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Model Technology Diversion Safeguard Law

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MODEL TECHNOLOGY DIVERSION SAFEGUARD LAW

by

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TABLE OF CONTENTS

I. INTRODUCTION

The fall of the Berlin Wall marked the end of the Cold War. The disintegration of the USSR and of the Warsaw Treaty Organization (WTO), the reason for the establishment of the Committee for Multilateral Export Controls (COCOM), raised the problem of defining a new export control policy corresponding to the changing international environment.

The cornerstone of this new policy became the adoption of a new "core list" for dual-use goods, allowing former Soviet block countries easier access to advanced technologies. The liberalization of export controls, however, is contingent upon the adoption of appropriate safeguard mechanisms by the former WTO members which, if successfully implemented, may ultimately lead to their deproscription by COCOM.

1. Objective of the Study

In December, 1989, Poland began negotiations with the U.S. government on the reduction of restrictions on exports. Hungary and Czechoslovakia followed the Polish example and the three countries were granted favorable consideration treatment in 1991. Bulgaria approached the U.S. government

in October 1991, declaring its willingness to abide by Western rules governing the transfer of high-technology. On November 1, 1991, the United States offered to begin negotiations leading to the eventual lifting of restrictions on U.S. high-technology exports to the three Baltic States -- Estonia, Latvia and Lithuania. In addition, an agreement has been reached among COCOM members on a set of criteria that individual countries must meet in order to qualify for deproscription.

The objective of this study is to analyze these criteria and to develop a model technology diversion safeguard law. Although the Model Law is designed to serve the potential needs of Bulgaria an attempt has been made to draft it in such a way which will make it possible to be used by other interested countries.

2. Scope of the Study

The euphoria that accompanied the dramatic democratic changes in Eastern Europe and the former Soviet Union a year ago, was followed by a sobering realization of the difficulties of transition and the cost of reform. The current situation -- one of increasing economic disruption, with growing shortages and raise of unemployment -- has resulted from the deterioration in the terms of trade between these countries and their inability to meet international competition. It has become clear, that the

reintegration of these countries in the world's economy will depend to a large extent on their ability to attract foreign investment, technologies and know-how. This, in turn, depends on the ability of the newly emerging democracies to join the Western proliferation control regimes.

The study focusses on export control aspects of the safeguard regime for trade in dual-use industrial goods. Moreover, emphasis is put on additional measures and communication issues, critical for the successful implementation of a safeguard regime.

3. Structure and Method of the Study

The paper is divided into seven chapters, this introductory note being the first one.

The Second chapter deals with the U.S. and COCOM system of export controls. It analyzes the stages in the development of these systems and focuses on recent changes reflecting the new approach of the West toward the former WTO members.

Chapter Three describes the import-export regime of Bulgaria. The Chapter also includes a discussion on the compatibility of the Bulgarian regime with international trade practice, and the measures that need to be undertaken in order to bring it in compliance with COCOM standards.

Chapter Four deals with an overview of existing technology diversion safeguard laws in Europe. A

distinction is made between the diversion control regimes of the neutral countries and the newly adopted export-control legislations by Poland, Hungary and Czechoslovakia.

Chapter Five deals with the elements of the proposed Model Law. References are made to relevant texts of the laws adopted by the three Central European countries, the United States Export Administration Act and Regulations. Special attention is paid to the critical issue of rules of origin. The Chapter also includes a discussion of the joint actions that need to be undertaken for the successful implementation of a safeguard legislation.

Chapter Six deals with the Law Communication Model. It is designed according to a study of the basic law characteristics of the proposed Model Law, and a comparative analysis of the existing U.S. and Bulgarian law communication systems.

Chapter Seven is dedicated to an analysis of the trends in development of proliferation controls and export-control regimes.

Each of the Chapters begins with a general overview to put the discussed specific problems in the perspective of the whole study. A serious effort is made to separate clearly the discussed issues, while providing for adequate references which will guide the reader through relevant parts of the text.

II. CHANGES IN COCOM'S POLICY SINCE 1989

1. The System of Export Controls

Cold war realities prompted the formation of the Committee for Multilateral Export Controls /COCOM/ to wage economic war on the Soviet bloc and to protect Western strategic technologies from diversion to proscribed destinations.[1] Formed under a U.S. initiative, in late 1949, COCOM has coordinated the strategic military exports of its members towards the East.[2]

COCOM is an informal non-treaty organization based in the U.S. embassy in Paris. It maintains three control lists:

a) The Atomic Energy List: indexing fissionable materials, nuclear reactors and their components;

b) The Munitions List: entailing war technologies and materials; and

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[1] For a general discussion of COCOM see G. Bertsch, East-West Strategic Trade, COCOM and the Atlantic Alliance, 1983; Panel on the Impact of National Security Controls on International Technology Transfer, Balancing the National Interest: U.S. National Security Export Controls and Global Economic Competition, 1987.

[2] Nowadays COCOM consists of all NATO members (without Iceland) plus Japan and Australia.

c) The Industrial Commercial List: categorizing "dual-use" products and technologies i.e. goods that have civilian and military application.[3]

The purpose of the system is to regulate the following general types of transactions:

* exports of goods and technologies from member countries;
* reexports of such goods and technologies from one foreign country to another;
* export and reexport from a foreign country of products containing parts and components originally from a COCOM member state or based on such technical data.

COCOM constantly reviews embargo lists to insure that only the latest technologies are controlled.[4] Unanimity is required to take items off the embargo lists and to add new items to them.[5]

Controls below a certain level, the Administrative Exception Note (AEN) level, do not need to be reviewed by COCOM. Instead, these controls can be reviewed by a member country through "national discretion". Such reviews are

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[3] See e.g. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No 100-418, 102 Stat. 1107.

[4] G. Bertsch, supra note 1, at 35.

[5] Panel Report, supra note 1, at 141.

reported monthly to COCOM.[6] Participating states implement COCOM lists through national legislation.[7] Although most COCOM members adopt duplicate COCOM controls, the fact that some COCOM members have less vigorously enforced controls has caused the U.S. to compensate by enacting more stringent extra-territorial laws.[8]

2. The U.S. System of Export Controls

Today's U.S. export control of industrial dual-use items represents an evolution from extraordinary war-time controls enacted in 1940.[9] Pursuant to the powers granted to it by the U.S. Constitution[10] the U.S. Government has the right to restrict exports of all goods, both tangible and intangible, and technical data subject to its jurisdiction. This broad definition covers also the financing, transporting, or servicing of such goods.[11]

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[6] L. Chen, Corporate Counsel's Guide to Export Controls, in Laws of International Trade (B.L.I. ed., 1991), at 301.01.

[7] G. Bertsch, supra note 1, at 136.

[8] Panel Report, supra note 1, pp. 137-139.

[9] Pub. L. No. 703, 54 Stat. 714 (1940); for a general history of U.S. export controls see Berman & Garson, United States Export Controls - Past, Present, and Future, 67 Col. L. Rev. 791, 835 (1967).

[10] Art. 1, Section 8, Clause 3.

[11] See Kutten & Murphy, An Overview of United States Export Controls, at 3 (1989).

Controls on exports of goods from the U.S. have been authorized since July 2, 1940.[12] This authorizing legislation has undergone three substantial revisions with the enactment of the Export Control Act,[13] the Export Administration Act of 1969,[14] and the Export Administration Act of 1979 (EAA).[15]

The EAA authorizes the control of goods and technologies for national security, foreign policy, and short supply reasons.[16] The Department of Commerce (DOC), through the Office of Export Administration (OEA) administers the over six hundred pages of the Export Administration Regulations (EAR) that implement the Export Administration Act.[17]

Though controls have been primarily directed at the Soviet Bloc, the U.S. imposes controls on goods and technologies destined for other nations to prevent possible

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[12] Act of July 2, 1940, Ch. 508, Section 6, 54 Stat. 712.

[13] Pub. L. No. 85-466, Ch. 11, 63 Stat. 7, as amended.

[14] Pub. L. No. 91-184, 83 Stat. 841, as amended.

[15] 50 U.S.C. app. 2401, P.L. 96-72, as amended.

[16] 50 U.S.C. 2402(2)(A)-(B) (1987).

[17] 15 C.F.R. 700-799 (1991). However, because of its complexity, this authority is spread over several agencies, including the following: Department of State, Department of Transportation, Department of Justice, Department of Interior, Department of Agriculture, Department of Energy and the U.S. Nuclear Regulatory Commission. For a brief explanation see Kutten & Murphy, supra note 11, at 5.

diversion or uses detrimental to U.S. national security and foreign policy. For this reason the world has been divided into seven country groups designated by the symbols "Q" (Romania), "S" (Libya), "T" (Latin America, except Cuba, and Greenland), "V" (all free world countries not otherwise specified and the People's Republic of China, Yugoslavia, and Afghanistan), "W" (Poland, Hungary and Czechoslovakia), "Y" (the geographic area formerly known as the Union of Soviet Republics,[18] Estonia, Latvia, Lithuania, Bulgaria, Albania, Laos and Mongolia), and "Z" (Cuba, Vietnam, North Korea and Kampuchea).[19] This has permitted the U.S. to keep the system flexible and to modify it following changes in foreign governments or even changes in a government's public posture.

3. Changes Since 1989

Following the dramatic events in Eastern and Central Europe, President Bush ordered, in January 1990, the Joint Chiefs of Staff to review the strategic threat posed by the members of the Warsaw Treaty Organization and the effect of multilateral strategic controls.[20] The conclusion of this

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[18] 57 Fed. Reg. 1, 8 (1992) (to be codified at 15 C.F.R. part 770).

[19] 15 C.F.R. 1770, Supp. No. 1 (1991).

[20] See G. Bertsch and St. Eliott-Gower, U.S. Cocom Policy: From Paranoia to Perestroika, in After the Revolutions. East-West Trade and Technology Transfer in the '90s. Edited by G. Bertsch, H. Vogel and J. Zielonka,

review, approved by the President on April 30, was that the countries of Eastern and Central Europe present a lesser strategic threat, and in order to ensure that export controls will not impede the reform process and the increased East-West cooperation, a complete overhaul of the COCOM system is needed.[21]

The new system is based on the idea of building "higher fences around fewer goods" and is detailed in a 5 point proposal made by the U.S. at a high-level meeting of COCOM in Paris, June 6-7, 1990.

The main components of this proposal are the following:

1. adoption of a "core list" for all proscribed destinations;

2. immediate decontrol for all proscribed destinations of about 40 dual use items;

3. decontrol to approximately the China Green Line;[22]

4. special decontrol efforts in three priority sectors: telecommunications, computers and machine tools;

Westview Press 1991, at 25.

[21] R. Price, Director, Office of COCOM Affairs, U.S. Department of State, Comments before the Conference on the future of East-West trade in information Technology, May 15-16, 1990, Washington, D.C., mimeo.

[22] The "green line" policy toward the People's Republic of China allows approval without referral to the Department of Defense or COCOM when the product is included under an advisory note for the PRC.

5. renewed commitment by member states to enhance enforcement of the controls.[23]

In addition the proposal speaks for the first time about "favorable treatment" of Eastern European countries deemed by COCOM to be in "transition to removal from the list of proscribed destinations".[24] In practical terms this means a policy of "differentiation" and preferential treatment of certain exports for countries that adopt COCOM approved safeguards against diversion of controlled goods or technologies to proscribed destinations or unauthorized end-users.[25]

The U.S. proposal has been met positively by the 17 COCOM member countries and they agreed to coordinate their new lists of controlled goods,[26] and also to help the Central European countries to establish their own diversion safeguard regimes.[27]

In fact, this idea was materialized a few months later when COCOM officially ratified favorable consideration

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[23] See supra note 20.

[24] Id.

[25] G. Harrison, Export Control Reform: An Analysis and Summary of H.R. 4653, CRS Report for Congress, May 4, 1990, at 3.

[26] COCOM "Core List" of Controlled Exports Seen Set for Approval by End of Next Month, 8 I.T.R. 106 (1991).

[27] U.S., Central Europe Cooperate on Safeguards, 4 E.C.N. No. 8, 1990, at 3.

treatments for Hungary, in December 1990, and for Czechoslovakia and Poland, in February 1991.[28]

Furthermore, for sectors critical to the development of Eastern Europe, such as agriculture, banking, transportation, education, environmental protection and energy, the Secretary of Commerce will identify where the Green Line is too low, and the U.S. will propose streamlining to higher technical level.

In order to be eligible for favorable consideration above the PRC Green Line, an East European country would have to meet two sets of criteria:

a) the country's policies may not be adverse to the interests of the United States or another COCOM country; it may not pose a significant military threat to the same countries or pose a significant threat of diversion;

b) the country must implement an adequate safeguard system to ensure against diversion, including end-use assurances and on-site verification.[29]

When in addition to that, a country undertakes steps to reduce its offensive capabilities and phase out its participation in the Warsaw Pact, including withdrawal of Soviet troops, the President should seek agreement in the

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[28] COCOM recognizes Central European Progress on Safeguards, 5 E.C.N. No. 9, 1991, at 4.

[29] H.R. 4653, 101th Cong., 2d Sess. Such favorable consideration applies only to exports of goods and technology for civil end uses.

Coordinating Committee to remove the country from the list of controlled countries and propose licensing treatment by the Committee as a free world cooperating country destination.[30]

These provisions are included in a Conference Report approved by the House and the Senate on October 26, 1990 to accompany legislation H.R. 4653 reauthorizing the EAA. The bill represents an effort of the Foreign Affairs Committee of the U.S. House of Representatives to mandate the proposals made by the Administration.[31]

The Committees rationale to advocate liberalization of exports to former Soviet Block members in Europe rests on the grounds that:

1. there has been an extraordinary movement towards democracy and free markets in the countries of Eastern Europe;

2. it is in the national security and economic interest of the United States to solidify the changes that have taken place and to promote additional progress;

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[30] H.R. 4653, 101th Congr., 2d Sess. According to U.S. officials, Hungary could be removed from the list of proscribed destinations, as early as June 1, when COCOM is scheduled to hold its annual high-level meeting (U.S., Allies Preparing to Ease Curbs on Exports to Baltics, Other Countries, 9 I.T.R. 434 (1992).

[31] See G. Bertsch and St. Elliot-Gower, U.S. COCOM Policy: From Paranoia to Perestroika, op. cit. supra note 20, at 27.

3. advanced products and technology that are committed to civilian purposes and end-use will facilitate the economic development and reform efforts of the countries in the region;

4. those countries in Eastern Europe that are committed to and capable of protecting against improper diversion should receive the technology that will help foster democracy and free market economies.[32]

This new U.S. approach reflects the assumption that while export controls, sharply reduced in numbers and fully multilateral, are necessary and appropriate for responding to any remaining national security threat to the United States posed by the former Soviet Union, the Eastern and Central European countries, as a bloc, might pose a national security threat to the West only because of the possibility that goods and technologies sold to them might be reexported to third non-cooperating countries.[33]

Although the bill was vetoed by President Bush, it was done on grounds that it limits the executive powers of the President.[34] As far as proposals for changes in U.S.

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[32] G. Harrison, op. cit. supra note 25, at 3.

[33] Findings and Recommendations from Executive Summary Report, Finding Common Ground: U.S. Export Controls In A Changed Global Environment, 8 I.T.R., 218 (1991).

[34] President Vetoes Bill On Export Controls But Acts To Endorse Its "Principal Goals", 7 I.T.R., 1770 (1990).

export control policy are concerned, there are no significant differences between the two approaches.[35]

Recently the appropriateness of such a new policy was confirmed by the conclusions of the research undertaken under the auspices of the National Academy of Sciences.[36] "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 suggest that the West can now safely move from a policy of general denial 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 Union itself".[37]

Discussing the future of the EAA and H.R. 4653 in the light of the controversy between the Administration and the Congress falls beyond the scope of this study but one may

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[35] G. Harrison, op. cit. supra note 25, at 7.

[36] National Academy of Sciences, National Academy of Engineering, Institute of Medicine, Finding Common Ground. U.S. Export Controls in a Changed Environment, 1991.

[37] Id. at 218.

note, however, that such developments reflect a trend observed since the late 1960's: i.e. the increasing participation of Congress in foreign policy decisionmaking and its continuing attempt to narrow the President's discretionary role in this field.[38]

This brief overview of recent changes in Cocom and U.S. export control policy and legislation leads to the conclusion that they are closely following and reflecting the progress of events in the former WTO members and their future development will depend upon the trend of political changes in these countries and the functioning of the newly adopted safeguard regimes by them.

In the light of the political evolution in Bulgaria it seems appropriate to make an assessment of its import-export legislation and its chances to meet the preconditions for a preferential treatment by COCOM.

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[38] G. Stenger, The Development Of American Export Control Legislation After World War II, 6 Wis.Intl.L.J. (1987) at 28.

III. BULGARIA'S IMPORT-EXPORT AND CUSTOMS LAW REFORM

Since 1991 Bulgaria has taken considerable steps towards reform of its import-export and customs laws. These changes are part of a comprehensive reform package that includes laws on privatization, foreign investment and bankruptcy. The purpose of this new legislation is to simplify import-export procedures, make customs control more effective, and introduce customs documents consistent with international trade standards.

A number of recent decrees and regulations address the subject:

* Decree 119[39] and Ordinance PD-16-02[40] define the import-export regime;

* Decrees 59[41] and 35[42] define the new customs regime in Bulgaria;

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[39] Decree 119 on the Import-Export Regime for 1991, State Gazette No. 52, 1991, at 4, amended No. 71, 1991, suppl. No. 79, 1991, No. 3, 9 and 11, 1992.

[40] State Gazette No. 15, 1992, at 10.

[41] Decree 59 on Strengthening the Customs Control and Perfecting the Customs System in the Republic of Bulgaria, State Gazette No. 30, 1991, at 1.

[42] Decree 35 on Adopting a Customs Tariff on Levying Duties on Goods Imported by Legal Persons and Private Merchants, State Gazette No. 20, 1992, at. 1.

* Decrees 115[43] and 18[44] introduce a licensing system for trade in military products.

1. Import-Export Regime

Decree 119 defines the import-export regime in Bulgaria.[45] The general rule is that goods are imported to and exported from Bulgaria on the basis of a Customs Declaration, although a Certificate is needed as well in the case of:

* imports and exports pursuant to government contracts;
* export of goods to which quotas apply;
* export of goods subject to short supply;
* goods subject to controls established by the Council of Ministers.[46]

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[43] Decree 115 on the Creation of a Governmental Commission to Regulate and Control the Trade and Production Regime for Military and Special Products, State Gazette No. 60, 1991, at 2.

[44] Decree 18 on the Adoption of Regulations on the Organization and Functioning of the Governmental Commission for Control over the Trade Regime in Military and Special Products, and of Instructions for Control over the Trade Regime in Military and Special Products, State Gazette No. 11, 1992, at 3.

[45] Initially enacted for one year, Decree 59 was extended by Decree 247 until December 31, 1992. See Decree 247 on Supplementing Decree 119, State Gazette No. 3, 1992, at 2.

[46] Arts. 1 and 2, Decree 119. The required Certificate is issued by the Ministry of Industry and Trade with the approval of the Ministry of Health (for drugs); Ministry of Agriculture and Food Industry (for alcohol, tobacco and rose

Lists of such goods are published in the State Gazette or administrative acts. Currently 15 commodities may not be exported unless certain conditions are met.[47]

A 15% surtax on all imports was repealed on March 10, 1992.[48]

2. Customs Regime

Customs policy for Bulgaria is defined by the Ministers of Finance and of Industry and Trade. Decree 59 establishes a Head Customs Office within the Ministry of Finance and 30 district customs offices. This organizational structure, designed to meet international standards, is intended to bring customs check points closer to centers of trade and -- along with the increased number of customs officers -- should make customs controls more effective and eliminate delays at the borders. However, a continuing problem is

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attar); Ministry of Culture (for exports of archeological, historical or cultural value); Ministry of Environment (for protected species); Committee of Atomic Energy (for radioactive elements); Ministry of Finance (for precious metals and stones); Ministry of Trade and Industry (for ferrous and non-ferrous metals); and the Governmental Commission for regulation and control of trade and production in military and special products (for defense articles, materials and technologies).

[47] See Decree 119, ¶3. The items currently prohibited for export are crude oil; raw cattle hides and pigskins; pork pancreas; wool, flax and hemp; fodder and bread grain; oil-yielding black sunflower; vegetable oils; scrap metal; firewood; wine grapes; kerosene and other petrols; gas oil for engine and industrial applications; and timber.

[48] Decree 35, ¶3, supra note 42.

that the customs administration is not yet fully computerized, which slows down processing time and impedes the application of consistent practices across the country.

Basic customs practices conform to international standards. Bulgaria has adopted the Harmonized Commodity Description and Coding System, and a tariff with 4 columns. The first column applies to less developed nations to which Bulgaria grants duty free entry. The second column applies to goods from developing countries with certain tariff preferences. The third column applies to MFN countries (including the United States), and the fourth column to all other countries.

Import duties are stated either as a percentage of the value of the import (ad valorem), as a specific amount per unit, or by combining these methods. Those familiar with U.S. methods for assessing duties will find the provisions of Decree 35 familiar. Customs duties must be paid within 30 days after the goods have crossed the border.

The classification of merchandise entering and leaving Bulgaria is the cornerstone of the customs procedure; once a product is "classified" the applicable duty can be determined from the tariff. Goods are classified according to the six General Rules for Interpretation contained in the Harmonized Tariff. There are no special rules applicable to Bulgaria. Decree 59 does not provide rules for settling classification disputes or for binding rulings by Customs.

However, importers or exporters dissatisfied with a classification decision may seek judicial review according to the general rules provided for in the Customs Law. They may also seek foreign government intervention which may lead to negotiations, protest to the Harmonized System Committee, or appeal in Brussels to the Customs Cooperation Council.

The preferred method for valuation is the use of the "transaction value", i.e. the price actually paid or payable by the Bulgarian buyer, stated c.i.f. the Bulgarian border, including brokers commissions, cost of containers when treated by customs as separate goods, and packing costs.[49] If the actual transaction value can not be determined then one looks at the transaction value of "identical" or "similar" merchandise.[50]

If transaction values can not be determined, the importer may select between deductive and computed value appraisements.[51] If no other method is available, Customs must determine the value according to "general principles", based on the data available in Bulgaria.

Decree 59 and its accompanying Ordinance detail the procedures for declaring and clearing exports and imports,

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[49] Art. 1, Decree 35.

[50] Arts. 4 and 5, Decree 35. The Remarks to Decree 35 define "identical" and "similar".

[51] Arts. 6 and 7, Decree 35.

goods destined for reexport, temporary import or export, the collection of import duties and customs clearance fees.[52]

Goods may be declared personally or through a representative, although the customs officer has the authority to require the appointment of a new representative if the one declaring the imports does not have sufficient knowledge of customs procedures. When declaring goods the importer or exporter must present:

* customs declaration in quadruplicate;
* invoice or proforma invoice, and goods specification;
* bill of lading if the goods are transported as unaccompanied cargo;
* insurance policy;
* certificate of origin;
* receipt for customs clearance fee;
* certificate on allocated share of a quota if the import-export is subject to such a regime;
* export or import license for goods or services subject to a special regime regulated by law or other statutory act.[53]

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[52] Ordinance on Customs Control over Goods Carried Across the Border of the Republic of Bulgaria (OCC), State Gazette No. 30, 1991, at 2. The OCC applies only to "foreign economic transactions of local or foreign legal or natural persons carrying out economic activity".

[53] Art. 6, OCC. For example goods of plant or animal origin, must also have a veterinary or phytosanitary certificate.

A Declaration may cover only goods classified under a single tariff number, but it may cover multiple shipments of such goods.[54]

If the person filing the customs declaration can not present all the necessary documents, Customs may allow the goods to be loaded or unloaded and ask the declarant to fill in a simplified customs declaration within three days. Under this procedure imported goods stay under customs control until all declaration formalities are completed, while goods for export may be transported as far as customs at the border. There the simplified customs declaration is ratified by the customs and sent back to the internal customs office where it was initially issued.[55]

Goods for export are presented for customs control at the appropriate internal customs office. Inspection may be done in the factory of the producer, in a warehouse or in the customs office itself.[56]

If the shipment consists of goods produced by different factories within the territory of different customs offices, the customs control is carried out sequentially by all the relevant customs offices. The cargo is sealed and the goods are transported under customs control to the next producer or warehouse. In such a case the customs declaration is

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[54] Art. 5, OCC.

[55] Art. 6(2), OCC.

[56] Arts. 10-15, OCC.

prepared on the basis of all documents presented by the carrier at the last customs. The customs officer checks all the customs declarations, accompanying documents and seals, marks the date on the declaration, and places the stamp "Export Allowed".[57] When quotas apply the special provisions of Decree 119[58] should be followed.

Imported goods are presented to customs by the carrier at the border. The carrier and the border customs office determine the internal customs office of the receiver where the clearance will be done and seal the cargo.[59] The customs inspection and the unsealing of the cargo can be done only by the customs officers after a customs declaration accompanied by the necessary documents is filed by the receiver of the goods. If all the formalities are followed the customs officer clears the goods and places the stamp "Import Allowed".[60] As an exception, the internal customs office may allow the importer to unload the goods, place them in a warehouse under customs control and fill in the customs declaration within three days.[61] The importers may also request simplified customs procedures in the case of express or special deliveries which require speedier

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[57] Arts. 15 and 16, OCC.

[58] See supra note 39.

[59] Arts. 17-19, OCC.

[60] Arts. 20-22, OCC.

[61] Arts. 23, OCC.

processing.[62] A charge of 0,5% of the customs dutiable value of imports and exports is collected for customs clearance.

Special rules apply in the case of reexport and of temporary import or export of goods, samples and specimens. As a general rule the goods are registered and kept under customs control and must be accompanied by the necessary international customs guarantee documents according to applicable international agreements or to the rules in the Ordinance.[63]

When goods are imported or exported for processing or repair, the provisions for temporary import-export apply. As a general rule duty is assessed on the basis of the value added abroad. Duties are not imposed on goods imported for processing or repair in Bulgaria unless they are sold in the country.[64] Goods imported for sale on consignment are under customs control until their sale.

In conformity with the Tokyo Round of the GATT, the average rate of duty is 8 percent. The rates range from 0 - 10% for raw and prime materials, 10 - 30% for investment goods, and 10 - 35% for consumer goods. Certain goods such as agricultural equipment and other commodities of special need for the Bulgarian economy are duty-free. On the other

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[62] Art. 19(2), OCC.

[63] See Chapter Four, OCC.

[64] Art. 25(1), OCC.

hand, the rate of duty for the so-called "excise goods", such as tobacco, alcohol, perfumery, and leatherwear, is considerably higher.

A new and comprehensive Law on Customs and Excise is currently drafted in Bulgaria and will be enacted next year. It is expected to provide for a uniform regime designed to serve the needs of a market oriented economy.

3. Licensing Regime for Trade in Military Goods and Technologies

In addition to streamlining its import-export and customs regime, Bulgaria has recently revised its licensing system for trade in military goods and technologies. The new system is intended to make public the procedures to be followed when trading in such products, to meet Western standards and to encourage the conversion of military industry.

The concerns that have provoked this new approach of the Bulgarian government are easy to understand. For years Bulgaria has been accused of secret arms trade in support of terrorist regimes and new evidence has been recently discovered. Most of this activity was previously carried by the former secret services, without public knowledge or control. The new government, however, is committed to a radical change in its foreign and security policies and

looks for closer cooperation with NATO. Thus strict new controls on military trade are required.

From an economic point of view, the government is seeking foreign investment to help convert the military industry to civilian production. These are areas of the economy in which the country has some competitive advantage. But while Western experts consider Bulgaria's military industry of world class, its conversion to civilian manufacture is likely to be difficult.

Under the new rules all trade and production of military goods and technologies is controlled by a Governmental Commission appointed by the Council of Ministers.[65] The Commission is an interagency body, headed by the Minister of Defense, whose members include representatives of the Ministries of Industry and Trade, Finance, Foreign Affairs, Interior and Transportation; the President's Security Adviser and the Secretary of the Council on Normative Acts.[66]

The Secretariat, experts and technical assistants of the Commission are provided by the Ministry of Defense. The Secretariat coordinates the work of the Commission and provides the information required by its members.

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[65] Decree 115, supra note 43.

[66] Decree 246 on the Amendment and Supplementation of Decree 115, State Gazette No. 3, 1992, at 2.

The purpose of the Commission is to:

* control trade in military and special products;[67]

* establish a system that meets international standards;

* further international cooperation;

* register all transactions in military and special products.[68]

All state and private enterprises are subject to the Commission, and trade in military and special products requires a General License issued by it.[69] In order to obtain such a license a company must be registered in Bulgaria and have Bulgarian legal personality. Under the Law on Foreign Investment,[70] foreign companies may produce or trade in weapons, munitions and military equipment subject to special permission granted by the Commission. As

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[67] According to the Regulation, "military products" includes armament, military equipment, missiles, ammunitions and spare parts, while "special products" means military technologies and materials, scientific know-how, and services oriented toward production, use and repair of military equipment, plus all commodities under control of the Ministry of Interior.

[68] Decree 18, on the Adoption of Rules on the Organization and Functioning of the Governmental Commission on Control over the Trade Regime in Military and Special Products, and of Regulation on Control in Trade in Military and Special Products, State Gazette No. 11, 1992, at.3.

[69] Decree 115, arts. 6 and 7.

[70] Law on Business Activities of Foreign Persons and Protection of Foreign Investment, State Gazette No 8, 1992, at 1.

permissions will be granted on a case-by-case basis, it is not yet clear how this will work out in practice.

The General License is issued for one year and can be revoked at any time for cause. It does not actually confer the right to buy or sell military products; its purpose is to ensure that the government is aware of who is engaged in manufacturing and trade in defense articles and technology. Until recently only the two state companies -- "Kintex" and the Central Engineering Administration (CEA) -- had such licenses. The CEA, however, has been closed down because it was trading only with Warsaw Pact members. At the same time, a new state company, Armtech Ltd., is expected to be licensed. Requests for licensing have also been received from some arms producers. Although the Regulation does not exclude the possibility of private companies receiving such a license, the current policy is to keep arms production and trade state owned in order to control prices and avoid smuggling.

Actual import and export of controlled goods or technologies requires an Import-Export Certificate from the Commission. An application for such a certificate must include an end-user statement that the controlled goods or technologies will be used only in accordance with the terms of the certificate. A new certificate must be issued for multiple transactions, even for goods which have already been subject to approval. A request for a certificate must

be granted or denied within 30 days; grounds for denial include violation of Bulgarian law and foreign policy or national security reasons.[71] The import of arms and military equipment is duty free.

Once imported to Bulgaria, controlled goods are subject to delivery verification and on-site inspections. Under international standards the participation of foreign officials in such inspections is possible.[72]

In the case of exports from Bulgaria of foreign controlled licensed products, prior permission from the licensor is needed. Moreover, the foreign party to the transaction must certify that it is licensed to trade in military products and declare, that the controlled merchandise will not be reexported without the consent of the exporter. The Commission has also the authority to require a Delivery Verification Certificate from the customs in the country of end-user.[73]

4. Bulgaria's Position on Trade in Dual-Use Goods

The recent changes to Bulgaria's import-export and customs laws are serious steps to introduce a more effective system corresponding to international standards. One notes, however, that dual-use commercial goods are not covered by

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[71] Decree 115, Section IV and V.

[72] Decree 115, Section VII.

[73] Decree 115, art. 23.

the new regime. This can be explained by a lack of adequate information about the purposes of COCOM and the misconception that the Committee is primarily concerned with military goods and technologies.

During the last few months, however, there have been signs that this attitude is quickly changing. In April, 1991, the Bulgarian Ambassador to the United States declared that an Interagency Committee has been established to prepare the implementation of a technology diversion safeguard regime, and Bulgaria is willing to begin negotiations with COCOM.[74] Such negotiations have in fact began,[75] and keeping in mind the high appraisal of Bulgaria's reform process expressed by U.S. officials,[76] one may expect that if an adequate safeguard regime is successfully implemented, Bulgaria will meet COCOM's criteria for removal from the list of proscribed destinations.

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[74] Political and Economic Problems, speech of Ambassador O. Pishev, at a C.S.I.S. meeting, Glasnost Group, Washington, Apr. 12, 1991.

[75] U.S. Allies Preparing to Ease Curbs on Exports to Baltics, Other Countries, 9 I.T.R. 434 (1992).

[76] Bulgarian Premier Predicts Early Approval of New Laws to Attract Foreign Investment, 9 I.T.R. 456 (1992).

IV. INTERNATIONAL COOPERATION IN EXPORT CONTROLS

Before proceeding with the drafting of the Model Law it is useful to examine briefly COCOM's cooperation with other European countries, non-members of the Committee, paying particular attention to the approach followed by the three Central European countries in their negotiations with COCOM.

1. Third Country Initiative

Since the early days of COCOM it became clear to its members that for the effectiveness of their export controls the cooperation of all alternative trade partners has to be ensured.[77] The concern of COCOM members is two-fold and applies to the reexport of their own-made controlled goods as well as to the export of indigenous products from third countries which fall within the category of controlled goods.

In Europe -- Switzerland, Sweden, Finland and Austria have been identified as the countries whose cooperation has to be obtained.[78] The question of their cooperation with

[77] C. Hunt, COCOM and Other International Cooperation in Export Controls, in Coping with U.S. Export Controls 1990, Practicing Law Institute, No. 530, 1990, pp. 75-97.

[78] See J. Stankovsky & H. Roodbeen, Export Controls Outside COCOM, in op. cit. supra note 20, at 70.

COCOM, however, was complicated by political factors, namely their neutrality status.[79] Therefore the U.S. and their allies had to resort to economic pressure, based on the integration of the neutral countries in the Western economic system, in order to "encourage" them to implement specific levels of control.[80] The benefits for complying with COCOM's export controls were the granting of favorable treatment, or the so-called "5(k) benefits".[81]

In the U.S. the basis for granting favorable treatment are laid down in section 5(b)(2)(c) of the Export Administration Act (EAA). Section 5 (b)(2)(c) enumerates the standards for an effective control system consistent with the principles agreed to in COCOM, including the following:

1. national laws providing appropriate civil and criminal penalties and statutes of limitations sufficient to deter potential violations;
2. a program to evaluate export license applications that includes sufficient technical expertise to assess the licensing status of exports and ensure the reliability of end-users;

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[79] Hunt, op.cit. supra note 131.

[80] Stankovsky & Roodbeen, op. cit. supra note 78, at 72.

[81] According to subsection 5(k), EAA, the complying countries can enjoy some or all of the advantages of COCOM membership, 50 U.S.C. 2404(k) (1991).

3. an enforcement mechanism that provides authority for trained enforcement officers to investigate and prevent illegal exports;

4. a system of export control documentation to verify the movement of goods and technology; and

5. procedures for coordination and exchange of information concerning violations of the agreement of the Coordinating Committee.[82]

Currently four European countries outside COCOM have established their own versions of the safeguard system.[83]

A. Switzerland

Switzerland has established its system of export controls since 1954.[84] According to the Swiss government the reasons for introducing the export control system are:

- to ensure Swiss industry's access to high technology from COCOM countries;
- to prevent diversion and illegal trade taking place from Swiss territory; and,
- to avoid accusations of Swiss profiteering from Western embargo.[85]

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[82] See e.g. Export Administration Annual Report FY 1989, at G-2.

[83] See Table 1.

[84] See Stankovsky & Roodbeen, op. cit. supra note 78, pp. 81-85.

[85] Id. at 82.

Switzerland applies the Import Certification/Delivery Verification (IC/DV) system,[86] and also controls internal transactions in goods imported under an IC. Exports to the Eastern block of indigenous high technology products are allowed within the limits of the "courant normal".[87] On January 1, 1986, Switzerland introduced control over in-transit goods,[88] and in August 1987 the country was granted full "5(k) treatment".[89]

B. Austria

Austrian law provides for the use of import certificates which in turn obligate the Austrian importer, vis-a-vis its own government not to reexport without prior approval. Thus, the Austrian government determines whether particular reexports from Austria should be permitted, considering the foreign export controls under which they were initially imported, and other relevant factors.[90] In June 1988 Austria introduced a system for export licensing of indigenous products and for controlling in-transit

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[86] Described in Chapter V, infra.

[87] "Courant normal" is a target figure and imposes financial limitations on the export of strategic goods.

[88] Ordinance on the Reexport of High Technology, 25 I.L.M., 919 (1986).

[89] Stankovsky & Roodbeen, op. cit. supra note 78, at 84.

[90] Foreign Trade Act Amendments Concerning Importation and Reexportation of High Technology, 25 I.L.M. 848 (1986).

shipments.[91] U.S. authorities are allowed to conduct prelicense or postshipment checks.[92]

C. Sweden

The Swedish government has decided to cooperate with COCOM in order to maintain the economic growth and competitiveness of its economy through continued access to advanced technology from abroad, and to avoid the use of Swedish territory for the circumvention of the export regulations of other nations.[93] According to this legislation Sweden uses the IC/DV system and controls the reexport of controlled goods. Severe penalties have been introduced within the framework of the Act on Penalties for the Smuggling of Goods.[94]

D. Finland

Because of its special relationship with the Soviet Union Finland has kept a very low profile on the implementation of a safeguard regime. Following secret

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[91] Stankovsky & Roodbeen, op. cit. supra note 78, at 80.

[92] Root, Spielman & Kaden, A Study of Foreign Export Control Systems, in Balancing the National Interests, op.cit. supra note 1, at 226.

[93] Ordinance on the Reexport of High Technology, Ordinance Prohibiting the Exporting of Certain Commodities, Statement given by the government, 25 I.L.M. 907 (1986).

[94] Id. at 917.

negotiations with the U.S. an IC and a "landing certificate" have been introduced in 1987.[95] Sanctions against violation of the safeguard regime are brought under broad legal provisions referring to state security regulations.[96]

COCOM-like status has been extended to the four neutral European countries on the basis of an assessment of progress and accomplishment in their export control regimes. The main driving force for the introduction of safeguard measures, from their part, has been the importance of free access to U.S. and Western technology. Their neutrality status, however, has imposed some restrictions on their level of compliance. Therefore, a balance has been struck by the implementation of export control mechanisms which do not discredit their neutrality.[97]

2. The Central European Approach

The only parallel that can be drawn between the neutral countries discussed above and the three Central European nations is their desire to gain broader access to Western high technology. As former Warsaw Treaty Organization members and proscribed destinations, Poland, Hungary and

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[95] Stankovsky & Roodbeen, op. cit. supra note 78, at 87.

[96] Id.

[97] Id. at 87.

Czechoslovakia were facing a different challenge: the necessity of a much higher level of commitment and compliance with COCOM's international export control system along with the further introduction of democratic and market economy changes.[98]

Poland was the first to approach Secretary of Commerce R. Mosbacher on December 1, 1989, declaring its willingness to enter into negotiations and sign an agreement with the U.S. government on the reduction of restrictions on exports. The government also stated its readiness to abide by Western rules governing retransfer of imported technology to other countries.[99] The Polish example was followed by the governments of Hungary and Czechoslovakia presenting similar offers.[100]

In the following negotiations the governments of the three countries adopted different attitudes.

Poland and Hungary decided to establish their national safeguard systems in two stages.[101] According to this plan the first stage was meant to be completed on the basis of the existing legislation, without the involvement of the

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[98] The preconditions for granting preferential treatment to these countries were discussed supra at 12.

[99] A. Rudka, Poland's Way Towards Controlling Technology Transfer, March 18, 1991, mimeo.

[100] See supra note 28.

[101] A. Rudka, Western Export Controls: East European View, paper presented at the Colloquium on Technology Transfer Issues, September, 1990, IEWSS, New York.

Parliament.[102] The second stage would require the enactment of a Law which will codify and refine the elements of the safeguard regime established under stage one, and, at the same time, will broaden the scope of the transactions covered as well as the enforcement powers of the Customs.[103]

The Czechoslovakian government on the other hand decided to act in one stage and the Export Control Law became effective on February 1, 1991[104] introducing changes in existing laws.

Both approaches have their merits. The Polish and Hungarian approach allow to acquire some experience in the process of implementation of the safeguard regime, and even to use the introduction of the second stage of the reforms as a bargaining chip for the acquisition of further benefits.[105] The Czech approach is more direct, allows the government to introduce quick and comprehensive measures, which, if successfully enforced, will be a serious guarantee for the government's commitment to reforms.

Keeping in mind Bulgaria's experience in reforming its import-export legislation, and the pressing need for Western

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[102] Some of the provisions in the acts adopted by Poland and Hungary are discussed in Chapter V, infra.

[103] Rudka, op.cit. supra note 99.

[104] For more details see infra Chapter V.

[105] See e.g. Rudka, op.cit. supra note 99.

know-how and modern technologies, it seems reasonable to suggest that Bulgaria should choose the one-stage approach.

V. MODEL LAW

1. Introduction

At the high level meeting of COCOM in Paris, June 6-7, 1990, it was agreed that the U.S. will lead the negotiations with Poland, Hungary and Czechoslovakia for the adoption of their own national safeguard regimes and afterwards submit the results for approval by the COCOM member states.

The negotiations themselves took about a year, the time necessary for the foreign delegations to acquaint themselves with COCOM and U.S. safeguard regimes, with the guidelines submitted to them, and, finally, to draft and discuss their own safeguard measures.[106]

The Model Law is designed to regulate the import-export regime for trade in dual-use industrial goods. It has been drafted keeping in mind the objections that are often addressed with regard to the U.S. control regime, by U.S. companies and foreign partners,[107] and is based on the Polish, Hungarian, Czech and Slovak experience. An attempt has been made to avoid unnecessary complications, to clearly

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[106] See supra note 28.

[107] Namely its complicated procedures, long delays and extraterritorial application.

describe the purpose and function of every element included and, as a whole, to give an accurate idea of the objectives and the functioning of the proposed system. The hope is that this kind of work can be an useful and time sparing tool for anyone interested in understanding third country involvement in COCOM's international export control system and its implementation on a national level.

Cooperation from third countries is needed in order to prevent diversion of indigenous technology or reexport of foreign high-tech products. By implementing a national safeguard regime a third country demonstrates its willingness to abide by COCOM standards and to gain access to advanced technology products from COCOM members. On the other hand the broadening network of cooperating countries streamlines export-control efforts and diminishes the risk of diversion to non-cooperating countries.

It should be also noted that the implementation and enforcement of a system consisting of technology diversion safeguards, and bans on nuclear and munitions exports is considered by COCOM members as a precondition for deproscription from the list of proscribed destination.[108]

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[108] Hungary to Comply Soon with COCOM Requirement for Freeing High-Tech Trade, 9 I.T.R. 390 (1992).

2. General Provisions

2.1. The purpose of the Model Law is to regulate the transfer of goods and technologies (controlled goods)[109] subject to the jurisdiction of the country implementing it and to prevent their diversion to proscribed destinations.[110]

2.2. "Transfer" means the import of controlled goods from countries members of COCOM, or countries cooperating with COCOM,[111] the export of such goods, the export of controlled goods of national origin and any other handling of such goods which falls within the jurisdiction of the customs authorities e.g. in-transit and in-bond goods.[112]

2.3. Subject to control are goods and technologies listed in the National Control List (NCL) published in an Annex (e.g. Annex III) to the Law. The NCL is compiled by a

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[109] Defined infra in 2.4.

[110] The list of countries to which the export of controlled goods is banned or subject to fulfillment of special requirements is decreed by the government of the country adopting the law and is published in an Annex (e.g. Annex I) to it. The list consists of country groups designated by different letters which symbolize the restrictions which apply to exports toward the particular country group. The list is subject to annual updating.

[111] Enlisted in an Annex (e.g. Annex II) to the Law.

[112] For a non-exclusive list see e.g. Para. 1 of the Hungarian Governmental Decree 61 on Licensing the Trade of Some Internationally Controlled Products and Technologies, of October 1, 1990, mimeo /Decree 61 Hungary/ and Arts. 4 and 7(3) of the Law Establishing the Legal Framework of an Export Control Safeguards Regime, December 5, 1990, mimeo /CSFR Law/.

competent State authority in conformity with the International Industrial List (the "core list") established by COCOM.[113]

2.4. For the purpose of this Law "goods" means any article, natural or manmade substance, material, supply or manufactured product, including inspection and test equipment, and excluding technical data;[114] "technology" means the information and know-how (whether in tangible form, such as models, prototypes, drawings, sketches, diagrams, blue prints, or manuals, or in intangible form, such as training or technical services) that can be used to manufacture, utilize, or reconstruct goods, including computer software and technical data, but not the goods themselves.[115]

2.5. Persons transferring controlled goods must comply with the general obligation not to use the controlled goods for military purposes and make sure that no person from a state to which the export of controlled goods is banned or subject to fulfillment of the terms of the control regime will become familiar with the controlled goods or will have

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[113] The United States were the first COCOM member to implement the new "core list" through the "Commerce Control List", 56 Fed. Reg. 168, 42824 (1991) (to be codified at 15 C.F.R. Part 799). In Hungary this task is conferred to a especially created for the purpose body (Decree 61 Hungary, para. 2). This list is also subject to annual review.

[114] Compare with EAA Art.16(3) and CSFR Law, Art.2(2).

[115] Compare with EAA Art.16(4) and CSFR Law, Art.2(2).

access to them.[116] This provision is of special importance with regard to former WTO and Council for Mutual Economic Assistance (CMEA) members since there are still Soviet troops in some of them as well as a considerable number of Soviet joint ventures.

3. Import of Controlled Goods

3.1. The import of controlled goods (enlisted in the NCL), is subject to a permission/certificate granted by the competent authority, e.g. Department of Export Controls (DEC) within the Ministry of Trade[117].

3.2. The purpose of the Import Certificate (IC) is manyfold:

- it permits the import of specified controlled goods for a specified period of time, to a named purchaser, for a designated end-use;
- it authenticates the status of the importer;
- it certifies the end-user of the imported goods;
- it is a proof of the importer's commitment to use the controlled goods only according to the conditions spelled out in the import certificate;

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[116] EAA Art. 5(a)(1), Art. 16(5) and CSFR Law, Art. 5(6).

[117] Compare with Art. 7 CSFR Law, Art. 3 Decree 61 Hungary and p.1 Communique Governing COCOM-Restricted Goods and Technologies, 8 Dziennik Urzedowy, Warsaw, Aug.28, 1990 (Polish Communique).

- it states the importer's agreement to allow pre-license and post-shipment checks;
- it is a proof that the importer is aware of the liabilities for violation of the conditions spelled out in the certificate.
- it helps the importer's government efforts to control the disposition of such goods in order to prevent their unauthorized diversion to proscribed countries.

3.3. With regard to the foreign exporter, the Import Certificate, provided by the importer of the goods, is a proof that the importer/end-user is willing to import the goods in his own country or when this is not the case -- not to send them in another country without the prior approval of the competent authorities in the exporters state.

3.4. The permission is applied for by the applicant only after concluding a contract with a foreign supplier.[118]

The permission becomes an Import Certificate only if an Export License has been granted by the competent authorities in the state-producer or exporter of the controlled goods.[119]

If the controlled goods are imported for processing or incorporation in other products, the final product should be described as well as the places where distribution will take

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[118] CSFR Law, Art. 7(2).

[119] CSFR Law, Art. 8(1).

place.[120] The importer has the obligation to notify, in writing, the next user of his obligation arising from the control regime of this law.[121]

If the end-user is different from the importer he must fill in a Statement by ultimate consignee and purchaser for import intended to discourage the unauthorized diversion of imported controlled goods.[122]

3.5. The application for an Import Certificate is addressed to the competent state authority, e.g. DEC.[123]

It is issued in the name of the company or person denominated therein. Any transfer of the Certificate is null and void.[124] The Department must be notified of any changes in connection with the data included in the application for a Certificate.[125] If the changes are substantial, the Department has the right to revoke the Certificate and on demand consider the issuing of a new one.[126] The Certificate is valid for a period of six

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[120] Compare with CSFR Law, Art. 7(3) and Polish Communique p. 1(b).

[121] CSFR Law, Art. 11(2).

[122] See e.g. Decree 61 Hungary, para. 5, and compare with CSFR Law, Art. 11(3).

[123] See e.g. Decree 61 Hungary, para. 4(1), CSFR Law, Art. 7(1), and Polish Communique, p. 1.

[124] Decree 61 Hungary, para. 4(3).

[125] Compare with Decree 61 Hungary, para. 4(3), CSFR Law, Art.14, and Polish Communique, p. 4.

[126] Decree 61 Hungary, para. 4(3).

months within which it must be presented to the foreign authority. After expiration of that period it becomes null and void.[127] The importer may ask the revocation of the Import Certificate and the issuance of a new one if there are changes in his contract with the supplier.[128]

4. Delivery Verification Certificate

4.1. The purpose of the Delivery Verification Certificate (DVC) is to certify that the imported controlled goods have arrived within the territorial jurisdiction of the importer's state and have been delivered to the person denominated in the exporter's license and in the importer's certificate.

4.2. The DVC is issued by the customs office carrying out the ultimate customs clearance in the territory of the importing state. A copy of the DVC must be sent within seven days to the Department which keeps records of all transactions in controlled goods (usually within the Ministry of Trade), while the original is send to the foreign exporter as a proof that the controlled goods have arrived at their destination.[129]

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[127] Id. para. 4(4).

[128] Id. para. 4(5). See Table I, p. 74.

[129] Compare with Decree 61 Hungary, para. 6, CSFR Law, Arts. 20 and 21, and Polish Communique, p. 1(b).

5. Export License

5.1. The export of controlled goods is subject to a permission granted by the competent state authority.[130]

5.2. The purpose of the Export License (EL) is to prevent the diversion of imported or domestically produced controlled goods by means of export and reexport. The Export License is a formal authorization issued by the competent state authority e.g. DEC, upon submission of a written application by the exporter. It permits the export or reexport of controlled goods for a specified period of time, to a named purchaser, in a particular country, for a designated end-use.

There are three cases where an Export License is needed:

a/ for the reexport of imported controlled goods;

b/ for the export of domestic controlled goods;

c/ for the export of domestic goods in which foreign controlled goods are incorporated; in this case the rules of origin must be applied.[131]

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[130] Compare with Decree 61 Hungary, para. 7, CSFR Law, Art. 9, and Polish Communique, p.3.

[131] Such rules of origin were introduced recently in Bulgaria by Decree 59 (supra note 41). According to art. 1 the country of origin is the country where the goods are produced or where they have undergone substantial processing. A processing is substantial if it increases the value of the goods by 50% or more (art.1(2)). If the goods are made out of foreign prime materials or components, they still can be considered as Bulgarian made goods if they have been subject to considerable processing in Bulgaria.

6. Rules of Origin

6.1. The determination of the country of origin has an impact on the assessment of duties, administration of country-specific quotas, preferential tariff arrangements and export restriction agreements. When U.S. made products are involved, for example, the problem of the extraterritorial application of the U.S. controls arises. According to the EAR, authorization by the Office of Export Administration is required for the following three types of transactions:[132]

a) reexport of U.S. origin goods and technology;

b) export and reexport of foreign end products that:

- incorporate U.S.-origin parts and components;
- are based on U.S.-origin technology.

In general no specific U.S. government approval is required if the U.S.-origin items comprise less than 25% of the total volume of the foreign-made product reexported to a "free world" country or less than 10% of the volume and valued at less than $ 10,000 for reexports to other countries.[133]

This distinction is of importance for the documents that have to be submitted for the approval of exports. In the case of imported controlled goods a copy of the reexport license and of the import certificate must accompany the application. See Table II, p. 75.

[132] 15 C.F.R. section 373.8(c)(2) (1985).

[133] See e.g. L. Kutten and B. Murphy, An Overview of United States Export Controls, Kluwer Law and Taxation Publishers, Boston, 1989, at 16.

For years the U.S. extraterritorial controls have been one of the thorniest problems among COCOM members.[134] They have been objected in principal on legal, political and commercial grounds and some countries have even adopted national legislation prohibiting domestic companies to comply with the U.S. measures.[135]

6.2. The CSFR Law is very vague on the subject. Art.3 only states that "permission is needed to export imported goods". The Hungarian Decree 61 mentions that a Reexport License must be attached to the application for an Export License (para 7(2)(c). The Polish Communique (p. 3) explicitly states that "the application for an Export License must be submitted together with a document expressing the consent of the appropriate authorities in the exporter's country to the reexport of the merchandise from the Polish customs territory. The problem of domestic products incorporating imported controlled goods is not addressed at all.

6.3. One possible solution is to provide that the national rules of origin should be applied.[136] This in

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[134] For details on foreign reactions to U.S. extraterritorial controls see e.g. Balancing the National Interests U.S. National Security Export Controls and Global Economic Competition, published by NAP, Washington, D.C. 1987, pp. 206-234.

[135] Id. at 215.

[136] The difficulty arises from the fact that there are no uniform international rules for determining the origin of goods which causes considerable tensions among governments.

turn will trigger the following procedure for the issuing of an Export License:

a) in the case of reexport of imported goods the consent of the competent authority in the exporter's country should be submitted in support of the application; in most of the cases it will be possible to evidence such consent with the International Import Certificate;

b) if prior authorization for reexport has not been requested, a new demand should be introduced with the foreign exporter;

c) if controlled goods are incorporated in a new product the procedure to be followed will be determined according to the national rules of origin:

- for domestic products the Export License issued by the competent national authority will be sufficient;
- for foreign products the authorization of the competent foreign authority should be attached if such a requirement is specified in the exporter's license or contract.

7. Application for Export License

7.1. The application for an Export License can be introduced only after an order from a foreign importer is made. The order need not to be a firm contract or an unconditional offer, but it must be more than a business inquiry with regard to a possible export. It must contain the following elements:

- country of ultimate destination;
- names and addresses of the ultimate consignee, intermediate consignee (if any), purchaser (if other than the ultimate consignee), and any other party to the transaction, whether principal or agent;
- quantity, value and description of the controlled goods to be exported; and
- end-use of the export.[137]

7.2. Depending upon the country for which the Export License is issued, some additional documents may be required. They may be:

- an "end-use" statement completed by the purchaser and end-user in the foreign country;
- an International Import Certificate issued by the competent authority in the importer's country;
- a DVC which certifies that the goods have entered the territory of the recipient's country.[138]

7.3. Any changes in the data included in the application for an Export License and its annexes must be communicated to the issuing authority. If the changes are considerable the competent authority has the right to revoke the license. The Export License is valid only for a period of six months within which it must be filed at the customs

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[137] See L.J.Kutten, op.cit. supra note 11, at 17.

[138] Compare with Decree 61 Hungary, para. 7, CSFR Law, Art. 15, and Polish Communique, p. 3.

office carrying out the export clearance simultaneously with the filing of the application for performing the export clearance. Upon request from the exporter and in the presence of extraordinary circumstances the original validity period may be prolonged. The expiration date must be indicated on the face of the license. Any transfer of the Export License is null and void.[139]

8. Granting of Import-Export Authorization

8.1. The Import Certificate and the Export License are issued by the competent state authority, e.g. DEC. DEC exercises jurisdiction over all transactions in controlled goods. Within 30 days after the filing of the application the DEC must advise the applicant about the decision.[140]

8.2. The application must be accompanied by all the necessary documents. If the application is incomplete the DEC will return it without consideration and inform the applicant of the specific deficiencies to be corrected. The application should be denied or revoked in the presence of untrue or false data, if the applicant or end-user have been denied import/export privileges, if the issuing of an IC/EL would violate national commitments undertaken in international agreements, the import/export of the

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[139] See e.g. Decree 61 Hungary, para. 7(3,4 and 5) and Polish Communique, p. 3.

[140] See e.g. Decree 61 Hungary, para. 8, and CSFR Law, Chapter 4.

controlled goods is intended for military use, if the transaction in controlled goods would violate national security interests.[141]

8.3. If the DEC has doubts over the intended use of the controlled goods or the capacity of the applicant to handle such goods it may ask the competent authorities e.g. customs or a proper auditors team, to carry out preliminary control. There a number of "red flag" indications that may signal possible illegal imports/exports or diversion:

- performance/design requirements incompatible with destination/country resources or environment or with consignee's line of business;
- stated end-use incompatible with the customary or known industrial applications for the equipment being purchased;
- stated end-use incompatible with consignee's line of business;
- stated end-use incompatible with the technical capability of the consignee or destination country;
- customer willingness to pay cash for a large value item or order;[142]

8.4. The DEC can deny the privilege to handle controlled goods to a particular applicant or end-user, for a determined period of time, if that person has been find

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[141] Compare with Decree 61 Hungary, para. 8(4) and CSFR Law, Arts. 5 and 6.

[142] See e.g. Balancing the National Interest, op.cit. supra note 1, at 55.

responsible for violating the export control regime. The decision to deny the issuance of a IC/EL or its revocation or the denial of import/export privileges must be justified.[143] The appeal of such a decision follows the national administrative procedure.

9. Customs Control

9.1. Customs exercise control and register all controlled goods within their jurisdiction. This control is subject to the national rules governing the customs control.

9.2. Customs carry out control over in-transit and in-bond controlled goods according to national rules and international agreements. Such control may also cover duty free zones within their territorial jurisdiction. They carry also running control over the fulfillment of the control regime in the place where the controlled goods are on request from the competent national or foreign authority. This control may be pre-license or post-shipment. Upon request from a supplier state authority its representatives may participate in the control.[144]

In such a case some new problems arise concerning issues of sovereignty, jurisdiction etc. Some of these details may be further elaborated in customs-to-customs

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[143] See e.g. Decree 61 Hungary, para 9, and CSFR Law, Art. 18.

[144] See e.g. Decree 61 Hungary, para 11, CSFR Law, Arts. 22 and 23, Polish Communique, p. 2.

agreements negotiated with the major trade partners among the COCOM members.[145] The underlying principle must be that the controls are carried out entirely by the national customs officers. Foreign participants may be present only as observers. Prior notification must be given by the foreign authority before initiating such controls.

9.3. Customs must immediately report all violations of the control regime to the Ministry of Foreign Trade which keeps track of all violations and transactions in controlled goods.[146]

10. Notification Procedure and Disposition of Controlled Goods

10.1. The proposed measures govern the procedures to be followed in cases where unauthorized controlled goods have arrived at a destination within the territorial jurisdiction of the state implementing the control regime and the ways to handle or dispose of them.

10.2. Anyone who obtains goods subject to the control regime must notify in writing the competent authority, e.g. DEC, and describe the way in which the goods were obtained, their intended use and any other relevant facts. The competent authority will render its decision based upon the

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[145] See infra p. 12, B.

[146] See e.g. CSFR Law, Art. 23.

fact whether the possessor of the goods meets the conditions for handling controlled goods and if the answer is negative will rule to turn them over to a designated customs house which reimburses after the auction of the controlled goods. If the possessor of the does not have legal title over the controlled goods he must turn them over to a designated customs house. The customs house will appoint a curator and undertake measures to identify the legal possessor. If such a person cannot be identified within a determined period of time and the controlled goods cannot be sold at an auction, they are subject to liquidation.[147]

11. Registration of Controlled Goods

11.1. All controlled goods crossing the state borders must be registered by the customs house within whose jurisdiction they are located.

All license holders and end-users are required to maintain records of all transactions in controlled goods and keep them available for inspection by the controlling authorities.[148]

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[147] Compare with CSFR Law, Art. 12.

[148] Compare with Decree 61 Hungary, para 10, and CSFR Law, Chapter 2.

12. Sanctions

12.1. Sanctions play an important role in the safeguard regime. Their purpose is to prevent to the extend possible all infringements and enforce the export control regime. For the implementation of a comprehensive scheme they should be introduced at different levels: administrative and judicial and they should apply at corporate and individual level.

12.2. The administrative sanctions may include the following measures:

* penalty;
* denial of import/export privileges;
* holding of shipment; and
* seizure.

They are usually imposed for minor violations of the export control regime, are imposed by the DEC and their appeal follows the national rules of administrative procedure.

12.3. When criminal penalties are applied a first distinction should be made between knowing and willful violations; between sanctions imposed on individuals or corporations, including sanctions for unauthorized possession of controlled goods.

In some cases (e.g. submittance of wrongful information in the application) the violations of the export regime can be qualified according to existing provisions in the

national penal code. In other cases the creation of specific rules will be necessary.

The criminal penalties imposed should be quite severe in order to discourage any attempt to violate the safeguard regime and may amount to fines up to 5 times the value of the controlled goods involved and/or imprisonment for up to 10 years.[149]

13. Final Remarks

13.1. In the case of Bulgaria the recently introduced legislation containing some of the elements of a safeguard regime may facilitate the implementation of such a system. The adoption of a Technology Diversion Safeguard Law, however, would be a complex procedure. Therefore, the appropriate balance should be maintained while introducing new elements and changes, and applying, whenever possible, national experience and practice.

13.2. No matter how smoothly the system will function, there will always be one delicate problem -- the question of confidentiality of information. Therefore, in order to encourage the applicants for an IC/EL to provide true and full data the controlling organ (at national and international level) should bear the explicit obligation to

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[149] See e.g. amendments to the Penal Code of the CSFR adopted on December 9, 1990, and Part III, Chapter 2 of the CSFR Law; p. 2, 3 and 4 of the Polish Communique; para. 5(2) and para. 13(3) Hungarian Decree 61; EAA Section 11.

use the information only for office purposes and to guarantee its confidentiality. At an international level the appropriate bilateral and multilateral measures should be undertaken.

One may suggest different mechanisms which may diminish this particular risk e.g. the implementation of a "Gold Card" system which will speed up also the paperwork process[150] but the question is how realistic the approval of such a system might be especially at this initial stage of the implementation of the safeguard regime. Therefore, it seems more reasonable to consider the introduction of such measures only after the first results of the new regime have been assessed.

14. Joint Actions

The introduction of a technology diversion safeguard system is not a goal in itself. It is a matter of concern not only for the country introducing it but also for the technologically advanced nations interested in controlling the diversion of their own made cutting edge technologies. It is of mutual interest, and for the sake of the proper functioning of the mechanism, to establish an open and sincere cooperation, trying to identify in advance some of

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150 See e.g. L. Kutten, op.cit. supra note 11, at 16. The "Gold Card" refers to a general license authorizing exports to certified end-users of any eligible commodity that will be used by them.

the foreseeable obstacles and provide for the necessary assistance in the areas where it will be most needed. It is not very difficult to identify some of the most critical issues for a country that plans to introduce for the first an export control system, namely:

- little experience in monitoring high technology exports and detecting illegal exports;
- lack of trained personnel;
- lack of bureaucratic institutions to handle the administration and implementation of export control regulations;
- lack of financial resources to meet the organizational needs.[151]

Obviously, for the solution of these and many other problems only the undertaking of joint actions by the interested parties will provide the right answer. Such joint actions may be conducted in the following areas:

A. Training and Know-How Transfer

The training of competent personnel is of crucial importance for the effective functioning of the system. The measures to be undertaken may include the organization of courses and seminars, the transfer of specific know-how and

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[151] See e.g. US, Central Europe Cooperate on Safeguards, 4 E.C.N., No. 9, 1990, at 3.

training the people using it, visits of experts, sharing of practical experience, technical advise and others.

B. Customs-to-Customs Agreement

The signing of such an agreement with the U.S. and the major trading partners among the COCOM members is one of the key elements to accompany the introduction of the safeguard system.[152] This agreement should be designed to regulate the cooperation between the customs officers of the respective countries in controlling the end-use of controlled goods and restrict the export and reexport to proscribed destinations. It should also spell out in details the procedure to be followed in the case of on-site verifications, the sharing and safeguard of confidential information, the conducting of joint actions etc.

C. Financing

For anyone familiar with the disastrous economic situation in the former CMEA members it is obvious that neither of these countries can bear alone the financial burden of implementing a comprehensive and efficient export control system. Therefore, this issue should be addressed from the very beginning of the negotiations in order to find

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[152] See e.g. Agreement between the Government of the United States of America and the Government of the Republic of Poland Regarding Mutual Assistance between their Customs Services of August 8, 1990, mimeo.

the proper solutions. The foreign assistance from COCOM members need not to be only monetary but it may also come in the form of supply of modern technology and equipment indispensable for the monitoring and functioning of the safeguard regime.

The successful and timely identification and solution of these problems is likely to speed up the implementation of the export control system. In this regard, a closer cooperation between the countries adopting non-proliferation regimes should be strongly recommended. At the early stages of their implementation they are likely to face some common problems which may be easily overcome by joint and concerted actions.

VI. LAW COMMUNICATION MODEL

The purpose of the Model Law clearly is to enforce compliance from individuals involved in trade in dual-use goods. This purpose, however, can be achieved only if the new law is properly communicated to and understood by those to whom it is addressed. An information loss or an improperly transmitted message are likely to jeopardize significantly the effectiveness of the whole regime. Keeping in mind the complexity of the proposed legislation, and the high stakes involved in stopping proliferation of controlled goods, a Law Communication Model will be briefly discussed.

Huszagh and Huszagh[153] identify four basic law characteristics which affect mostly information loss in a law communication process: formality descriptor, substantive descriptor, jurisdiction descriptor, and stability descriptor. When applied with regard to the proposed law model the following conclusions can be achieved.

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[153] S. Huszagh and F. Huszagh, A Model of the Law Communication Process: Formal and Free Law, 13 Ga. L. Rev, Fall 1978, pp. 193-241.

1. Formality Descriptor

A first distinction is made between formal, informal, and free laws.[154] The difference depends on the required level of subsequent governmental regulation following the enactment of the proposed legislation. For example, formal laws are described as contextually clear, not requiring personal mediation between law subject and government entities to accomplish the behavior intended by the information source.[155] In contrast, informal laws incorporate only some elements within the original statutory enactment. The determination of what entities are subject to the law and their specific obligation is delegated to administrative bodies or postponed to the enforcement or dispute resolution phases.[156] Free laws provide for minimal description of the destination responsibilities and do not give order and constancy to recurrent events.[157]

In this context, although the Model Technology Diversion Safeguard Law is clear in purpose: to regulate the transfer of controlled goods and prevent their diversion to proscribed destinations, thus giving the impression of being a formal law, it delegates discretionary and enforcement

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[154] Id. at 196.

[155] Id. at 197.

[156] S. Huszagh and F. Huszagh, Production and Consumption of Informal Law: A Model for Identifying Information Loss, 13 Ga. L. Rev., Winter 1979, pp. 515-546.

[157] See Huszagh & Huszagh, supra note 153, at 198.

authority to an intervening governmental administration (e.g. the DEC) and therefore should be described as informal.

2. Substantive Descriptor

A second distinction can be drawn between laws having an economic, political or social focus,[158] or representing a mixture of several foci.

In the discussed case, although the dominant substantive focus is economic, the political element plays an important role. The whole concept of liberalizing COCOM's exports to the Eastern European countries is contingent on the commitment of their governments to cooperate with the West and to build a democratic society based on free market economy.

3. Jurisdiction Descriptor

The jurisdiction descriptor applies with regard to the territorial applicability of the law.[159] In theory, there are three levels of territorial application: federal, state and local. Keeping in mind the state system in Bulgaria, and the purpose of the Model Law, it is evident that the proposed legislation is designed to operate at a State level.

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[158] Id. at 198.

[159] Id. at 199.

4. Stability Descriptor

In this case a distinction is drawn between old, modified, and new laws.[160] There is no doubt that the Model Law falls within the category of new laws due to its subject regulation and the new enforcement and implementation mechanism it creates.

5. Law Communication

The four characteristics of the Model Law make it possible to determine in advance the areas where information loss may occur and the way the law transmission model should be conceived in order to optimize the receptor capacity of the intended law subjects.

As a general observation one may note that informal laws, compared to formal laws, are composed of sequential messages.[161] This enables them to remain in tune with environmental changes, and requires a higher degree of alertness on the part of the encoders and decoders. In designing the communication model special attention should be paid to the need to reach all law subjects in order to keep them properly informed about their specific obligations. One may argue that citizens are assumed to be cognizant of the laws applicable to them and their ignorance is not a defense for law enforcement. In this particular

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[160] Id. at 200.

[161] See supra at 62.

case, however, keeping in mind the highly sensitive matter regulated by the Model Law, the government's commitment to prevent technology diversion, and the international political and economic implications which may result from such diversion, it is in the best interests of the executive body to undertake all the measures necessary for the effective law transmittance. The importance of such an intervention is further confirmed by the fact that economic and social laws, unlike political laws, usually originate from multiple information sources, less familiar to individuals.[162] At the same time a new law poses more problems with regard to its interpretation, compared to old or modified laws.[163]

On the basis of the discussed law characteristics of the Model Law, and by comparing the existing law communication system in Bulgaria and in the U.S., an attempt will be made to design a communication system for the Technology Diversion Safeguard Law.

Normally legislation is communicated at four different levels:

1. full law text (U.S. Statutes at Large, U.S. Code etc.);
2. full law text plus annotations (e.g. U.S. Code Annotated, loose-leaf services, reporters);

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[162] Huszagh & Huszagh, supra note 153, at 198.

[163] Id. at 200.

3. specialized media (trade and professional journals, newsletters); and

4. mass media (newspapers, general periodicals).[164]

In both the U.S. and Bulgaria almost all levels of the communication system are similar. The full law text in Bulgaria is printed in the State Gazette and, except otherwise provided, laws come into force three days after their publication.

Although there are examples of annotated law publications in Bulgaria, they by no means enjoy the regularity and popularity of the U.S. Code Annotated, for example, or of some U.S. Agencies Reports. Therefore, it seems appropriate to suggest that after the adoption of the Model Law the DEC should start the publication of a loose-leaf service which will keep all interested parties up to date about changes in the legislation, in the list of proscribed destinations, of goods etc. When properly indexed such a service should enable even unsophisticated personnel to conduct the necessary research.

A special emphasis should be put on coverage in trade and professional journals, and the publication of a news letter by the DEC should be considered. With the rapidly increasing number of private enterprises in Bulgaria, directly involved in international trade, a great interest may be expected in a publication containing summaries of new

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[164] Id. at 201.

import/export regulations, information on upcoming seminars, practical discussion of export control issues etc.

Another valuable tool for information is likely to be the publication of booklets on a variety of export control topics.

Finally, it seems appropriate to suggest the setting up of an information office within the DEC, where specific questions relating to export controls can be addressed and answered by mail or by telephone.

These services may be further expanded with the organization of seminars, including basic and advanced training on how to cope with the export control legislation.

Undoubtedly, there is a large variety of measures and sources that might be useful for the transmittance of the proposed legislation and for increasing the public awareness of its existence and specifics. The type of communication system to be implemented will depend, however, to a large extend on the availability of highly skilled professional encoders and the financial capabilities of the executive branch. In any case, a large variety of alternatives should be considered, and evaluated, with regard to national specifics and experience.

VII. CONCLUSION

The lightning changes in the countries of Central and Eastern Europe, and the disintegration of the Soviet military and political block, have had a deep impact on export controls. COCOM members have quickly responded to the new realities by easing the restrictions for trade with Poland, Hungary and Czechoslovakia. This liberalized policy will likely extend to other formerly communist countries as soon as they develop internal export control regimes that satisfy COCOM's concern about improper diversion of exports. Bulgaria is perhaps the furthest along among these countries. An export control law on trade with military products has been enacted, and the implementation of a control regime for dual-use goods is under active consideration.

The process of decontrol, however, does not mean a wholesale repeal of all restrictions. The lessons learned from the war with Iraq clearly remind that non-proliferation concerns will continue to play an important role in the future.

While export control efforts in the past focused on sensitive dual-use technologies, during the next few years

more attention is likely to be paid at exports of goods related to nuclear and missile technology, as well as to chemical and biological warfare.

These two diverging trends most probably will result in spreading the network of cooperating countries under the aegis of COCOM, accompanied by a further shortening of the list of controlled goods. On the other hand, broader multilateral enforcement procedures are likely to be implemented in order to achieve a higher degree of uniformity in complying with the requirements of the control regime. In order to be successful such procedures should combine rigid controls and sanctions against non-signatories, designed to eliminate the threat of third countries which do not wish to cooperate.

APPENDIX

TABLE I

Import of Controlled Goods

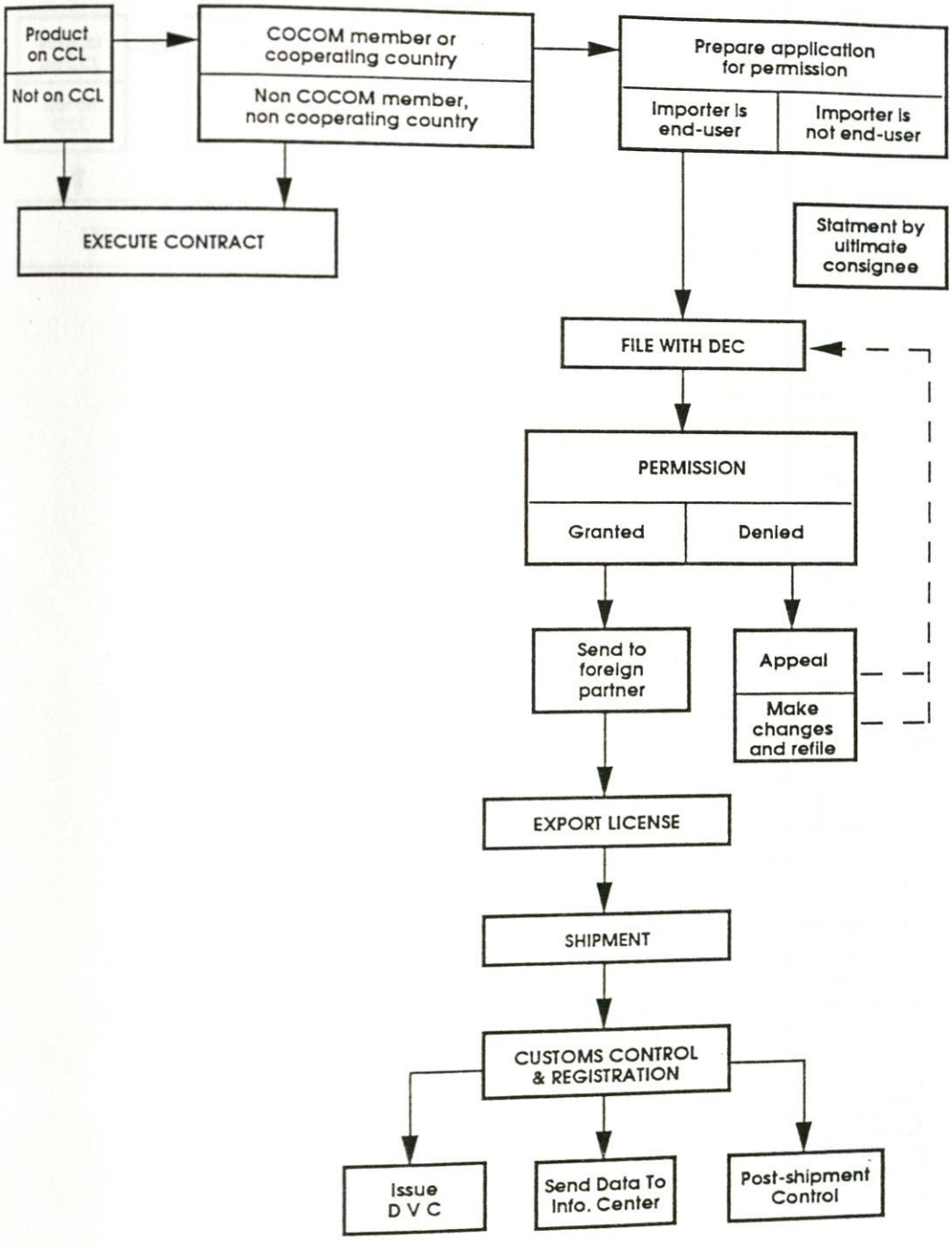

TABLE II .

Export of Controlled Goods