
Finding Common Ground: U.S. Export Controls in a Changed Global Environment

By

The National Academies of Sciences and Engineering

[The following is a reprint of the first part of an executive summary of a report, entitled as above, prepared by the Panel on the Future Design and Implementation of U.S. National Security Export Controls of the National Academies of Sciences and Engineering. The second part of the report, dealing with the Panel's various recommendations, will be published in the Summer, 1991 issue of *The DISAM Journal*. The original report and the executive summary were released by the Academy on 31 January 1991. The executive summary carries the following notation: "Every effort has been made to make all arguments complete, but the findings and recommendations included herein are selective. The reader's attention is directed to the full report for additional detail. Copies may be obtained through the Committee on Science, Engineering, and Public Policy of the National Academies of Science and Engineering, or directly from the National Academy Press."]

I. INTRODUCTION

This study was requested by the U.S. Congress in the Omnibus Trade and Competitiveness Act of 1988, in which the National Academies of Sciences and Engineering were asked "to conduct a comprehensive study of the adequacy of the current export administration system in safeguarding United States national security while maintaining United States international competitiveness and Western technological preeminence." The congressional request identified a series of specific issues, which were incorporated subsequently into the Academies' charge to the blue ribbon panel that was established to undertake the study. The study itself began in the fall of 1989, shortly before the opening of the Berlin Wall, and concluded in early December 1990, shortly after the signing of the Treaty on Conventional Forces in Europe (CFE) and the historic Paris meeting of the Conference on Security and Cooperation in Europe.

During this extraordinary period of history, the rapid pace of developments in Europe (and events in the Persian Gulf) profoundly altered the frame of reference for the study, thereby requiring that the panel address an even more complex and comprehensive subject matter than originally intended.¹ Thus, to assist the diverse readership of this report to understand its full scope and specific content, this executive summary is organized in a somewhat unusual fashion. A brief overview is first presented, followed by a summary of the most salient issues, which is intended for the general reader. The panel's principal findings and recommendations are then arrayed according to key subject areas, so that readers may focus on the level of detail and particular issues appropriate to their interests.

¹In response to these unforeseen changes, the panel found itself repeatedly having to reexamine its charge, and inevitably some of the original emphases of the study required modification. The changes in emphasis notwithstanding, the panel believes it has remained faithful to the original charge of the study.

II. BRIEF OVERVIEW

This study addresses two fundamental questions: (1) How should U.S. export control policies be organized in a post-Cold War world? (2) Are U.S. export control policies formulated in a manner consistent with, and supportive of, the full scope of U.S. interests? The conditions that determined the feasibility and effectiveness of national security export controls² since World War II have now changed dramatically, and the nature of the Western security alliance seems likely to change as well. The Warsaw Treaty Organization (WTO), also known as the Warsaw Pact, has lost its meaning as a threatening military alliance. The dissolution of the WTO, particularly when combined with obligations assumed under the CFE treaty, means that a forward-based, Soviet strategic offensive capability in Central Europe is no longer possible. Thus, on the basis of the agreed reductions in Soviet and East European military forces (assuming that they are completed in good faith), the dissolution of the WTO, and the emerging defensive Soviet military posture in Asia, the panel concludes that a new paradigm for the application of West-East export controls is now required. **The panel recommends that the United States and the other nations of the Coordinating Committee for Multilateral Export Controls (COCOM) change the basis of their technology transfer and trade relationships with the Soviet Union and the East European countries from the "denial regime" that has existed for more than 40 years to an "approval regime" based on multilaterally agreed and verifiable end use conditions.**³

In contrast to the reduced threat posed by the Soviet Union and the former WTO countries, there are growing concerns about the acquisition by certain countries and political organizations of technologies contributing to nuclear, chemical, and biological weapons, missile delivery systems, and advanced conventional weapons. Proliferation of these technologies could be a decisive factor in the expansion to a global scale of conflicts initiated by regional powers, the exacerbation of intraregional instabilities, and the further spread of extremist violence and state-sponsored terrorism.

The most important distinction between traditional East-West and proliferation controls is that the United States is not in a position to exercise the same level of influence over the suppliers of proliferation technologies. Indeed, some of the potential suppliers of weapons of mass destruction also are the targets of current control regimes. **Moreover, to be effective, such control regimes must include participation by the Soviet Union and the People's Republic of China. With the end of the Cold War, the possibility of such comprehensive multilateral cooperation may now exist.**

The panel notes that proliferation of weapons of mass destruction and their delivery systems is a U.S. national security concern and should be treated as such in U.S. law and policy. Proliferation control regimes must be tailored to the particular circumstances or threats, but some of the policy responses are likely to include properly fashioned export controls. **The choice of policy responses—including the appropriate mix of export controls—for managing proliferation risks is a complex and difficult problem that requires far**

²*National Security export controls* are procedures designed to regulate the transfer of items from one country to another in such a way as to protect militarily important technologies from acquisition by potential adversaries (see Section 5 of the Export Administration Act (EAA) of 1979, as amended). These are contrasted in the report with *foreign policy export controls*, which are restrictions imposed on the export of general classes of items to one or more specified countries in order to further the foreign commitments and interests of the United States or to fulfill its international obligations (see Section 6 of the EAA).

³For the convenience of the reader, findings of the panel appear in boldface print; recommendations of the panel are indicated by an asterisk and boldface print.

more careful and extensive study than this panel or any other group has yet been able to conduct.

A. U.S. Policy

Carefully tailored and/or refashioned export controls can be appropriate and viable in support of the following U.S. policy objectives: (1) constraining access by the Soviet military to technology and end products that contribute significantly and directly to the improvement of weapons capabilities, (2) constraining access by certain countries to technology and end products that contribute significantly and directly to the development of advanced weapons systems, (3) constraining access by countries of proliferation concern to nuclear, biological, chemical, and missile delivery technologies and know-how, and (4) imposing multilaterally agreed sanctions for violations of international agreements or norms of behavior.

B. The COCOM Regime

The continued credibility of COCOM now depends on the willingness of its members to recognize and respond to the new political, economic, and military realities by developing a flexible and adaptive strategy. The panel finds that the traditional COCOM objective of retarding the qualitative progress of Soviet military capabilities could be preserved while simultaneously allowing for expanded trade by shifting the focus from a denial regime, based on an embargo of controlled goods and technology, to an approval regime, based on a sharply reduced COCOM Industrial List and contingent on verifiable end-use conditions *approved by COCOM*.

C. Proliferation Regimes

There are currently insufficient linkages between the multilateral arrangements established to address nuclear, chemical, and missile technology exports and the COCOM control regime. Further, issues pertaining to international arms trade, and trade in high-technology weapons, require more coherent multilateral attention than they now receive. Given the great complexity of proliferation problems, and the many actors who are involved, the panel believes that high-level leadership and policy coordination will be needed from a small number of countries, including at least the United States, the United Kingdom, the Soviet Union, France, Germany, Japan, and China. This should be combined with a mechanism or set of mechanisms for developing and maintaining coordinated international regimes to which all interested states can be parties. In applying export controls to proliferation problems, care must be taken to make them narrowly targeted and as fully multilateral as possible.

D. The U.S. Control Regime

The U.S. government should develop a new policy process in which all interests are fully and clearly expressed so that presidential leadership can drive decisions in a balanced and timely fashion. At present, line agencies with conflicting missions are often unable to integrate the various national security, economic, and foreign policy issues and give executive authorities a balanced, coherent view of the key issues. As a result, a disproportionate amount of bureaucratic resources are expended in resolving disputes, rather than administering and enforcing the export control system. The resulting confusion has on some occasions caused additional delay and expense for U.S. exporters. To resolve these difficulties, the panel recommends that clear policy guidance be established by the President in a national security directive; that an interagency policy coordinating process be

established to formulate and review proposals and recommendations in full consideration of all relevant national interests; and that all routine administrative activities undertaken within the established policy guidelines be consolidated in a *single* administrative agency, with clear instructions as to when issues should be referred to the interagency policy coordinating process.

III. SYNOPSIS FOR THE GENERAL READER

A. The Changing Calculus of U.S. National Security Interests

The current U.S. national security export control regime, and indeed the entire multilateral control framework embodied in COCOM, is an artifact of the Cold War period, which has now ended. It was relatively simpler during that period to identify potential adversaries and to respond to the threat with an appropriate mix of military, economic, and diplomatic initiatives. Today, the external challenges to U.S. national security are more complex. First, many of the most difficult and urgent challenges, rather than being purely military in nature, are now often economic and technological. Second, the military challenge posed by the Soviet Union is reduced and substantially less offensively oriented. Third, in contrast to the dramatic political changes in Europe and the improved East-West climate, significant and troubling challenges remain in other geopolitical areas, particularly a generally heightened potential for regional hostilities. Some of these problems—such as the crisis in the Persian Gulf—represent a direct threat to U.S. interests and to international security; others threaten to escalate into broader international contexts. Many of these problems are driven or exacerbated by the proliferation of advanced munitions and dual use technologies related to nuclear, chemical, and biological weapons and to missile delivery systems.⁴

1. Growing Economic and Technological Challenges. Most analysts and policymakers acknowledge that the operative definition of U.S. national security now must include the need to maintain a successful, vigorous U.S. role in the global economy. Early entry into, and sustained participation in, global markets by U.S. exporters are key elements of such a role. Among the factors that must be taken into account in policy formulation are the following:

- The changing structure of the global economy
- The increasingly rapid global diffusion of technology
- Declining U.S. technological and manufacturing preeminence
- Growing technological and manufacturing sophistication in Japan and the newly industrializing countries (NICS)
- The changing distribution of global economic and financial power
- Increasing concern about the U.S. defense industrial base⁵
- The growing importance of exports to U.S. economic vitality

2. Changes in the Traditional Sources of Physical Threat. While the economic and technological challenges facing the United States continue to multiply, the older problem of East-West conflict, featuring various types of Soviet military threat, has been reduced and changed dramatically. The Soviet Union remains the only country capable of destroying the United States with nuclear weapons. It retains vast conventional arms and large standing armies. Nevertheless, mutual force reductions agreed to under the 1990 CFE treaty, if implemented in good faith, mean that forward-based Soviet forces in Europe will be reduced to conditions of rough parity with those of the North

⁴The term *dual use* indicates items that have both a civilian (i.e., commercial) and military application.

⁵The defence industrial base is the complex of industries, skilled personnel, and technologies needed to manufacture today's—and tomorrow's—sophisticated weapons systems.

Atlantic Treaty Organization (NATO) countries. Moreover, The political context within the Soviet Union itself no longer bears any resemblance to the earlier circumstances of the Cold War, and trends under way promise further reduction in the external power and influence of the Soviet military, although both are likely to remain substantial for some time to come.

The most far-reaching changes have come in Eastern Europe, where countries once in the thrall of the Soviet Union have set about to create new democratic and market-based systems, with the result that the political foundation of the WTO has been undone. German unification has eliminated the outer salient of the pact, and Poland, Hungary, and Czechoslovakia, the core of the WTO, have all obliged the Soviet government to withdraw forces from their territory.

As a result, it is reasonable to assume that the WTO has lost its fundamental meaning as a military alliance and for all practical purposes no longer makes possible a forward-based, Soviet strategic offensive capability in Central Europe. Indeed, trends in Europe soon will foreclose the very possibility of stationing Soviet forces outside the borders of the Soviet Union.

Preventing war, primarily by political means, is now said to constitute the central objective of Soviet security policy. This new formulation both requires and enables a substantial reduction, disengagement, and restructuring of Soviet military forces. The offensive threat to Western Europe, inherent in the WTO's previous military doctrine and force posture, has been disavowed by the Soviet leadership and undone by the political revolution in Eastern Europe, by successful completion of the CFE treaty, and by expanded emphasis on the Conference on Security and Cooperation in Europe process. The prevention of war, the defense of the integrity of the Soviet Union, and the pursuit of Soviet international interests are to be accomplished primarily by political means.

As these changes occur, substantial opportunity exists for exercising direct Western influence on Soviet security policy through mechanisms of cooperation. It now appears possible to establish and maintain a distinction between commercial and military applications, assuming that end use can be verified, in considering technology trade with the Soviet Union. Cooperation in regulating general weapons exports also appears feasible in this new context, as do mutually supportive policies on regional conflict. **This relief from traditional concerns about, and expansion of constructive opportunities in, the Soviet Union enable a shift in Western export control policy from one emphasizing general denial to one focusing on positive behavioral change.**

The Soviet Union is becoming a far more transparent and penetrable society, which has important implications for the West's estimation of its security concerns. It now will be much harder for the Soviet Union to conceal important changes in its overall military or economic situation. Nevertheless, there is likely to be a continuing need for reliable and accurate Western intelligence reporting for the foreseeable future.

The panel agrees with the conclusion drawn by the Department of Defense that there is *no* credible scenario in which the Soviet Union could mount a theater-wide conventional attack against the West in either the European or Asian theaters with less than 18 to 24 months preparation. The panel takes note, however, of the continued Defense Department concern about Soviet capabilities to launch local attacks within regions near the Soviet border with as little as 90 days mobilization.

With respect to economic exchange with the East, events are inexorably drawing Eastern Europe into the economic orbit of the West. The likely result of large-scale Western economic

assistance will be a greater East European (and, to a lesser extent, Soviet) integration with the West, and a greater Western stake in the success of the economic and political reforms now under way in those countries. At the same time, debate will continue over where to draw the line in imposing East-West export controls. It is now in the West's security interest to permit the flow to Eastern Europe and the Soviet Union of dual use technology, apart from a few highly critical items. Indeed, the liberalization of controls could be part of a broad strategy to encourage the process of political and economic reform in Eastern Europe and the Soviet Union, thereby strengthening that region's stability and security.

The panel did not devote as much consideration to the People's Republic of China as a "traditional" source of national security threat to the United States, primarily because the Chinese have not posed the same degree of direct threat as have the Warsaw Pact countries. At the same time, however, China has emerged as a powerful regional actor in Asia. For many reasons, a cautious policy is warranted by the impending generational change in Chinese leadership. But it is also in the interest of the United States to nurture a deeper and more cooperative relationship with the current Chinese regime, including further efforts to convince China to participate more fully in the major nonproliferation regimes.

3. The Advent of New Sources of Physical Threat. Despite the reduced threat posed by the Soviet Union, the United States today is still far from the goal of a relatively safe and secure world. New and growing concerns have arisen about the behavior and intentions of various countries and political organizations regarding the acquisition of nuclear, chemical, biological, and missile technologies. These new, proliferation-related threats could potentially manifest themselves in ways quite different from the traditional East-West military confrontation in Europe, including (1) expansion of conflicts initiated by regional powers, (2) regional instabilities exacerbated by the availability of technologies of proliferation concern, and (3) extremist violence and state-sponsored terrorism.

Tensions in areas outside Central and Eastern Europe, the traditional region of greatest Western concern, are being exacerbated by the spread of weapons of mass destruction and high-performance weapons. This trend adds to the need for a close reexamination and restructuring of existing nonproliferation regimes.

During the past 15 years, technologies useful in the construction of nuclear weapons, chemical/biological weapons, and missile delivery systems have spread to a number of additional nations. There is substantial evidence that India, Iraq, Israel, Pakistan, and South Africa may now or soon possess nuclear weapons capabilities. And the Iran-Iraq war provided graphic evidence of the use of missiles and chemical weapons on both sides. In fact, the most disturbing development has been those situations in which countries acquire both the means of mass destruction and long-range delivery vehicles, such as ballistic or cruise missiles.

The proliferation of nuclear weapon related technology and missile delivery systems around the world, as well as a relatively rapid diffusion or acquisition of capability to produce chemical weapons, poses new security threats to U.S. forces overseas and to the international community and requires, in turn, new and innovative policy responses. Such responses will require the creation of multilateral regimes, or strengthening of existing regimes, involving both the Soviet Union and the People's Republic of China as participants. There will be little chance for long-term success if these two key players are not officially included in all proliferation control regimes at the earliest opportunity. Without comprehensive multilateral regimes, the chances for effective control of proliferation threats are critically weakened.

B. Evidence on the Acquisition of Sensitive Western Technology

The panel examined intelligence evidence,⁶ including some at high levels of classification, on the acquisition of sensitive Western technology during the late 1980s by the Soviet Union and its Warsaw Pact allies and by countries of proliferation concern. Through the end of 1989, the intelligence services of the Soviet Union and the other WTO countries continued to act largely in concert to target, acquire, and pass on to the Soviet military a wide range of specific high-technology products, keystone equipment,⁷ plans, blueprints, and technical data developed and produced in the West. These acquisition efforts typically involved a variety of mechanisms, including espionage, illegal sales, diversions by means of reexport through third countries, and legal acquisition through purchases in third countries.

1. The Post-Cold War Technology Acquisition Problem. Although it is too soon to describe accurately the characteristics of the post-Cold War technology acquisition "problem" of the 1990s, some clear indications can be identified. First, because so much of the modern technology and equipment needed by the Soviets and other WTO countries is now dual use in nature, diversions and legal sales in third countries have become the predominant acquisition methods and account for the majority of successful acquisition efforts. Second, the disbandment of the state security apparatus in Poland, Hungary, and Czechoslovakia, as well as the *Stasi* in the former German Democratic Republic, removes much of the non-Soviet Warsaw Pact government-sponsored capability to acquire strategic technology either through espionage or diversion.⁸

Third, in general, the Soviet effort to acquire Western technology has not succeeded in reducing the West's technology lead, according to Department of Defense (DOD) and intelligence community estimates. In fact, the Soviet Union continues to be at least 5 to 10 years behind in most key technology areas. Inevitably, therefore, the Soviet Union will remain dependent on certain Western technology that it cannot produce itself, or could produce only at inordinate expense, if it wishes to modernize further its strategic or conventional forces and to develop its overall economy.

2. Acquisition of Proliferation Technologies. Within recent years, the intelligence community has begun to devote increased attention to monitoring and analyzing the acquisition of proliferation technologies—namely, technologies associated with nuclear, chemical, and biological weapons, missile delivery systems, and advanced conventional weapons—by countries considered to represent potential national security threats to the United States and to international security. In some respects, the development of such data is even more difficult than in the case of Soviet acquisition efforts due to (a) the multiplicity of areas and actors that potentially require attention, (b) the difficulty of developing reliable sources of human intelligence, and (c) the ease with which the acquisition and use of some of these technologies is justified for commercial purposes or can be misrepresented or hidden entirely. Nevertheless, much is known about the evolving nature of the threat in each proliferation area.

⁶For a more detailed treatment of the panel's examination of these issues, see Chapter 4 of the main report.

⁷The term *keystone* is used to denote critically technological equipment, such as sophisticated machine tools, necessary to manufacture other products.

⁸The panel heard evidence of what it considers likely will be a short-term phenomenon: continued technology acquisition efforts by former employees of disbanded East European intelligence services, either on a free-lance basis or under the sponsorship and direction of the Soviet intelligence services. It will take some time to dismantle fully a system that has been the means of livelihood for thousands of people, and in the interim these free-lance collection efforts are a continuing source of concern.

C. The Impact of Export Controls on U.S. Industry⁹

Although there is no single reason or explanation for the decline of U.S. global competitiveness, export controls are one of a number of factors that collectively contribute to the competitive difficulties of the United States, even though experts disagree about the magnitude of—or even how to measure—their specific impact. **In fact, after considering the matter extensively, the panel determined that precise measurement of the quantitative effect of export controls on the U.S. economy is an elusive goal. Unlike other factors, however, this component is largely modifiable by changes in U.S. policy, and hence, its negative impact can be ameliorated, if not entirely eliminated.**

U.S. industry has three primary concerns about the implementation of export controls: (1) the unilateralism of certain aspects of U.S. export control policy, (2) the lack of selectivity in developing and managing lists of controlled items, and (3) the lack of fairness and efficiency in the administration of U.S. export controls. The negative economic impact of export controls on the U.S. economy has stemmed almost entirely from the unilateral aspects of U.S. policy. **Unilateralism disadvantages the U.S. economy in an increasingly competitive world, and such approaches should be used rarely and only to support carefully considered national imperatives.**

For much of the recent past, multilateral controls have been applied to a broader range of goods and technologies than appears to have been warranted by the facts, or for which there was a real consensus within COCOM. The problem of over-inclusiveness appears to be in the process of remediation as a result of the June 1990 COCOM High-Level Meeting; it should not be permitted to recur.

Although routine U.S. license processing has become more efficient and processing times have been reduced, requests for export licenses involving first entry into a new market, or those that require more detailed examination for other reasons, still can be substantially delayed. Here again, U.S. firms can be disadvantaged relative to their foreign competitors in opening new export markets.

D. The U.S. and Multimaterial Export Control Regimes¹⁰

1. The COCOM Regime. Since 1949, all of the NATO countries (except Iceland), and more recently Australia, Japan, and Spain, have worked through COCOM, an unofficial, non-treaty organization, to coordinate nationally based restrictions on the export of sensitive dual use technology to the Soviet Union and other Warsaw Pact countries and the People's Republic of China. COCOM maintains three lists: the International Munitions List (military items), the Industrial List (dual use items), and the International Atomic Energy List (nuclear items). The COCOM lists are similar to the U.S. control lists, but they are not identical.

Under their initiative for Third Country Cooperation (TCC),¹¹ the COCOM countries have worked to encourage other non-Communist countries—primarily the NICs—to adopt effective control programs. COCOM members are committed to support agreements reached with third countries and to use the control mechanisms installed in such countries. Some COCOM countries

⁹This issue is addressed in Chapter 3 of the main report.

¹⁰For a detailed description of the multilateral and U.S. export control regimes, see Chapter 6 of the main report.

¹¹These are efforts made by COCOM countries, modeled on U.S. bilateral agreements, to convince third countries to cooperate with COCOM export control policies by preventing reexports of COCOM-controlled items.

have been reluctant to engage third countries in formal negotiations, primarily because they are uncomfortable with the extraterritorial nature of the TCC requirements.

All COCOM countries use the IC/DV¹² documents available from cooperating third countries to some degree. The real discrepancy in practice between U.S. policy and that of other COCOM countries is in the area of COCOM reexports. **No other COCOM partner requires the type of authorization for reexport out of a COCOM or cooperating country required by the United States. The end result is a serious disadvantage for U.S. economic interests.**

Another contentious aspect of the licensing debate concerns whether the COCOM countries should practice "national discretion."¹³ The argument for national discretion is that it reduces the burden of license processing on COCOM and provides a paper trail (due to the obligation to report annually to COCOM on the export of national discretion items) on shipments that otherwise would not exist. **Yet, because there is no standard for the approval or denial of export at this level by national governments and because member nations choose to interpret quite differently the control threshold at which national discretion is employed, national discretion for dual use items undermines the purposes as well as the principles of a multilateral regime.**

2. U.S. Export Controls. U.S. export controls on dual use technology are implemented primarily under the authority of the Export Administration Act of 1979, as amended. The challenges to U.S. security interests posed by the proliferation of chemical and nuclear weapons, missile delivery systems, and other advanced weapons systems are addressed through the Export Administration Act, the Arms Export Control Act, the Atomic Energy Act, and the Nuclear Non-Proliferation Act. These laws involve controls in the following areas: nuclear weapons and related technology, missile technology, chemical weapons and weapons precursors, and exports to specific countries.¹⁴

The panel devoted a considerable amount of time to examining the characteristics of and problems with the U.S. export control regime. Among the principal problems it identified were the following.

(A) *Multiplicity of Statutes, Agencies, and Regimes.* Export controls are implemented through a multiplicity of statutes with differing objectives and criteria. The statutes themselves were not coordinated at the time they were written, and they come under the supervision of different congressional committees. Over a dozen agencies, plus the military services, are engaged in administering controls, and they apply distinct regulatory programs that often overlap and conflict. The lead agencies in constructing export control policy hold strongly diverse positions. As a result, these disparate agencies are often unable to integrate the various national security, economic, and foreign policy issues and give executive authorities a balanced, coherent view of the key issues. **The U.S. government needs to institutionalize a process in which all interests are fully and clearly expressed so that presidential leadership can drive decisions in a balanced and timely fashion.**

(B) *Jurisdictional Disputes.* In many instances it is unclear which administrative agency has jurisdiction over a particular category of items. Neither the trade laws nor the implementing

¹²Import certification and delivery verification.

¹³*National discretion* refers to the export of certain controlled dual use items to proscribed destinations on the authority of the national government, without the requirement of full COCOM review and consensus approval.

¹⁴Among the countries so targeted are Cambodia, Cuba, Iran, Iraq, Libya, North Korea, and Vietnam.

regulation of the various agencies provide clear standards for determining the correct authority covering a particular item. **A disproportionate amount of bureaucratic resources are expended in resolving disputes, rather than administering and enforcing the export control system. The resulting confusion has caused delay and expense for U.S. exporters.**

(C) *Licensing Complexity.* Three agencies are most prominently involved in national security license processing and review.¹⁵ **A complex pattern of overlapping and sometimes conflicting regulations, which have evolved in part due to specific agency expertise, must be understood by exporters even though no single agency's responsibilities span more than one set of regulations.** The system is further complicated by different licenses introduced for the purpose of relaxing controls on different levels of West-West trade,¹⁶ as well as different levels of control and license conditions for proscribed countries and proliferation concerns. Foreign-based multinational corporations that use U.S.-origin goods and technology find compliance requirements very difficult, and small and medium-sized companies, both U.S. and those foreign majority-owned, that lack the resources necessary to make sense of U.S. export laws often simply give up the effort to seek new international markets for U.S. manufactured products.

(D) *Overlapping Enforcement.* The U.S. Customs Service and the Commerce Department's Office of Export Enforcement share responsibility for export enforcement interdiction and investigation functions.

Interdiction efforts by Customs are carried out by approximately 100 Customs inspectors, about 300 criminal investigators, and efforts at international cooperation through 19 overseas offices. The Customs enforcement program involves random inspections of exports at ports of exit and investigations of potential violations of both the EAA and the Arms Export Control Act, as well as other, unrelated trade laws. Potential criminal cases are forwarded to the Department of Justice for prosecution.

The Commerce Department's Office of Export Enforcement focuses solely on enforcement of the EAA. It has eight domestic offices and two overseas posts. The Office of Export Enforcement also investigates potential export control violations. Commerce may either forward cases to the Department of Justice for criminal prosecution, levy civil penalties for violations, or both. The Commerce Department also may place U.S. and/or foreign parties on the "Table of Denial Orders," which makes them ineligible to take part in any way in any export-related transaction.

¹⁵In the Commerce Department, the Bureau of Export Administration (BXA) administers the licensing process for items on the Commodity Control List. According to Commerce Department statistics, BXA processed close to 81,000 individual dual use license applications in CY 1989, with a value of more than \$132 billion. Of those cases, 92 percent were approved. An additional \$34 billion is estimated to have been exported under U.S. distribution licenses. The average processing time for all individual license cases dropped from 28 days in 1985 to 17 days in 1989.

The State Department's Center for Defense Trade, Office of Defense Trade Controls (ODTC: formerly the Office of Munitions Control), and its parallel policy arm, the Office of Defense Trade Policy, process licenses for items on the Munitions List. According to ODTC, approximately 54,000 munitions licenses, with a total value of \$57 billion, were approved in FY 1989. The average processing time for munitions license cases dropped from 61 days in 1987 to 49 days in 1989.

The Defense Department's Defense Technology Security Administration reviews cases referred to it by the State and Commerce Departments and has the right, conferred by executive order, to review license applications to certain destinations and/or for certain technologies.

¹⁶The term *West-West trade* refers to trade between non-proscribed countries, including intra-COCOM trade.

Domestically, overlapping jurisdiction and lack of communication between Customs and the Office of Export Enforcement at the Commerce Department have sometimes resulted in their working on the same case without each other's knowledge. The Customs Service and the Office of Export Enforcement have not been able to establish a working mechanism to coordinate enforcement activities. The levels of sanctions for violations and the circumstances that must be established for their imposition vary from statute to statute. Sanctions have developed over the years through ad hoc legislation, and no effort has been made to assess and systemize them.

(E) *Outdated and Confusing Control Lists.* Like COCOM, the United States separates controlled goods and technologies into lists of munitions, industrial, and nuclear-related items. The U.S. lists are, respectively, the Munitions List (ML), the Commodity Control List (CCL), and the Nuclear Referral List (NRL).¹⁷ The system of U.S. list management suffers from a lack of clear definitions and criteria for control and decontrol, as well as the widely varying formats and structures that exist in domestic and international lists. In determining items for national security control under the EAA, dissension and confusion surround the definition of "militarily critical." Moreover, despite repeated calls to "balance" military criticality with economic concerns, the only balancing factor explicitly recognized in the list construction process is the foreign availability,¹⁸ or controllability, of items.

The foreign availability assessment process that was established to determine the controllability of items on the CCL has proven largely ineffective. Although data from the foreign availability assessments are sometimes used in list review, the assessment process is costly and contentious and has rarely resulted in timely decontrol.

(F) *Ineffective Dispute Resolution.* An elaborate interagency committee structure exists to resolve disputes over the list construction process for national security controls and for U.S. licensing decisions. Ultimate resolution of interagency policy disputes is handled through two policy coordinating committees (PCCs)¹⁹ reporting to the National Security Council (NSC). Disputes that the PCCs cannot resolve are forwarded to the President.

The process for dispute resolution is characterized by a lack of transparency resulting from unclear policy guidelines and complicated agency responsibilities. In considering whether to allow certain shipments, agencies disagree on levels of technology and the necessary conditions of sale. They also disagree on the criteria for control or decontrol of list items and on the interpretation of statutory guidelines. No effective working mechanisms exist for resolving these disputes.

Although the Export Administration Review Board process for resolving disputed licenses has worked fairly successfully for exports to proscribed destinations, at the time of publication

¹⁷The Department of State (in consultation with DOD) generates and administers the ML. The Department of Commerce, in consultation with DOD and other agencies, generates and administers the CCL. The Department of Energy and the Department of Commerce, with assistance from the Nuclear Regulatory Commission and the national research laboratories, draw up the NRL, which is incorporated into the CCL. Title 10 C.F.R. 110 is maintained by the Nuclear Regulatory Commission.

¹⁸According to the EAA, *foreign availability* exists when a non-COCOM origin item of comparable quality is available to adversaries in quantities sufficient to satisfy their military needs.

¹⁹The PCC on Technology Transfer handles COCOM-related issues at the under secretary level and is chaired by the NSC. The PCC on Non-Proliferation deals with trade issues relating to the spread of nuclear and chemical weapons and missile delivery capabilities. It is chaired by the Under Secretary of State for international security affairs, with an observer from the NSC.

there was no parallel system for exports to non-proscribed countries or for proliferation cases. The insufficient procedures for dispute resolution in licensing decisions cause further tension between agencies and disadvantage to U.S. exporters. Clearer guidelines for case referral and more definitive standards for licensing decisions are needed.

(G) *Insufficient use of Judicial Review.* The EAA generally exempts Commerce Department actions from the judicial review provisions of the Administrative Procedure Act (APA). The Omnibus Trade and Competitiveness Act of 1988 provided limited judicial review only for Commerce Department civil enforcement actions. Judicial review is no cure-all. Specifically, it is not the appropriate means for resolving interagency disputes on the very issues on which courts lack expertise and traditionally defer to the executive branch. What judicial review can do, however, is correct agency errors in interpreting and applying statutory provisions.

(H) *Exercise of Export Control Authority.* Although many countries maintain some form of export restrictions, the United States is alone in its historically frequent use of trade controls to respond to international events. U.S. law does not expressly state that trade is a privilege extended to citizens by the government, not a right of its citizens, but implementation of U.S. export control laws assumes that the universe of U.S. exports is controlled worldwide, unless otherwise stipulated. This assumption is inconsistent with the trade laws of most other COCOM countries that operate on the basis of trade as a right, not a privilege. The proclivity of the United States to use trade sanctions as a ready tool of foreign policy has caused significant problems for U.S. exporters.

(I) *Nature and Extent of Unilateral Controls.* One result of the bias toward trade as a privilege, rather than a right, is the unilateral nature of many of the control practices applied under U.S. regulations.²⁰ In a world of diffuse economic and technological power, the widespread use of unilateral export controls is counterproductive. Although some COCOM countries practice limited or unofficial forms of reexport controls, the United States is the only country formally requiring that its permission be obtained by non-U.S. parties for the reexport of goods or technology that have come to rest in another country. The major adverse reaction to U.S. reexport controls arises out of their complexity and their connection with U.S. unilateral foreign policy objectives. There is an abundance of anecdotal evidence²¹ that foreign manufacturers avoid U.S. sources in order to escape the encumbrance of U.S. reexport controls.

(J) *Industry Participation.* The EAA provides a formal mechanism for industry participation in the national security export control process. The secretary of commerce appoints a technical advisory committee (TAC)²² for any goods or technology determined by the secretary to be difficult to evaluate because of technical matters or worldwide availability. The Commerce Department has established 10 TACS, which now include about 175 industry members.

Industry members for each TAC are chosen by the Commerce Department on the basis of individual company nominations. In addition to subject matter qualifications, appointments

²⁰Significant examples include reexport controls, foreign policy controls over U.S.-owned foreign entities, controls over foreign products with U.S.-origin technology, parts, or components, and so on.

²¹See, for example, Appendix D of the panel's report, which contains a summary of the panel's foreign fact-finding missions.

²²The TACs are to consist of representatives of industry as well as the Departments of Commerce, State, and Defense, the intelligence community, and others at the discretion of the Secretary of Commerce.

traditionally have been subject to the nominee's receipt of a security clearance and screening by the Office of the Secretary of Commerce and the White House Personnel Office. The latter has resulted in rejection of technically qualified applicants and has added months to the appointment process. Any truly effective export control system requires close cooperation between industry and government. **Controls will be more effective if industry understands and supports the rationale for controlling a particular item.** Recently, there has been somewhat greater industry participation in list management. **However, serious problems remain with the extent of involvement by U.S. industry, which is a major reason why legitimate economic considerations are not taken into account at the start of the policy process.** Moreover, the current system of export controls tends to cast government and industry as adversaries, rather than partners. On the other hand, the lack of sufficient business involvement in the system is also partly self-inflicted. **Business must take a more active part in the process, particularly in the nomination of technically qualified personnel to work on the TACS.**

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[To be continued in the next edition of *The DISAM Journal*]