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# 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 second 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 first part of the report was published in the Spring, 1991 issue of *The DISAM Journal*, pages 65 thru 77. 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."]

## IV. FINDINGS AND RECOMMENDATIONS ON U.S. EXPORT CONTROL POLICY

### A. The Need for Export Control in a Changed Global Environment.<sup>1</sup>

The Western effort to deny technology over the past four decades to the Soviet Union and its WTO [Warsaw Treaty Organization] allies has largely succeeded. Significant changes have now occurred, however, in the nature of the threats that export controls are intended to address and in the definition of "national security" under which the controls are implemented. The Soviet military threat has not disappeared, but it is changed and substantially reduced. And the other former WTO countries as a bloc no longer pose a credible military threat. **Thus, the panel finds that export controls, sharply reduced in number and fully multilateral, are necessary and appropriate for responding to any remaining national security threat to the United States posed by the Soviet Union. It also finds, however, that a new approach to export control policy is needed in responding to threats to technologies of proliferation concern.**

Carefully tailored and/or refashioned export controls can be appropriate and viable in support of the following policy objectives:

1. **Constraining access by the Soviet military to technology and end products that contribute significantly and directly to the improvement of its weapons systems capabilities.**

2. **Constraining access to technology and end products that contribute significantly and directly to the development of advanced weapons systems by countries that pose a threat of aggression.**

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<sup>1</sup>For 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.

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3. Constraining access by countries of proliferation concern to nuclear, biological, chemical, and missile delivery technologies and know-how.

4. Imposing multilaterally agreed sanctions for violations of international agreements or norms of behavior.

These four objectives are very different from one another operationally. Constraining the improvement of Soviet weapons systems, for example, primarily involves a single target country and trade in high technology available from a relatively small group of nations. In contrast, constraining the proliferation of chemical weapons potentially involves many countries and many types of technology and end products that are much less sophisticated and much more widely available. Consequently, forms of control that might be effective and sensible for constraining Soviet weapons systems improvement might be both ineffective and unreasonably burdensome in constraining chemical weapons proliferation.

### **B. A New Approach to East-West Controls.**

The current challenge is to fashion a response that capitalizes on the enormous political and economic opportunities presented by the changes in Eastern Europe and the Soviet Union, while managing the risk associated with legitimate security concerns. **These increased opportunities—and increased margin for error—suggest that the West can now safely move from a policy of general denial (with limited exceptions) of dual use controlled items to a policy of presumed *approval* to export, predicated on the basis of verifiable end-use conditions.** The arguments for such a transition are clearly greatest for those nations of Eastern Europe that now pose a national security threat to the West *only* because of the possibility that goods and technologies sold to them might be reexported to the Soviet military or to countries of concern for other reasons. But the case also holds for the Soviet Union itself. To encourage this evolution and to ensure that institutional momentum does not maintain the use of export controls longer than prudence requires, the panel recommends the following:

- \* **The United States should work with the other COCOM countries to develop an explicit multilateral policy statement that outlines the circumstances under which dual use export controls can and should be terminated.**

There undoubtedly are risks attendant to the improvement of long-term Soviet capabilities. The most obvious is the outright loss of control over the end use of sensitive dual use goods, particularly in the event of an outbreak of hostilities (when it obviously would no longer be possible to verify end use). There also are dangers of diversion (particularly diversion-in-place), reverse engineering, and dissemination of technical data and know-how under this scheme. **But the fact remains that continued pursuit of a policy of general denial is neither administratively feasible in light of the multiple channels and sources for acquisition nor politically desirable in the context of the positive trend in East-west relations with the demise of the WTO and the signing of the CFE [Conventional Forces in Europe] treaty.** Under these circumstances, the panel recommends that U.S. policy keep in mind the following elements:

- \* **Continue to constrain access by the Soviet military to technology and end products that contribute significantly and directly to the improvement of weapons capabilities.**

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- \* Ensure that export controls do not impede the permanent conversion (or closure) of Soviet military industrial resources to the manufacture of products for the civilian sector.
  - \* Maintain consensus with U.S. allies on the coordination of further liberalization of export controls on trade with the Soviet Union.
  - \* Move progressively toward the removal of export controls on dual use items to the Soviet Union and East European countries for commercial end uses that can be verified.

### C. New Proliferation Targets for National Security Export Controls.

Export controls are not completely effective in slowing proliferation, because they are not universally adhered to nor equally enforced, because they only partially constrain indigenous capability, and because technical information and assistance cannot be completely contained. Moreover, many products and technologies that have proliferation significance in very selected circumstances are widely available and have predominantly innocent commercial applications. However, traditional export controls, multilaterally applied and enforced, can help to constrain the spread of weapons and the technical capability to produce them. They also may be useful in isolating countries or parties that violate accepted standards of conduct. For export controls to be effective in this new environment, they must be fashioned so as to achieve a high level of international cooperation that will ensure even-handed application while avoiding unnecessary injury to world commerce.

In order to be effective, proliferation controls must be focused only on narrowly proscribed military activities or items that are required directly for weapons systems and must include, to the extent practicable, verifiable end-use assurances. Lacking such specificity, efforts to control exports of proliferation-related technologies create a risk similar to that encountered in the case of COCOM controls on dual use technology—namely, imposing significant economic costs that may be disproportionate to their effectiveness.

### D. Limitations on Certain Types and Uses of Export Controls.

Serious discontinuities exist between export controls on the commercial sale of munitions on the one hand and the transfer of munitions on a government-to-government basis on the other. The problem of how to impose reasonable limitations on foreign military sales extends well beyond the United States, and it is being exacerbated by the overcapacity of arms production worldwide. This is a significant and troubling problem; though not in the panel's mandate, it is urgently in need of study.

A second conceptual problem, which lies more squarely within the panel's mandate, is that Section 6 of the Export Administration Act, which governs foreign policy controls, and certain other statutes (e.g., the International Emergency Economic Powers Act, IEEPA) permit the use of export controls for purposes that have little or no direct relationship to U.S. national security interests—for example, to express national displeasure toward particular countries whose policies offend U.S. moral or political views. National security is clearly the paramount goal of U.S. foreign policy. But the blurring of the distinction between the uses of export controls permitted under the relevant U.S. laws detracts from the legitimate application of export controls for either purpose. It also creates confusion and doubts about U.S. intentions among those countries cooperating

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with the Western strategic technology control effort, as well as difficulties for U.S. exporters.

Because they are volatile and unpredictable, foreign policy controls can interfere with virtually any transaction in international trade. Thus, the perceived threat of new foreign policy control measures probably is at least as responsible for causing foreign companies to design-out<sup>2</sup> U.S. products and suppliers as are traditional national security export controls.

In addition to the problems listed above, the distinction between some foreign policy controls and national security controls is artificial. For example, missile, nuclear, or chemical weapons proliferation could directly affect the national security of the United States and its allies. Despite this fact, missile- and chemical-related items are controlled primarily under foreign policy, rather than national security legislative authority, and nuclear controls are maintained as both a national security and foreign policy concern as a result of the existence of another relevant statute. These threats should be recognized as legitimate national security concerns. Serious consideration should be given to whether authority for export controls *other* than for reasons of national security or to implement the mandate of a responsible international organization or agreement can be justified, particularly given their relative ineffectiveness, and in light of today's highly competitive international economy. The panel makes the following recommendations with regard to foreign policy export controls:

- \* Foreign policy controls maintained to prevent the proliferation of missile delivery systems or nuclear, chemical, or biological weapons should be reclassified under the rubric of "proliferation controls" to differentiate them appropriately as an element of U.S. national security policy.
- \* The United States should not impose foreign policy controls on a continuing basis, except in those circumstances in which sufficient multilateral agreement and cooperation exist to make them efficacious and to prevent discrimination against U.S. product and technology suppliers.
- \* If unilateral controls are used, then the setting and enforcement of time limitations become imperative. The United States should, in all cases, seek to negotiate multilateral implementation and enforcement, or informal cooperation whenever possible from other countries in similarly restricting trade. However, the United States will find it difficult to lead if few other countries can be convinced to follow. Under these circumstances, the imposition of unilateral controls may become counterproductive and damaging to U.S. economic interests, and every effort should be made to remove them at an early time.
- \* The criteria for the imposition and retention of national security and foreign policy controls set forth in Sections 5 and 6 of the Export Administration Act (EAA) should be reviewed and made more explicit.
- \* To the extent that the President chooses to invoke export control measures through the use of the International Emergency Economic Powers Act (IEEPA), the criteria for its application should be reviewed and modified so that they are similar to the conditions that Congress has specified in Sections 5

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<sup>2</sup>This is the phenomenon known as "de-Americanization" of product lines.

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and 6 of the EAA with respect to controls imposed for national security or foreign policy reasons. "Emergency powers" granted to the President under the IEEPA generally should not be imposed for more than six months before Section 6 of the EAA must be invoked.

## V. FINDINGS AND RECOMMENDATIONS ON COCOM

The focus of COCOM on control of dual use, East-West trade will limit its future usefulness and viability. Although support for controls on the transfer of munitions to the Soviet Union is likely to continue, support for the denial of dual use items is eroding. This is particularly true of controls on dual use items that are not highly sophisticated and have no obvious military utility. The traditional COCOM objective of retarding the qualitative progress of Soviet military capabilities could be preserved while allowing for expanded, legitimate trade by shifting the focus of COCOM from an embargo on the export of listed items to proscribed countries to control of items on a sharply reduced COCOM Industrial List, with approval contingent on verifiable end-use conditions approved by COCOM. Rather than considering approved sales of controlled items to controlled countries as "general exceptions" to an embargo, the denial of such sales would be the exception.

License review would still be necessary, but once standard end-use conditions for the approval of Industrial List items were established, the focus of the control program would be to ascertain compliance with those conditions. The extensiveness of end-use conditions and the need for physical verification would depend on the nature of the item and the security risk inherent in the proposed transfer. Although COCOM partners have always been opposed to extraterritorial application of export controls, the end-use verification practices envisioned here would not be universally applied to all transactions and need not be adversarial.

COCOM also should review its traditional objective of controlling East-West arms transfers under the International Munitions List and International Atomic Energy List. Although a comprehensive discussion of munitions transfers is beyond the scope of this study, it is important to note that an upgraded role for COCOM in managing arms transfers is a viable future possibility.

The continued credibility of COCOM depends on the willingness of the members to recognize and respond to the new political, economic, and military realities through development of a more flexible and adaptive control strategy and a higher threshold of military utility as a criterion for control. To this end, the panel recommends that COCOM take the following steps:

- \* Approve the sale of items on a sharply reduced Industrial List to the Soviet Union and Eastern Europe for civilian end uses when acceptable safeguards can be demonstrated to COCOM.
- \* To the extent feasible, make standard and public the end-use conditions necessary for favorable consideration of exports of controlled items.
- \* Provide for periodic, and in some cases unannounced, visits to the physical location to verify the end use of selected items. The right of visitation would be a condition of sale.

There has been much speculation about the effect on COCOM of virtually "borderless" trade within the European Community (EC) after 1992. Export of munitions items will still be controlled, however, to all destinations, and trade moving from an EC member to an outside destination will still be subject to appropriate national licensing and documentation requirements.

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The current members of the EC are also members of COCOM, with the exception of Ireland. It is possible that the advent of "borderless" trade could exacerbate existing problems in those EC/COCOM countries with relatively fewer resources to devote to export control, since they could become targeted as relatively easier points of diversion for items originating elsewhere in the Community. Nevertheless, given the complicated business of organizing and administering monetary and economic unification, it is unlikely that the EC will want to add to its responsibilities in the near future (i.e., prior to 1992).

Perhaps the most fundamental effect of license-free COCOM trade or borderless trade in the EC will be the sharp reduction in government-created and -maintained paper trails of controlled transactions, which will reduce the availability of the most frequently used tools of enforcement. The inclusion of a "control identifier" on the standard Customs Cooperation Council trade documents (used internationally to identify the contents, origin, and destination of goods in trade) may have potential as a useful enforcement tool. Accordingly, the panel recommends that COCOM undertake the following:

- \* Press for the adoption of a license-free system of trade within COCOM to be implemented consistently and in accord with "common standard" compliance<sup>3</sup> in order to ensure effective controls and to avoid disadvantaging those countries that have made the effort to comply.
- \* Create a generic control indicator<sup>4</sup> in conjunction with the internationally recognized import/export documents. The control indicator or marker could be used by all countries that maintain restrictions on the export of certain items.

The United States has urged its COCOM partners to undertake a "Third Country Initiative," now called Third Country Cooperation (TCC), with a number of European neutrals and newly industrializing countries (NICs). The mutual security motivation for cooperation among COCOM members has proved to be only marginally valid for gaining cooperation by third countries, however. The European neutrals have cooperated to some extent, but most Asian and Latin American NICs have been slower to respond, perceiving their national interest to be related only indirectly to East-West tensions. As a result, since its initiation in 1984, the TCC initiative has enjoyed only limited success. Few COCOM members have actively pursued such agreements; the agreements negotiated<sup>5</sup> do not systematically reach all items controlled by COCOM; and the cooperating countries exhibit uneven will in implementation and enforcement. Mindful of this situation, COCOM should take the following steps:

- \* Include on the COCOM "core list" of controlled items, currently under multilateral negotiation, only those items that are physically produced or sourced only in COCOM member nations or fully cooperating third countries.<sup>6</sup>

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<sup>3</sup>COCOM has adopted a "common standard of licensing and enforcement" and member countries have agreed to work towards adopting the various elements

<sup>4</sup>A generic code indicator would be some type of internationally standardized marking system (e.g., a bar code) used to identify the contents, origin, and destination of goods in trade.

<sup>5</sup>This conclusion is inferred from comments of both U.S. and foreign government officials. The panel was not able to analyze the actual agreements because access to those documents was denied by the State Department.

<sup>6</sup>Fully cooperating countries are those countries that have implemented all five of the essential elements of a COCOM-comparable export control system. The elements are outlined in Chapter 6 of the main report.

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- \* **Initiate a plan whereby fully cooperating third countries can observe and contribute to COCOM list construction and case review. This may involve expanding the membership of COCOM or creating an "observer status."**
  - \* **Eliminate reexport authorization requirements for goods being reexported out of fully cooperating third countries.**
  - \* **Seek multilateral agreement to control the reexport of controlled goods *out of* noncooperating third countries.**
  - \* **Offer extension of the license-free system of trade as a COCOM-wide benefit to cooperating countries that have operational export control systems. The Third Country Cooperation Working Group in COCOM should certify the cooperating countries that have adequate systems.**

Sharply differing views on the appropriate translation of COCOM objectives into actual export restrictions inevitably have created tensions among the member countries. National control systems vary widely, as does the methodology by which items are determined to warrant control or decontrol. Perhaps the most potentially damaging discrepancies in COCOM are, however, members' practices in licensing West-West trade, particularly regarding the application of so-called national discretion (i.e., "administrative exception" controls).

**Despite the obvious connection to military utility of the COCOM strategic criteria, the role of the national defense agencies of member countries in the COCOM list review process is limited and inconsistent. Moreover, the Strategic Technology Experts Meeting, which has been nominally affiliated with COCOM since 1985, has been ineffective as a forum for coordinating inputs from national military establishments. Industry participation in list review, although seemingly more influential than defense input by the other COCOM countries, is also inconsistent. To address these concerns, the United States should press COCOM to undertake the following:**

- \* **Seek a common standard of licensing and enforcement practices for trade with non-proscribed countries. This should include controls on the reexport of controlled items (including those items eligible for approval with conditions) out of noncooperating countries.**
- \* **Eliminate the use of national discretion (administrative exception controls). The revised Industrial List ("core list") should be brief enough that all cases can be reviewed by COCOM.**
- \* **Improve the transparency of COCOM operations. This includes making the conditions necessary for favorable consideration of controlled exports standard and public, to the extent feasible.**
- \* **"Internationalize" the image of COCOM. For example, (1) move COCOM headquarters out of the U.S. embassy annex in Paris, (2) upgrade the involvement of other members in the administration of COCOM, and (3) share the costs of operation more evenly.**
- \* **Encourage increased input from members' national defense and intelligence agencies by upgrading and more fully integrating with COCOM the existing Strategic Technology Experts Meeting.**

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## VI. FINDINGS AND RECOMMENDATIONS ON PROLIFERATION CONTROLS

The earlier review of evolving U.S. national security interests made clear the large and growing international security problems posed by the militarization of a number of regions and the proliferation of advanced conventional weapons and weapons of mass destruction in those regions. Four general observations follow from this analysis:

1. There are at present insufficient linkages between the COCOM regime and the various other multilateral arrangements established to address nuclear, missile, or chemical exports.

2. There is insufficient high-level leadership and policy coordination for a collective approach to proliferation problems.

3. The three proliferation control regimes (i.e., those governing nuclear, missile, and chemical weapons) do not cover all the proliferation issues of greatest security concern.

4. The three proliferation regimes are not well coordinated at the operational level either internationally or within the U.S. government.

Effective export control regimes designed to address these problems must be collective and should include all the major supplier countries. Without the cooperation of the major supplier countries, weapons, weapons designs, and critical dual use technologies will continue to be available to nations that are intent on acquiring advanced conventional weapons or weapons of mass destruction.

The objectives of the various proliferation control regimes are not as narrow or distilled as the objectives of traditional COCOM controls. In fact, each of the regimes in question addresses a unique issue with its own problems and distinguishing characteristics. Perhaps the most important distinction between East-West and proliferation controls, however, is that the United States is not in a position to exercise the same level of influence over the suppliers of items related to nuclear, chemical, and missile proliferation. Indeed, some of the potential suppliers of these weapons of mass destruction are also the targets of current control regimes. Moreover, it is critical to include the Soviet Union as a formal participant in arrangements to control the sale of advanced weapons and weapons capabilities. These findings lead the panel to the following recommendations:

- \* Proliferation of weapons of mass destruction, their delivery systems, and advanced conventional weapons is a U.S. national security concern and should be treated as such in U.S. law and policy.
- \* The principal focus should be on those proliferation problems—that is, nuclear weapons, chemical and biological weapons, and missile delivery systems—that, in combination, have the potential to create expanded negative impacts.
- \* Control regimes must be tailored to the particular circumstances of specific proliferation threats and, to be effective, must be as fully multilateral (i.e., involve the maximum number of suppliers) as possible. Some of these regimes are likely to rely, at least in part, on properly fashioned export controls.

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If proliferation is to be effectively managed, two conditions must be met. First, legitimate security concerns of potential proliferators must be recognized and addressed, most likely in a regional context. Second, there must be a well coordinated approach to dealing with specific states or groups that have been identified as being intent on proliferating. **These conditions suggest that the most effective and politically realistic approach involves close coordination among a relatively small number of countries, combined with a broad mechanism to strengthen and coordinate international regimes to which all interested states can be parties.**

Coordination among the major players could be achieved on an informal basis through one or more existing international mechanisms or through some new organization. Moreover, the United Nations—particularly the revitalized Security Council—also may be a viable forum for achieving broad political consensus on these issues. In principle, it is desirable to integrate the existing multilateral export control regimes to manage nuclear proliferation, the proliferation of missile technologies, and the proliferation of chemical weapons. In practice, because of differences in the basis and operation of these proliferation regimes and their varied country membership, and because of the obstacles to negotiating the necessary arrangements among large numbers of states, it seems unlikely that the complete integration of the existing regimes will occur in the near future.

To the extent that export controls are employed as an instrument for managing proliferation risks, it must be recognized that they represent only one of several policy tools available for managing this difficult set of problems. **The actual choice of an appropriate mix of policy instruments for managing proliferation risks is a complex and difficult problem that, in most areas, requires far more careful and extensive study than this panel or any other group has yet been able to conduct.**

The panel recommends that the United States take the following steps:

- \* **Develop or expand export controls that focus narrowly on the proliferation risks and activities of greatest concern in order to minimize negative commercial, developmental, and foreign policy impacts.**
- \* **Seek active, specific, and operational coordination on proliferation controls among the major players, including at least the United States, the United Kingdom, the Soviet Union, France, Germany, Japan, and China.**
- \* **Develop a new regime, or expand an existing regime, to cover proliferation of advanced conventional weapons and related systems.**
- \* **In negotiating the Chemical Weapons Convention, explicitly consider collective export control responses to non-signatories that develop or possess chemical weapons.**
- \* **Seek enforcement and inspection procedures that can successfully focus on those few destinations that pose the greatest proliferation risks.**
- \* **Develop better coordination of proliferation activities within the U.S. government and its embassies abroad.**
- \* **As part of a broader strategy of managing proliferation risks, seek to strengthen and coordinate existing multilateral export control regimes for proliferation items, with the long-term goal of eventual consolidation.**

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- \* **Avoid broad and burdensome export control regimes, especially those that would be unilaterally applied to U.S. exporters.**

## **VII. FINDINGS AND RECOMMENDATION ON THE U.S. CONTROL REGIME**

### **A. Goals.**

The export control policy process should be reformed in order to achieve the following results:

- Policy issues are resolved in a timely manner and policy decisions are enforced by the executing agency.
- Views of relevant departments are heard and considered, and crucial unresolved cases presenting significant policy issues are taken to a senior-level interagency group for prompt resolution.
- The system is made simpler, more open, and internally consistent so that policymakers, administrators, and U.S. and foreign business can more easily understand it and work with it.
- The development of export control policy is well balanced, and industry and other affected parties have appropriate opportunities for input into policy formulation, including regulatory changes and list development.

### **B. Policy Formulation.**

**The executive branch must formulate an efficient and coherent policy development framework and provide an appropriate administrative structure to ensure that policy is properly executed. A clearer division of functions would help dispel the current confusion in the bureaucracy between policy formulation and its implementation. The National Security Act of 1947, as amended, and subsequent legislation provide ample authority for the President to formulate and execute national security policy through the National Security Council. This includes authority to establish policy on export controls. To attain these goals, the panel recommends the following:**

- \* **The President should invoke the authority granted under the National Security Act of 1947, as amended, and subsequent legislation to provide detailed instructions on key components of export control policy through the issuance of a national security directive (NSD) for the formulation and implementation of export control policy. Such a directive would specify the interagency mechanisms for implementing the President's policy, particularly with regard to a streamlined licensing system and a fast, effective dispute resolution process.**
- \* **Through the vehicle of an NSD, the President should provide guidance on the fundamental objectives for all national security export controls (including munitions, dual use, nuclear, missile, and chemical/biological) and direction for achieving those aims.**
- \* **The NSD should establish the general policy and specific procedures for constructing and reviewing the control lists. Such policy and procedures would include (1) an interagency methodology for list construction, that is, criteria or standards for determining military criticality, economic costs, and other factors, (2) specification of agency responsibility for assessing the national security importance of controlled items,**

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(3) clarification of priorities (or burden of proof) for balancing diverse interests, and (4) specification of the process for resolving disputes over list construction.<sup>7</sup> The NSD also should establish parameters for distinguishing between routine and exceptional licensing cases and detail the decision-making process for each.

- \* To eliminate the existing public confusion over the specific terms of U.S. policy, which is a major defect of the current system, presidential guidance should be made public to the extent feasible.

### C. Policy Mechanisms.

A framework for national security export control decision making must contain appropriate mechanisms to carry out the policy enunciated by the President. The arrangement for export controls should be part of the same apparatus for policy implementation that an administration establishes for any important component of national security. The relevant executive branch agencies will retain a strong voice in policymaking. The basic function of the policy mechanism should be to integrate the existing policy roles of the various executive branch agencies. The panel recommends four main elements for the export control policy formulation system: (1) a comprehensive national security directive, (2) an Export Control Policy Coordinating Committee (EC/PCC), (3) national security export control interagency groups, and (4) working groups and technical groups.

- \* The NSD should lay out formally the details of the executive structure. Lines of responsibility and accountability should be clearly established among all the participating groups.
- \* An Export Control Policy Coordinating Committee should be established to formulate and review policy recommendations, resolve exceptional disputes among agencies, and monitor the work of the interagency groups. The EC/PCC would be the locus for export control policy decision making within the framework of the NSD. It should comprise senior representatives of the involved departments and agencies. To ensure objective evaluation of disputes reaching this level and the immediate attention of the National Security Council as necessary, the EC/PCC should be chaired by the national security advisor or the deputy advisor.

Under National Security Decision Directive 10, authority is granted to establish interagency working groups deemed important to U.S. national security policy.

- \* Interagency working groups should be established as necessary to consider the appropriateness of export controls as a means of addressing overall U.S. national security and foreign policy objectives. Serving as the principal operating policy groups, they should advise the President on the advantages and disadvantages of the various U.S. export control programs and on the need for modification of current programs or for new programs.

The interagency groups would oversee working and technical groups, address agency differences, and refer unresolved matters to the EC/PCC. They also would verify that policy is uniformly applied by each group and ensure that technical advice from U.S. industry is included in agency decisions on control list additions and deletions.

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<sup>7</sup>See Chapter 10 of the main report for a detailed discussion of list construction and review.

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#### D. Policy Execution.

More efficient case processing, better procedures for dispute resolution, and greater system transparency are the potential gains from a revised administrative process.

- \* **In order to achieve a more rational and effective export control policy process, the U.S. domestic process should be reconfigured through consolidation of all day-to-day administrative functions in a single agency.**

The reorganization and accompanying policy directives would give the single agency final authority to make decisions on routine licenses, promulgate regulations, and resolve interpretive disputes within the specific policy guidelines of the NSD.

- \* **The single agency should handle administration of restrictions on dual use items, munitions, items controlled for nonproliferation purposes, and trade-related items under "emergency" powers. The goal of the reorganization is to consolidate administration of controls based on an internally consistent set of regulations while keeping broad policymaking and final dispute resolution in the hands of the President and responsible department secretaries in the National Security Council and the Export Control Policy Coordinating Committee.**

The panel evaluated two basic alternatives for consolidating agency functions. The first alternative is to put administrative functions in a newly created administrative structure. The second is to consolidate functions in an existing department or agency. **Given the progress that has been made so far in improving both policy and process, the panel concluded that it would be better to modify the current system rather than start anew.** In consolidating administrative functions, therefore, it would be sensible to select as the chief administrative agency one of the three departments—State, Defense, or Commerce—primarily involved in export controls <sup>8</sup>

**The Commerce Department's Bureau of Export Administration [BXA] already handles, in dollar value, the great majority of cases processed by the export control system, and it has undergone considerable administrative improvement of its own. *It has an established administrative apparatus,* which has achieved improved efficiency over the past few years. Further, the agency has dealt with a broad spectrum of products and technologies, and it has a sophisticated and reasonably comprehensive regulatory scheme. The Export Administration Act already identifies the Commerce Department as the implementing agency for the act, which covers the majority of the export control spectrum.**

The improved policy formulation process described earlier would alleviate some of the current inevitable mixing of policy formulation and execution in the Department of Commerce, which is charged with both export regulation and promotion. **In this regard, the panel has determined to its satisfaction that BXA's export administration functions are sufficiently separate from the export promotion activities of the Commerce Department.** Thus, the panel recommends the following:

- \* **The Commerce Department's Bureau of Export Administration should be selected as the single administrative agency for export controls.**

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<sup>8</sup>For a detailed discussion of the administrative options, see Chapter 9 of the main report.

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- \* **As part of the consolidation of functions, measures should be taken to lessen BXA's remaining deficiencies, such as upgrading the technical center staff at the Office of Technology and Policy Analysis and its professional grade levels.**

The enhancement of policy decision making and the administrative reforms outlined above obviously will not address all the issues and problems of the export control system. **Thus, if the single agency scheme is to work, the U.S. government will have to make necessary changes to the existing legislation and governmental structure for export control administration.** Although the proposed changes would require some statutory revision and some transfer of functions among Executive Branch agencies, responsibilities for policy formulation would remain with the appropriate departments, subject to coordination with Congressional bodies and the mechanism for interagency policy formulation. In addition, agencies with special expertise will be involved in the interagency and working groups and in license review.

### **E. Other Changes Relating to the Proposed Reforms.**

1. **Control List Construction, Harmonization, and Review.** Implementing U.S. export control policy involves the balancing of conflicting national interests. Achieving that balance requires trade-offs between the potential benefits that can accrue to national security from export controls and the potential costs that such controls can impose on other U.S. policy objectives. The process the United States has been using for list construction and review for East-West controls has not struck a balance between these national interests in an efficient and satisfactory way. Historically, there have been five basic difficulties with the U.S. system for list construction and review:

1. The absence of significant constraints on the defense and intelligence communities with respect to the number of items that can be controlled.

2. The absence of any mechanism that forces the defense and intelligence communities to reveal the strength of their preferences among the items they propose to control.

3. The absence of any mechanism that forces the foreign policy and commercial communities to reveal their views about the relative costs to short- and long-term U.S. foreign policy and trade interests that would result from controlling an item.

4. The absence of clear decision-making authority to "balance the national interest." This, combined with bureaucratic political maneuvering, has led to interagency gridlock, which has proved remarkably resilient to legislative "fixes."

5. The absence of a means by which the system can be easily tuned to respond to changing international political and military circumstances or to changing priorities and judgments of the national political leadership.

The panel has developed an improved methodology that tries to address these five problems.

- \* **As described in detail in Chapter 10 of the main report, the process for choosing items for control within any particular control regime should involve the following: (1) identification of items of potential concern, (2) rank ordering and weighting of items in terms of the national security risks posed by an adversary's acquisition and use of each item, with careful consideration given to the controllability of items, (3) an approximate rank ordering and weighting of items in terms of the economic and foreign policy costs of**

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restricting trade in each item of concern, (4) a policy judgment as to how risks and benefits of control should be balanced, and (5) a comparison of benefits and costs that allows a sorting into controlled and uncontrolled items.

The chapter focuses on trade with the Soviet Union, beginning with how a control list might be constructed. The panel believes that the methodology also could be applied, however, to other COCOM-controlled destinations, such as Eastern Europe and the People's Republic of China, and to the control of technologies important in the proliferation of advanced conventional weapons and weapons of mass destruction. The panel makes the following recommendations regarding the various control lists:

- \* A set of integrated U.S. control lists should be fashioned so that the different lists are similarly structured and formatted. Integrating the lists will lessen overlap and discrepancies among the control lists. The respective structures of the U.S. and multilateral control lists also should be harmonized.
- \* Building on progress made so far in the policy process, the United States should continue to make the appropriate shift of administrative resources from traditional East-West export controls to controls directed at proliferation concerns and the end-use verification of more narrowly targeted East-West controls, as suggested by the panel.
- \* An interagency task group should regularly undertake a thorough review of the Munitions and Commodity Control Lists to eliminate duplication and ensure coordination of the COCOM Industrial List. The U.S. dual use list should be compatible with other multilateral control arrangements.

2. Judicial review. The panel makes the following recommendation:

- \* The statutory exemption in Section 13(a) of the EAA from the application of provisions of the Administrative Procedures Act [APA], including the appropriate level of administrative due process and judicial review of Commerce Department actions, should be removed.

The application of the administrative due process and judicial review provisions of the APA is not inconsistent with the protection of U.S. national security or foreign policy interests. Classified information or other national-security-sensitive information can be safeguarded within the framework of the APA. The courts would defer to the Executive Branch on matters of policy and would afford appropriate latitude for agency discretion. The courts would not question policy decisions, however, including determination of what items should be subject to export control.

The repeal of the Section 13(a) barrier would more effectively ensure public participation in the development of regulations and would afford access to the courts for unsuccessful license applicants. The APA standard for judicial review would deny relief except for absence of procedural due process and for arbitrary action. It is unlikely, in the panel's judgement, that these changes would unduly burden the Commerce Department in administering the EAA or lead to an excess of litigation.

3. Export Control Enforcement. Opposing views over which agency should have primacy in various enforcement areas are indicative of broader problems concerning administrative responsibility for trade enforcement. Those problems

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extend well beyond the direct domain of export controls and involve a number of enforcement bodies, including the Customs Service, the Drug Enforcement Administration, and the Office of Export Enforcement. Examination by the panel indicated that more time and resources would be necessary to develop sound findings and recommendations to resolve these issues. Accordingly, the panel recommends the following:

- \* **The General Accounting Office should be requested to undertake a study of this important problem. This study should include an effort to analyze and systemize the various criminal and civil sanctions in the U.S. export control statutes. Consideration should be given to enactment of appropriate civil sanctions for export control violations.**
- \* **With regard to administration of enforcement, uniformity of administrative procedures should be part of the single administrative agency recommended by the panel. The existing Commerce Department enforcement procedures appear to be appropriate. In the absence of single agency administration, therefore, measures like those used by the Commerce Department should be instituted in the other agencies.**

4. **U.S. Representation at COCOM.** In addition to problems with the domestic process, the U.S. portion of the COCOM process is also flawed. Of particular note are the inadequacy of industry representation, insufficient dissemination of information on the control list and COCOM decisions, and the technical proficiency of the staff of the permanent U.S. mission. To address these problems, the panel recommends the following:

- \* **Given the increasing relative importance of international economic concerns and the greater weight U.S. partners in COCOM attach to trade considerations, industry concerns should be more fully represented at COCOM discussions.**
- \* **As with the U.S. government domestic process, the COCOM process should be made much more transparent.**
- \* **The level of technical knowledge of the permanent U.S. mission to COCOM should be upgraded to the extent necessary.**

5. **Priorities of the U.S. Intelligence Community.** As noted earlier, new demands are being placed on the intelligence community due to the dissolution of the WTO, the changes in the Soviet Union itself, and the growing concern about the acquisition of proliferation technologies. Accordingly, the panel makes the following recommendations regarding the role and priorities of the intelligence community in the new era:

- \* **The intelligence community should expand its efforts to develop reliable information on changes in the nature and pattern of current Soviet technology acquisition efforts.**
- \* **The intelligence community should continue and expand its recent efforts to develop an analytic capability to examine Soviet technology acquisition and utilization from the standpoint of the actual state of Soviet technology progress and the internal dynamics of technology diffusion within the Soviet Union and the East European countries.**
- \* **The executive branch should give serious consideration to reallocating resources—and/or identifying additional resources—to develop better**

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information about the acquisition and utilization of sensitive Western technology by countries of proliferation concern.<sup>9</sup>

#### **F. Enhancing Industry Participation.**

Greater balance and effectiveness in the export control system require a greater level of industry participation in the system. To accomplish this objective, the panel recommends the following:

- \* **To improve the current level of industry input, the President should establish a permanent industry advisory committee on export administration. To ensure continuity from administration to administration, the committee should be required by law.**
- \* **A number of specific changes should be made to the technical advisory committees to enhance the breadth of their charge, level of interagency participation, and amount of technical expertise.**

In addition to the above, a third step should be taken to achieve greater balance among national security, foreign policy, and economic interests: *Economic security should be formally institutionalized in a national security framework.* It was for this reason that the previous Academies' study, the Allen report, recommended that the secretaries of commerce and treasury participate in NSC meetings on export controls.

- \* **Because many important national security issues will involve serious economic concerns, those federal agencies responsible for economic matters should be formally brought into the policy process for meetings of the NSC in which their expertise could serve the national interest. Specifically, the Secretary of Commerce should be included routinely as an advisor/participant in NSC discussions.**

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<sup>9</sup>A recent study by the Defense Science Board, *New Scenarios for American Defense: Implication for Intelligence and for the Defense Technology and Industrial Bases* (Washington, DC: U.S. Department of Defense, 1990), reaches a similar conclusion.