

## TRADE REGULATION — EXPORT CONTROLS — CoCOM AGREES ON NEW MULTILATERAL EXPORT GUIDELINES ALLOWING EASTERN BLOC TO PURCHASE LOW LEVEL TECHNOLOGY LEGALLY

A West German businessman recently pleaded guilty to charges of submitting a false export license application and supporting documents.<sup>1</sup> These falsifications aided a group of international exporters convicted recently of nine violations of the Export Administration Act. The scheme involved the export of high technology components from the United States to a front company in Austria.<sup>2</sup> From Austria the goods, including specialized integrated circuits used in cruise missiles, were illegally exported to Eastern Bloc countries.<sup>3</sup>

The Coordinating Committee for Multilateral Exports (CoCom), a voluntary organization comprised of a majority of the NATO countries and Japan,<sup>4</sup> seeks to establish mutually agreeable export control standards. These control standards apply to goods which, if exported to Eastern Bloc countries, could constitute a threat to the security of Western society.<sup>5</sup> CoCom's most recently adopted export

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<sup>1</sup> Klaus Talleur was sentenced to a six month suspended prison term and one year of probation. One of his cohorts and business associates received a two year prison term. *West German Businessman Sentenced For Violations, Commerce Announces*, 2 INT'L TRADE REP. 107, (1985).

<sup>2</sup> Talleur's company, a West German trade firm doing business under the name of Contracta Project Engineering and Consultation GmbH, was purported to be the final destination of the goods; however, Talleur shipped the components to another firm in Germany by the name of Steuerungstechnik und Messgeraete, which serviced Eastern Bloc countries. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The Consultative Group, the predecessor of CoCom, was comprised of export control officials from the United States, France, Italy, the Netherlands, Belgium, and Luxembourg; it was formulated in 1949 as a reaction to the Cold War following the close of World War II. Hunt, *Multilateral Cooperation in Export Controls - The Role of CoCom*, 14 U. TOL. L. REV. 1285, 1285-86 (1983). The Cold War between the United States and the U.S.S.R. resulted in large military buildups in both countries. The United States was concerned for its national security "in large part from concern over Soviet aggressiveness in Germany." 2 S. MORISON, H. COM-MAGER & W. LEUCHTENBURY, *THE GROWTH OF THE AMERICAN REPUBLIC* 622 (7th ed. 1980). CoCom membership includes: Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. *Export Ad. Ann. Rep. FY 1982*, at 13 n.1 [hereinafter cited as *EAA Report 1982*].

<sup>5</sup> Hunt, *supra* note 4. The Eastern Bloc, or CoCom-proscribed countries, consists of the U.S.S.R., the Warsaw Pact countries, Albania, North Korea, Vietnam, Kampuchea, the Mongolian People's Republic, and the People's Republic of China. *Export Ad. Ann. Rep. FY 1983*, at 28 [hereinafter cited as *EAA Report 1983*].

guidelines diverge significantly from prior United States policy because they permit the previously unauthorized<sup>6</sup> export of low level technology.<sup>7</sup> The United States favors these guidelines because they more closely align its trade practices with those of other CoCom nations.<sup>8</sup>

### I. LEGAL FRAMEWORK

Historically, the United States has advocated stringent guidelines on the export of all technology, without regard to probability of the military application.<sup>9</sup> The United States has justified its strict position by citing national security concerns.<sup>10</sup> Other CoCom member nations,

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<sup>6</sup> Unfortunately, all CoCom guidelines and proposals are classified, which forces analysis to be based on scant news releases. CoCom has three categories of controlled items: the International Atomic Energy List, the International Munitions List, and the International List. The latter list contains dual use items, a categorization which has created conflicts within the United States Government and among CoCom members. The International List consists of items typically used for civilian purposes, but which also have potential military application. Hunt, *supra* note 4, at 1288-89; *see also*, *EAA Report 1982*, *supra* note 4, at 24. For example, the United States Department of Defense charges that the conventional Apple Computer can be used to target tactical nuclear weapons and consequently should be put on the dual lists. The Commerce Department maintains that due to the large number of personal computers, use of controls would be unmanageable and would divert attention from truly critical items. The State Department's position is that the "credibility of the international control mechanism is undermined if you try to control things like [personal computers] that are traded on a mass world-wide basis." *An Opening to the East for Tiny Computers*, *Business Week*, May 28, 1984, at 31, 32 [hereinafter cited as *An Opening*]. Conflicts among CoCom allies have resulted from the differing policy goals each wishes to emphasize, the general idea being that "allies have consistently opposed using export restrictions for political purposes not clearly related to Western security interests." Root, *Trade Controls That Work*, 52 FOREIGN POLICY 61, (1984).

<sup>7</sup> Low level technology items require only notification to CoCom before export to Soviet Bloc countries. Previous guidelines imposed complex, expensive, and time consuming licensing requirements on exporters. Memorandum from Fenwick, Davis & West (Oct. 21, 1985) (discussing establishment of the G-Com General Export License).

<sup>8</sup> The new guidelines permit computers with a 50% or greater processing power to be exported to the Eastern Bloc. Previously, the United States was one of the few countries not engaged in the export of this type of technology. *U.S. Allies to Restrict Computer - Technology Exports to Soviet Bloc*, *Wall St. J.*, July 23, 1984, at 14, col. 1.

<sup>9</sup> Richey, *Washington Counters Soviet Pilfering of its High Tech Know-How*, *Christian Sci. Mon.*, May 18, 1984, at 14.

<sup>10</sup> The original United States position in CoCom placed strong emphasis on the need to impede the U.S.S.R.'s economic and military development. This policy originated in the early days of the Cold War. Since the recent trend has been to liberalize trade with the Eastern Bloc, the United States has been forced to reassess its long-term goals and priorities. Aeppel, *The Evolution of Multilateral Export Controls: A Critical Study of the COCOM Regime*, 9 FLETCHER FORUM 105, 113 (1985).

however, were often neither willing to adopt nor subsequently to enforce<sup>11</sup> such narrow guidelines. These nations emphasized trade considerations<sup>12</sup> rather than foreign policy<sup>13</sup> or national security concerns.<sup>14</sup> The United States therefore adopted unilateral export control guidelines<sup>15</sup> which, because of the lack of a coordinated effort among

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<sup>11</sup> The majority of CoCom countries do not utilize enforcement mechanisms for export control; therefore, many illegal foreign exporters must contend only with inquiries from the Commerce Department if the goods originate in the United States. A Spanish firm was recently fined \$1 million and received five years probation and suspension of all export privileges from the United States. The Barcelona firm of Piher Semiconductores had illegally re-exported \$2.4 million of electronic test equipment and semiconductors to Cuba and the U.S.S.R. *Spanish Firm is Fined \$1 Million in High Technology Diversion Case*, 1 INT'L TRADE REP. 1338 (1985) [hereinafter cited as *Spanish Firm*]. Additionally, the news media has recently focused on the black market, which illegally exports advanced computer technology from West Germany and Sweden to the U.S.S.R. Huser, *Congress Plans Closer Scrutiny of Export Policing, Licensing*, 1984, CONG. Q., Jan. 28, 1984 at 157; see also *supra* notes 1-2.

<sup>12</sup> Karl Kiser, Director of Bonn's Foreign Policy Institute, assessed the situation: "The fundamental problem is that the American concept of security is overwhelmingly military in nature," while that of the Europeans is "equally economic." Kempe & Lachica, *CoCom Feuds Over Trade to East Bloc*, Wall St. J., July 17, 1984, at 35, col. 1. For a discussion of policy differences between the United States and Western Europe, see Yergin, *East-West Technology Transfer: European Perspectives*, 8 THE WASHINGTON PAPERS 10 (1980). The opposing perspectives of the United States and Western Europe have reduced the effectiveness of CoCom over the years: "Europe and Japan have long advocated reductions in product coverage, and the United States has lost the power to enforce cooperation." Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970's and 1980's*, 65 MINN. L. REV. 739, 807 (1981).

<sup>13</sup> In 1978 the United States denied the export of a computer to TASS, the Soviet news agency, in response to the conviction of Soviet dissident Anatoly Shcharansky. The United States sought support for its position from CoCom members in vain. As a result, French producers agreed with TASS to provide a computer more powerful than was originally ordered from the United States. France's transaction with the U.S.S.R. circumvented controls previously set in CoCom, "and thereby emphasize[d] its resolve not to use export controls for political purposes." Root, *supra* note 6, at 64-65.

<sup>14</sup> Aepfel, *supra* note 10.

<sup>15</sup> In 1968, the United States unilaterally restricted approximately 1100 items which the Eastern Bloc could nonetheless have acquired from other CoCom members. Consequently, the number of items subject to control in the United States was far greater than those in other CoCom nations. Meese, *Export Controls to China: An Emerging Trend for Dual-Use Exports*, 7 INT'L TRADE L.J., 20, 23 (1982). William Root, former Director of the State Department's Office of East-West Trade, has charged that unilateral controls "strengthened the Soviets militarily by slowing the entire process of establishing effective multilateral controls over militarily significant items." Root, *supra* note 6, at 62.

other CoCom members, proved to be politically<sup>16</sup> and economically<sup>17</sup> ineffective.

Export guidelines in the United States are codified<sup>18</sup> in the Export Administration Act of 1979 (EAA).<sup>19</sup> The EAA designates three areas of national concern upon which the United States export restrictions, also known as the Commodity Control Lists, are based: foreign policy,<sup>20</sup> national security, and economic

<sup>16</sup> Many Western Europeans view the unilateral controls as an attempt by the United States to control the export agenda of other foreign entities. This perception has caused great resentment. For a discussion of the problems encountered with extraterritorial application of United States law to countries not direct parties to trade transactions, see Abbott, *supra* note 12, at 840-43.

<sup>17</sup> Unilateral export guidelines based on foreign policy considerations can lead to adverse effects, both politically and economically. For example, in 1978 President Carter utilized unilateral United States export controls on gas and oil exploration and production equipment to protest the conviction of Soviet dissident Anatoly Shcharansky. Shortly thereafter, Moscow cancelled a contract with a United States producer of gas-lift equipment, and switched to a French supplier. This move exemplifies "Soviet determination not to buy from firms subject to United States foreign policy controls, except as a last resort." Root, *supra* note 6, at 64-65. Industry officials have predicted that the guidelines "will enable United States and foreign manufacturers to sell hundreds of millions of dollars worth of personal computers to Soviet Bloc customers." *An Opening*, *supra* note 6, at 31-32.

<sup>18</sup> The United States, the only CoCom country to codify policy directives, has declared:

(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary -

(A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States to fulfill its declared international obligations.

50 U.S.C. app. §§ 2402(2)(A) & (B) (1982).

<sup>19</sup> 50 U.S.C. app. §§ 2401-2420 (1982).

<sup>20</sup> In 1979, Congress established six additional criteria which the President must consider before imposing export controls. These criteria were "ostensibly for foreign policy purposes." The additional criteria are:

(1) the probability that controls will achieve their intended purpose in light of such factors as availability from other countries of items to be controlled;

(2) the compatibility with overall policy toward the targeted country;

(3) the reactions of other countries;

(4) the trade effects;

(5) the enforceability; and

(6) the foreign policy consequences of not imposing controls.

Meese, *supra* note 15, at 24-25 [citing 50 U.S.C.A. app. § 2405(b) (1981)].

considerations.<sup>21</sup> In addition, the EAA established the Office of Export Administration (OEA) to formulate export controls on raw materials and high technology with possible military application.<sup>22</sup>

The OEA utilizes three categories of licenses to implement export controls: the general license, the specific license, and the special license.<sup>23</sup> Placement of an export item into either the general or specific license category depends upon the specific technical data to be exported and the intended destination within the controlled country.<sup>24</sup> Obtaining a general license does not necessitate that applicants submit documentation to the Commerce Department.<sup>25</sup> Instead, the exporter must merely match his product with those on a lengthy list of previously approved items.<sup>26</sup>

Recent amendments have created an additional type of general license which does not require a validated license for the export of certain goods to CoCom nations.<sup>27</sup> Eligibility for this new G-COM license is based not upon the intended end-user, but rather upon the technical performance characteristics of a given item; however, written approval from the Commerce Department is necessary before an item can be re-exported to a non-CoCom country.<sup>28</sup> These amendments are expected to impact the high technology industry in the United

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<sup>21</sup> See generally Comment, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355, 355-56 (1984) (discussion of the extraterritorial implications in trade regulations). For a discussion of the Commodity Control List and its application, see Commodity Control List and Related Matters, 15 C.F.R. § 399 (1985).

<sup>22</sup> The OEA addresses areas of export licensing, assessment of foreign availability, and formulation of technical and policy analyses for export controls. A recent reorganization of the OEA emphasizes the commodity classifications and technical planning. The Reagan administration hopes this reorganization will help to streamline CoCom negotiations since OEA would be able to devote a full-time group of "technical gurus" to the mission. *Major Reorganization of Controls Structure At Commerce Department Outlined by Archev*, 2 INT'L TRADE REP. 1025 (1985).

<sup>23</sup> 15 C.F.R. §§ 371-373 (1985).

<sup>24</sup> See Meese, *supra* note 15, at 26. For a discussion of the categorical grouping of countries along with applicable control restrictions, see Special Country and Policies and Provisions, 15 C.F.R. § 385 (1985).

<sup>25</sup> See generally 15 C.F.R. § 371 (1985) (no application required for general license and no document issued).

<sup>26</sup> See R. Robinson, *The Importance of Time in Administrative Decision Making* 17 (The Dean Rusk Center Monograph No. 3, 1983) (discussion of the impact of government regulation of international trade on business).

<sup>27</sup> Amendments to Export Administration Regulations, 50 Fed. Reg. 38,511 (1985) (to be codified at 15 C.F.R. §§ 371, 374, 386, & 399).

<sup>28</sup> *Spanish Firm*, *supra* note 11 and accompanying text (details of penalties imposed when Commerce approval is not obtained before a product is reported).

States positively since they will greatly reduce processing time for exports to CoCom nations.<sup>29</sup>

The specific license, in contrast, requires that each item being exported have an individually validated permit.<sup>30</sup> A specific, validated export license is necessary for the export of a controlled commodity to any country to which the OEA controls apply.<sup>31</sup> The process of securing a specific validated license is often costly and time consuming.<sup>32</sup> Generally, the EAA provides for a ninety-day limit on processing time for export license applications.<sup>33</sup> This ninety-day limit has proven unrealistic, however, for complex Eastern Bloc applications. Because of their complexity, processing an Eastern Bloc license application requires an average of 192 work days; some applications require as many as 547 work days.<sup>34</sup>

To ease the hardships imposed on exporters utilizing specific validated licenses, Congress created a third category of special licenses,

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<sup>29</sup> Among the Commodity Control List items affected are the following: machinery and equipment for the manufacture of electronic equipment, components and materials and related test gear; communications transmissions equipment; electronic measuring, calibrating, counting, testing and/or time interval measuring equipment; semiconductor diodes and dice and wafers therefor; transistors and dice and wafers therefor; electronic component assemblies, sub-assemblies, printed circuit board and microcircuits; electronic computers, peripherals, equipment or systems containing electronic computers; stored program controlled communication switching equipment and systems; recording equipment and media. Memorandum, *supra* note 7.

<sup>30</sup> See 15 C.F.R. § 372.1(b) (1984) (no technical data on commodity control list may be exported to any destination without a validated OEA license).

<sup>31</sup> For example, a specific validated license "is required for the export of computers and much peripheral equipment to any destination other than Canada." McKenzie, *The Commerce Department Proposed New Restrictions on Distribution Export Licenses*, 1 *COMPUTER LAW*, 24 (1984).

<sup>32</sup> Buyers in Hong Kong have curtailed their purchase of technology from the United States due to increasing licensing delays. An official at Cable and Wireless Systems in Hong Kong commented that "purchases of American products had dropped by 28 percent from 1982 to 1983 and likely would be reduced by more than 80 percent this year." Auerback, *Writing Off U.S. Suppliers*, Washington Post Nat'l Weekly Ed., May 21, 1984, at 21, col. 2. It takes approximately 90 days for the Commerce Department to process license applications. Huser, *Bargain on Export Procedure Struck by Conference Panel*, 1984 *CONG. Q.*, May 26, 1984, at 1264, col. 1.

<sup>33</sup> U.S. Congress, House, Subcomm. on International Economic Policy and Trade, *Extension and Revision of the Export Administration Act of 1969*, Part 1, 96th Congress, 1st Sess. 1979, 589.

<sup>34</sup> The routine Eastern Bloc license application requires an average of 88 working days for processing, with the maximum being 207. A moderately complex application requires on average 102 working days, with the maximum being 235 days. J. McIntyre, *Uncertainty in Business - Government Relations: The Dynamics of International Trade Policy* 61 (The Dean Rusk Center Monograph No. 2, 1983).

the most important of which is the distribution license.<sup>35</sup> The majority of items on the Commodity Control List are exported through use of a distribution license.<sup>36</sup> The use of a single distribution license is more economical, both in terms of time and money,<sup>37</sup> than the use of multiple specific validated licenses.<sup>38</sup> Unlike the specific validated license, a single distribution license authorizes multiple shipments of a single controlled commodity to approved consignees in specified countries for a period of one year.<sup>39</sup> Thus, exporters can save time and money since application for separate specific validated licenses is not required for individual shipments of the same commodity to the same approved destination.<sup>40</sup>

Despite these benefits, Congress received complaints from both the public and private sectors concerning the current distribution licensing procedures. Commerce Department officials expressed concern that distribution licenses were being utilized to assist the illegal re-export of commodities to controlled destinations.<sup>41</sup> Private sector officials complained both that the processing time for applications was unduly lengthy<sup>42</sup> and that the list of items available for export was too narrow.<sup>43</sup>

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<sup>35</sup> 15 C.F.R. § 373.3 (1985).

<sup>36</sup> Amendments to the Distribution License Procedure, 49 Fed. Reg. 35,790 (1984) (to be codified at 15 C.F.R. §§ 373 & 376).

<sup>37</sup> Distribution license sales represent at least \$20 billion a year for high technology companies in the United States. *Commerce Department Issues Revised Regulations for Distribution Licenses*, 1 INT'L TRADE REP. 253, 254 (1984) [hereinafter cited as *Revised Regulations*].

<sup>38</sup> This is especially true when goods are inexpensive and could not support the cost of a specific validated export license for each transaction. McKenzie, *supra* note 31, at 24.

<sup>39</sup> *Id.*

<sup>40</sup> See generally *supra* note 37.

<sup>41</sup> In an effort to deter violations of export regulations, the Commerce Department levied a \$1.5 million civil penalty against Digital Equipment Corporation. The Commerce Department agreed to suspend payment of \$400,000 of the fine during a three-year probationary period, however, and to waive payment of that portion if Digital restrains from further illegal activities. The remaining \$1.1 million is the largest penalty to be levied by the Commerce Department for violations of the Export Administration Act. Digital's violations consisted of the completion of numerous sales of computers to a German firm, Deutsche Integrated Time, which earlier had been denied export privileges due to prior convictions of illegally re-exporting computers originating in the United States to the Eastern Bloc. *Digital Equipment Corp. Fined \$1.5 Million for Violations in Largest Penalty Ever Paid*, 1 INT'L TRADE REP. 259 (1984).

<sup>42</sup> See Huser, *supra* note 32.

<sup>43</sup> See *supra* notes 15-17 and accompanying text (discussion of the narrow United States unilateral export controls).

In response to these concerns, Congress amended the EAA. These amendments attempt to make exporters self-regulating through the development of internal audit programs. Most major companies already use such programs.<sup>44</sup> The new audit programs place primary responsibility for export controls on the individual exporter.<sup>45</sup> To deter potential abuses, the amendments establish strict penalties, including license revocation and criminal charges, for violators.<sup>46</sup> The exporters also bear the burden of assuring the Commerce Department of the integrity and reliability of all parties involved in the transaction.<sup>47</sup>

## II. COMMENT

The self-regulatory program eliminates the previous requirement that each applicant be granted a certain number of specific validated licenses or complete a certain number of transactions to be eligible

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<sup>44</sup> The Commerce Department reports that most major high technology export firms already use an internal monitor to control exports. Vincent Greenwald, of the Exporter Services Division of the Commerce Department, predicts that individual exporters will have major incentives to enforce the appropriate distribution license regulations. Foremost will be the selective audits performed by the Commerce Department. Telephone interview with Vincent Greenwald, Exporter Services Division of the Commerce Department (Sept. 27, 1984).

<sup>45</sup> The proposals specifically require the following:

- (1) that license applicants have an adequate internal control program consisting of an identification of positions in the firm and consignee firms responsible for compliance with the distribution license procedure requirements;
- (2) systems for assuring compliance with product and country restrictions;
- (3) an internal audit system or program;
- (4) nuclear and end-use/end user controls;
- (5) an education program for those in the firm and consignee firms involved in distribution license sales;
- (6) a system for distribution and verification of receipt by consignee of the Denial List and related material;
- (7) a way to screen customers against the list; and
- (8) a process of screening original equipment manufacturers (OEM's), including the collection and analysis of information on the OEM principals, size, and sales volume.

*Revised Regulations*, *supra* note 37.

<sup>46</sup> Greenwald, *supra* note 44.

<sup>47</sup> Jake Garn (R-Utah), Chairman of the Senate Banking Committee, criticized recommendation of an internal audit system. Garn charged that the changes in the distribution licensing amendments had reduced the control mechanism to "little more than an honor system." Garn also accused the Commerce Department of bowing to the business sector's demands due to the Department's "inherent protrade [sic] bias." *Garn Criticizes New Distribution License Regulations, Says Banking Will Hold Hearing*, 1 INT'L TRADE REP. 300 (1984).

for a distribution license.<sup>48</sup> In addition, the amendments focus only on "truly critical" technology, thus narrowing the list of items ineligible for a distribution license.<sup>49</sup> Once a firm gains administrative approval for its internal audit plan,<sup>50</sup> the benefits become apparent. Application of the amendments to the distribution licensing procedures should decrease processing time, and fewer applicants should be declared ineligible.<sup>51</sup> Further, the new distribution licensing procedures should boost the competitiveness of United States high technology industries, without sacrificing safeguards against the illegal export of goods to the Eastern Bloc.<sup>52</sup>

The impact of the amendments to the distribution licensing procedures would be even more pronounced if the United States and a substantial number of other member nations were to approve the CoCom guidelines.<sup>53</sup> Adoption of the CoCom proposals would trigger additional relaxation of the stringent controls currently utilized

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<sup>48</sup> See *Revised Regulations*, *supra* note 37. The proposals require that each prospective exporter successfully complete a pre-license review program by the Commerce Department. The "proposals also require pre-approval consultations and pre-license audits of applicants unknown to the department, a more extensive post-license audit program, and contains safeguards against firms that fail to comply." Press Release from Daniel Landa, Office of the Secretary of Commerce (Sept. 10, 1984) (discussing revisions to proposed distribution license rules).

<sup>49</sup> See *Revised Regulations*, *supra* note 37 (impact of the revised distribution license).

<sup>50</sup> See *supra* note 45 and accompanying text (requirements for an audit plan).

<sup>51</sup> See *Revised Regulations*, *supra* note 37 (impact of the revised distribution license).

<sup>52</sup> The new distribution license proposals are viewed as a victory for high-technology firms which had warned that tighter controls "could cause unnecessary paperwork, shipment delays and the loss of overseas customers to Japanese and European competitors." Lachica, *U.S. Eases Position on Tighter Controls for Some Exporters*, Wall St. J., Sept. 11, 1984, at 2, col. 3. Congressman Don Bonkers, sponsor of the bill, reported that the goal of the legislation is "to unshackle industry so that they can compete more effectively" by controlling only critical technology. Huser, *supra* note 32.

<sup>53</sup> Sources within the governmental affairs branch of Honeywell, Inc. anticipate that adoption of the CoCom guidelines will allow export to the Eastern Bloc of the following non-strategic, low-performance computers:

- (1) Personal computers with a PDR of less than 2 mega bits/second;
- (2) Incorporated (removable) computers with a PDR of less than 5 mega bit/second;
- (3) Embedded (non-removable) computers with PDR of less than 28 mega bits/sec.

Interview with Pamela K. Young, Manager, Federal Affairs, Honeywell, Inc. (Oct. 11, 1984).

by the United States,<sup>54</sup> and make a greater number of items eligible for export via the distribution license.<sup>55</sup> The changes in the CoCom control list, in conjunction with the amendments to the distribution licensing system, should result in a greater quantity of noncritical items being eligible for export from the United States to the Eastern Bloc in a more efficient manner.<sup>56</sup>

For CoCom to prevent the Eastern Bloc's acquisition of militarily useful technology effectively, the export guidelines must be approved and enforced unanimously.<sup>57</sup> Yet, as with most multinational groups, internal harmony and unanimous support for policy directives are objectives which realistically are seldom achieved.<sup>58</sup> Unanimous policy support and enforcement are particularly difficult to obtain in CoCom because membership is purely voluntary.<sup>59</sup> Furthermore, members prefer to act by "gentleman's agreement," which requires decision

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<sup>54</sup> The United States would have to amend its current Commodity Control List to reflect the changes it has proposed to CoCom. Otherwise, after the adoption the CoCom amendments would not be implemented legally. Interview with Roman W. Sloniewsky, Deputy Assistant General Counsel for Domestic Commerce, in Washington, D.C. (Oct. 11, 1984).

<sup>55</sup> For a detailed discussion of the amendments to the distribution licenses, see *Revised Regulations*, *supra* note 37.

<sup>56</sup> CoCom members concede that the group's major problem is that members usually ignore CoCom policy when national interests are at stake. Internal CoCom sources quickly implicated French authorities as the worst offenders. See Kempe & Lachica, *supra* note 12. Sources within the State Department, however, indicated that the CoCom countries violate the established policy only in extraordinary circumstances. Officials within CoCom rely heavily upon the art of diplomacy to make CoCom an effective organization. Telephone interview with Bob Campbell, Research Analyst at the State Department (Aug. 20, 1984).

<sup>57</sup> William Root, former chief of the United States Negotiating Team to CoCom has blamed a substantial portion of CoCom's ineffectiveness on the United States. This blame is due in large part to the lack of a unified position within the United States. For example, Root contends that "CoCom computer negotiations were unsuccessful for six years largely because of U.S. intransigence in the face of constructive allied suggestions." Root, *supra* note 6, at 68.

<sup>58</sup> Recently, the United States had lobbied to legitimize CoCom further via multinational treaty. Had CoCom been given treaty status, a policy enforcement mechanism would have existed. The treaty efforts have been abandoned, however, because West European delegates indicated that they would have been unable to obtain the necessary parliamentary approval. Kempe & Lachica, *supra* note 12.

<sup>59</sup> CoCom operates on a very informal basis; enforcement mechanisms are not a viable option since membership is purely voluntary. Aepfel, *supra* note 10, at 108-09. "The basic challenge of all politics is to arrive at a fair and workable harmonization of conflicting individual, group, and aggregate human needs." Unfortunately, this challenge is rarely met. T. COULOMBIS & J. WOLFE, INTRODUCTION TO INTERNATIONAL RELATIONS: POWER AND JUSTICE 10 (1978).

by unanimous vote. This preference is unfortunate since CoCom's members do not always honor their gentlemanly agreements. Members often reserve the right to act independently based on their individual legal, policy, and administrative situations.<sup>60</sup> Individual members are thus free to deviate from approved export standards.<sup>61</sup>

Before CoCom policy guidelines can be enforced unanimously, the United States and CoCom individually and collectively must solidify their policy formation process.<sup>62</sup> Unfortunately, no single administrative body in the United States is responsible for coordinating participation in CoCom; instead, this function is divided among the Departments of State,<sup>63</sup> Commerce, and Defense.<sup>64</sup> In planning United States participation in CoCom, each of these departments seeks primarily to further its individual policy goals;<sup>65</sup> consistency in the regulation of United States participation in CoCom is often only a secondary concern.<sup>66</sup> The division of authority among these depart-

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<sup>60</sup> *EAA Report 1982*, *supra* note 4, at 24.

<sup>61</sup> K mpfe & Lachica, *supra* note 58 and accompanying text.

<sup>62</sup> Senator Sam Nunn (D-GA) stressed the importance of avoiding interagency disputes: "[w]hen such disagreements persist, the government renders itself nearly incapable of setting a balanced and reasonable export control policy that is responsible to national security needs but fair to American business at the same time." News Release from United States Senate Permanent Subcomm. on Investigations (Oct. 15, 1984) (discussing Department of Defense's role in export decisions) [hereinafter cited as News Release].

<sup>63</sup> Unnamed sources from the State Department have blamed the Defense Department's refusal to cooperate with other CoCom countries as a key factor which led to William Root's resignation as Director of the State Department's Office of East-West Trade. Auerbach, *Export Risks Lead to Pentagon*, Wash. Post, Apr. 3, 1984, at D8, col. 5.

<sup>64</sup> The Commerce Department charges that the Defense Department "lacks sensitivity to private sector concerns about the detrimental impact of national security export controls on the United States international trade." Conversely, the Defense Department complains "that the Commerce Department is primarily a trade promotion agency and is thus not well suited to police high-tech imports." See Richey, *supra* note 9. Senator Nunn (D-GA), Spokesman of the Permanent Subcommittee on Investigations, reported that "lengthy interagency disputes can be avoided when the Pentagon's technical assessments are presented as being strictly technical." The subcommittee report stressed that the Department of Defense's contribution to export guidelines should be of a purely technical, not political and ideological, perspective. News Release, *supra* note 62.

<sup>65</sup> See *supra* notes 61-63 and accompanying text; see also Hosenball, *infra* note 66 and accompanying text (discussion of departmental conflicts between Commerce, Defense, and State).

<sup>66</sup> "[I]nteragency disagreement pits conservatives in the Pentagon, who want to see relatively tight controls on small computer shipments to the Eastern Bloc, against State and Commerce officials who argue that such controls are impractical, potentially

ments was originally conceived as a means to insure that the interests of each department were represented adequately.<sup>67</sup> Unfortunately, each department seems to disregard the other departments, producing a lack of cohesion in United States policy toward CoCom. This divisive approach has proven fatal in the past to the formation of policy.<sup>68</sup>

In addition to the lack of consistency in United States policy, individual CoCom members have differing interests, creating additional conflicts within CoCom and making enforcement of export controls difficult.<sup>69</sup> Western Europe, in contrast with the United States, is reluctant to use export controls for political purposes. In fact, some Western European leaders have charged that CoCom is an over-politicalized, irresponsible organization doing nothing to deter the flow of technology and information to the Eastern Bloc.<sup>70</sup> As a result of perceived inefficiencies within CoCom, Western Europeans have become less satisfied with tighter restrictions which the United States has advocated in the past.<sup>71</sup> These inter-CoCom conflicts culminated in a recent breakdown in negotiations on export controls for personal computers, prompting United States officials to reassess means previously utilized to obtain trade agreements.<sup>72</sup>

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economically harmful to the United States, and irritating to the allies." Hosenball, *U.S., CoCom Trying to Set New Small CPU Policy*, *Electron News*, Apr. 30, 1984, at 4, col. 4.

<sup>67</sup> See *supra* notes 63-66 and accompanying text.

<sup>68</sup> The tri-departmental disagreements regarding computer technology prompted Ambassador Abraham Katz, permanent United States delegate to CoCom, to send a telegram to the various departments complaining about the lack of departmental unity. Hosenball, *supra* note 66. Due to departmental conflicts the new guidelines on personal computers took more than six years to complete. Root, *supra* note 7, at 68-69.

<sup>69</sup> See *supra* notes 12-13 and accompanying text (examples of ineffective enforcement of export controls).

<sup>70</sup> "Allied reluctance to use trade controls to punish odious Soviet behavior is usually attributed to the higher priority they allegedly place on trade." Root, *supra* note 6, at 61.

<sup>71</sup> West Germany's Economic Minister, Martin Bangemann, refused to consider tighter restrictions on export controls. He predicted that other countries not quite so closely bound to the United States as West Germany would not agree to future restraints on exports. *German Economic Minister Says U.S. Pressure For Restrictions Unacceptable, May Retaliate*, 1 INT'L TRADE REP. 178 (1984) [hereinafter cited as *German Minister Comments*].

<sup>72</sup> Completion of the latest CoCom computer guidelines took approximately six years, in part due to the unbending attitude of the United States. Root, *supra* note 6, at 68-69.

Previously, many Western Europeans felt forced to adopt guidelines advocated by the United States since many European industries were dependent on United States technology.<sup>73</sup> Ten years ago the United States was credited with the development of seventy percent of the world's technology, while for 1984 that figure was fifty percent. Predictions indicate that this figure may fall to as low as thirty percent by 1994.<sup>74</sup> Consequently, many Western Europeans no longer feel economically or technologically dependent on the United States and have ignored many of these earlier guidelines. For example, some Western Europeans have made significant steps toward domination of the personal computer market by using national interest exceptions in CoCom, even though they had earlier agreed to controls.<sup>75</sup>

The past ineptness of CoCom's policy<sup>76</sup> has forced the United States to take a more realistic approach to export controls. Recent developments indicate that the United States has realized that CoCom agreements will be ineffective unless enforced multilaterally by member countries.<sup>77</sup> A willingness to compromise on CoCom personal computer controls indicates that the United States will align itself more closely with the practices of Western Europeans.<sup>78</sup> In the past, the United States has used highly restrictive export controls as a means of economic warfare against communist nations, a practice not followed by Western Europeans.<sup>79</sup> If this trend toward decontrol

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<sup>73</sup> See *German Minister Comments*, *supra* note 71.

<sup>74</sup> Aepfel, *supra* note 10, at 107 (discussion of economic factors which have produced changes within CoCom).

<sup>75</sup> Auerback, *China Hits Slowness of High Tech Imports*, N.Y. Times, Apr. 24, 1984, at D9, col. 1.

<sup>76</sup> See *supra* note 13 and accompanying text (example of a CoCom nation blatantly ignoring a CoCom export control, undermining CoCom's effectiveness).

<sup>77</sup> See Root, *supra* note 6. In a recent Senate report regarding the transfer of technology, the National Science Foundation estimated that the percentage of United States high technology sales compared to that of other nations has declined from 75% to 50% and may fall as low as 30% by the end of the decade. This prediction is based on the fact that other nations have made significant progress in the development of high technology industries. Thus, for the United States "to succeed in keeping certain key militarily useful technologies out of the hands of Communist adversaries like the Soviet Union, American efforts must be coordinated with other major suppliers." PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE UNITED STATES SENATE, TRANSFER OF TECHNOLOGY REPORT, S. DOC. NO. 664, 98th Cong., 2d Sess. 24 (1984).

<sup>78</sup> "The agreement is particularly significant since it is expected to serve as a model for accords now being negotiated in regard to other militarily sensitive technologies." Aepfel, *supra* note 10, at 111.

<sup>79</sup> Meese, *supra* note 15, at 23.

of previously restricted commodities continues,<sup>80</sup> then pro-trade concerns will likely achieve a more prominent role in future export control negotiations for the United States.<sup>81</sup>

High technology industries will certainly prosper if the United States continues its emphasis on economic and trade considerations.<sup>82</sup> This shift in focus will lead to decontrol of items not militarily critical. Long-range planning will necessitate that control items be selected based on their specific military relevance to the Eastern Bloc's current technical deficiencies.<sup>83</sup> Consequently, the United States will be in a

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<sup>80</sup> For example, President Carter used stricter controls of high technology as a foreign policy tool to show official displeasure with the U.S.S.R.'s invasion of Afghanistan. Additional restrictions included: "revocations and denials of high-technology export licenses; controls on the export of grain and certain agricultural products; an embargo on the sale of phosphates for fertilizer; and severe restrictions on the sale of technology to produce equipment used in oil and gas production." *Id.* at 20 n.2.

<sup>81</sup> China represents an example of the relaxed United States attitude toward export controls for Communist countries. In 1980, the Reagan administration took steps to relax trade restrictions further for China. Approximately twice the prior level of technology is now available for export to China. Reagan has committed his administration to the achievement of a formal differentiation between the Eastern Bloc and China. Yergin, *supra* note 12, at 3. Recently the administration established a special China Team Center to speed license application for the export of goods to China. *Progress on CoCom Controls for China Reported by Archey in Hill Testimony*, 2 INT'L TRADE REP. 1295 (1985).

<sup>82</sup> The most significant changes in the United States will be felt by producers of personal computers. The Apple 2-Plus, the Atari-400 and 800 series, the Radio Shack TRS-80 models two and three, and the Canon ex-1 no longer will be subject to the unilateral controls within the United States. *New CoCom Guidelines on Computer Exports Tighten Curbs, Defense Department Maintains*, 1 INT'L TRADE REP. 87 (1984). The Industry Coalition on Technology Transfer (ICTT), which represents more than 3,000 high-technology firms with over 4 million employees, estimates that their worldwide sales are currently greater than \$250 billion. Their export income represents approximately 30% of their output compared with only 8% for other United States manufacturers. These high returns have resulted in productivity which is six times greater than that of other United States industries. *Transfer of Technology: Hearings before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. 208-09 (1984) (statement of W. Clark McFadden II, on behalf of ICTT).

<sup>83</sup> *Former State Department Official Calls for Controls Changes in Journal Article*, 1 INT'L TRADE REP. 260 (1984). The Reagan administration recently released a list of items the U.S.S.R. wishes to acquire. The Technology Transfer Intelligence Committee, organized under the auspices of the Central Intelligence Agency, gathered the information. The report indicates that Moscow's Military Industrial Commission "seeks 'one-of-a-kind military and dual-use hardware, blueprints, product samples, and test equipment to exploit and use to improve the technical levels and performance of Soviet weapons, military equipment, and defense manufacturing equipment.'" *Administration Releases Update of Report on Soviet Acquisition of West's Technology*, 2 INT'L TRADE REP. 1257 (1985).

better position to compete with Western Europe for the export of low level technology.<sup>84</sup>

### III. CONCLUSION

Whether CoCom has achieved its policy objective is still debatable. CoCom's mission is to implement a plan which will guard its members against military or economic threat from the Eastern Bloc, while enhancing trade among the nations involved.<sup>85</sup> Changes in distribution licensing procedures should insure a relatively high degree of compliance due to costly penalties imposed for violations.<sup>86</sup> At the same time, CoCom's scaled-down guidelines for low level technology pose no increased military threat. In short, the guidelines allow the United States to export items which are currently available to the Eastern Bloc from a variety of foreign sources.<sup>87</sup> As a result, CoCom remains an important and viable organization capable of focusing international attention upon export issues.<sup>88</sup>

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<sup>84</sup> See *supra* notes 8, 17, 24, 52, 53, and accompanying text (examples of items affected by the new export guidelines).

<sup>85</sup> The CoCom strategy to keep Western society safe is aimed at preventing critical high technology from reaching the Eastern Bloc. This goal is unrealistic since the Eastern Bloc will eventually acquire the technology through its own internal advancements; at best CoCom can only impede the Eastern Bloc's technological progress via controls.

<sup>86</sup> See *supra* notes 1, 2, 41, 48 and accompanying text (examples of fines imposed for violation of export controls and an explanation of the internal audit plan).

<sup>87</sup> See *supra* notes 8, 13, 32, 52 and accompanying text (examples of how the United States will be more competitive).

<sup>88</sup> Despite CoCom's shortcomings, members still want to participate in CoCom since "[w]ithout this organization, competition among Western exporters would have escalated the technology sales to the East." Kempe & Lachica, *supra* note 12.

