); H.R. 3431, 103d Cong., 1st Sess. (1993); H.R. 3627, 103d Cong., 1st Sess. (1993); H.R. 3534, 103d Cong., 1st Sess. (1993); H.R. 3937, 103d Cong., 2d Sess. (1994).

226. S. 1617, 103d Cong., 1st Sess. (1993); S. 1820, 103d Cong., 2d Sess. (1994); S. 1838, 103d Cong., 2d Sess. (1994).

227. *See, e.g.*, H.R. 3431, 103d Cong., 1st Sess. (1993) (seeking to eliminate controls on computer equipment to virtually all to Russia and all other countries not subject to U.S. embargo).

228. *Export Controls: Roth Says President is Committed to Working With Congress on EAA Bill*, 12 Int'l Trade Rep. (BNA) No. 5, at 228 (Feb. 1, 1995).

229. H.R. 2912, 103d Cong., 1st Sess. (1993). This bill is entitled "a bill to liberalize controls on the export of telecommunications equipment and technology in order to

in the EAA²³⁰ to further deregulate exports of telecommunications equipment and technology²³¹ to Russia, China, and Eastern Europe.²³² Representative Wyden's bill was subsequently introduced in the U.S. Senate in 1994.²³³ House Bill 2912 would amend the EAA to require the Secretary of Commerce to propose to the multilateral export control regime the elimination of controls on telecommunication exports for civil end uses to Rus-

promote democracy and free communication and enhance economic competitiveness." *Id.* at 1. There is a 13% chance this bill will pass the House Committee on Foreign Affairs. BILLCAST (103d Cong. 1993-94), available in Westlaw, BC Database.

230. 50 U.S.C. app. § 2404(c) (1988 & Supp. V 1993). This section requires the Secretary of Commerce to maintain a control list of commodities subject to export controls for national security purposes. *Id.*

231. H.R. 2912 § 2, at 3-5.

(i) the term 'telecommunications equipment' includes-

(I) telephone switching systems and stored program controlled communications switching systems, including related features and components that provide services and management of telecommunications networks;

(II) telecommunications transmission equipment;

(III) microwave, light wave, and other radio relay, transmitting, or test equipment, and related components and accessories;

(IV) telecommunications cables and components, including optical fibers and optical fiber cables;

(V) equipment containing frequency synthesizers when used in land-based mobile communications systems;

(VI) equipment described in any of subclauses (I) through (V), or any other telecommunications equipment, that contains lasers;

(VII) computer hardware and application specific software which are related to any of the items described in clauses (I) through (VI) and are required for data communications; and

(VIII) all spare parts, components, and measuring or test equipment related to any of the items described in subclauses (I) through (VII);

(ii) the term 'telecommunications technology' means technology related to telecommunications equipment, including technology for the production, development, and use of telecommunications equipment;

(iii) the term 'telecommunications networks' includes local area, intracity, intercity, and international telecommunications networks; and

(iv) the term 'telecommunications' means voice, video, and data communications over any public or private network or broadcasting system, and service related to such communications.

Id.

232. *Id.* at 3. The Eastern European countries included in this bill are Poland, the Czech Republic, Slovakia, Bulgaria, Romania, Albania, Estonia, Lithuania, and Latvia.

Id.

233. S. 1838, 103d Cong., 2d Sess. (1994). S. 1838 has a 21% chance of passing in the Senate Committee on Banking, Housing, and Urban Affairs. BILLCAST (103d Cong. 1993-94), available in Westlaw, BC Database.

sia and the other nations included under this Bill.²³⁴

In addition, two proposals are pending in both the House and Senate to amend Section 4 of the EAA²³⁵ to deregulate exports of computer equipment and technology.²³⁶ Although this legislation does not mention Russia specifically, these amendments to the EAA would ultimately deregulate much of the equipment currently prohibited for export to Russia.²³⁷ House Bill 3534,²³⁸ proposed in the Senate as Senate Bill 1820,²³⁹ would require the Secretary of Commerce to conduct yearly reviews²⁴⁰ of export controls of computer equipment and technology²⁴¹ for each country for which a validated license is required.²⁴² House Bill 3534 would also require the Secretary of Commerce to report to Congress indicating the reasons for each control.²⁴³ If the purpose of control is to defer the development of a specific capability in a particular country, the Secretary of Commerce

234. H.R. 2912 § 2, at 2-3. The bill also eliminates the requirement of re-export authorization for re-exports to the former Soviet Republics, China, and certain Eastern European nations. *Id.*

235. 50 U.S.C. app. § 2403. Section 4 is the General Provisions section of the EAA that discusses types of licenses, delegation of authority, notification to the public, and fees. *Id.*

236. See H.R. 3534, 103d Cong., 1st Sess. (1993); S. 1820, 103d Cong., 2d Sess. (1994); H.R. 3431, 103d Cong., 1st Sess. (1993); S. 1617, 103d Cong., 1st Sess. (1993) (seeking to deregulate export controls on computer equipment and technology).

237. See H.R. 3534, H.R. 3431 (seeking to deregulate exports to countries where validated license is required for computer exports). A validated license is required to export most computer equipment and technology to Russia. 15 C.F.R. § 799.1 (Supp. 1 1994).

238. H.R. 3534, 103d Cong., 1st Sess. (1993). The short title of this bill is the "Computer Equipment and Technology Export Control Reform Act." *Id.* at 1. There is a 35% chance this bill will pass the House Committee on Foreign Affairs. BILLCAST (103d Cong. 1993-94), available in Westlaw, BC Database.

239. S. 1820, 103d Cong., 2d Sess. (1994). This bill has only an eight percent chance of passing through the Senate Committee on Banking, Housing, and Urban Affairs. BILLCAST (103d Cong. 1993-94), available in Westlaw, BC Database.

240. H.R. 3534 § 2, at 2-4. In reviewing the existing controls the Secretary must consider: (1) the compatibility with U.S. policy objectives toward the target country; (2) the quantity and performance of the computer systems; (3) the availability of the controlled export from other sources; and (4) the economic costs of the controlled export. *Id.*

241. *Id.* at 2. Computer equipment and technology includes computer hardware, software, computer communications equipment, networking equipment, and related technology. *Id.*

242. *Id.* at 2-7. After the review is completed, House Bill 3534 would require the Secretary of Commerce to increase the export controls thresholds if warranted by the findings in the review. *Id.* at 4-5.

243. *Id.* at 2-3.

must indicate the period of time the controls are expected to defer such capability.²⁴⁴ In an attempt to balance the need for revising export controls with national security concerns, House Bill 3534 would require the Secretary of Commerce to identify and publish proliferation end users²⁴⁵ and the specific validated license requirement for that end user.²⁴⁶

House Bill 3431, proposed by Representative Donald Manzullo [R-IL], would implement even broader deregulation of computer equipment and technology exports than House Bill 3534.²⁴⁷ By adding a provision to Section 4 of the EAA, House Bill 3431 seeks to eliminate the requirement of a validated license for the export of computers, telecommunications equipment, and certain semiconductors except to: (i) a terrorist country; (ii) a country subject to an embargo by the United Nations which the U.S. is participating in; or (ii) any product to which missile technology controls apply.²⁴⁸ Because Russia is neither

244. *Id.* House Bill 3534 would also remove controls on computer systems valued at less than US\$5,000. *Id.* § 3, at 7. In addition, House Bill 3534 seeks to decontrol exports of mass-market computer equipment. *Id.* § 4, at 8.

For purposes of this subsection, the term 'mass-market computer equipment' means any computer system, computer networking equipment, peripheral to a computer system, part or subassembly of a computer system, or combination thereof, on which export controls are in effect under this Act, and which will have been installed for end-use outside the United States in a quantity exceeding 100,000 units over a 12-month period,

Id. at 8.

245. *Id.* § 5, at 10-11.

For purposes of this subsection, the term 'proliferation end-user' means any entity that is engaged, directly or indirectly, in the design, development, or production of nuclear, chemical or biological weapons or missiles and is located in a country that is not party to a bilateral or multilateral agreement the purpose of which is to limit the spread of such weapons and activities to which the United States is a party.

Id.

246. *Id.* If the Secretary of Commerce fails to publish the proliferation end user, however, exporters may assume that the end user is not a proliferation end-user. *Id.* at 11.

247. H.R. 3431, 103d Cong., 1st Sess. (1993). The short title of this bill is the "Computer and Communications Trade Freedom Act." *Id.* at 1. House Bill, 3431, only has a one percent chance of passing the House Committee on Foreign Affairs. BILLCAST (103d Cong. 1993-94), available in Westlaw, BC Database. House Bill 3431 was also introduced in the Senate as the "High Technology Export Reform Act," S. 1617, 103d Cong., 1st Sess. (1993). There is only a four percent chance S. 1617 will pass the Senate Committee on Banking, Housing, and Urban Affairs. BILLCAST (103d Cong. 1993-94), available in Westlaw, BC Database.

248. H.R. 3431 § 3, at 3-6.

labelled as a terrorist country²⁴⁹ nor subject to a U.S. embargo,²⁵⁰ this bill would dispose of the validated license requirement for the export of computers and telecommunications equipment to Russia.²⁵¹

2. Deregulation of Encryption Software

An additional bill pending to amend the EAA involves the deregulation of encryption software.²⁵² Data encryption software allows a user to scramble a computer message into a form that prevents an unauthorized user from interpreting the contents of the message.²⁵³ Until the past decade, encryption software was only used for defense purposes,²⁵⁴ but as the need for security in commercial systems increased, cryptography became necessary for general uses.²⁵⁵

Although some encryption exports are controlled by the Department of Commerce, through its maintenance of the CCL,²⁵⁶ encryption exports are also controlled under the U.S. Munitions List,²⁵⁷ which is regulated by the Department of State.²⁵⁸ The U.S. Munitions List was established under the Arms Export Con-

249. See 59 Fed. Reg. 51,130, 51,131 (1994) (listing Cuba, Iran, Iraq, Lybia, North Korea, Sudan, and Syria as terrorist countries).

250. Telephone Interview with Rodger Caringan, Licensing Officer, U.S. Department of State, Economic and Business Bureau-Economic and Sanctions Policy (Mar. 7, 1994) (confirming that Russia is not subject to U.S. trade embargo nor is Russia subject to U.N. embargo in which United States is participating).

251. See H.R. 3491 § 3, at 3-6 (eliminating validated license requirement for all computer exports to all destinations that are not subject to embargo or labelled terrorist destination).

252. H.R. 3627, 103d Cong., 1st Sess. (1993).

253. Ira S. Rubenstein, *Export Controls on Encryption Software*, in *COPING WITH EXPORT CONTROLS 1994*, at 177, 181 (PLI Comm. L. & Practice Course Handbook Series No. 705, 1994). Messages are scrambled through encryption and descrambled through decryption. *Id.* at 182. Encryption algorithms, the mathematical function used for scrambling and descrambling messages, prevent unauthorized users from intercepting a confidential message. *Id.*

254. *Id.* Cryptography aided the U.S. government in intelligence gathering and securing information. *Id.*

255. *Id.* With the growth of business computerized networks, encryption software has become a routine business precaution. *Id.*

256. 15 C.F.R. § 799.1 (Supp. 1 1994).

257. 22 C.F.R. § 121.1. The U.S. Munitions List controls the exportation of defense materials such as bombs, grenades, missiles, tanks, aircraft and protective equipment. *Id.* The Munitions List also controls cryptographic equipment and software. *Id.*

258. 22 C.F.R. § 121.1.

trol Act ("AECA").²⁵⁹ The AECA gives the President the power to control the import and export of defense articles and services.²⁶⁰

In November 1993, Representative Maria Cantwell [D-WA] proposed House Bill 3627²⁶¹ to amend the EAA to prohibit the requirement of a validated license for encryption software that is generally available²⁶² for commercial use.²⁶³ In addition, House Bill 3627 seeks to eliminate a validated license requirement for all other software that is generally available.²⁶⁴ Furthermore, this amendment would place encryption software under the exclusive control of the Department of Commerce although most encryption software is currently controlled under the Munitions List.²⁶⁵

Deregulation of encryption software has yielded considerable response from Congress²⁶⁶ and the Clinton Administration.²⁶⁷ In early 1994, the Clinton Administration conducted an interagency review of encryption technology.²⁶⁸ Much of the review focused on the use of the key escrow chip,²⁶⁹ ("clipper

259. 22 U.S.C. § 2778(a)(1) (1988 and Supp. V 1993).

260. *Id.*

261. H.R. 3627, 103d Cong., 1st Sess. (1993). House Bill 3627 has only has a one percent chance of passing the House Committee on Foreign Affairs. BILLCAST (103d Cong. 1993-94), available in Westlaw, BC Database.

262. H.R. 3627 § 1, at 3.

[T]he term 'generally available' means, in the case of software (including software with encryption capabilities), software that is offered for sale, license, or transfer to any person without restriction through any commercial means, including, but not limited to, over-the-counter retail sales, mail order transactions, phone order transactions, electronic distribution, or sale on approval

Id.

263. *Id.* at 2-3.

264. *Id.* at 2.

265. *Id.* at 1-2. Under House Bill 3627, the Secretary of Commerce would not control encryption software used for military or intelligence purposes. *Id.* at 2.

266. See *Export Controls on Mass Market Software: Hearing before the Subcomm. on Economic Policy, Trade and Environment of the House Comm. on Foreign Affairs*, 103d Cong., 1st Sess. (1993) [hereinafter *Software Hearings*] (providing Congress with information on effect U.S. controls on encryption and other software have on U.S. economy).

267. See Statement of the Press Secretary, The White House Office of the Press Secretary, Feb. 4, 1994, at 2 [hereinafter Press Secretary] (discussing results of Administration's review on encryption).

268. *Id.* Much of the review involved the problems of encryption software in the United States and the fear that while cryptography helps U.S. businesses protect company secrets, it can also be used to further criminal activities. *Id.* at 2-3.

269. *Id.*

chip") a split-key encryption system that offers tamper-proof security for computer activity over phone lines.²⁷⁰ In an attempt to resolve the debate over exporting encryption software, the Clinton Administration proposes to permit the exportation of the clipper chip.²⁷¹

House Bill 3937²⁷² provides an alternative response to the increasing concerns over controls on encryption software.²⁷³ House Bill 3937 would require the U.S. President to perform an assessment of the encryption software market.²⁷⁴ In conducting the assessment, the President shall review the types, quality, and market penetration of encryption software produced outside the United States and consider the economic impact of encryption export controls on U.S. businesses.²⁷⁵ Legislators seek to use the President's findings to revise U.S. export policy on encryption software.²⁷⁶

3. Proposal to Redraft the EAA in its Entirety

In addition to addressing exportation of encryption software, House Bill 3937 offers legislation that would fully revise the EAA.²⁷⁷ Primarily, House Bill 3937 seeks to improve multi-lateral cooperation for export controls on dual-use technology.²⁷⁸ House Bill 3937 would also amend the foreign availability provision of the EAA²⁷⁹ to require the Secretary of Commerce to conduct an annual review of controlled commodities.²⁸⁰ In addition, House Bill 3937 would require the Secretary of Com-

270. Rubenstein, *supra* note 253, at 217. The U.S. government intends to hold the "keys" for systems using the split key clipper chip. *Id.* at 217-18.

271. Press Secretary, *supra* note 267, at 2.

272. H.R. 3937, 103d Cong., 2d Sess. (1994). This bill has already passed the House Committee on Foreign Affairs and has a 98% chance of passing the House floor and a 94% chance of passing on the Senate floor. BILLCAST (103d Cong. 1993-94), available in Westlaw, BC Database.

273. H.R. 3937 § 117, at 247.

274. *Id.*

275. *Id.* at 247-48.

276. H.R. REP. NO. 531, 103d Cong., 2d Sess., pt. 2, at 3 (1994).

277. H.R. 3937, 103d Cong., 2d Sess. (1994). The bill is entitled the Export Administration Act of 1994. *Id.*

278. *Id.* § 102, at 6. House Bill 3937 presumes that unilateral controls generally do not prevent controlled countries from obtaining controlled commodities. *Id.* House Bill 3937, therefore, seeks to increase the effectiveness of multilateral controls. *Id.* § 103, at 9.

279. 50 U.S.C. app. § 2404(f) (1988 & Supp. V 1993).

280. H.R. 3937 § 105, at 47-49.

merce to report all allegations of controlled commodities available from non-U.S. sources to the U.S. Congress and the steps taken to address the allegations.²⁸¹ The responsibilities of the Secretary of Commerce would also include conducting periodic reviews of computer equipment and technology to determine when advances in computer technology make certain export controls obsolete.²⁸²

D. *The Debate Over Deregulation of Exports to Russia*

The bills seeking to deregulate export controls on dual-use technology have yielded additional documentation highlighting the debate over decontrolling exports to Russia and other nations.²⁸³ Those with economic interests at stake, such as U.S. technological companies, favor decontrol.²⁸⁴ In contrast, those concerned with U.S. security interests, such as the National Security Agency²⁸⁵ ("NSA"), oppose deregulating controls on exports to Russia.²⁸⁶

281. *Id.* at 45-46.

282. *Id.* at 50-56.

283. See, e.g., *Telecommunications Hearings*, *supra* note 9 (presenting arguments for and against deregulating export controls on telecommunications equipment to former Soviet Union); *Export Control and High Technology: Hearing before the Subcomm. on Technology, Environment and Aviation of House Comm. on Science, Space and Technology*, 103d Cong., 2d Sess. (1994) [hereinafter *Technology Hearings*] (describing benefits and national security concerns that arise due to deregulating high-technology export controls).

284. See, e.g., *Telecommunications Hearings*, *supra* note 9, at 13-16 (testimony of Robert Allen, Chairman of the Board and Chief Executive Officer, AT&T) (testifying that Cold War export controls will jeopardize millions of dollars in telecommunications sales to Russia).

285. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981). The establishment of the National Security Agency ("NSA") and other U.S. government intelligence operations was authorized by the National Security Act of 1947. *Id.*; ch. 343, 61 Stat. 495 (1947) (codified as amended at 50 U.S.C. §§ 401-32 (1988 & Supp. V 1993)). The Department of Defense is responsible for operating and controlling the NSA. 46 Fed. Reg. 59,946-47. The NSA is responsible for establishing, operating, and controlling signal intelligence activities and collecting information for counterintelligence purposes. *Id.* at 59,947-48.

286. See *Dual Personality*, *supra* note 19, at 116 (stating that NSA is opposed to deregulating telecommunications exports to Russia because developing Russia's communication networks makes it more difficult to monitor activities of Russian government); *Telecommunications Hearings*, *supra* note 9, at 16-18 (testimony of Lt. Gen. Lincoln Faurer (retired), Former Director of the National Security Agency) (stating that changes in export controls that weaken NSA's abilities to collect intelligence material are harmful to U.S. national interests, and that instability in Russia demands surveillance and gradual change in export controls).

1. The Economic Argument for Deregulation of Exports

The arguments in favor of deregulating export of dual-use items to Russia are presented in House Bill 2912 the bill to liberalize export controls on telecommunications to Russia and the former Eastern Bloc.²⁸⁷ According to the congressional findings section of this House Bill 2912,²⁸⁸ deregulation would enhance democratic initiatives in Russia, contribute to U.S. economic competitiveness, eliminate outdated export restrictions, and allow U.S. companies to export materials currently available from other sources.²⁸⁹

Further arguments for decontrol are enumerated in House Bill 3431.²⁹⁰ First, telecommunications and computer equipment and technology exports account for more than eighty-five percent of the value of exports controlled by the Department of Commerce under the EAA.²⁹¹ Second, the computer and telecommunications industries account for 12.3% of all of the export trade in the United States and represent over 850,000 U.S. jobs.²⁹² Third, the rapid pace of technological development has

287. H.R. 2912, 103d Cong., 1st Sess. (1993).

288. *Id.* § 1, at 1-2.

289. *Id.*

(a) The Congress makes the following findings:

(1) The free exchange of ideas and information through modern, reliable telecommunications equipment fosters the development of democratic institutions, the promotion of free market economic reforms, and the facilitation of international commerce.

(2) Exports of advanced telecommunications equipment and technology contribute to United States economic competitiveness and high-skill, high wage jobs in the United States.

(3) Export restrictions on telecommunications equipment and technology are outdated, controlling the export of equipment and technology that is more than 10 years old and has over 15 times less capacity than similar equipment and technology in use today in the United States.

(4) Foreign availability of telecommunications equipment and technology exists both from countries that do not belong to or cooperate with the Coordinating Committee for Multilateral Export Controls, and from within countries to which export of such equipment and technology are controlled by the agreement of the Coordinating Committee.

Id.

290. H.R. 3431, 103d Cong., 1st Sess. (1993). House Bill 3431 seeks to eliminate the requirement of a validated license for computer and telecommunications exports to Russia and all other nations not subject to an embargo or repeatedly involved in acts of international terrorism. *Id.* § 3, at 3-6.

291. *Id.* § 2, at 1-2.

292. *Id.* at 2.

rendered export controls meaningless,²⁹³ and finally, the availability of controlled exports from COCOM and non-COCOM countries poses a great disadvantage to the U.S. technological industry, thereby damaging the U.S. economy.²⁹⁴

These congressional findings are largely based on the testimony from representatives of U.S. technological industries who have appeared before Congress to encourage the U.S. government to change its policies on export controls.²⁹⁵ Companies such as AT&T assert that export controls on telecommunications equipment to Russia will effect millions of U.S. dollars in sales over the next five years as Russia is expected to be one of the world's largest telecommunications markets.²⁹⁶ AT&T claims this translates into U.S. jobs as they must increase revenues by five to ten percent yearly to maintain current employment levels.²⁹⁷ Similarly, producers of encryption software argue that the demand for encryption technology is so widespread that exports controls could cost U.S. software companies billions in revenue.²⁹⁸

In addition to the economic incentives, advocates of export deregulation argue that certain controls are meaningless as Russia can receive restricted U.S. technologies from non-U.S. sources.²⁹⁹ Most European countries do not regulate the export-

293. *Id.*

294. *Id.* at 2-3.

295. See *EAA Hearings*, *supra* note 9, at 17-39 (statements of Paul Freedenberg on behalf of Computers, Business Equipment and Manufacturer's Association, Richard Lehmann, IBM Corp.; Boyd McKelvain, General Electric; and David Danjczek, Litton Industries); *Technology Hearings*, *supra* note 283, at 39 (testimony of Carol E. Henton, Manager, Corporate Export Administration Department, Varian Assoc., Inc., representing semi-conductor equipment); *Telecommunications Hearings*, *supra* note 9, at 13 (testimony of Robert E. Allen, Chairman of the Board and Chief Executive Officer, AT&T).

296. *Id.* at 14-15 (testimony of Robert E. Allen). In some areas of the former Soviet Union there are two telephone lines per 100 people, compared to the United States where on average there are 50 phone lines per 100 people. *Id.* at 15. Furthermore, Russian President Boris Yeltsin has expressed a strong interest in acquiring Western technology to revitalize the Russian economy. Alam, *supra* note 10, at 143.

297. *Telecommunications Hearings*, *supra* note 9, at 15 (testimony of Robert E. Allen).

298. *Software Hearings*, *supra* note 266, at 8 (testimony by Raymond Ozzie, IRIS Associates, representing the Business Software Association) (stating US\$6-9 billion of revenue are at risk because of demands for controlled encryption software).

299. *Cold War Controls*, *supra* note 126, at 291. For example, Israel, which was not a member of COCOM, was legally able to sell advanced telecommunications equipment to China while the U.S. government prohibited U.S. companies from doing so. *Id.*

tation of encryption software.³⁰⁰ Since the fall of the Soviet Union, Japan and Western European countries have exported dual-use technologies to Russia more frequently and on a larger scale than the United States.³⁰¹ With the dissolution of COCOM, U.S. high-technology companies are increasingly concerned that the United States will impose stricter controls than other former COCOM members, allowing restricted destinations to obtain the controlled commodities while hindering U.S. competitiveness in international markets.³⁰²

Deregulation of dual-use technology exports is further supported by the fact that the threat of the Russian military's conventional forces has subsided.³⁰³ The declining defense budget has resulted in the reduction and relocation of Russian military forces.³⁰⁴ Budget cuts have also led to a drop in equipment modernization of conventional weapons by the Russian government.³⁰⁵

Finally, proponents of deregulation assert that Russian access to technology aids democratic initiatives.³⁰⁶ Advanced telecommunications is a prerequisite for economic development in Russia³⁰⁷ and the free flow of information propels democratic movements.³⁰⁸ Proponents, therefore, argue that controlling exports to Russia actually hinders U.S. policy objectives to assist the evolving democratic, capitalist governments in the former Soviet

300. *Encryption Foreign Availability: How Much Evidence Do You Need?*, EXPORT CONTROL NEWS, July, 31, 1994, available in Westlaw, Allnews Database. The Software Publishers Association confirmed that encryption software programs are produced in 78 countries including Australia, Belgium, Finland, Germany, Israel, Switzerland, and the United Kingdom. *Id.* Many of the companies in these countries export the encryption software throughout the world. *Id.*

301. Alam, *supra* note 10, at 145.

302. See *Technology Hearings*, *supra* note 283, at 46-47 (statement of Carol Henton, Manager, Corporate Export Administration Department, Varian Assoc., Inc.) (stating that only multilateral export controls are effective and unilateral controls only harm U.S. industries).

303. *Security Hearings*, *supra* note 18, at 23 (prepared statement of Lt. Gen. James R. Clapper, Jr., USAF, Director, Defense Intelligence Agency).

304. *Id.*

305. *Id.*

306. See *Cold War Controls*, *supra* note 126, at 288 (stating that it is no coincidence that secure democracies have advanced telecommunication infrastructures).

307. *Telecommunications Hearings*, *supra* note 9, at 11 (testimony of Lawrence Eagleburger of Baker, Worthington, Corsley, Stansberry Law Offices, and former Acting Secretary of State).

308. *Id.* at 14 (testimony of Robert E. Allen).

Union.³⁰⁹

2. Supporting Export Controls: The National Security Argument

Despite the potential benefits of decontrolling the exportation of computer and telecommunication technology, others oppose deregulation based on national security concerns.³¹⁰ This opposition is based on the presumption that Russia's economic and political instability requires the United States to retain a more restrictive export policy toward Russia.³¹¹ Although opponents of deregulation recognize various dual-use technologies are available from non-U.S. sources, they argue that the United States should not contribute to the proliferation of sensitive technology.³¹²

The ability to monitor other nations is a necessary part of U.S. security.³¹³ As the NSA is responsible for decoding signals of foreign governments and collecting information for counter-intelligence purposes,³¹⁴ the NSA fears that advancing Russia's telephone network would make it more difficult to monitor them during times of peace and harder to disrupt the network during times of war or unrest.³¹⁵ For example, advanced fiber-optic telecommunications could link Russia's government and defense installations and hamper U.S. surveillance efforts because coded transmissions over fiber cables cannot be moni-

309. *Cold War Controls*, *supra* note 126, at 288.

310. *See Morillo*, *supra* note 16, at 1120 (noting U.S. President Clinton has been criticized for emphasizing economic benefits of deregulating dual-use exports at expense of national security).

311. *See Telecommunications Hearings*, *supra* note 9, at 18 (testimony of Lt. Gen. Lincoln Faurer (retired), Former Director of the National Security Agency) (stating that political instability in Russia demands watchfulness and gradual deregulation of export controls); Nitze, *supra* note 20, at 483-84 (recognizing that political instability in Russia yields uncertainty as to whom will control its vast arsenal).

312. U.S. CONGRESS, OFFICE OF TECHNOLOGICAL ASSESSMENT, 103D CONG. 2D SESS., EXPORT CONTROLS AND NONPROLIFERATION POLICY 56 (1994). Supporters of unilateral export controls argue that deregulating controls simply because they are available from other sources is analogous to selling a gun to a criminal just because the criminal can buy it elsewhere. *Id.*

313. *See Software Hearings*, *supra* note 266, at 11 (testimony of Stephen T. Walker, President, Trusted Information Systems, Inc.) (stating that limiting availability of cryptography is necessary for United States to spy on adversaries).

314. Exec. Order No. 12,833, 46 Fed. Reg. 59,941, 59,947-48 (1981).

315. *Dual Personality*, *supra* note 19, at 116.

tored.³¹⁶

The NSA is also opposed to the deregulation of encryption software³¹⁷ as cryptography hinders the ability of the United States to monitor international communications.³¹⁸ As the proliferation of software programs with advanced encryption algorithms increases,³¹⁹ the NSA's ability to listen to communications of other governments decreases.³²⁰ Encryption software also enables U.S. adversaries, terrorists, and spies to keep communications secret from the NSA.³²¹ Furthermore, the worldwide use of encryption enhances the ability to develop offensive weapons to attack U.S. communications systems.³²²

Those concerned with national security have also asserted that the economic benefits of deregulation may only yield a short-term benefit that will be outweighed by increased military spending in the long run.³²³ High-speed computers, for example, which have numerous civilian uses, can also enhance nuclear weapon systems.³²⁴ Iraq is a prime example.³²⁵ In exporting U.S. dual-use items to civilian industries in Iraq, the United States enabled the Iraqi government to produce sophisticated weapons systems ranging from ballistic missiles to nuclear weapons.³²⁶ Because of these exports, the United States spent billions in defense dollars fighting the Gulf War.³²⁷ Similarly, opponents of deregulation are fearful that the Russian arsenal could benefit

316. Peter Behr & Thomas W. Lippman, *Fiber-Optic Sales to Russia Promote Debate*, WASH. POST, Jan. 6, 1994, at D10.

317. See *Software Hearings*, *supra* note 266, at 1 (statement of Rep. Sam Gejdenson) (indicating NSA seeks to regulate exports on software that is mass-marketed in United States).

318. *Id.* at 11 (testimony of Stephen T. Walker, President, Trusted Information Systems, Inc.); see Robert T. Nelson, *Software Firms, NSA Battle Over Exports*, SEATTLE TIMES, Feb. 2, 1994, at D1 (reporting NSA opposes exporting encryption software because cryptography impairs efforts of U.S. spies).

319. See Rubenstein, *supra* note 253, at 182. A cryptographic algorithm is the mathematical function used in encryption software. *Id.*

320. Charles E. Evans, Comment, *U.S. Export Control of Encryption Software: Efforts to Protect National Security Threaten the U.S. Software Industry's Ability to Compete in Foreign Markets*, 19 N.C.J. INT'L & COM. REG. 469, 486 (1994).

321. *Id.* at 487.

322. *Id.* at 488.

323. Morillo, *supra* note 16, at 1122.

324. *Id.* at 1121.

325. See *id.* at 1121 (describing how U.S. exports to Iraq developed Iraqi arsenal).

326. *Id.*

327. *Id.*

from advanced technology.³²⁸

Opponents also assert that deregulating export controls creates enforcement concerns.³²⁹ Although the EAA has strict licensing and enforcement provisions,³³⁰ the United States has not been always been able to determine if the exporter knows the civilian export will be used for proliferation activities.³³¹ Those concerned with national security fear that relaxation of export controls of goods intended for civilian use will result in the diversion of these goods for military purposes.³³²

III. NATIONAL SECURITY INTERESTS DICTATE THE UNITED STATES SHOULD CONTINUE TO CONTROL THE EXPORTATION OF DUAL-USE TECHNOLOGY TO RUSSIA

Russia's political transformation³³³ invites the elimination of export controls that were implemented due to the Cold War.³³⁴ The United States, however, should continue to limit deregulating export controls to Russia because the current state of Russia continues to pose threats to U.S. security interests.³³⁵ At the same time, the United States cannot ignore the costs export controls place on U.S. technological industries.³³⁶ The disbanding of COCOM and the intention to establish a new multilateral export regime³³⁷ present the United States with the opportunity to

328. See Alam, *supra* note 10, at 146 (noting opponents of deregulation are fearful Russia will qualitatively enhance their military capabilities). The Russian government's arsenal includes 27,000 nuclear warheads. *Security Hearings*, *supra* note 18, at 22.

329. Morillo, *supra* note 16, at 1121.

330. See OVERVIEW OF EXPORT CONTROLS, *supra* note 26, at 67-80.

331. Morillo, *supra* note 16, at 1121.

332. See Alam, *supra* note 10, at 146 (noting that Russia has made quantitative cutbacks in its arsenal, but possibility that Western technology will qualitatively upgrade remaining weapons still exists).

333. See Clines, *supra* note 8 (reporting on disbanding of Soviet Union in December 1991).

334. See *supra* notes 29-40 and accompanying text (describing unilateral and multilateral export controls imposed to prevent Soviet Union from dual-use technology).

335. See *supra* notes 153-92 and accompanying text (discussing political and economic instabilities in Russia, influence of ultra-nationalist leaders, and Russia's nationalistic external policies).

336. See *Telecommunications Hearings*, *supra* note 9, at 14-15 (testimony of Robert E. Allen, Chairman of the Board and Chief Executive Officer of AT&T) (stating U.S. companies may lose billions of dollars in revenue if export controls toward Russia and other former communist nations continue).

337. *Launching New Regime*, *supra* note 196, at 1634.

create an export policy toward Russia that addresses both economic and national security concerns.

A. Threats to National Security That Arise from Russian Access to Dual-Use Technologies

During the Cold War, the United States limited exports of dual-use technologies to Russia to prevent the Russians from enhancing their military capabilities, to further intelligence gathering, and to hinder Russian economic development.³³⁸ In many respects, these rationales for limiting exports of dual-use commodities remain. As Russia is politically unstable,³³⁹ surveillance efforts are an important aspect of national security. The political environment in Russia also creates the possibility of the Russian government using Western technology to enhance their military capabilities.³⁴⁰ Moreover, the United States seeks to frustrate corrupt activities that threaten the development of a capitalist economy in Russia.³⁴¹

1. Dual-Use Exports Impair U.S. Surveillance Efforts

Eliminating export controls on telecommunications equipment and encryption technology makes it increasingly difficult for the United States to monitor activities in Russia.³⁴² With Yeltsin's popularity on the decline³⁴³ and ultra-nationalists gaining power,³⁴⁴ the future leadership of Russia is unclear. Although Russia is no longer the military superpower it once

338. *Telecommunications Hearings*, *supra* note 9, at 9-10. (testimony of Lawrence Eagleburger of Baker, Worthington, Corssley, Stansberry Law Offices, and former Acting Secretary of State).

339. *See supra* notes 153-66 and accompanying text (describing lack of support for Yeltsin and influence of Ultra-Nationalist Party).

340. *See Galuska, supra* note 166, at 56 (reporting on popularity of Zhirinovskiy and his desire to enhance Russian defense industries).

341. *See CRIME AND CORRUPTION IN RUSSIA, supra* note 135 (describing current state of Russia as nation plagued with organized crime and corrupt activities).

342. *See Dual Personality, supra* note 19, at 116 (explaining NSA is opposed to deregulation of export controls on telecommunications equipment because advanced telecommunications system is harder to monitor); *Software Hearings, supra* note 266, at 11 (stating cryptography cripples ability of United States to monitor international communications).

343. *See Hiatt, supra* note 155, at A20 (reporting that only eight percent of Russians support Yeltsin).

344. *See Policy Toward NIS, supra* note 17, at 1 (stating Ultra-Nationalist Party is largest political bloc in Russian parliament).

was,³⁴⁵ the Russian arsenal contains 27,000 nuclear warheads.³⁴⁶ In order to preserve national security, the United States must have the ability to monitor political activity to determine who will ultimately control the Russian nuclear arsenal.

Even if Yeltsin remains in power, the United States must have the capabilities to watch Russia closely. As Yeltsin has contemplated authoritarian measures,³⁴⁷ asserted a nationalistic agenda, and encouraged Russian defense contractors to market their goods abroad,³⁴⁸ U.S. surveillance efforts are necessary to monitor the activities of the Russian government. In addition, Yeltsin's establishment of the Ministry of Security requires the United States to have the abilities to counter Russian surveillance efforts.³⁴⁹

2. Dual-Use Exports Can Facilitate the Development of the Russian Arsenal

As highlighted by the Toshiba-Kongsberg affair,³⁵⁰ the exportation of dual-use technologies can also provide Russia with the ability to enhance their military capabilities.³⁵¹ While in theory the United States can limit the exports to civilian end users, as seen with Iraq, exporting dual-use commodities enables the receiving government to use the technology for military purposes.³⁵² Allowing U.S. industries to export telecommunications and computer equipment for limited purposes,³⁵³ therefore, does not diminish the possibility that the technology will be diverted for restricted use.

345. See *Security Hearings*, *supra* note 18, at 23 (stating Russia's conventional forces have weakened and pose smaller threat to United States than during Cold War).

346. *Id.* at 22.

347. Cohen, *supra* note 17, at 373.

348. Efron, *supra* note 186, at 8.

349. See Trimble, *supra* note 167, at 42 (reporting that Russian Ministry of Security is run by former KGB agents who intend to spy on Western nations).

350. See *supra* notes 106-11 and accompanying text (exhibiting how violations of export controls can harm U.S. national security interests).

351. See Kenner & Russell, *supra* note 110, at 623 & n.6 (explaining how exporting dual-use technology to Russia enabled Russia to enhance ability of their submarines to evade radar).

352. Morillo, *supra* note 16, at 1121 (discussing how United States encouraged exportation of sensitive technology to Iraq).

353. See 15 C.F.R. § 771.20 (c). The GLX is not available for items subject to missile technology or nuclear proliferation controls and only encompasses exports to civilian end users for civilian uses. *Id.*

Political instabilities present various scenarios where Russia may divert dual-use technologies. First, if Yeltsin is overthrown, an ultra-nationalist leader will have access to dual-use technologies to produce more sophisticated weapons.³⁵⁴ In this worst case scenario, the short term economic benefit of deregulating exports will be replaced by long term expenditures of fighting another Cold War, or in the worst case scenario, a conventional war.³⁵⁵ Second, if Yeltsin adopts a more authoritarian, nationalistic agenda, the chances of Yeltsin developing the Russian arsenal increase.³⁵⁶ Enhancing Russia's military capabilities will become necessary if Yeltsin continues to pursue actions comparable to engaging war with the Republic of Chechnya.³⁵⁷

Economic instability in Russia also increases the likelihood that the Russians will sell weapons and technology to other nations to increase revenue.³⁵⁸ The Russians have already attempted to sell arms to India³⁵⁹ and continue to transfer arms to Iran.³⁶⁰ If this behavior continues, exporting dual-use technology to Russia will not only enhance the Russian arsenal but these technologies will in effect enhance the military capabilities of other countries whose policy objectives are counter to those of the United States.

3. Dual-Use Exports Foster Corruption

Exporting computers and telecommunications does not aid in developing capitalist markets in Russia because Russia's economy is plagued by organized crime.³⁶¹ While telecommunications technology and encryption software can help develop legitimate businesses, they also provide the means to further en-

354. See Galuska, *supra* note 166, at 56 (reporting Zhirinovskiy seeks to rebuild Russia's defense industries).

355. See Morillo, *supra* note 16, at 1121-22 (citing Iraq as example that short term economic benefits of exports was outweighed by costs of fighting full-fledged War).

356. See Hockstader, *supra* note 159, at A28 (reporting that Yeltsin's decision to wage war on Chechnya caused Yeltsin to lose support from Russian democrats who see Yeltsin's decision to send troops Chechnya as authoritarian measure).

357. *Id.*

358. See *supra* notes 173-77 and accompanying text (describing substantial economic instability in Russia).

359. *Policy Toward NIS*, *supra* note 17, at 34.

360. See *Russia in New Regime*, *supra* note 210, at 5 (indicating U.S. concern over 1988 Russian arms contract with Iran).

361. See *CRIME AND CORRUPTION IN RUSSIA*, *supra* note 135 (stating corruption in Russia has permeated economy and politics).

hance criminal activity in Russia.³⁶² In order to develop a more stable economy in Russia, the United States must limit exports that enhance the capabilities of criminals to threaten capitalist endeavors in Russia.

The extensive corruption has also caused the Russian people to be wary of democracy and capitalism.³⁶³ As corruption continues, so does the likelihood of the Russian people embracing an authoritarian government.³⁶⁴ In order to stifle the trend toward authoritarianism, the United States cannot pursue an export policy that ignores the influence organized crime has on Russian politics and the Russian people.

B. *Balancing the Competing Interests*

Although the Russian government poses extensive security concerns, the economic arguments for deregulating export controls cannot be ignored. The United States must address the ability of Russia to obtain controlled dual-use technologies from non-U.S. sources.³⁶⁵ At the same time, the United States should continue to encourage programs that can develop democracy and capitalism in Russia while enabling the United States to have a healthy trade relationship with Russia in the future.

1. Addressing the Concerns of U.S. Businesses

Two bills pending in Congress seek to balance economic interests with national security. House Bill 3534³⁶⁶ and House Bill 3937³⁶⁷ propose legislation that attempts to alleviate controls on dual-use technologies that is available from other sources while recognizing the need to maintain controls for security purposes. Through requiring the Secretary of Commerce to conduct yearly reviews on technology export controls and indicating the reasons for controls, House Bill 3534 imposes greater accountability

362. See Press Secretary *supra* note 267, at 2-3 (indicating concerns over exporting encryption software as encryption devices can help further criminal activity).

363. CRIME AND CORRUPTION IN RUSSIA, *supra* note 135, at 5 (statement of Dr. Louise Shelly).

364. See *id.* at 5-6 (indicating Russian people lived in nearly corruption-free society before democratization, and manner in which Russians appraise democracy directly impacts on ability of authoritarian leaders to gain control).

365. See *supra* notes 292-302 (noting extent of controlled dual-use technologies available to Russia outside United States).

366. H.R. 3534, 103d Cong., 2d Sess. (1994).

367. H.R. 3937, 103d Cong., 2d Sess. (1994).

on the Administration without asserting where controls should be lifted.³⁶⁸ Similarly, House Bill 3937 requires more stringent and more frequent assessments of technology available from non-U.S. sources.³⁶⁹ This type of legislation avoids removing controls where similar, but not as powerful or comprehensive technology, is available from sources outside the United States while preserving U.S. competitiveness in international markets.

Multilateral cooperation is essential if the United States seeks to control a particular commodity that is available worldwide. As a new multilateral export regime is scheduled to form,³⁷⁰ the United States will have the opportunity to present the reasons for retaining controls on dual-use exports to Russia. If multilateral cooperation is achieved, the United States maintains enforcement mechanisms under the Multilateral Export Control Enhancement Amendments Act³⁷¹ to impose sanctions on those countries illegally transferring dual-use technology to Russia.³⁷²

The United States, however, must continue to exercise unilateral controls to Russia in limited instances. Even if an export is widely available from non-U.S. sources, the United States must prevent exporting technology that is critical to U.S. security interests. In these limited circumstances, the United States must consider the global impact of contributing to the proliferation of sensitive technology before considering the economic benefits.

Although the instability in Russia requires the United States to continue to limit exports of dual-use technology to Russia, the United States should continue to develop economic opportunities in other former communist nations. As Hungary, Poland, and the Czech Republic are establishing political and economic institutions comparable to those of Western countries,³⁷³ the United States has the opportunity to develop viable trade relationships with these nations. U.S. businesses can develop these markets with few restrictions as most of the exports controls to

368. H.R. 3584 § 2, at 2-7.

369. H.R. 3937 § 105, at 45-49.

370. *Launching New Regime*, *supra* note 196, at 1634.

371. 50 U.S.C. app. § 2410a (1988 & Supp. V 1993).

372. *Id.* §§ 2410a(a), 2410a(h).

373. McKenzie, *supra* note 3, at 7.

Hungary, Poland, and the Czech Republic have been lifted.³⁷⁴ Although the potential markets in these countries are less extensive than the economic opportunities in Russia, the current situation in Russia would require the United States to risk national security in exchange for economic gains.

2. A Viable Export Policy Toward Russia

In order to develop a viable trade relationship with Russia in the future, the United States must pursue policies that foster these initiatives. Admitting Russia into the new multilateral export control regime will allow the United States to have greater control over Russia's proliferation activities. Once the United States is assured that Russia is not diverting dual-use technologies to nations such as Iran,³⁷⁵ one of the major concerns over decontrolling exports to Russia will have been addressed. In the interim, the United States should continue to provide educational programs for Russian capitalists and democrats³⁷⁶ and encourage U.S. investment in civilian industries in Russia through the U.S.-Russia Business Development Committee.³⁷⁷ These programs will promote economic and political stability while countering nationalism and anti-Western sentiments in Russia.

CONCLUSION

As the Cold War has come to an end, the United States is looking for ways to build ties with Russia and open economic opportunities that were closed for over forty years. The alleviation of export controls on dual-use technology to Russia appears to achieve those goals. Russia's inability to establish a stable regime, however, creates a variety of U.S. security concerns. To address the competing objectives of economic opportunities with

374. See 15 C.F.R. § 799.1 (Supp. 1 1994) (indicating dual-use exports to Poland, Hungary, and Czech Republic are likely to be approved).

375. See *Launching New Regime*, *supra* note 196, at 1634 (stating Russian membership in new regime is contingent on rescinding Russian arms contract with Iran). Countries expected to participate in the new regime have agreed to control exports to pariah nations. *Allies Firm Up List*, *supra* note 212, at 1922.

376. See *Policy Toward NIS*, *supra* note 17, at 49 (discussing program where members of Russian parliament study democratic process with U.S. congressional counterparts). The United States also invites Russian entrepreneurs to receive training and education in the United States. *Id.* at 25.

377. See *supra* notes 220-22 and accompanying text (describing activities of Business Development Committee to promote investment and trade with Russia).

national security, the U.S. Congress must amend the EAA to remove controls on exports available to Russia from other countries while retaining export controls on sensitive dual-use technologies to Russia. Meanwhile, the Clinton Administration should promote policies that foster democracy and capitalism in Russia in order to enable U.S. industries to export dual-use technologies to Russia in the future without compromising U.S. security.