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# The Evolving Framework of the United States Export Control System:

## A Case Study in Exporting Fiber Optic Telecommunications Systems to the Former Soviet Union

By Linda M. Googins

In response to the dramatic changes in the political systems of Eastern Europe and the former Soviet Union, the United States is being forced to reconsider the purposes and procedures of its export control policy. American businesses, eager to be the first to enter new commercial markets, have lobbied hard to reduce the number of items controlled and licenses required to export goods to these countries. There remain, however, national security concerns that the political changes may not be permanent and the existence of large nuclear arsenals continue to pose a military threat to the West. In reformulating its export control policy, the United States must attempt to balance these competing concerns so as to encourage the development of new democracies and market economies and, at the same time, preserve the goals of national security.

This article will discuss first the current United States' export control system, specifically as it applies to the export of "dual use" items<sup>1</sup> to the former Soviet Union. Second, the role of international cooperation in restricting exports will be examined, focusing on the effectiveness of CoCom.<sup>2</sup> Finally, this article will examine, as a "case study," the exportation of fiber optic telecommunications systems to Russia. This particular issue has intensified the debate over export control policy, dividing those wishing to support the new democracies with exports of high technology against those desiring to protect United States security interests.

### I. The Export Control System

#### A. *Legal Authority for Export Controls*

The legal authority for government control over exports of goods, technology or software from the United States derives from the Commerce Clause of the United States Constitution, which grants Congress the power to regulate commerce with foreign nations.<sup>3</sup> Congress, in an exercise of this power, has enacted several statutes relating to exports.<sup>4</sup> Of these acts of legislation, the Export Administration Act of 1979 ("EAA"), as amended,<sup>5</sup> is the most important to American exporters. The EAA provides the organizational structure for the control system, and also authorizes the export controls for dual use items.<sup>6</sup>

The Export Administration Act is a broad grant of power to the President, directing him to take action to further stated congressional goals. The President, in turn, has delegated this power to the executive agencies under the direction of cabinet secretaries. The Bureau of Export Administration ("BXA") of the Department of Commerce is the principal operating unit for administering and enforcing the EAA.<sup>7</sup> The substantive regulations applicable to exporters have been promulgated by the Secretary of Commerce in the Export Administration Regulations ("EAR").<sup>8</sup>

#### B. *Why Control Exports?*

Under the Export Administration Act, there are three stated purposes for controlling exports: to protect national security, to further foreign policy goals, and to protect the domestic economy from a drain of goods in short supply.<sup>9</sup> For reasons of national security, the government regulates the export of items which are deemed important to the strategic and military capabilities of "controlled countries."<sup>10</sup> Controlled countries consist primarily of communist countries, i.e., the People's Republic of China, countries within the territory formerly controlled by the Soviet Union, and the former Warsaw Pact allies. In comparison, foreign policy controls are not necessarily directed only at "controlled countries." They are either additional or parallel controls, which are implemented for the purpose of fulfilling U.S. foreign policy objectives.<sup>11</sup>

National security controls, directed at limiting other countries' access to strategic items, need to be maintained on a multilateral basis in order to be effective.<sup>12</sup> In comparison, foreign policy controls allow the United States to protest or support actions of foreign governments and have been effectively maintained on a unilateral basis. However, recent political developments in "controlled countries," combined with an increasing number of foreign nations capable of producing "strategic items" have challenged the multilateral framework that the United States has historically used to implement its national security controls.

Breakdowns in the multilateral framework of enforcement directly affect the ability of American companies to

compete on an international level. American businesses desiring to export to formerly communist countries, therefore, are most concerned with relaxing the number of items and countries controlled for national security reasons. Thus, it is necessary to discuss the scope of controls, which items are controlled and what licenses are required for export.

### C. Scope of Export Controls

Under the Export Administration Act, all commodities, technology, and software are subject to control by the Commerce Department whenever they are exported from the United States or re-exported by a U.S. or foreign person from any foreign country to another foreign country.<sup>13</sup> Foreign origin items generally become subject to such control when they enter the United States and are re-exported.<sup>14</sup> Canada is excepted from most, but not all, U.S. export controls, but has no special exceptions from re-export controls.<sup>15</sup>

The Commerce Department has the responsibility for classifying items whose export is considered particularly sensitive and listing those items on the "Commerce Control List" ("CCL").<sup>16</sup> The CCL does not include items under the exclusive jurisdiction of another U.S. agency.<sup>17</sup> The major exception is for items of an "inherently military nature,"<sup>18</sup> which are subject to the Arms Export Control Act ("AECA").<sup>19</sup> Under the AECA, the Department of State, Office of Defense Trade Controls<sup>20</sup> maintains the "Munitions Control List" and issues export licenses for items on that list.<sup>21</sup>

Because the CCL covers dual use items, i.e., those which can be used for both military and civilian purposes, distinguishing between the two agencies' licensing control can be difficult. Thus, in order to get a proper export license, an exporter must first determine which government agency has jurisdiction. Although some changes have been made to alleviate this burden on American businesses, an exporter should still consult both the Commerce and State departments' regulations, the EAR and ITAR respectively, as regards to the types of items controlled by each agency.<sup>22</sup>

### D. Export Licensing Requirements

After determining agency jurisdiction, an exporter conducts a preliminary assessment of export licensing requirements, taking into consideration the nature of the item, the country of destination, and the end-user or known end-use. First, the nature of the commodity is taken into consideration when referring to the CCL to determine if an item is subject to any export controls. Entries on the CCL are

identified by an "Export Control Classification Number" ("ECCN").<sup>23</sup> The general characteristics of the item will guide the exporter to the appropriate commodity group. Then, the particular characteristics and function of the item should be matched to a specific ECCN. If the export is a high technology item, it is likely to be subject to national security controls, and, therefore, will require an application for an "Individual Validated License."<sup>24</sup> It is important to note that the Commerce Department imposes the task of making the correct classification determination on the exporter.

Second, for each ECCN the CCL indicates the country groups to which validated licenses are required and the statutory basis for control. For national security control purposes, foreign countries are separated into seven country groups designated by the symbols Q, S, T, V, W, Y, and Z.<sup>25</sup> The former U.S.S.R., the Baltic states, Albania, Bulgaria and Mongolia are included in Country Group Y.<sup>26</sup> Czechoslovakia, Poland, and Hungary are in Country Group W.<sup>27</sup> These groups represent the "controlled countries" that have been identified as targets of national security controls in accordance with the EAA.<sup>28</sup>

Thus, even if an item is not a high technology item, it may be subject to licensing because of the country of destination. The national security licensing policy for these destinations is one of approval if the Bureau of Export Administration determines that the export is for a civilian use or would otherwise not be detrimental

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to United States security.<sup>29</sup> In addition, exports to these countries of CoCom<sup>30</sup> controlled commodities (represented by an ECCN with suffix "A") require review and approval in CoCom, unless they are covered by a "likely to be approved" or "favorable consideration" notation in the ECCN which, respectively, indicates that they are licensable at national discretion or licensable after notice to CoCom if no objection is raised within a specified time period.

Finally, the exporter should check the list of "banned end-users," representing those companies which have been found guilty of past violations of the EAA, or are considered by the government to be unreliable in safeguarding exports against re-export.<sup>31</sup> The exporter also is required to report any potential end-use of which he or she knows would be in violation of the export regulations.<sup>32</sup> Such impermissible end-uses would include terrorist activities or projects involving weapons of mass destruction.

If all three of the above considerations are met, then the item may be shipped under a "General License."<sup>33</sup> General licenses are licenses established by EAR provisions

for which no application is required and for which no document is normally issued.<sup>34</sup> The conditions for the use of these licenses are set out in 15 C.F.R. Part 771 for commodities and Part 779 for technology and software. Most non-strategic items may be exported under a general license.

In all other cases, an "Individual Validated License" is required for export.<sup>35</sup> An individual validated license is a document issued by the Bureau of Export Administration in response to an application filed by an exporter that authorizes a specific export from the United States. These licenses may be subject to interagency review.<sup>36</sup> There are also "Special Licenses," which are essentially multiple validated licenses for projects, distribution or service supply contracts.<sup>37</sup>

## II. International Cooperation in Restricting Exports

### A. *CoCom: Its Role and Function*<sup>38</sup>

Since World War II, United States strategic export controls have operated largely within the framework of a multilateral arrangement with U.S. allies. In 1949, near the beginning of the Cold War, the Coordination Committee for Multilateral Controls ("CoCom") was established to coordinate the restrictions on the export of scarce or strategic items to the Soviet Union, the People's Republic of China and their allies. The participants of CoCom consist of the representatives of NATO, less Iceland, plus Japan and Australia.

CoCom is not based on a treaty or other formal international agreement. The procedures and deliberations of CoCom are confidential. The Committee operates under a rule unanimity. Thus, any one member holds veto power over the other members. Measures informally agreed to in CoCom must be implemented by laws or regulations of the participating governments before they acquire legal effect. The national security controls under the EAA are almost always the result of multilateral determinations made within CoCom. CoCom's function in the United States export licensing process, however, is not set forth explicitly in the EAR.

The basic functions of CoCom in support of controlling strategic exports are: (1) to achieve agreement on strategic criteria for controls, (2) to formulate detailed lists of embargoed commodities and technical data, and (3) to coordinate efforts to achieve effective enforcement of the embargo. CoCom also reviews the export by CoCom members of specific proposed shipments to controlled countries. Members exchange views on export control enforcement standards, but CoCom itself has no enforcement powers of its own.

In addition, CoCom periodically reviews and updates a CoCom Atomic Energy List, Munitions List, and Core List. The Core List, formerly the Industrial List, includes dual use goods and technology which are not included on one of the other lists. The CoCom lists are not officially

published. However, the control lists of participating governments are based on the CoCom lists, and the regulations of many participants, including the United States, incorporate virtually the complete text of Industrial List entries. Thus, the United States "Commerce Control List" is based substantially upon the CoCom Core List, and the U.S. "Munitions List" is based substantially upon the CoCom Munitions List.

### B. *Effect of CoCom Prior to 1990*

Efforts by the United States and her allies to increase the effectiveness of the CoCom system led to a series of high-level meetings among the CoCom partners, culminating in a January 1988 meeting at Versailles. The meeting affirmed as a basic principle of CoCom that each country has the responsibility to ensure effective enforcement of CoCom-agreed controls on its exports.

Consistent with the January 1988 commitment to increase the effectiveness of controls while shortening the control list, a CoCom working group developed a "common standard" with respect to licensing and enforcement. This common standard was endorsed by CoCom as guidance to enable all member governments to achieve any needed control program improvements. The common standard represented agreed minimum elements that must be present for an effective control system.

CoCom confidentiality cloaks the details of the common standard. The major elements, however, are assumed to include: (1) licensing requirements (e.g., control list, regulations, industry awareness), (2) documentation (license application, import certificate/end use statement, technical support documentation), (3) enforcement, and (4) cooperation.

### C. *Changes in CoCom Since 1990*

The dramatic changes in superpower relationships combined with the fact that there are fewer and fewer "sole source" countries for commercially exchanged goods and know-how has caused some commentators to question the continuing relevance of CoCom.<sup>39</sup> This questioning of CoCom's effectiveness comes as the countries of Eastern Europe and the former Soviet Union are viewed more as new commercial markets than as a military threat.

In June 1990 CoCom conducted a High-Level Meeting ("HLM") to discuss the liberalization of export controls. CoCom agreed to a "special procedure" for exporting to Czechoslovakia, Poland and Hungary, removing them from the "controlled" category and allowing them to receive exports of western high-technology.<sup>40</sup> Political developments and development of the capacity and commitment to safeguard sensitive exports are the considerations for removing a country from controlled status.

In addition, it was agreed to redraft the CoCom Industrial List. Starting with a blank slate, technical experts determined which items were necessary to maintain the

West's existing strategic advantage in high-technology over that of the former Soviet Union. A new "Core List" approved by CoCom in May 1991, greatly reduced multilateral East-West controls.<sup>41</sup> The "Commerce Control List" was restructured in September 1991.<sup>42</sup> This was done to follow the structure of the newly agreed to "Core List."

In 1990, the United States and other members of CoCom approved nearly 1600 export licenses for shipments of high-technology goods to the Soviet Union worth about \$1.7 billion, including high-speed computers to be used to improve the safety of Soviet nuclear power plants.<sup>43</sup> This marked the third consecutive rise in exports, and a dramatic increase over approved exports worth nearly \$250 million in 1987.<sup>44</sup>

### III. A Case Study: Exporting Telecommunications Systems to Russia

#### A. Introduction

The telephone system in the former Soviet Union grew out of a collection of regional networks using copper wires, built under Stalin in the 1930's. Unlike Eastern Europe, the territory of the former Soviet Union does not have a reasonable pre-World War II infrastructure on which to build new communications links.<sup>45</sup> Today, making inter-regional or inter city calls is problematic and it is almost impossible for a caller from the West to reach someone in one of the former Soviet republics.<sup>46</sup>

In the next century, telecommunications could do for Russia what the railroad did for the United States 200 years ago. Fiber optic cables, introduced in the United States in the early 1980's, are lines capable of carrying huge amounts of digital data across long distances. Fiber optic technology revolutionized the way American companies do business. In addition to its many civilian uses, fiber optic cables are also acknowledged to have important military uses. Defense and intelligence agencies hold fiber optics responsible for the high-technology advantage the West holds over the East.

In 1986, the Soviet Union formed the Svetovod Research Institute to develop fiber optic technology.<sup>47</sup> After three years it achieved virtually nothing, clearly demonstrating the effectiveness of CoCom's export restrictions on fiber optic technology and the Soviet Union's dependence on the West for high-technology goods and know-how. Other options for modernizing communications are not as viable as fiber optics. Digitizing, an upgrade of the lines without new fiber optic cables, would be time consuming.<sup>48</sup> Mobile communications and satellite operations are not capable of fully covering the vast territory of Russia. Thus, fundamental to the future development of Russia and the former Republics of the Soviet Union is the improvement of telecommunications and the installation of fiber optic cables.

Until recently, the United States and her allies, acting through CoCom, have maintained tight restrictions on the export of high-technology to communist countries. How-

ever, the remarkable changes in the political structure of the Soviet Union over the past year persuaded the members of CoCom to redraft their export control policy. At the center of the debate over reducing the types of controlled items was fiber optic technology, an item useful for both commercial and military applications. This debate highlighted the vastly different positions that the United States Government took against the European Allies and American industry in viewing the West's role in assisting the former Soviet Union to make the transition from communism to democracy.

#### B. Reasons for Change 1989-1990

After taking control of the Soviet Union in 1985, Mikhail Gorbachev oversaw the drastic political reforms of Eastern Europe and by 1991, the breakup of the Soviet Union. As early as 1988, Western policy makers were willing to reconsider their export control policies in order to assist the formerly communist countries of Eastern Europe make the transition to democracy and free markets.<sup>49</sup> By 1989, the European members of CoCom were anxious to liberalize exports, but expressed frustration at the perceived reluctance of the United States, which advocated a more gradual change for security reasons.

Responding to the concerns of U.S. allies, President Bush ordered the Joint Chiefs of Staff ("JCS") to conduct a study on dual use export controls and reevaluate the strategic threat posed by the U.S.S.R. On February 14, 1990, CoCom held a two day meeting in Paris to begin a review of rules in the first move towards relaxing parts of the 40 year old system of curbs on the sale of high tech goods to Warsaw Pact countries. In May of 1990, the White House released a statement on the conclusion of the JCS report that a complete overhaul of the list was warranted.<sup>50</sup> The allies were somewhat surprised, but, nevertheless, encouraged by the position of the United States.

#### C. Agreement to Liberalize Export Controls

Following up on its February meeting, CoCom held a High-Level Meeting in Paris on June 6-7, 1990. The United States put forth several proposals intended to preserve the system of CoCom while making it more flexible. The proposals were widely accepted and agreement was reached on drastically streamlining the current "Industrial List" of controlled dual use products.<sup>51</sup> At the conclusion of the HLM, agreement was reached on a liberalization program which would:

- (1) replace the current list of controlled items, the Industrial List, with a "Core List" of key technologies and goods to be drawn up from scratch, i.e., a blank slate;
- (2) delete 1/3 of the Industrial List entries;

(3) decontrol certain priority sectors, e.g., computers, machine tools and telecommunications;

(4) develop special procedures for countries representing a lesser strategic threat; and

(5) renew the commitment to the "common standard" level of effective protection.<sup>52</sup>

Technical experts were given until December 1990 to draft the new "Core List" of restricted exports. American industry voiced its approval of the position and leadership that the United States Government showed towards relaxing export controls and opening potentially huge commercial markets. The enthusiasm of the telecommunications industry, however, was cut short when the Department of Commerce blocked a plan by a consortium led by the American telecommunications company U.S. West to lay a fiber optic link across the entire length of the Soviet Union.

#### *D. Dispute Over Fiber Optics*

Despite intense industry lobbying efforts, the United States announced on February 14, 1991, that restrictions on exports of fiber optic equipment to the Soviet Union would continue until the domestic situation "settles into a more predictable and promising pattern."<sup>53</sup> Then Deputy National Security Adviser Robert M. Gates, speaking before the Electronics Industries Association, stated that "[w]e simply

must hold the line on approvals to ship [technology and goods] that could dramatically enhance Soviet strategic capabilities."<sup>54</sup>

At the end of February, the United States and her allies decided to postpone the second CoCom HLM, originally scheduled for December 1990 to approve the draft "Core List," because of continuing differences over trade in telecommunications equipment and related technology.<sup>55</sup> The United States, Canada and the United Kingdom failed to resolve their differences with a group of other countries, led by France and Germany, over the export of fiber optic telecommunications equipment to the Soviet Union.<sup>56</sup> These countries protested the United States' proposal to limit fiber optic sales to equipment capable of transmitting data at 45 megabits per second or less, because they claimed that this equipment was no longer produced in the West.<sup>57</sup>

The HLM was finally held on May 23, 1991. At a one-day meeting held in Paris, the United States and her allies reached agreement on a new "Core List," scheduled to take effect on September 1991.<sup>58</sup> The Core List brought about a 50 percent reduction in the existing controls, in addition to the 33 percent reduction agreed to by CoCom in June 1990, for a total reduction of 83 percent.<sup>59</sup>

United States industry again expressed its disappointment.<sup>60</sup> Although pleased with progress on avionics, semiconductor manufacturing equipment, and machine tools, industry spokespersons expressed disappointment at the lack of progress made on telecommunications and computers.<sup>61</sup>

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The Bush Administration responded that the new "Core List" now contained "only the most critical goods and technologies that are essential in maintaining the existing significant gaps between Western and Soviet based military systems."<sup>62</sup> The government also pointed out that the May 24th agreement would enable the Soviet Union to upgrade its telephone system to the standard of the United States in the early 1980's.<sup>63</sup> This would include phones that work, cellular equipment, and facsimile machines - a significant improvement over the current state of affairs.

#### E. *The Final Breakup of the Soviet Union*

On August 19, 1991, an attempted coup by communist hardliners failed to oust Gorbachev from government. This surprising turn of events appeared to justify the United States reluctance to approve high-technology exports of a military significance to the U.S.S.R. A delay in the relaxation of export controls was expected in the wake of the Soviet crisis.<sup>64</sup> The final Core List, however, was published as scheduled on September 1, 1991, and the necessary member country regulations effectively put the list into action.<sup>65</sup>

The failed coup precipitated the breakup of the Soviet Union and in September of 1991 the Baltic republics finally regained their independence. With the new Core List in place and the break up of the Soviet Union a reality, American businesses were anxious to enter these new commercial markets. American industry representatives were concerned that U.S. businesses were losing a competitive advantage to their overseas counterparts, especially Germany and France, whose governments were actively supporting investment in the Soviet Union.<sup>66</sup>

On September 25, 1991 the Congressional Subcommittee on International Economic Policy and Trade heard testimony on allowing the sale of fiber optic technology to the Soviets.<sup>67</sup> The United States Government continued to argue that exporting high-speed fiber optic equipment to the Soviet Union would enable the Soviet military to compromise U.S. intelligence gathering operations.<sup>68</sup> An important issue for the government was the fate of non-public networks - frequencies still occupied by the military and a key factor in mobile networks.<sup>69</sup>

The National Security Agency ("NSA") led the opposition within the United States Government against relaxing controls on high-tech telecommunications equipment. The agency, which gathers intelligence primarily through electronic interception, argued that the Soviet military could use fiber optic networks to avoid interception of traffic. The

NSA's position was significantly strengthened by the Persian Gulf War. Although the United States' military was able to deactivate most of Iraq's telecommunication system during that war, they were unable to knock out the country's fiber optic network, which helped President Saddam Hussein maintain links with his military commanders in the south. It is acknowledged that, in times of war, the only way to take out a fiber optic system is to drop a bomb and sever the cable.<sup>70</sup>

Still, the National Association of Manufacturers ("NAM") expressed its grave concern over the lack of progress in telecommunications negotiations. "Of particular concern to American industry is the apparent working assumption of the United States Government that there is no feasible distinction to be made between civil and military uses for telecommunications equipment," said a NAM paper sent to the Department of Commerce at the beginning of 1991.<sup>71</sup> "We firmly reject the contention that any modernization of the Soviet public telephone network [through the

use of fiber optics equipment] poses a threat to U.S. national security because of an assumed benefit to Soviet military communications."<sup>72</sup>

Pressured by Congress, American businesses and European allies, the Bush Administration began to rethink export control curbs on the sale of advanced telecommunications equipment, computers and space satellites to the Soviet Union. At the end of 1991, Gorbachev agreed to

step down from the leadership of the Soviet Union, and the Russian flag was raised over the Kremlin. With the Soviet Union dissolving into fragments of the old republics, some in the defense/intelligence community changed their position, arguing that it may be better for the Soviet Union's military high command to have better communication to prevent misuse of nuclear weapons by breakaway republics.<sup>73</sup>

#### F. *A Loophole Found and Exploited*

A significant event in the debate over exports of fiber optics occurred in November 1991. A German manufacturer, Carl Zeiss Jena, sold high-speed fiber optic cable to the Soviet Union using a loophole in Western trade restrictions.<sup>74</sup> The company, located in what used to be East Germany, sold more than 600 miles of fiber optic cable to Moscow, taking advantage of an exemption in the trade regulations for Eastern European manufacturers that had done business with the Soviet Union in the past. The United States sent a team to investigate Carl Zeiss Jena and the sale to the Soviet Union. If the cable was actually produced on the territory of

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*"The United States sent a team to investigate Carl Zeiss Jena and the sale to the Soviet Union."*

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former East Germany, then the CoCom restrictions would not apply. The United States team was to investigate whether a mere transfer had been made.<sup>75</sup>

At the same time, the United States began intensive consultations with her allies on plans to eventually ease long-standing restrictions on high tech exports to the republics of the former Soviet Union.<sup>76</sup> On February 7, 1992, at a CoCom working group meeting, three European countries, Germany, Netherlands, and Italy, proposed that the members drop virtually all restrictions on exporting civilian telecommunications gear. Eight other European nations supported the proposal.<sup>77</sup> The United States withheld its support, presumably awaiting a report from its investigation of the Carl Zeiss Jena sale.

Finally, on March 6, 1992, the United States reached a tentative agreement with Europe and Japan to loosen international controls on exports of advanced telecommunications equipment. The products covered by the agreement included high-quality fiber optic cables.<sup>78</sup> Despite prior concerns of the intelligence and defense communities, the United States decided to strengthen the economies of the former Soviet republics and to lay a foundation for American business activity there.

#### IV. Conclusion

The political changes of Eastern Europe and the Soviet Union were swift and dramatic. Remaining in place, however, was an export control system designed to withhold critical western technology from the communist countries in order to protect national security interests. European allies and American businesses were the first to advocate a relaxation in high-technology exports. While obviously anxious to take advantage of new commercial markets, they effectively argued that the technology was necessary if the formerly communist countries were to make a successful transition to democracy and free market economies.

Fiber optic telecommunications equipment became the focus of the debate over international cooperation in export controls. Because the nature of the technology made it useful for both civilian and military applications, the United States Government at first adamantly opposed the exportation of fiber optic technology. Beginning in the fall of 1991, however, a strong lobbying effort from American industry and pressure from European allies caused the United States to rethink its position. The final "straw" appeared to be the sale of a fiber optic cable from a German company to the Soviet Union. Realizing that American companies had the most to gain from allowing sales of fiber optic technology, the United States made a basic shift in policy in March of 1992. As this case demonstrates, any effective liberalization of export controls in the future hinges on the concept of differentiation, whereby export controls will be decided on a country-by-country basis, balancing the benefit of the technology against real concerns for national security.

#### Endnotes

<sup>1</sup>"Dual use" items are those which have civil uses but which can readily be utilized in military applications, or are deemed to have strategic significance. The term "items" is used to refer to all that is subject to export control, which includes equipment, materials, software and technology.

<sup>2</sup>"CoCom" stands for the Coordinating Committee for Multilateral Export Controls. It is the framework in which the United States cooperates with other nations in order to effectively enforce export controls for national security reasons.

<sup>3</sup>U.S. Const. art. I, § 8, cl. 3.

<sup>4</sup>The most important statutes affecting exports include the following: Trading with the Enemy Act of 1917, 50 U.S.C. app. §§ 1-44, implemented in Foreign Assets Control Regulations ("FACR"), 31 C.F.R. 500-30 (maintained by the Department of Treasury, Office of Foreign Assets Control, controlling certain exports to, and financial transactions with, named countries); Arms Export Control Act of 1976 ("AECA"), 22 U.S.C. §§ 2751-96, implemented in International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. 120-130 (maintained by the Department of State, Office of Defense Trade Control, regulating the export of defense articles and services "inherently military in character"); Export Administration Act of 1979 ("EAA"), 50 U.S.C. app. §§ 2401-2420, implemented in Export Administration Regulations ("EAR"), 15 C.F.R. 768-99 (maintained by the Department of Commerce, Bureau of Export Administration, providing the organizational structure for the export control system and controlling the export of "dual use" items).

<sup>5</sup>50 U.S.C. app. §§ 2401-20 (1988 & Supp. I 1989, Supp. II 1990, Supp. III 1991). The EAA of 1979 was amended in 1981, Pub. L. 97-145, 95 Stat. 1727 (Dec. 29, 1981), extensively amended in 1985 by the Export Administration Amendments Act of 1985, Pub. L. 99-64, 99 Stat. 120 (July 12, 1985), and by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (Aug. 23, 1988).

<sup>6</sup>*Id.*

<sup>7</sup>Exec. Order No. 12214, 3 C.F.R. 256 (1981), reprinted in 50 U.S.C. app. § 2403 note (1988).

<sup>8</sup>15 C.F.R. 768-99 (1991).

<sup>9</sup>50 U.S.C. app. § 2402 ("Congressional declaration of policy").

<sup>10</sup>50 U.S.C. app. § 2402(2)(A) (authorizing the President to impose national security export controls "to restrict the export of goods and technology which would make a significant contribution to the military potential of any other . . . countries which would prove detrimental to the national security of the United States").

<sup>11</sup>50 U.S.C. app. § 2402(2)(B) ("to further significantly the foreign policy of the United States or to fulfill its declared international obligations").

For example, items integral to the production of nuclear, chemical and biological weapons, missile technology, or aiding in terrorist activities have been deemed by the United States to be important to control either unilaterally or in co-operation with other countries for reasons of foreign policy.

<sup>12</sup>50 U.S.C. app. § 2404(i) (in recognition of the effectiveness of multilateral controls for national security, this section authorizes the President to enter into negotiations with the other governments to accomplish uniform enforcement measures).

<sup>13</sup>50 U.S.C. app. § 2404(a) (national security controls - authority).

<sup>14</sup>50 U.S.C. app. § 2404(a)(5)(A).

<sup>15</sup>50 U.S.C. app. § 2404(b).

<sup>16</sup>15 C.F.R. 799 ("Commodity Control List and Related Matters").

<sup>17</sup>15 C.F.R. § 799.1(a).

<sup>18</sup>22 C.F.R. § 120.3.

<sup>19</sup>22 U.S.C. §§ 2751-96 (1988).

<sup>20</sup>This office, formerly known as the Office of Munitions Control, maintains the regulations implementing the AECA known as ITAR, the International Traffic in Arms Regulations. 22 C.F.R. §§ 120-28.

<sup>21</sup>22 C.F.R. § 121.

<sup>22</sup>See e.g. Charles A. Duelfer, *Defense Export Controls*,

1 *Coping with U.S. Export Controls* 1992 311 (Practising Law Inst. 1992); Joel L. Johnson, *Commodity Jurisdiction: State or Commerce?*, 1 *Coping with U.S. Export Controls* 1992 319 (Practising Law Inst. 1992).

<sup>23</sup>Formerly called the "Export Control Commodity Number." See 15 C.F.R. § 799 (1991).

<sup>24</sup>See *infra* notes 35-36.

<sup>25</sup>15 C.F.R. § 770 (Supp. I).

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>50 U.S.C. app. §§ 2401(b)(1), 2415.

<sup>29</sup>15 C.F.R. § 785.2(a)(1).

<sup>30</sup>See *supra* note 2 (defining "CoCom").

<sup>31</sup>15 C.F.R. § 788 (Supps. No. 1 & 2) (stating that exports to banned end-users are subject to a denial order or temporary denial order).

<sup>32</sup>15 C.F.R. § 786.

<sup>33</sup>There are several types of general licenses. Most commodities that are not subject to validated licensing may be shipped under a General License G-DEST. 15 C.F.R. § 771.3. Exports of technology and software that will be publicly available may be shipped under a General License GTDA. 15 C.F.R. § 779.3. Exports not covered under a GTDA may be shipped either under a General License GTDR, which requires written assurances against prohibited re-exports, or under a General License GTDU, which includes standard commercially available software. See 15 C.F.R. § 779.

<sup>34</sup>No EAR general license may be used for the export of items under the licensing jurisdiction of agencies other than the Department of Commerce. 15 C.F.R. § 771.1.

<sup>35</sup>15 C.F.R. Part 772 (Supp. 1) (instructions for the preparation of an application for a validated license); see also 15 C.F.R. Part 776 (special commodity policies and provisions).

<sup>36</sup>Many applications for Individual Validated Licenses and Reexport Authorization will require review by one or more agencies - Department of Defense, State, or Energy - depending on the nature of the commodity, the destination and end-use.

<sup>37</sup>15 C.F.R. §§ 773.2, 773.3, & 773.7.

<sup>38</sup>Parts of this section were derived from two articles written by Mr. Cecil Hunt, Deputy Chief Counsel, Bureau of Export Control, Department of Commerce. Cecil Hunt, *CoCom and Other International Cooperation in Export Control*, 1 *Coping with U.S. Export Controls* 131 (Practising Law Inst. 1992); Cecil Hunt, *Multilateral Cooperation in Export Controls - the Role of CoCom*, 14 *U. Tol. L. Rev.* 1285 (1983).

<sup>39</sup>See Dan Haendel & Amy L. Rothstein, *The Shifting Focus of Dual Use Export Controls: An Overview of Recent Developments and a Forecast for the Future*, 25 *Int'l Law.* 267 (Spring 1991) (suggesting that international cooperation in the export control area will remain strong, but the rising importance of controlling items that can be used in nuclear, chemical and biological weapons production, will re-orient the focus of organizations such as CoCom away from East-West and towards North-South controls on proliferation of hazardous items).

<sup>40</sup>On March 10, 1992, U.S. officials said that Poland, Hungary, the Czech

and Slovak Federal Republic, Latvia, Lithuania, and Estonia would be removed soon from the internationally approved list of countries now prohibited from receiving high-technology goods from the West. Hungary could be removed as early as June 1, 1992, when CoCom holds its annual HLM. *U.S., Allies Preparing to Ease Curbs on Exports to Baltics, Other Countries*, 9 *Int'l Trade Rep.* (BNA) 434 (Mar. 11, 1992).

Earlier in the year, the Commerce Department announced that the geographic area of the former U.S.S.R. would remain a controlled destination and continue to fall within Country Group Y as defined in the EAR. In addition, U.S. exporters may continue to use the designations "Union of Soviet Socialist Republics," "Soviet Union," or "U.S.S.R." on export control documents until new political entities are identified in the EAR. *U.S. Export Regulations Will Continue to Apply to Area Comprising Former U.S.S.R.*, 9 *Int'l Trade Rep.* (BNA) 9 (Jan. 1, 1992).

<sup>41</sup>After agreeing to a 33% reduction of the Industrial List in June, the new "Core List" included a further 50% reduction, bringing the total reduction in existing controls down from 83% since 1990. The agreement and above numbers were released in a White House statement, by the White House Press Secretary Marlin Fitzwater. *U.S., CoCom Allies Agree on New "Core List" of Controlled Exports, Industry Disappointed*, 8 *Int'l Trade Rep.* (BNA) 800 (May 29, 1991). <sup>42</sup>See *U.S. Publishes "Core List" Easing Curbs on Exports to Soviet Union*, 8 *Int'l Trade Rep.* (BNA) 1314 (Sept. 11, 1991).

<sup>43</sup>See *U.S. Will Maintain Restrictions on Exports of Fiber-Optics Equipment to the Soviet Union*, 8 *Int'l Trade Rep.* (BNA) 266 (Feb. 20, 1991).

<sup>44</sup>BXA estimated that in 1988 \$1.1 billion of approved exports to the Soviet Union and in 1989 \$1.3 billion. *Export Controls*, GAO Rept. (90-185FS) (Appendix II 1990) (U.S. Export Control Policy Regarding the Soviet Union).

<sup>45</sup>See *Telecommunications Revolution Planned, East European Markets*; *Fin. Times Ltd.*, Sept. 21, 1990, available in LEXIS, Nexis Library, Int'l File.

<sup>46</sup>There are an estimated 125 telephone lines per 1,000 inhabitants of the former Comecon countries, as compared to 375 in the EEC and 500 in the former West Germany. See Anthony Robinson, *World Telecommunications: Poised for a Quantum Leap*, *Fin. Times*, Oct. 7, 1991, at XXVI.

<sup>47</sup>*Telecommunications Revolution Planned, East European Markets*; *Fin. Times Ltd.*, Sept. 21, 1990, available in LEXIS, Nexis Library, Int'l File.

<sup>48</sup>*Id.* (reporting that it took British Telecom over a decade to implement digitization in Britain, a country more modern and much smaller than Russia today).

<sup>49</sup>In 1988, the Export Administration Act was extensively amended by the Omnibus Trade Act of 1988 (also, the most recent revision to the EAA). The Act required the Department of Commerce to take a number of decontrol actions in accordance with the stated Congressional purposes. See Pub. L. 100-418, 102 Stat. 1107 (Aug. 23, 1988).

<sup>50</sup>Statement by White House Press Secretary Marlin Fitzwater (May 2, 1990).

<sup>51</sup>7 *Int'l Trade Rep.* (BNA) 635 (June 13, 1990).

<sup>52</sup>7 *Int'l Trade Rep.* (BNA) 835 (June 13, 1990).

<sup>53</sup>*U.S. Will Maintain Restrictions On Exports of Fiber-Optics Equipment to Soviet Union*, 8 *Int'l Trade Rep.* (BNA) 266 (Feb. 20, 1991).

<sup>54</sup>*Id.*

<sup>55</sup>*Dispute Over Telecommunications Forces Postponement of High-Level CoCom Meeting*, 8 *Int'l Trade Rep.* (BNA) 298 (Feb. 27, 1991).

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>*Commerce Publishes Draft "Core List" of Controlled Items Based on*

CoCom Pact, 8 Int'l Trade Rep. (BNA) 1030 (July 10, 1991).

<sup>52</sup>Charles Mason, *Defense Agencies Win CoCom Battle, Telephony*, June 3, 1991, available in LEXIS, Nexis Library, Comm. File, see also *supra* note 41.

<sup>53</sup>U.S., *CoCom Allies Agree on New "Core List" of Controlled Exports, Industry Disappointed*, 8 Int'l Trade Rep. (BNA) 800 (May 29, 1991).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>U.S. *Seen Likely to Delay Relaxation of Export Controls in Wake of Soviet Crisis*, 8 Int'l Trade Rep. (BNA) 1236 (Aug. 21, 1991).

<sup>58</sup>U.S. *Publishes "Core List" Easing Curbs on Exports to Soviet Union*, 8 Int'l Trade Rep. (BNA) 1314 (Sept. 11, 1991); see also *Recent Soviet Turmoil Does Not Prevent Publishing of Export List*, *Fiber Optic News*, Sept. 9, 1991, available in LEXIS, Nexis Library, Comm. File; Keith Bradsher, *U.S. is Easing Restrictions on Exports of Technology*, N.Y. Times, Aug. 30, 1991, Sec. D (Fin.), at 2.

<sup>59</sup>See *infra* note 65. Testifying before a Congressional panel, a vice-president of AT&T stated that "our foreign competitors are establishing financing programs to ensure that the new Soviet telephone network will be built with French, German, and Japanese equipment."

<sup>60</sup>House Panel Hears Testimony on Allowing Sale of Fiber Optics Technology to Soviets, 8 Int'l Trade Rep. (BNA) 1395 (Sept. 25, 1991); see also David Silverberg, *Export Act Renewal Raises Dispute*, *Defense News*, Sept. 30, 1991, at 40.

<sup>61</sup>8 Int'l Trade Rep. (BNA) at 1395.

<sup>62</sup>*Id.*

<sup>63</sup>See Charles Mason, *Defense Agencies Win CoCom Battle, Telephony*,

June 3, 1991, available in, LEXIS, Nexis Library, Comm. File.

<sup>64</sup>*Dispute Over Telecommunications Forces Postponement of High-Level CoCom Meeting*, 8 Int'l Trade Rep. (BNA) 298 (Feb. 27, 1991).  
<sup>65</sup>*Id.*

<sup>66</sup>Stuart Auerbach, *High-Tech Export Curbs to Be Re-examined: Administration Rethinking CoCom Restrictions After Coup Attempt*, *Wash. Post*, Oct. 11, 1991, at F1.

<sup>67</sup>See John Markoff, *Soviet Fiber-Optic Deal Challenges U.S. Policy*, N.Y. Times, Nov. 21, 1991, Sec. D (Fin.), at 2.

<sup>68</sup>See John Markoff, *Three Western Allies Seek End To a High-Tech Export Ban*, N.Y. Times, Feb. 7, 1992, Sec. D (Fin.), at 1.

<sup>69</sup>U.S., *CoCom Allies to Hold Meeting on Changes in Former Soviet Union*, 9 Int'l Trade Rep. (BNA) 144 (Jan. 22, 1992).

<sup>70</sup>U.S. *Opens Intensive Talks with Allies on Easing High-Tech Curbs on Ex-U.S.S.R.*, 9 Int'l Trade Rep. (BNA) 231 (Feb. 5, 1992); Markoff, N.Y. Times, Feb. 7, 1992, Sec. D (Fin.), at 1.

<sup>71</sup>U.S. *Allies Agree to Liberalize Telecommunications Exports to Ex-U.S.S.R.*, 9 Int'l Trade Rep. (BNA) 430 (Mar. 11, 1992); Stuart Auerbach, *U.S. Shifts, Agrees to Ease Fiber-Optics Export Curbs*, *Wash. Post*, Mar. 6, 1992, at D10; Keith Bradsher, *Pact Seeks Looser Curbs on Exports*, N.Y. Times, Mar. 6, 1992, Sec. D (Fin.), at 1.

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