



1-1-1991

## For Whom the Bell Tolls- CoCom: Past, Present, Future

Uzzi O. Raanan

*University of the Pacific, McGeorge School of Law*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/globe>



Part of the [International Law Commons](#)

### Recommended Citation

Uzzi O. Raanan, *For Whom the Bell Tolls- CoCom: Past, Present, Future*, 4 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 165 (1991).

Available at: <https://scholarlycommons.pacific.edu/globe/vol4/iss1/7>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

**For Whom The Bell Tolls — CoCom:  
Past, Present, Future**

TABLE OF CONTENTS

I. INTRODUCTION ..... 166

II. BACKGROUND ..... 169

    A. *Historical Development of CoCom* ..... 169

        1. *The Formation of CoCom* ..... 169

        2. *Periods of Adjustment* ..... 171

    B. *CoCom's Structure and Operations* ..... 174

        1. *Organizational Structure* ..... 174

        2. *The Operation of the Committee* ..... 175

III. LEGAL ISSUES IN COCOM ..... 177

    A. *CoCom's Binding Powers* ..... 177

    B. *Oversight of Member Compliance* ..... 179

    C. *Legality of CoCom in International Law* ..... 180

        1. *CoCom as a Binding Treaty* ..... 180

        2. *The Legality of a Peacetime Embargo* ..... 181

IV. PHILOSOPHICAL DIFFERENCES IN COCOM ..... 184

    A. *A Comparison of Export Systems* ..... 184

        1. *Japan* ..... 184

        2. *Germany* ..... 185

        3. *Canada* ..... 186

        4. *United States* ..... 186

            a. *The Export Administration Act* ..... 188

            b. *Procedure for receiving export licenses in the U.S.* ..... 192

            c. *Views in the United States* ..... 193

V. RECENT CHANGES . . . . .	194
A. Latest CoCom Directives . . . . .	194
B. Resulting Changes in the United States . . . . .	196
VI. COCOM IN THE FUTURE . . . . .	197
VII. CONCLUSION . . . . .	199

## I. INTRODUCTION

After forty-one years of masterminding the embargo of trade in technology against the Eastern Bloc, the Coordinating Committee for Multilateral Export Controls (CoCom)<sup>1</sup> must decide whether to dismantle its organization and initiate a new era of free trade, or maintain the embargo, with periodic fine-tuning reflecting political and economic changes. The dilemma facing the Committee's seventeen member-nations arose following reforms which ushered in new political and economic systems in nearly every Eastern European nation.<sup>2</sup>

---

1. CoCom consists of the following countries: Australia, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States. Masden, *Trade Regulations-Export Controls- CoCom Agrees on New Multilateral Export Guidelines Allowing Eastern Bloc to Purchase Low Level Technology Legally*, 16 GA. J. INT'L & COMP. L. 197, 197 n.4 (1986). See generally Haendel & Rothstein, *The Shifting Focus of Dual Use Export Controls: An Overview of Recent Developments and a Forecast for the Future*, 25 INT'L LAW 267 (1991). Haendel and Rothstein's article was released while this Comment was in its publishing stages. They review the changing role of export controls and reinforce a number of predictions offered by this comment.

2. N.Y. Times, Dec. 3, 1989, § IV, at 3, col. 1. In early 1989, the Polish government legalized Solidarity. *Id.* On May 22, Janos Kadar, Hungary's communist leader for over 32 years stepped down, and was replaced by a centrist leader. *Id.* A month later, Poland held its first free elections since the rise of communism, with Solidarity winning control of Parliament. *Id.* By the end of the summer, Tadeusz Mazowiecki, a Solidarity leader, was elected as prime minister. *Id.* On October 7, the Hungarian Parliament revised the Constitution, allowing for a multi-party system. The Communist

While most European communist regimes collapsed, the Union of Soviet Socialist Republics (U.S.S.R.) approached reform with caution. The Soviet government restructured the political organization and decision making apparatus of the central government, and improved relations with the West. They then decentralized the Soviet economy to encourage private initiative. Presently, as economic conditions continue to deteriorate, the U.S.S.R. struggles internally to survive, with the latest signs implying a possible retreat from initial reform policies.

Responding to the rapid changes in Eastern Europe, a somewhat stunned Western alliance reexamined political and economic relationships with its former adversaries. On June 1, 1990, the U.S. and the U.S.S.R. signed a trade agreement with provisions to include the Soviet Union as a most favored nation.<sup>3</sup> Western nations also pledged economic assistance to Eastern Europe, particularly to Poland, Hungary, and Czechoslovakia, which are in the process of forming democratic institutions.<sup>4</sup>

Along with initiating financial assistance programs, CoCom also reexamined its policies on regulating the export of sensitive

---

Party, which had ruled since 1956, was then disbanded. *Id.* During November, the East German Politburo resigned and the Berlin Wall was opened. *Id.* In Bulgaria, Todor I. Zhivkov, the country's communist leader since 1954 resigned. *Id.* At the same time, the hard-line communist leadership in Czechoslovakia relinquished control, and Vaclav Havel, leader of the democratic movement, was elected president. *Id.* The year ended with only one bloody revolution, when on December 22, the Rumanian people overthrew Nicolae Ceausescu. *N.Y. Times*, Nov. 9, 1990, § A, at 10, col. 3.

During 1990, reform movements gathered momentum, as former despotic nations held free elections for the first time since the institution of communism. In March and April, the opposition United Democratic Front won a majority of the seats in the Hungarian Parliament. *Id.* In May, Jozef Antall, of the United Democratic Front, became Prime Minister of Hungary, while the first free elections since 1937 were held in Rumania. *Id.* Free elections followed in Bulgaria. *Id.* A short time later, the Bulgarian Parliament named Zhelyu Zhelev, leader of the opposition Union of Democratic Forces, as the country's first non-communist president in 40 years. *Id.* On August 3, Arpad Goencz, once condemned to life imprisonment for his role in the 1956 anti-communist uprising, was elected by Parliament to serve as president of a democratic Hungary. *Chicago Tribune*, Aug. 4, 1990, at 4, Zone C. On October 3, West and East Germany united. The year closed with the first Polish presidential election held in the new democracy. In a run-off election, Lech Walesa, leader of the group credited with triggering the Eastern European revolution, was elected president. *Chicago Tribune*, Dec. 12, 1990, at 24, Zone C.

3. *American Banker*, June 15, 1990, at 10.

4. *N.Y. Times*, Jan. 14, 1990, § I, at 14, col. 1. To assist in the reconstruction of Eastern Europe, ten billion dollars was granted by 34 nations which established the European Bank for Reconstruction and Development in Eastern Europe. *Id.*

technology and industrial goods to Eastern Europe and the Soviet Union.<sup>5</sup> In their August round of meetings, CoCom members, whose past objective was to forestall their adversaries' technological advancement, suddenly faced an historic opportunity to encourage reforms by infusing failing Eastern European economies with advanced technology.

As CoCom deliberated over the ramifications behind the collapse of the Eastern Bloc, its attention shifted to the third world. There, as the superpower deterrence system disappeared, a vacuum had evolved, encouraging the military exploits of desperate leaders. The Iraqi invasion of Kuwait, on August 2, 1990, was a stark example of the new threat to world peace, and the need to refocus export control laws. As the Iraqi war machine demonstrated, sophisticated Western and Eastern technology can be extremely dangerous in the hands of unstable regimes. Therefore, to avoid a future reoccurrence of the Gulf War, industrial countries must respond with a safety apparatus to control the flow of dangerous exports of technology to third world countries.

This comment examines CoCom's possible role in a new world that is no longer occupied by a bipolar power struggle between communism and capitalism. Part II traces CoCom's historic development as well as organizational composition. Part III then examines the legal status of CoCom's "gentlemen's agreement," while part IV explores various philosophies that influence decision making within CoCom. Part V details the new measures adopted by CoCom in response to changes in the Soviet and Eastern European systems. Part VI predicts that reopening European borders as well as a decline in U.S. economic and technological power will lead to CoCom's disappearance from the East-West

---

5. 7 Int'l Trade Rep. (BNA) 114, 114 (Jan. 24, 1990). According to White House spokesperson Marlin Fitzwater, "[t]he situation that's changed now, of course, is with the emergence of these new Democracies in Eastern Europe, or countries moving in that direction at least, and our interest to help support those countries by additional exports of technology, and by the seeming change of the military threat from the Soviet Union . . . That leads to our addressing this issue, and why the situation is frankly different today than it was a year ago." *Id.* Although the U.S. has called for liberalizing export controls to all CoCom controlled countries, it has singled out specific Eastern European nations that have moved toward democratic political systems (Poland, Czechoslovakia, and Hungary) to receive more sophisticated technology. *Id.*

export control arena. It then proposes that CoCom's developed and time-tested methods be redirected towards developing multilateral cooperation to prevent radical regimes from acquiring dangerous technology.

## II. BACKGROUND

### A. Historical Development of CoCom

#### 1. The Formation of CoCom

In the aftermath of the Berlin blockade of 1948, Western leaders realized that tensions with the Soviet Union would continue well into the future.<sup>6</sup> Planning for such a contingency, the U.S. renewed wartime export restrictions<sup>7</sup> and initiated discussions with Western allies to establish embargo lists against the U.S.S.R. and its satellite states.<sup>8</sup> In 1949, the U.S. proposed the formation of the Consultative Group, which comprised of export control officials from various Western nations, who were charged with supervising export control lists containing regulated items.<sup>9</sup> The Consultative Group served as a policy-setting body. In 1950, CoCom was created to execute the day-to-day embargo directives,<sup>10</sup> assuming the policy making responsibility a short time later.<sup>11</sup> CoCom became the deliberative body, where member-nations discussed the

---

6. Hunt, *Multilateral Cooperation in Export Controls-The Role of CoCom*, 14 U. Tol. L. Rev. 1285, 1286 (1983).

7. Originally export controls were enacted during World War II as a response to domestic shortages in basic commodities. Liebman, *The Export Administration Amendments Act of 1985*, 20 INT'L LAW. 367, 367 (1986). The controls were enacted in 50 U.S.C. app. § 701 as amended June 30, 1942, c. 461, 56 Stat. 463. *Id.*

8. *Id.*

9. Berman & Garson, *United States Export Controls-Past, Present, and Future*, 67 COLUM. L. REV. 761, 835 (1967). The Consultative Group was established by the United States, United Kingdom, France, Italy, Netherlands, Belgium, and Luxembourg. *Id.* Between 1952-1953 Norway, Denmark, Canada, and West Germany joined the Group and eventually Portugal, Greece, Turkey, Japan, and Australia became members as well. *Id.*

10. Hunt, *supra* note 6, at 1287.

11. Webster, *CoCom: Limitations on the Effectiveness of Multilateral Export Controls*, 1983 Wis. INT'L L. J. 106, 108 (1983) (presented at the Symposium on U.S. Export Policy on Technological Transfer).

types of export control policies they planned to enact in their respective nations.

CoCom's initial purpose was to restrict the export of goods and technology which could contribute significantly to the military potential of "controlled countries,"<sup>12</sup> and which could adversely affect the security of member-states.<sup>13</sup> Some writers speculate that CoCom originally intended to wage an offensive economic warfare against the U.S.S.R., and its satellites, at the height of the Cold War era.<sup>14</sup> Today, the embargo aims to preserve the western technological lead over Warsaw Pact countries.<sup>15</sup> CoCom accomplishes this end by restricting the export of "dual use technology."<sup>16</sup> Since dual use technology is a vague term that generally includes any technology used for both civilian and military purposes, and most civilian items may be used by the military, many disagreements within CoCom revolve around where to draw the dual use line. According to the United States government, CoCom controls goods and technology "which are principally used in peacetime for the development, production or use of arms; those from which technology of military significance might be extracted; and those of military significance in which proscribed destinations have a deficiency."<sup>17</sup>

CoCom was conceived as a secret and informal agreement, due

---

12. The countries designated by CoCom as controlled are: Albania, Bulgaria, Czechoslovakia, Hungary, Kampuchea, the Mongolian People's Republic, North Korea, the People's Republic of China, Poland, Rumania, Soviet Union, and Vietnam. Masden, *supra* note 1, at 197 n.5. See Recent Developments, *Export Controls: New CoCom Measures on High Technology Exports*, 29 HARV. INT'L L.J. 547, 547 n.4 (1988) (listing the controlled countries).

13. Hunt, *supra* note 6, at 1287-88. Each member of CoCom may independently increase its own list of controlled countries. *Id.* Although unsuccessful in including Cuba in the CoCom embargo, the United States has used economic methods to pressure western countries to treat Cuba as a controlled country. Berman & Garson, *supra* note 9, at 836.

14. Hunt, *supra* note 6, at 1287-88. CoCom served as the economic arm of the battle to win the Cold War. *Id.*

15. *Id.* at 1288. As Soviet hegemony over Eastern Europe waned, the Warsaw Pact ceased to exist. See Washington Post, Feb. 26, 1991, at A16, § 1 (signing of declaration, by member nations of Warsaw Pact, to dismantle "the military organs and structures of the treaty").

16. Webster, *supra* note 11, at 114. Dual use technology includes "items intended for civilian use but which also have a potential for military use." 7 Int'l Trade Rep. (BNA) 94, 94 (Jan. 17, 1990).

17. Hunt, *supra* note 6, at 1288.

to concern within NATO over the legality of the peacetime trade embargo against communist nations.<sup>18</sup> Although CoCom has remained viable for forty-one years, “no written agreement--treaty, executive agreement or other constitutive document” has ever been signed between the members.<sup>19</sup> Instead, agreements dealing with operations and procedures are codified as footnotes to written technology control lists.<sup>20</sup> As a result of the secret nature of the pact, exact details of the understanding behind the framework and workings of CoCom remain unknown.<sup>21</sup> Authorities familiar with CoCom suggest that the organization maintains secrecy in order to protect participating governments from domestic criticism.<sup>22</sup>

Policy guidance was provided on an ad hoc basis, during the early years of the embargo, as representatives to CoCom received instructions from their respective governments, which also conducted direct ad hoc consultations with governments interested in specific CoCom issues.<sup>23</sup> CoCom has since developed an infrastructure which maintains a full time staff. In recent years, the Committee has held more structured “high-level” meetings where political-level representatives of member-states have discussed issues of export policy and practice.<sup>24</sup>

## 2. Periods of Adjustment

CoCom’s progress throughout the years plots an erratic, yet constant, course leading towards liberal export controls. At its inception, CoCom’s regulations responded to what was perceived

---

18. Webster, *supra* note 11, at 108. Efforts by the United States during the 1980s to legitimize CoCom by creating a multinational treaty were resisted by Western European delegates claiming that approval was not possible in their respective parliaments. Masden, *supra* note 1, at 206 n.58.

19. Bingham & Johnson, *A Rational Approach to Export Controls*, 57 FOREIGN AFF. 894, 904 (Spring 1979).

20. *Id.* See *infra* note 47 (discussing the function of control lists).

21. Webster, *supra* note 11, at 108.

22. Bingham & Johnson, *supra* note 19, at 904. Some European governments are vulnerable to criticism from the left, for joining the U.S. in embargos against the communist nations. *Id.* On the other hand, the U.S. government is subject to domestic criticism, for acquiescing in the loose controls by Japan and Western Europe. *Id.*

23. Hunt, *supra* note 6, at 1287.

24. *Id.*



as a real communist threat.<sup>25</sup> Member-states, which received financial aid through the Marshall Plan, were obligated to follow the U.S. containment strategy adopted to fight the Cold War. To assure compliance with the embargo, the U.S. enacted the 1951 Battle Act, which threatened to cut off any aid to countries exporting controlled goods.<sup>26</sup> CoCom has since advanced towards a less restrictive trade policy, with periodic retreats during episodes of East-West conflict. Through the years, control lists have fluctuated from a high of 270 items in 1951 (during the Korean War) to 149 in 1976 (the detente era), to 124 in 1985,<sup>27</sup> and most recently dipping to 78, in response to changes in Eastern Europe.<sup>28</sup>

In the 1960s, despite American attempts to limit economic growth in communist countries, CoCom regulations concentrated only on limiting military growth.<sup>29</sup> The 1970s evidenced a relaxation of export controls, partly due to the spirit of detente achieved during the Nixon era.<sup>30</sup> During those years, American policy emulated the more relaxed and pragmatic European and Japanese trade policy.<sup>31</sup> CoCom control lists were not abandoned though. Instead, member-states frequently utilized an exception procedure. Under this arrangement, if member-states agreed unanimously that export of specific items would not jeopardize their security, products could be exported even if they appeared on

---

25. Aeppel, *The Evolution of Multilateral Export Controls: A Critical Study of the CoCom Regime*, 9 FLETCHER F. 105, 109 (1985).

26. *Id.* Most of the controlled goods in those days were produced in the United States. *Id.* The Mutual Defense Assistance Control Act of 1951 (known as the Battle Act) denied American financial aid to any country that allowed export of strategic goods to embargoed nations. *Id.* This coercive strategy has since given way to diplomatic maneuvering and persuasion techniques. *Id.*

27. *Id.* at 109 n.12.

28.7 Int'l Trade Rep. (BNA) at 835 (June 13, 1990). The latest cuts were made during CoCom's June 1990 high-level meeting. *Id.*

29. Webster, *supra* note 11, at 110. During the 1960s, CoCom agreed to U.S. proposals to regulate emerging areas of integrated circuits and computers. Root, *Trade Controls That Work*, 56 FOREIGN POL'Y 61, 63 (1984). In return, the United States agreed to remove many items of military technology, which the Soviets already had acquired. *Id.*

30. Aeppel, *supra* note 25, at 110.

31. *Id.* See *infra* notes 92-102 and accompanying text (discussing Japanese and German export control policy).

the control lists.<sup>32</sup> Since computers were highly regulated, the United States, as the leading computer manufacturer, filed the largest number of requests for exceptions.<sup>33</sup> Since the exceptions were monetarily insignificant most of the granted exceptions only dealt with low performance computers designed for a clear civilian use.<sup>34</sup> Between 1971-75, at the height of detente, CoCom approved exceptions reached \$590 million, some of which were never utilized.<sup>35</sup> These applications represented less than one percent of eighty-six billion dollars in exports from CoCom countries to CoCom proscribed destinations.<sup>36</sup>

During the early 1980s, the Reagan administration's aggressive anti-communist strategy intensified the Cold War.<sup>37</sup> After a study of the effects of export controls, CoCom also shifted emphasis in export controls from manufactured products to critical technology, including technological components, technology design and technology manufacture.<sup>38</sup> Due to recent warming of relations between the U.S. and the U.S.S.R., and dramatic changes in Eastern Europe in the latter part of the 1980s, CoCom is once again reexamining its export control policies during the 1990s.

Although danger still exists that CoCom will tighten the reigns

---

32. Webster, *supra* note 11, at 110-11.

33. *Id.* at 111 n. 23.

34. Root, *supra* note 29, at 63.

35. *Id.*

36. *Id.* at 64.

37. See Aeppel, *supra* note 25, at 106. On December 30, 1981, responding to imposition of martial law in Poland, the United States stopped issuing licenses for export to the Soviet Union of oil and gas exploration and production equipment as well as transmission and refining equipment. Root, *supra* note 29, at 66. This move reversed the 1977-81 policy of encouraging Soviet energy exports. *Id.* The embargo was removed in November 1982, but not before it led to the gas pipeline crisis, in which Western allies ignored U.S. requests to withhold exports designated for the construction of the Soviet gas pipeline. *Id.* at 67. In the 1980s, the Reagan administration reverted to Cold War policies of "economic containment." *Id.* The U.S. reverted to strict export control policies at a time when its leadership in world technology had dipped from leading over 70% of world technologies in 1974, down to 50% in 1984, with expectations of reaching 30% in 1994. Aeppel, *supra* note 25, at 107.

38. Webster, *supra* note 11, at 112-13. The U.S. and CoCom changed the emphasis of their control lists to manufacturing technologies critical to military applications following a recommendation by the Pentagon Defense Science Board, chaired by Fred Bucy. Root, *supra* note 29, at 64. According to the Bucy special report, even end products could be decontrolled, due to the difficulty of reproducing the technology that produced the items. *Id.* This critical technology approach was incorporated into 1979 version of the Export Administration Act. *Id.*

of control once again, in reaction to future conflicts, this is unlikely to occur. In the past, CoCom did reverse its reforms several times, yet the embargo always returned to pre-crisis levels, each time increasing the scope of reforms. Furthermore, the collapse of the Eastern Bloc also signifies the most dramatic change seen in the European continent since CoCom was formed. Therefore, with a possible exception of the U.S.S.R., tough export control policies are not likely to be reestablished against the former communist countries, which are now exhibiting democratic and free market tendencies. Since the latest changes in Europe also represent a virtual attainment of CoCom's initial objectives, CoCom may have reached the end of its function in East-West trade.

## *B. CoCom's Structure and Operations*

### *1. Organizational Structure*

Although CoCom is credited with shaping the export policy of its seventeen member-nations,<sup>39</sup> debate centers around whether the Committee really has influence beyond providing a symbolic gesture of member unity. CoCom is divided into three policy layers. The permanent secretariat, headquartered in Paris, manages the routine operations of the Committee.<sup>40</sup> The thirty members of the secretariat consist of mid-level diplomats and technical specialists who meet daily to discuss control lists, and consider applications for exceptions to the list requirements.<sup>41</sup> The mid-level Executive Committee consists of higher-level government

---

39. CoCom directives are also respected by other nations, such as Austria, Ireland, and Sweden, which agree to comply with CoCom policy in order to receive technology from members of CoCom. *Export Controls: New CoCom Measures on High Technology Exports*, *supra* note 12, at 550.

40. Van Genderen, *Cooperation on Export Control Between the United States and Europe: A Cradle of Conflict in Technology Transfer?*, 14 N.C.J. INT'L L. & COM. REG. 391, 394 (1989). CoCom is headquartered in the compound of the American Paris consulate. *Id.* It operates on a budget of \$500,000, with an office space covering 14,000 square feet. Aepfel, *supra* note 25, at 116.

41. Webster, *supra* note 11, at 115. National representatives consider exception requests during weekly meetings. *Id.* at 117.

representatives who meet twice a year.<sup>42</sup> The supreme policy body is composed of high-level government officials who meet once a year to “translate political decisions on licensing rules into directives for the lower administrative levels.”<sup>43</sup>

## 2. The Operation of the Committee

Although CoCom is described as an informal “gentleman’s agreement,” the organization’s infrastructure suggests that the pact has evolved into far more than a mere forum for informal policy making. To achieve its objective, CoCom divides its activities into three tasks: Establishment and updating of control lists; review of exception requests submitted from member-states; and coordination of enforcement and administration activities by different CoCom member governments.<sup>44</sup>

CoCom maintains three embargo lists to guide the export policies of its members.<sup>45</sup> The lists are: International Atomic Energy List; International Munitions List; and the Industrial List (containing dual use items not found in the first two lists).<sup>46</sup> These lists are not published, and the only information available is found in publications by the respective member-states, once the suggestions are codified.<sup>47</sup> In addition to reviewing control lists

---

42. Van Genderen, *supra* note 40, at 394. These officials meet to review and amend technical control lists. *Id.*

43. *Id.*

44. Webster, *supra* note 11, at 114.

45. Hunt, *supra* note 6, at 1288-89.

46. Van Genderen, *supra* note 40, at 395. The International Industrial List is divided into three subcategories: embargoed items (International List I); quantitatively controlled items (International List II); and exchange of information and surveillance items (International List III). *Id.* List I contains embargoed items which can only be exported once permission is obtained from CoCom. List I includes: “Metalworking machinery; chemical and petroleum equipment; electrical and power generating equipment; transportation equipment; electronic and precision instruments; metals, minerals, and their manufacture; chemicals and metalloids; petroleum products; rubber and rubber products.” Aepfel, *supra* note 25, at 109 n.9. Items on List II may be exported in limited quantities, while items on List III require a report to CoCom as to export and intended end use. Van Genderen, *supra* note 40, at 395.

47. *Id.* In the United States the list is adopted by the Commodity Control List, found in 15 C.F.R. § 799.1 Supp. 1 (1990) (which is a part of the Export Administration Regulations). Great Britain codifies export laws in the Export of Goods (Control) Order of 1989 (EGCO). Section 5 of the EGCO requires the exporter of goods from the U.K. to provide proof, upon demand from the

on a regular basis, the Committee also conducts comprehensive list reviews every three to four years.<sup>48</sup> During review deliberations, participants consider technological advances and the availability of particular goods or technology to controlled nations from sources outside of CoCom member-countries.<sup>49</sup> Determination of availability influences the future composition of control lists.

During the high-level review procedure, each member may submit "original proposals" four months in advance of the discussions, and "counterproposals" up to forty-five days before member consideration.<sup>50</sup> If two or more members agree, "revised proposals" may be submitted at any time during the review.<sup>51</sup> Any member also may submit a "proposal for consistency," covering changes required in order to maintain technical consistency with other items not under control.<sup>52</sup> If an item has been used commercially in the West for five years or more, an "original proposal" to decontrol is considered approved unless a counterproposal is submitted.<sup>53</sup>

CoCom representatives also meet once a week to review petitions made by individual businesses seeking one time exceptions to export prohibitions.<sup>54</sup> Each member-state forwards

---

Commissioners, that exports reached their licensed destination. *Id.* The EGCO subjects violators of the export controls to a fine not exceeding two thousand pounds and, or, a prison term not exceeding two years. *Id.* at § 6. The Regulations are then divided into separate sections listing the controlled goods. Schedule 1, Part II Group 1 contains military aircraft, arms and related material, ammunition, military stores and appliances, and security and para-military equipment. *Id.* Group 2 specifies items related to atomic energy minerals and materials and nuclear facilities, equipment and appliances. Schedule 1, Part II Group 3A contains metal working machinery and associated equipment. *Id.* Group 3B is composed of chemical and petroleum equipment. *Id.* Group 3C catalogues electrical and power-generating equipment. *Id.* Group 3D lists general industrial equipment. *Id.* Group 3E has aircraft, spacecraft, marine equipment and ships (other than warships and naval equipment). *Id.* Group 3F details electronic equipment including communications and radar and scientific instruments and apparatus. *Id.* Group 3G lists controlled electronic equipment including computers, software and telecommunications equipment, and photographic equipment. Group 3H of Schedule 1, Part II mentions metals, minerals and their manufacture. *Id.* Group 3I lists chemicals, metalloids, petroleum products and synthetic rubber. *Id.*

48. Hunt, *supra* note 6, at 1289.

49. *Id.*

50. *Id.* at 1290.

51. *Id.*

52. *Id.*

53. Hunt, *supra* note 6, at 1290.

54. Webster, *supra* note 11, at 117-18.

to CoCom applications for the export of controlled items which it deems fit for export.<sup>55</sup> Member-states must review each application and respond within eighteen days.<sup>56</sup> Upon reaching a unanimous vote, CoCom issues a recommendation to the requesting nation.<sup>57</sup>

Even when CoCom denies an exception request, member-nations may proceed with a sale if they determine that the transaction is important to their "national interest."<sup>58</sup> The requirement of CoCom approval is also blunted by the practice of member governments which allow export of some items without submitting to CoCom's review.<sup>59</sup> In some instances governments have even dealt with each other directly, through high level channels, bypassing the CoCom arrangement.<sup>60</sup> The British government chose this method when it decided to sell sophisticated Harrier jets to China.<sup>61</sup>

CoCom also serves as a consultative forum for national enforcement activities.<sup>62</sup> To achieve this end, CoCom established the Subcommittee on Export Controls, which meets periodically to study member-state enforcement procedures and to suggest ways to improve security procedures.<sup>63</sup>

### III. LEGAL ISSUES IN COCOM

#### A. CoCom's Binding Powers

CoCom does not appear to possess the capacity to enforce compliance by member-states. In some cases the member-states do

---

55. *Id.* CoCom does not deal directly with individual exporters. *Id.*

56. *Id.* The states must respond with a full approval, partial approval, or denial of the request.

*Id.*

57. *Id.*

58. Webster, *supra* note 11, at 118 n.52.

59. *Id.* Many times, fully aware that exceptions would not be approved by CoCom, member-states do not bring problematic cases for review. *Id.* at 118 n.52.

60. *Id.*

61. *Id.*

62. *Id.* at 119.

63. Webster, *supra* note 11, at 119.

not officially recognize CoCom.<sup>64</sup> Once control lists are agreed upon within the Committee, member-states convey the regulations to their respective governments, which enact them into national law, thus enforcing CoCom regulations on an individual state level.<sup>65</sup>

Since CoCom does not enforce the embargo, the U.S. has at times attempted to punish violators of the controls by blacklisting firms exporting goods in violation of CoCom lists.<sup>66</sup> Yet, even without a formal role in international law, and perhaps for that reason, CoCom has been described as effective in preventing shipment of substantial amounts of military hardware and dual use technology to controlled countries.<sup>67</sup>

CoCom's past efficiency in accomplishing its task may have

---

64. Bingham & Johnson, *supra* note 19, at 904.

65. Webster, *supra* note 11, at 119-20.

66. *Id.* at 119 n.55. An example can be seen in Congressional sanctions against Toshiba Machine Company of Japan, following its violation of Japanese (and CoCom) export regulations. Between 1980 and 1984, Toshiba sold to the U.S.S.R. sophisticated propeller milling machines. Comment, *Curbing Illegal Transfers of Foreign Developed Critical High Technology From CoCom Nations to the Soviet Union: An Analysis of the Toshiba-Kongsberg Incident*, 12 B.C. INT'L & COMP. L. REV. 181, 181-82 (1989). In conjunction with the Toshiba sale, Kongsberg Vaapenfabrik of Norway sold to the Soviets sophisticated computer equipment that made it possible to operate the Japanese equipment. *Id.* at 182 n.4. Both the Japanese and Norwegian export regulations follow guidelines established by CoCom. *Id.* at 183 n.7. Upset that the Toshiba-Kongsberg sales led to an enhancement of the Soviet submarine propeller technology, the U.S. Congress passed the Multilateral Export Enhancement Amendments Act of 1988. Comment, *The Toshiba Sanctions Provision: Its Constitutionality and Impact on CoCom*, 1989 B.Y.U. L. REV. 623, 625 n.12 (1989). The 1988 Act places retroactive sanctions, as well as similar provisions on future violations. *Id.* at 635. Another example of American use of extraterritorial power occurred when Piher Semiconductores, a Spanish firm, was fined one million dollars and received a five year probation along with a suspension of all import privileges of items from the United States. The firm was convicted of re-exporting \$2.4 million worth of electronic test equipment and semiconductors to Cuba and the Soviet Union. Masden, *supra* note 1, at 199 n.11. Yet, even American enforcement efforts cannot prevent items from being exported through avenues such as the black market, through which the Soviets receive exports of advanced computer technology from countries such as Germany and Sweden. *Id.* American use of extraterritorial jurisdiction on non-citizens and over acts that occur outside the United States has been sharply criticized by Western Europeans. 5 Int'l Trade Rep. (BNA) 137, 137-38 (Feb. 3, 1990).

67. Webster, *supra* note 11, at 120-121. CoCom has survived during four decades largely due to its informal, non-binding nature, which has not threatened the independence of its member-states. *Id.* At the same time, this informal nature of CoCom has compromised many of the organization's goals of uniform regulations. *Id.* See *id.* at 122-23 (for a discussion of problems contributing to the ineffectiveness of CoCom, and arguments that CoCom has failed in its main mission, a point evident by the advanced Russian military and industrial development).

even rendered the organization's future role obsolete.<sup>68</sup> Supporting this view is the dismal economic condition facing the U.S.S.R. and Eastern countries, in addition to information that Western military technology is far more advanced than its Eastern European counterpart.<sup>69</sup> To the extent that this result can be attributed to the embargo, it is important to consider how CoCom managed to achieve such a dramatic impact, without a legal status or the power to enforce its decrees. One possibility is that CoCom's members are philosophically homogeneous.<sup>70</sup> However, a more plausible explanation is that although a formal treaty does not exist, pressure from member-states (especially the United States) assures a general adherence to the embargo policy. CoCom has essentially developed into a *de facto* binding treaty.

### B. Oversight of Member Compliance

Since there is no CoCom "law," the Committee does not police or investigate member non-compliance.<sup>71</sup> To assure private party compliance, members of CoCom use the Import Certificate/Delivery Verification (IC/DV) system.<sup>72</sup> The IC/DV is an export documentation system designed to prevent the reexport to controlled nations of items traded between CoCom member nations.<sup>73</sup> To comply with the system, an importer must provide the exporter with a statement, certified by the importing government, assuring that the importer intends to receive the goods and that the goods will not be reexported without approval from

---

68. Freedenberg, *CoCom Enters the Post-Cold War Era*, presented before the 1990 ABA section of the International Law & Practice Fall Meeting, San Jose, California (held Dec. 6-8, 1990) at 14 (quoting from a speech to American Foreign Service Association at Symposium on Export Controls, U.S. Department of State, at 2 (Washington D.C., Mar. 27, 1990).

69. *Id.*

70. See *infra* notes 90-142 and accompanying text (describing the philosophical differences within CoCom).

71. Hunt, *supra* note 6, at 1294.

72. *Id.* In the U.S. the system is codified in 15 C.F.R. § 768 (1990). See 15 C.F.R. § 775 Supp. No. 1 (1990) (listing the agencies responsible for the implementation of the IC/DV program in other participating nations).

73. Hunt, *supra* note 6, at 1294.



the importing government.<sup>74</sup> Thus, the importing country receives notice of the impending transaction and can enforce the regulations more effectively.<sup>75</sup> CoCom also exchanges information with member-states, circulating news about the latest export diversion hazards and methods of embargo evasion.<sup>76</sup> Even though CoCom appears to successfully operate on a goodwill honor system, the nonexistence of an enforcement mechanism raises a doubt as to reasons for the embargo's success.

### *C. Legality of CoCom in International Law*

#### *1. CoCom as a Binding Treaty*

CoCom's apparent success in maintaining the embargo suggests that the "gentlemen's agreement" may possess characteristics constituting a binding legal understanding. Governments may enter into detailed and precise agreements for future conduct, while still preserving the "nonlegal" and non-binding nature of the agreements.<sup>77</sup> Violators of such agreements are not liable for claims of reparations or other judicial remedies.<sup>78</sup> Yet, "it is possible and reasonable to conclude that states may regard a non-binding undertaking as controlling even though they reject legal responsibility and sanctions."<sup>79</sup> Nations entering non-binding multilateral agreements usually rely on the other parties to execute their respective obligations.<sup>80</sup> Thus, it is possible that a member-state challenging the CoCom embargo would be "subject to estoppel in view of the gentlemen's agreement and the reliance of the parties on that agreement."<sup>81</sup>

---

74. *Id.*

75. *Id.*

76. *Id.*

77. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW CASES AND MATERIALS* 395 (2d ed. 1987) (quoting Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 *AM. J. INT'L L.* 296 (1977)).

78. *Id.* at 396.

79. *Id.*

80. *Id.* at 395.

81. *Id.* at 397.

From the inception of the trade embargo, member-states have adopted CoCom generated "suggestions" into their national laws. Committee members have not always complied with the spirit or sometimes the letter of the embargo. But, officially, all signatories have abided by the agreement. As the Toshiba-Kongsberg incident demonstrates, participants in the embargo place heavy pressure on each other to improve their export control enforcement apparatus.<sup>82</sup> Member-states are clearly not free to completely ignore CoCom and its policies. Thus, members of CoCom rely on each other to follow the agreement, and would likely apply the concept of estoppel against member-nations attempting to declare the embargo non-binding.

## 2. *The Legality of a Peacetime Embargo*

Whether or not the export embargo is a product of a binding agreement, the coercive peacetime economic measures may conflict with internationally-recognized norms. As a concerted effort, seventeen of the most technologically advanced nations withhold goods and technology from their ideological foes, stifling the latter's economic and military growth. Consequently, Eastern-European present-day means of communication, computer technology, and industrial production are years behind their Western counterparts. If this result were CoCom's ultimate intent, then the seventeen member-states contravened the United Nations'(U.N.) Charter, which resolves to promote "higher standards of living, full employment, and conditions of economic and social progress and development."<sup>83</sup> The embargo specifically targets the Eastern economies, affecting the living conditions in these sovereign states. The Charter also encourages "solutions of international economic, social, health, and related

---

82. See 5 Int'l Trade Rep. (BNA) 134-35 (Feb. 3, 1988) (discussing strengthening of control programs in Japan and Norway in the aftermath of the Toshiba-Kongsberg case). See also Comment, *Analysis of the Toshiba-Kongsberg Incident*, supra note 66, at 185 nn.19-20. (describing new legislation strengthening export controls in Japan and Norway).

83. U.N. CHARTER Art. 55, at ¶ (a).

problems . . . .”<sup>84</sup> The U.N. clarified its opposition to economic coercion in its Twentieth Session, declaring that “[n]o state has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal and external affairs of any other state.”<sup>85</sup> The Declaration condemned all political or economic intervention in the affairs of other states.<sup>86</sup> The Declaration further proclaimed that “[e]very state has an inalienable right to choose its political, *economic*, social and cultural systems, without interference in any form by another state.”<sup>87</sup> The CoCom embargo has the effect of altering the military, economic, and political nature of the controlled nations. As Eastern European nations have begun to “westernize” their institutions, CoCom has rewarded their decisions by lifting the trade embargo. The quick reaction to changes in Eastern Europe demonstrates that the embargo had the purpose to directly change the internal affairs of controlled nations. Thus, as controlled nations comply with western political and economic standards, the trade embargo against them is repealed. The embargo’s attempt to preserve the inferiority of Eastern technology, and in effect their economies, opposes U.N. directives.<sup>88</sup>

---

84. *Id.* at ¶ (b).

85. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 GAOR Supp. (No. 14) ¶ 1 at 11-12 (1965) reprinted in 2 M. KU, A COMPREHENSIVE HANDBOOK OF THE UNITED NATIONS 770 (1979) (emphasis added). See Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations, 25 GAOR, Res. 2625 (Oct. 24, 1970) reprinted in ARANGIO-RUIZ, THE UN DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW 318 (1979). The Declaration was approved unanimously and calls for all states to refrain from military, political, *economic* or any other form of coercion against the independence of any other state. *Id.* at 319. (emphasis added).

86. *Id.*

87. *Id.* (emphasis added).

88. The General Agreement on Tariffs and Trade (GATT) also seeks to eliminate “discriminatory treatment in international commerce.” THE GENERAL AGREEMENT ON TARIFFS AND TRADE, opened for signature Oct. 30, 1947, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187, at Preamble. As part of the GATT protocol, contracting parties agreed to encourage free trade. See generally *id.* (detailing the GATT agreement). Yet, only members of GATT are protected by the agreement. *Id.* at Art. 1. Czechoslovakia is the only member of GATT which is also targeted by CoCom. *Id.* at Preamble. Thus, GATT is not a fertile forum for forwarding the end of CoCom initiated embargos. In addition, GATT provides for an exception to its general open trade provisions, where such exception is “necessary for the protection of its essential security interests.” *Id.* at Art. XXI. Thus, due to GATT’s membership requirement, as well as the national security exception,

On the other hand, CoCom has operated in conjunction with the North Atlantic Treaty Organization (NATO),<sup>89</sup> which militarily rivaled the Warsaw Pact during the Cold War. During those years, export controls served as a guarantee for NATO members' national security. By preventing the advancement of Eastern technology, the Western allies "contained" the possible aggression of Warsaw Pact nations. A direct correlation certainly existed between thriving Eastern economies and their technologically advanced military. Yet, NATO and the Warsaw Pact never faced each other on the battle field. In fact, CoCom operated the embargo largely in peacetime, attempting to stunt Eastern economies as a contingency for future conflict.

Had CoCom discouraged the export of military hardware or specific military related technology, the national security exigency would have possibly transcended the concept of non-intervention. Yet, the dual use technology designation for items controlled by CoCom was very ambiguous. Virtually all manufactured items and technology have military application. Consequently, members of CoCom withheld many useful items from the economies of controlled nations, under the guise of national security.<sup>90</sup> The U.S., a leading exporter of technology and an influential force behind CoCom policies, overtly utilized export controls to achieve its foreign policy objectives.<sup>91</sup> Thus, the CoCom directed embargo did not serve a purely national security objective. To the extent that CoCom lists surpassed the minimal national security necessity, they contradicted basic notions of non-interference in the internal affairs of sovereign nations. Even if the military threat during the Cold War was sufficient to justify the overinclusive scope of the

---

GATT does not preclude the CoCom trade embargo against the Eastern bloc.

89. Iceland (a member of NATO) is not affiliated with CoCom. Bingham & Johnson, *supra* note 19, at 904. Australia (not a member of NATO) joined CoCom in 1989. 6 Int'l Trade Rep. (BNA) 711, 711 (May 31, 1989).

90. Items include simple-use computers, usually available to consumers in the West, telecommunication technology that would help to link the largest nation in the world, and other items that are taken for granted by Western consumers.

91. See *infra* note 106 (discussing U.S. sanctions against the U.S.S.R. in protest of the Shcharańsky affair). See also *infra* note 143 (discussing U.S. sanctions against the U.S.S.R. in protest of Soviet treatment of Lithuania).

embargo, the threat of the Cold War is no longer as real. Where the threatening Eastern Bloc once stood, a group of nations with serious economic conditions now stands.

#### IV. PHILOSOPHICAL DIFFERENCES IN COCOM

##### *A. A Comparison of Export Systems*

Although CoCom members faithfully adopt the Committee's control lists, situations arise in which individual member-states have discretion to interpret certain ambiguous provisions. In such instances, each nation's view of the purpose and scope of CoCom gains importance, and variations in enforcement often occur. Also, the conflict of views within CoCom may eventually influence the Committee's survival. In order to illustrate the different philosophies influencing CoCom, this comment compares the philosophy behind the export laws of Japan, Germany, Canada, and the United States.

##### *1. Japan*

Japanese law strives to "develop foreign trade, to safeguard the balance of international payments and the stability of the currency, and to insure the most economic use of foreign currency funds."<sup>92</sup> Japan designed its export control laws with the long-term goal of eliminating restrictions.<sup>93</sup> Japanese export control officials are responsible for building and improving the economy, rather than assuring national security.<sup>94</sup> In 1966, the Japanese Export Control List tracked 194 items.<sup>95</sup> Of those, 161 originated in the CoCom

---

92. Baker & Bohlig, *The Control of Exports--A Comparison of the Laws of the United States, Canada, Japan, and the Federal Republic of Germany*, 1 INT'L LAW. 163, 171 (1966).

93. *Id.*

94. *Id.* Yet, following the embarrassing Toshiba episode, which generated political pressure, Japan has increased export control personnel from 40 to 103. *Administration Officials Hail CoCom Parley at Success, Citing Progress in Enforcement*, 5 Int'l Trade Rep. (BNA) 134, 135 (Feb. 3, 1988). Thus, according to one U.S. official, "its system can no longer be described as worthless."  
*Id.*

95. Baker & Bohlig, *supra* note 92, at 181.

control list, while the remaining thirty-three entries included items in short supply, or appliances restricted in order to achieve quality control.<sup>96</sup> Japanese export control laws are, therefore, very limited in their scope. With the exception of the Japanese-Russian dispute over the Northern Kurile Islands, Japan does not have strategic motives comparable to the United States. This fact is reflected in the Japanese export control law, which makes no provisions for incorporating foreign policy or national security.<sup>97</sup> When Japanese officials interpret CoCom directives, they have the incentive to err in favor of free trade.

## 2. Germany

The German parliamentary authorization for export control laws states that “restrictions are to be limited in nature and scope to the extent which is necessary to achieve the purposes indicated in the authorization.”<sup>98</sup> . . . “[R]estrictions shall be revoked as soon as, and to the extent that, reasons warranting their introduction no longer prevail.” Since export restrictions must be approved by the Bundestag, which restricts the regulating power of the executive branch, German export restrictions are limited in scope.<sup>99</sup> In 1967, German export control lists included 225 items, virtually all of the items not selected by CoCom were agricultural products restricted in order to fulfill Common Market obligations.<sup>100</sup> Control laws restricted other items due to short supply or in order to assure superior quality of exported goods.<sup>101</sup> With the opening of Eastern European markets, Germany has great incentive to advocate a dwindling of CoCom restrictions, perhaps even allowing CoCom

---

96. *Id.*

97. *Id.*

98. *Id.* at 173.

99. *Id.*

100. Baker & Bohlig, *supra* note 92, at 181. Even when specific CoCom controls have been violated, the German government has resisted prosecution of violators, or the imposition of meaningful penalties on those convicted of export crimes. Gaffney, *German Profiles Uber Allies*, Wash. Times, Sept. 4, 1990, at C1.

101. Baker & Bohlig, *supra* note 92, at 181 (giving certain minerals as an example of items in short supply).

to quietly fade away. Germany's CoCom representative, Joachim Jahnke, pointed to the German government's proclamation before the Bundestag, "[w]e stick to CoCom -- we will not pull out!" Jahnke then warned, "[b]ut CoCom should not ask the impossible. CoCom will become obsolete if -- but only if -- it fails to adapt to the new circumstances. . . . Continued cohesion on the Western alliance requires that CoCom adapt sufficiently-- and sufficiently fast-- to stay viable."<sup>102</sup> As Germany begins to cooperate economically with its Eastern neighbors, it will have difficulty participating in a technological embargo against its new economic partners.

### 3. *Canada*

Canadian law limits export regulations to goods of a "strategic nature," the export of which is detrimental to Canadian security, to the implementation of governmental agreements, and to the assurance of an adequate supply of goods in Canada.<sup>103</sup> These restrictions do not go as far as their U.S. counterpart, which give the President flexibility to link export control laws with foreign policy goals.

Following CoCom approval on July 1, 1990, Canada reduced its Export Control List by approximately forty percent.<sup>104</sup> The purpose of the change reflects a policy aimed at encouraging Canadian exporters to participate in the reconstruction of Eastern Europe.<sup>105</sup>

### 4. *United States*

Unlike their CoCom counterparts, Americans view trade with the controlled nations as concessional, benefitting only the other

---

102. Freedenberg, *supra* note 68, at 14.

103. Baker & Bohlig, *supra* note 92, at 170-01.

104. *Canada Revises Export Control List to Ease Restrictions on Trade With East Block Nations*, 7 Int'l Trade Rep. (BNA) 1297, 1298 (Aug. 22, 1990).

105. *Id.*

countries.<sup>106</sup> As a result, the U.S. has utilized export regulations to further national security and foreign policy, as opposed to attempting to promote free trade.<sup>107</sup>

In the past, the U.S. strictly enforced the embargo against controlled nations, going beyond CoCom recommended control lists.<sup>108</sup> In 1967, over 625 categories of goods required a license in order to be exported to a controlled nation.<sup>109</sup> Only 161 of those categories were taken from CoCom lists.<sup>110</sup> In 1968, the United States restricted the export of 1100 items which were available to controlled countries from other CoCom members.<sup>111</sup>

Due to strict enforcement of export control regulations in the United States, American exporters have lost many contracts to European competitors, who were subject to fewer restrictions.<sup>112</sup>

---

106. Aeppel, *supra* note 25, at 106. Europeans view trade with the Soviet Union as essential and beneficial both economically and politically. *Id.* In 1978, in response to Soviet treatment of dissident Anatoly Shcharansky, the arrest of American businessman Jay Crawford and the harassment of American journalists, President Carter adopted unilateral U.S. controls on oil and gas exploration and production equipment, as a tool for his foreign policy. Root, *supra* note 29, at 64. The United States consequently denied an export license for a computer sought by the Soviet news agency TASS, in response to the Shcharansky trial. *Id.* at 65. Even after the U.S. sought allied support for its foreign policy actions, France chose to circumvent previously agreed upon CoCom controls and sold a more powerful computer to TASS. *Id.* This action was an example of French resolve not to apply export controls in foreign policy. *Id.* The Shcharansky affair marked a change in American policy, which strained relations with its allies. *Id.* Prior to 1978, most controversies within CoCom involved the strategic value of specific equipment. *Id.* The shift in U.S. policy under the Carter administration created open controversy and allied disharmony in questions of East-West economic relations. *Id.*

107. Baker & Bohlig, *supra* note 92, at 170. Export regulations also serve to protect the domestic supply of materials in the United States. 15 C.F.R. § 777.15 (1990). See 15 C.F.R. § 399.1 Supp. No. 1 (1990) (discussing categorical grouping of countries along with control restrictions applied to the countries).

108. Berman & Garson, *supra* note 9, at 848-49. Strict adherence to export licensing was fueled by Congressional hostility to U.S. exports to communist countries. *Id.* Thus, even when the Executive branch attempted to increase trade with Eastern Europe, control officials who made daily licensing decisions erred on the cautious side rather than allowing too many risky items to be exported to controlled nations. *Id.*

109. Baker & Bohlig, *supra* note 92, at 179.

110. *Id.*

111. Masden, *supra* note 1, at 199 n. 15.

112. Aeppel, *supra* note 25, at 107. Since the U.S. and other members of CoCom differ at times over the meaning of technology of strategic significance, many times clients who are refused access to American goods (which are considered essential to national security) find similar technology elsewhere. *Id.* This was found to be true when the U.S. government refused to sell sophisticated Boeing 767s to Ethiopia, a communist controlled nation not found on the CoCom list. *Id.* The sale was blocked because the planes contained gyroscope technology. *Id.* As a result, the Ethiopians



U.S. exporters were displaced of an estimated nine billion dollars a year as a result of unilateral U.S. export controls.<sup>113</sup> Critics of the American approach point to the fact that Eastern European purchasers also lost faith in the reliability of American companies, whose exports are subject to the political whims of elected officials.<sup>114</sup> Controlled nations, therefore, recognize that any political event may close the doors to American exports. They are thus careful not to purchase items which may get caught in U.S. export bureaucracy, or for which a reliable supply of replacement parts is not assured. American industrial leaders also blame declines in U.S. exports on extensive deliberations that occur among the Departments of State, Commerce, and Defense, which have “unnecessarily slowed, and often stymied, the licensing process.”<sup>115</sup>

*a. The Export Administration Act*

The U.S. Congress authorizes export controls through the Export

---

approached a French company that sold them an airplane carrying the same technology. *Id.*

113. 136 Cong. Rec. E 365, Extensions of Remarks, (remarks by Congressman Frenzel (R-Minn.) (introducing revisions to the export control laws) (Feb. 26, 1990). Cf. 7 Int'l Trade Rep. (BNA) 836, 837 (June 13, 1990). According to Representative Sam Gejdenson (D-Conn.), Chairman of the House Foreign Affairs Subcommittee on International Economic Policy and Trade, American companies lose between \$10-15 billion. *Id.*

114. 136 Cong. Rec. S 1101, Extensions of Remarks, (remarks by Senator Riegle speaking on behalf of the Export Facilitation Act of 1990 (Feb. 26, 1990)). See 136 Cong. Rec. E 365 (remarks by Congressman Frenzel (R-Minn.) introducing revisions to the export control laws) (Feb. 26, 1990) (speaking of the annual loss of revenue to United States). According to William Root, former Director of the State Department's Office of East-West Trade, the unilateral export controls by the United States hamper serious agreements for multilateral controls, and result in the strengthening of the Soviet military. Masden, *supra* note 1, at 199 n.15 (citing Root, *supra* note 29, at 62).

115. 7 Int'l Trade Rep. (BNA) 651, 651-52 (May 9, 1990). American businesses have always complained that the strict export laws have hindered their ability to be active in potentially lucrative markets. *Export Controls- U.S. Policies and Procedures Regarding the Soviet Union*, United States General Accounting Office, Fact Sheet for the Chairman, Committee on Finance, U.S. Senate, at 18 (May 1990). Due to the difficulty of receiving export licensing for products and for parts, many Soviet companies have turned to other markets for products such as oil, gas, and construction equipment. *Id.* Other comments deal with the concerns that before strict measures took effect in the U.S., in the late 1970s and 1980s, some American companies commanded large shares of Soviet markets, such as oil and gas exploration and production equipment. Much of that market advantage has disappeared during the 1980s. *Id.*

Administration Act of 1979 (EAA).<sup>116</sup> Congress first enacted the EAA in 1969, to guide American export controls.<sup>117</sup> It was reapproved as the Export Administration Act of 1979 and amended in 1981, 1985, 1988, and most recently in 1990.<sup>118</sup>

The EAA divides export items into three categories of licenses: the general license, the specific license, and the special license.<sup>119</sup> The Department of Commerce's decision to place an export item into either a general or a specific license category depends on the individual item to be exported and the intended destination within the controlled country.<sup>120</sup> A party wishing to export an item must

---

116. The Export Administration Act of 1979 is codified as amended at 50 U.S.C. app. §§ 2401-20 (1981). The Department of Commerce, with the cooperation of the Department of Defense and the State Department, maintains specific export regulations. Van Genderen, *supra* note 40, at 399. The U.S. Customs authorities enforce the regulations, while the Department of State is the primary American negotiating agency at CoCom meetings. Hunt, *supra* note 6, at 1290. The State Department receives advice from the Departments of Commerce and Defense as well as other agencies with interest or expertise in strategic export controls. *Id.* During the list review process, the State Department is reinforced with a technical staff from the Department of Commerce and other agencies that make up the delegation to CoCom sessions. *Id.* Many of these groups are organized into interagency Technical Task Groups which evaluate information dealing with various types of equipment and technology. *Id.* The Technical Task Groups are in charge of reviewing additions and deletions to CoCom control lists. *Id.* They get information from Government Advisory Committees which are organized by the Department of Commerce to provide guidance in carrying out the EAA. *Id.*

117. Pub. L. No. 91-184, 83 Stat. 841 (1969) (codified at 50 U.S.C. app. §§ 2401-13). The Export Administration Act of 1969 was enacted as a result of the American need for foreign markets, as it abolished export controls on all American goods available in foreign markets, except those found to specifically affect U.S. security interests. Aepfel, *supra* note 25, at 110.

118. *See Export Facilitation Act of 1990*, Report by Committee on Foreign Affairs, House of Representatives Report 101-482, 101st Congress, 2nd Session (May 10, 1990) (accompanying H.R. 4653, which is the official proposed bill introducing the Export Facilitation Act of 1990). The Export Facilitation Act of 1990 was approved by Congress on October 26, 1990, and remains in affect until June 30, 1992. 7 Int'l Trade Rep. (BNA) 1636, 1636 (Oct. 31, 1990).

119. 15 C.F.R. §§ 371-373 (1985). *See also* 15 C.F.R. § 385 (1985) (discussing categorical grouping of countries along with control restrictions applied to those countries).

120. Masden, *supra* note 1, at 201. There is no need to apply for a general license, which allows the export of certain items found in the Control List. *See id.* at 201. The G-Com general license was enacted in 1988. The G-Com does not require a validated license for the export of certain goods to CoCom nations. *Id.* Written approval from the Commerce Department is necessary before an item can be reexported to a non-CoCom country. *Id.* A specific license requires an individually validated permit for each item being exported. 15 C.F.R. § 372(b) (1984). The distribution license was created in order to simplify and hasten the export license procedure. Masden, *supra* note 1, at 201. This license authorizes multiple shipments of a single controlled item to approved buyers in specified countries for a one year period. Masden, *supra* note 1, at 203. Thus, exporters do not have to re-apply for a license with each identical transaction. *Id.* at 203. *See also* Letterman, *United States Regulation of High Technology Exports*, 20 INT'L LAW. 1147-84 (1986) (providing an in-depth

refer to the codified version equivalent of the EAA, which is found in the Export Administration Regulations (EAR).<sup>121</sup> The Commodity Control List,<sup>122</sup> found within the EAR, identifies the specific items subject to controls, as well as the type of restrictions placed on their export.<sup>123</sup> Violators of the EAA or the EAR are subject to criminal prosecution by the U.S. Attorney General or to civil litigation and fines by the Department of Commerce.<sup>124</sup>

In the EAA of 1979, Congress approved the use of export control laws to achieve foreign policy goals.<sup>125</sup> Prior to that date, export control laws primarily served national security and supply shortage goals.<sup>126</sup> In 1985, amendments to the EAA added the requirement that the Commodity Control List be reviewed annually, and that these reviews include an evaluation of at least one third of

---

description of the export licensing process).

121. The EAR is codified in 15 C.F.R. § 768-799 (1990). The Department of Commerce reacts to changes from CoCom, Congress, and the Administration by constant revision to the EAR. Letterman, *supra* at 120, at 1147-51. *See id.* at 1151 n.5 (giving a detailed list of revisions made to the EAR as a result of reviews and amendments by CoCom).

122. 15 C.F.R. pt. 799, Supp. No. 1 (1990).

123. The Control List is found in § 399.1 of the EAR. Letterman, *supra* at 120, at 1147-51. A general guide to the use of the Control List is found in § 399.1(f) of the EAR. Supplement 1 to the EAR, at § 391.2 has Department of Commerce interpretation of the categorization of certain commodities within the Control List. *Id.* The Control List is divided into ten general groups (numbered 0-9): (0) Metalworking machinery; (1) chemical and petroleum equipment; (2) electrical and power-generating equipment; (3) general industrial equipment; (4) transportation equipment; (5) electronics and precision equipment; (6) metals, minerals, and their manufactures; (7) chemicals, metalloids, petroleum products, and related materials; (8) rubber and rubber products; (9) miscellaneous. *Id.* Each Control List entry is preceded by a four-digit Export Control Commodity Number (ECCN) and a code letter. The first letter indicates the strategic level of control, the second identifies the Group to which the item belongs, and the last two digits identify other related items within the Group. *Id.* at 1157. The four digits are followed by a code letter, indicating the types of documents required as well as the level of imposed control. *Id. See id.* at 1160 (explaining the system of classifying countries into controlled and other categories for export licensing determination).

124. 15 C.F.R. § 387 (1986). The most recent version of the Export Facilitation Act of 1990 increases the maximum prison sentence allowed from ten to twenty years, and the maximum fine from one to two million dollars. *Export Facilitation Act of 1990*, Report by Committee on Foreign Affairs, House of Representatives Report 101-482, 101st Congress, 2nd Session (May 10, 1990) (accompanying H.R. 4653, the official proposed bill introducing the Export Facilitation Act of 1990).

125. Liebman, *supra* note 7, at 368. The EAA of 1979 reflected concerns from the business community, and for the first time imposed a time frame within which the Commerce Department had to process export license applications. *Id.* at 369 (citing 50 U.S.C. app. 2409).

126. *Id.*

the CoCom list.<sup>127</sup>

The Export Facilitation Act of 1990 (EFA) enacted the most recent amendments to the EAA.<sup>128</sup> As its objective, the EFA sets out to: Limit bureaucratic wrangling and inefficiency, maintain the effectiveness of CoCom, ensure that the Commodity Control List keeps pace with technological advances, and promote government accountability and due process.<sup>129</sup>

The EFA creates a license-free CoCom, allowing unrestricted trade between member-states.<sup>130</sup> The Act requires the U.S. to propose to CoCom a decontrol of goods and technology which are rated below the technical sophistication of the China Green Line.<sup>131</sup> The U.S. must also seek to achieve a favorable consideration for items rated less favorably than the China Green Line for civil end use to Eastern European countries.<sup>132</sup> These countries qualify for the relaxation in controls provided they do not have designs adverse to the U.S. or CoCom member-states, and that they have established safeguards to protect against diversion of the goods.<sup>133</sup> The U.S. must also recommend that CoCom establish a case-by-case review of goods and technology rated less

---

127. *Id.* at 371. The 1985 Act dealt with the problem of foreign availability of U.S. controlled goods. *Id.* It partially shifted the burden of proof to the Commerce Department, requiring the Secretary of Commerce to attempt the elimination of foreign availability of controlled goods by negotiating with the governments of countries involved. *Id.* at 372.

128. See *Export Facilitation Act of 1990*, Report by Committee on Foreign Affairs, House of Representatives Report 101-482, 101st Congress, 2nd Session (May 10, 1990) (accompanying H.R. 4653, which is the official proposed bill introducing the Export Facilitation Act of 1990). Deliberations over the Export Facilitation Act of 1990 started in 1989. The 1990 Act was criticized by the Bush administration, for going too far in liberalizing export controls, without preserving the President's flexibility to respond to "evolving national security and foreign policy issues." 7 *Int'l Trade Rep.* (BNA) 651, 651 (May 9, 1990).

129. *Export Facilitation Act of 1990*, Report by Committee on Foreign Affairs, House of Representatives Report 101-482, 101st Congress, 2nd Session, at 2 (May 10, 1990) (accompanying H.R. 4653, the official proposed bill introducing the Export Facilitation Act of 1990).

130. *Id.*

131. *Id.* at 2-3. The China Green Line is a preferred level of export classification currently enjoyed by the People's Republic of China. *Id.* Export of items placed on the China Green Line only require formal notification to other CoCom members. Turza & Essaye, *The Changing World of Export Controls*, N.Y.L.J., Aug. 2, 1990, at 5.

132. *Export Facilitation Act of 1990*, Report by Committee on Foreign Affairs, House of Representatives Report 101-482, 101st Congress, 2nd Session, at 2-3 (May 10, 1990) (accompanying H.R. 4653, the official proposed bill introducing the Export Facilitation Act of 1990).

133. *Id.*

favorably than the China Green Line for civil end use designated for the Soviet Union and the other Eastern European nations.<sup>134</sup> The EFA removes all items from the Commodity Control List by October 1, 1992, unless justification exists to reinstate them. The Act sets guidelines for distinguishing between dual use items which are regulated by the Department of Commerce (under the EAA) and those regulated by the State Department (munitions under the Arms Export Control Act<sup>135</sup>). The EFA also clarifies when the Secretary of Commerce must consult with the Secretary of Defense in the exporting license process.<sup>136</sup> The EFA increases criminal penalties for willful violations of export laws and provides for judicial review of government decisions under the EAA.<sup>137</sup>

*b. Procedure for receiving export licenses in the U.S.*

Prior to the export of specified items, the Department of Commerce must review the applications requesting the export license.<sup>138</sup> If an item could potentially affect national security, the Department of Defense also reviews the forms.<sup>139</sup> In the event that neither agency can decide whether to approve the request, the

---

134. *Id.* This will assure that truly non-military items will not summarily be placed on control lists.

135. The United States Munitions List is found in 22 C.F.R. § 121.01 (1990).

136. *Export Facilitation Act of 1990*, Report by Committee on Foreign Affairs, House of Representatives Report 101-482, 101st Congress, 2nd Session, at 2-3 (May 10, 1990) (accompanying H.R. 4653, the official proposed bill introducing the Export Facilitation Act of 1990).

137. *Id.*

138. Section 4 of the EAA grants specific authority to the Secretary of Commerce to administer and expand trade. 50 U.S.C. app. § 2403(a) (1970). See *Export Controls- U.S. Policies and Procedures Regarding the Soviet Union*, United States General Accounting Office, Fact Sheet for the Chairman, Committee on Finance, U.S. Senate, at 6-7 (May 1990) (listing the items in the Commodity Control List).

139. *Export Controls-U.S. Policies and Procedures Regarding the Soviet Union*, United States General Accounting Office, Fact Sheet for the Chairman, Committee on Finance, U.S. Senate, at 7 (May 1990). If the U.S. government approves the export of an item which is covered by a CoCom list, the application is submitted to CoCom for an exception. Hunt, *supra* note 6, at 1292. See Berman & Garson, *supra* note 9, at 844. (describing the "case method" used by the Office of Export Control in reviewing specific license applications). The Export Administration Act gives the Department of Defense a certain veto power over security cases. Root, *supra* note 29, at 80. If the President of the United States chooses to override such a veto, he must notify Congress, which is unlikely, since such action would create the impression that the President is not in full control of his own government. *Id.*

application is sent through an interagency review process.<sup>140</sup> The Export Advisory Review Board, chaired by the Secretary of Commerce, reviews the application if a conflict of views persists.<sup>141</sup> As a last resort, the President of the United States decides the issue.<sup>142</sup>

*c. Views in the United States*

American views of the role of export controls are primarily advanced by two groups: the Department of Commerce, supported by industrial leaders, and the Department of Defense. The Department of Commerce urges the need for international competitiveness, as an essential element of technological and military superiority. The Department of Defense, on the other hand, maintains that withholding technology from certain controlled nations is still essential to national security. With a thaw in the Cold War and a rising trade deficit, U.S. business is gathering considerable support for open-trade policies. This suggests that CoCom's founder and most committed member will no longer serve as the organization's binding force in the future.

Of the four countries examined, only the United States furthers foreign policy objectives through the use of export controls.<sup>143</sup> This U.S. policy can partly be attributed to the fact that exports account for twenty to forty percent of the gross national products of most CoCom nations, while only eight percent of U.S. gross

---

140. *Export Controls-U.S. Policies and Procedures Regarding the Soviet Union*, United States General Accounting Office, Fact Sheet for the Chairman, Committee on Finance, U.S. Senate, at 7 (May 1990).

141. *Id.*

142. *Id.*

143. An example of the attitude that economics should be used to further political goals was seen in May 1990, when Senator Alfonse M. D'Amato (R-N.Y.) introduced legislation aimed at prohibiting the Bush administration from liberalizing export controls for items sold to the U.S.S.R., until the Soviets end their harsh treatment of Lithuania and begin talking about Lithuanian independence. 7 Int'l Trade Rep. (BNA) 651, 652 (May 9, 1990). In a speech to the Senate, Senator D'Amato claimed that "[w]e can say to [Soviet President Mikhail] Gorbachev, if you end your economic aggression against Lithuania, we will reward you at the end of that process with a most-favored-nation status and, yes, we will change the rules as they relate to CoCom and you will be entitled to the kinds of materials, the kinds of sensitive equipment, the kinds of technology that you have never heretofore had." *Id.*

national product.<sup>144</sup> Philosophical differences within CoCom also serve as a reminder that each member-state has its own agenda. As relations with the Soviet Union improve, and Eastern Europeans develop economic ties with the West, pressure within CoCom to do away with export controls will increase.

## V. RECENT CHANGES

### A. Latest CoCom Directives

Acknowledging pressure from other CoCom member-states, on May 2, 1990, the Bush administration announced plans to seek a liberalization of export controls at the next Committee meeting.<sup>145</sup> The recommended changes affect the sale of computers, telecommunications equipment and machine tools, which, according to the Bush administration, include items deemed "of low strategic value."<sup>146</sup>

On June 6-8, 1990, CoCom met in Paris, and discussed the Bush administration proposals to substantially reduce CoCom control lists, reflecting the changing nature of the Warsaw Pact strategic threat.<sup>147</sup> At the instigation of the United States, CoCom agreed to reduce the categories controlled by the embargo list as a first step in the modernization of the multilateral export control system.<sup>148</sup> Member-states also agreed to scrap the Industrial List and replace it with a newly devised "Core List,"<sup>149</sup> containing

---

144. Webster, *supra* note 11, at 111.

145. 7 Int'l Trade Rep. (BNA) 648, 648 (May 9, 1990).

146. *Id.*

147. *Fact Sheet On U.S. Core List Proposal To CoCom, Released by U.S. Commerce Department Oct. 1, 1990.* 7 Int'l Trade Rep. (BNA) 1526 (October 3, 1990). Even though great support exists in the United States for liberalization of export controls, opposition persists. According to Frank J. Gaffney Jr., a former senior Pentagon official and now director of the conservative Center for Security Policy, "[i]t is high time Congress provided some adult supervision over the Bush administration's systematic dismantling of vital controls governing the transfer of militarily relevant technologies to Moscow." 7 Int'l Trade Rep. (BNA) 648, 649 (May 9, 1990).

148. 7 Int'l Trade Rep. (BNA) 1526 (Oct. 3, 1990).

149. The CoCom control list contained between 130,000 to 140,000 controlled products. Los Angeles Times, July 23, 1990, Part D, at 6, col. 1. The new Core List reduces the list to between 8,000 to 10,000 commodities. *Id.*

strategic commodities and technologies.<sup>150</sup>

CoCom deliberations resulted in a removal of thirty of the 116 designations from the control list, with plans to remove eight additional categories in the future.<sup>151</sup> CoCom also downgraded certain items to the preferred China Green Line.<sup>152</sup> The seventeen member-states then agreed to meet again, allowing each country to propose a new version of the "Core List."<sup>153</sup> Member-states also decided to relax controls for exports traded with Czechoslovakia, Hungary and Poland, provided that their strategic postures favor Western interests.<sup>154</sup> In return, the three formerly embargoed countries must develop control systems to prevent diversion of

---

150. 7 Int'l Trade Rep. (BNA) 1526 (Oct. 3, 1990). The June 6-8 meeting set up a timetable according to which member-states were to submit any proposals for the new core list by October 15, 1990. 7 Int'l Trade Rep. (BNA) 1638 (Oct. 31, 1990). In its suggestions for the new core list, the United States sought to preserve strategic items believed to be essential to current Soviet military needs. 7 Int'l Trade Rep. (BNA) 1526 (Oct. 3, 1990). The United States proposed to keep on the list items previously controlled by CoCom which are used in missile and chemical weapon development or nuclear proliferation. *Id.* The United States core list proposal consists of eight categories of strategically critical items: Group 1- Electronics design, development and production; Group 2- Materials and materials processing; Group 3- Telecommunications (7 Int'l Trade Rep. 1638); Group 4- Sensors, sensor systems and lasers (7 Int'l Trade Rep. 1526); Group 5- Navigation and avionic systems; Group 6- Marine technology; Group 7- Computers (7 Int'l Trade Rep. 1638); Group 8- Aerospace and propulsion Equipment. 7 Int'l Trade Rep. 1526.

151. *CoCom Agrees to Rewrite Export Rules "From Scratch," U.S. Officials Report*, 7 Int'l Trade Rep. 835, 835 (June 13, 1990) (measures taking effect July 1, 1990). According to Secretary of State, James Baker, this will affect approximately 80% of all exports currently subject to CoCom regulations. 7 Int'l Trade Rep. (BNA) 662, 662 (May 9, 1990).

152. Turza & Essaye, *supra* note 131, at 5. The four control list items lowered to the China Green Line are related to: "equipment to manufacture or test high-technology memory and switching devices; electronic equipment for testing, measuring or for microprocessor/microcomputer development; analog-to-digital and digital-to-analog Converters, position encoders and transducers; and fibrous and filamentary materials. 55 Fed. Reg. 26655 (June 29, 1990).

153. 7 Int'l Trade Rep. (BNA) 835, 835 (June 13, 1990). The Core List consists of eight categories of items. *See supra* note 150 (listing the categories as released by the United States). According to Robert Price, Director of the CoCom Office at the Department of State, the new Core List will not go into effect in CoCom member-states until April or May of 1991. 7 Int'l Trade Rep. (BNA) 1700, 1700 (Nov. 7, 1990).

154. Turza & Essaye, *supra* note 131, at 5. The new CoCom country classification divides Eastern Europe into a number of license levels. Los Angeles Times, July 23, 1990, Part D, at 6, col. 1. The core list removes controls from most items destined to the former East Germany. *Id.* Largely, most applications for items exported to Poland, Czechoslovakia, and Hungary will be approved under a liberal license treatment. *Id.* The U.S.S.R., Albania, and a number of other countries, will still receive a tougher review, with most items going through the CoCom approval process. *Id.* The new regulations liberalize controls to all nations, with the exceptions of Cuba, Vietnam, North Korea, Libya, and Cambodia. *Id.*



technology to proscribed destinations, as well as sever intelligence contacts with proscribed countries.<sup>155</sup>

The resulting changes in the control lists affect most export areas, except sensitive items that are important to national security.<sup>156</sup> Controlled categories remaining on the CoCom control list include: Missile technology, sophisticated computer systems (such as equipment on the Intel 486 standard), and certain telecommunications technology (such as systems with a transmission capacity of 156 megabytes per second).<sup>157</sup>

### *B. Resulting Changes in the United States*

The Bush administration currently plans to maintain U.S. controls at the CoCom level, rather than to attempt a unilateral export policy. This approach will promote U.S. exporter's competitiveness in the world market.<sup>158</sup>

The new policy has already engendered changes in export control laws in the U.S. Reacting to revisions of the CoCom Industrial List, the Commerce Department amended the Commodity Control List on June 29.<sup>159</sup> On August 31, 1990, the Commerce Department clarified and revised additional items on the Commodity Control List.<sup>160</sup> On November 27, 1990, the Commerce Department announced the establishment of the General

---

155. Turza & Essaye, *supra* note 131, at 5.

156. 7 Int'l Trade Rep. (BNA) 835, 835-36 (June 13, 1990). See *id.* at 836 (listing items to be removed from the CoCom list as of July 1, 1990).

157. *Id.*

158. The June 1990, changes CoCom made to the control list affect three main product areas: Computers, machine tools, and telecommunications. 7 Int'l Trade Rep. (BNA) 835, 835 (June 13, 1990). The reforms are expected to increase exports for all CoCom members, with a 50% change in American exports over the previous year, and a reduction of 85% of all export license applications. *Id.*

159. 55 Fed. Reg. 26652 (June 29, 1990). The United States removed only 22 of the 30 items recommended by CoCom. 55 Fed. Reg. 26656 (June 29, 1990). Approximately three items remained due to missile technology non-proliferation concerns and five items due to nuclear non-proliferation purposes. *Id.*

160. 55 Fed. Reg. 35828 (Aug. 31, 1990).

License G-Temp, which replaced the General Licenses GTE.<sup>161</sup> The G-Temp temporarily permits the export of certain commodities for up to one year, without the need to register with the Office of Export Licensing (OEL).<sup>162</sup> The Commerce Department also announced the creation of the General License GDR (German Democratic Republic), which eliminated licensing requirements for items traded with East Germany, as the former Soviet satellite fully integrated into the Federal Republic of Germany.<sup>163</sup> To ease trade between CoCom member-states, the Commerce Department also initiated the General License GCT, which will purportedly eliminate the need for up to eighty percent of the licenses issued in 1989 for intra-CoCom trade.<sup>164</sup>

## VI. COCOM IN THE FUTURE

Major differences exist in the way Americans and their CoCom counterparts view the purpose of export controls. During the early years of the CoCom embargo, West Europeans participated in the American vision of export controls because the Marshall plan was more important to them than trade with the East.<sup>165</sup> Yet, when Western European economies revived, the U.S. lost much of the leverage it had in the organization.<sup>166</sup>

Since Europeans view trade as essential to both their economic and national security, they have consistently fought to liberalize control lists. With the impending collapse of the communist bloc and the possible decline of the Soviet Union as a threat to European security, in the future the United States will have

---

161. General License G-Temp, 55 Fed. Reg. 49274 (Nov. 27, 1990) (to be codified in 15 C.F.R. § 771.22). The General License GTE authorized temporary exports for certain purposes such as exhibition, demonstration, inspection and testing, and requires prompt return to the country of export. 15 C.F.R. §§ 772, 774, 786, 790, 799.

162. General License G-Temp, 55 Fed. Reg. 49274 (Nov. 27, 1990) (to be codified in 15 C.F.R. § 771.22).

163. 55 Fed. Reg. 26654 (June 29, 1990). The former German Democratic Republic is no longer subject to CoCom restrictions.

164. 55 Fed. Reg. 25083 (June 20, 1990).

165. Bingham & Johnson, *supra* note 19, at 906-07.

166. *Id.* at 906.

difficulty convincing CoCom participants that peacetime embargos against Eastern countries are still necessary.<sup>167</sup> As former Soviet satellites turn away from communism and attempt to embrace Western style market economics, denial of technology needed to support the changes will also conflict with CoCom's goal of preserving Western institutions. Thus, at the very least, CoCom will be forced to make major policy changes, reevaluating its role in a new political world structure.<sup>168</sup>

It is also possible that when the political dust settles, if the Soviet "revolution" is realized, the organization's Cold War goals will no longer be relevant, and CoCom will fade away from East-West trade relations.<sup>169</sup> This hypothesis, naturally, depends on the

---

167. Although the United States has made it clear that Eastern European countries would receive most of the benefits of liberalized export controls, it is apparent that if the Soviet Union moves towards a market economy, and its political institutions "democratize," it will be in the interest of the U.S. to extend export concessions to the U.S.S.R. As Commerce Secretary Robert Mosbacher predicted on September 17, 1990, the Soviet Union is likely to become "more like the U.S.," pointing to the possibility of a Soviet federal system, he said "it's like sitting in Philadelphia in the 1780s." 7 Int'l Trade Rep. (BNA) 1429, 1429 (Sept. 19, 1990). Mosbacher also pointed to Soviet support for the United States in the Iraq crisis as a reason for the willingness of the United States to help the Soviet Union economically. *Id.*

168. E. Allen Wendt, senior representative for strategic technology policy at the State Department has commented about the June 1990 CoCom meeting, "[w]e are turning CoCom on its head." 7 Int'l Trade Rep. (BNA) 835, 835 (June 13, 1990). According to Wendt, by honoring the pledge made by leaders of the Group of Seven industrialized countries, to encourage East European political and economic reforms, "CoCom is playing its part by giving those countries access to the technology they need to modernize their economies." *Id.* at 836.

169. According to John Yochelson, Director of International Business and Economic Affairs at the Center for Strategic and International Studies, "[t]he Europeans have made it clear they want to reach out to Eastern Europe." *Trade Tensions Between the U.S., Europe Seen Rising over Controls On Sensitive Exports*, 7 Int'l Trade Rep. 119, 119 (January 24, 1990). "The United States, for national security reasons, is likely to want to slow the pace of that," according to Mr. Yochelson. *Id.* Yochelson also pointed to recent legislation in the German Parliament which, according to him, proposed that "CoCom be virtually gutted." *Id.* Germany has also made large efforts to dismantle many of the past decade's export controls, citing to reduced tensions with the Soviet Union and the need to rebuild East European economies. Gaffney, *German Profiles Uber Allies*, Wash. Times, Sept. 4, 1990, at C1. Cf. 7 Int'l Trade Rep. (BNA) 835, 836 (June 13, 1990) (citing Allen Wendt of the State Department as saying the German export control laws are the "toughest laws in CoCom"); Genscher: *Stricter Export Laws Will Follow Elections*, The Week in Germany, Nov. 30, 1990, at 2. German Foreign Minister Hans Dietrich Genscher stated that starting March 1, 1991, all German companies will be required to designate one employee to enforce export control laws. Yet, the thrust of Genscher's comments focused on German export of items dealing with the "manufacture of weapons of mass destruction," which does not necessarily affect German trade with Eastern European nations. *Id.*

way the Soviet Union resolves its internal struggle, which threatens to reverse many of the newly realized reforms.

Another development which is likely to influence CoCom's future is the recent crisis in the Middle East, which highlights the problem created by proliferation of both dual use and military technology in third-world nations. In order to prevent third-world leaders from achieving their political and economic goals by military means, the entire community of industrialized nations will have to cooperate in the future. Although the North-South relationship may be more complicated than the East-West rivalry, CoCom still must shift its concentration to guarding against the radical and volatile ambitions of third world regimes.<sup>170</sup> As the Iraqi use of Soviet, American, and European technology has indicated, in order to truly succeed in the non-proliferation of nuclear and military technology, CoCom must solicit the cooperation of China, Eastern Europe, and the Soviet Union. To achieve this cooperation, CoCom must either adapt by including its former adversaries, or perish all together, for a lack of purpose in a new world order.

## VII. CONCLUSION

In order to predict the future of export controls in CoCom's seventeen member-nations, it is important to understand the original intent of the trade embargo, as well as its present day function. CoCom was organized during an era of bipolar rivalry between the U.S. and the U.S.S.R. It was utilized by the Western Alliance as the economic weapon against the "communist menace." Yet, even during those tense times, members of CoCom disagreed about the nature of the sanctions. While the U.S. used the embargo to

---

170. In the wake of the Iraq crisis, the Bush administration considered, among a number of options, ideas to expand CoCom to curb the global spread of advanced weapons. Wash. Times, Sep. 6, 1990, at A7, Part A. According to Michael Liikala, Director of the 10-state Western Regional Bureau of Export Administration, "[o]ur problem in the 1990s will be to prevent high-tech and nuclear products from falling into the hands of warring Third World countries, especially those that are not among the 126 signatories to the non-proliferation of Nuclear Weapons Treaty." Los Angeles Times, July 23, 1990, Part D, at 6, col. 1.

advance its foreign affairs agenda, other members confined the economic restrictions to national security interests. Today, with the dissolution of the Warsaw Pact, and democratization in Eastern Europe, communism no longer threatens the Western way of life. Also, the U.S. is no longer the leading producer of technology. Therefore, as the U.S. continues to lose its economic influence over members of CoCom, the trade embargo against the East will likely vanish. In the event CoCom continues to operate, the question of the legality of a peacetime trade embargo will likely gain prominence. Controlled nations will likely argue that members of CoCom interfere with the internal affairs of sovereign nations, and therefore violate international norms.

*Uzzi O. Raanan*