U.S. EXPORT POLICY TOWARD THE PRC

GPO

The two principal statutes that govern United States export controls are the Export Administration Act of 1979, as amended, which controls "dual-use" items and is administered by the Department of Commerce, and the Arms Export Control Act, which controls munitions items and is administered by the Department of State. The last major changes to the Export Administration Act were included in the Export Administration Amendments Act of 1985, and in the Omnibus Trade and Competitiveness Act of 1988.

Since the last extension of the Export Administration Act expired on August 20, 1994, the regulations issued under that Act have been maintained in effect under the International Emergency Powers Act by Executive Order. Another Executive Order, issued in 1995, established new procedures and deadlines for processing Commerce Department export license applications.

Prior to the 1995 Executive Order, decisions on export applications that were referred to other agencies were made by consensus. The 1995 Executive Order directed the Commerce Department to send all applications to the Departments of Defense, State, and Energy and the Arms Control and Disarmament Agency for review. It also shortened the maximum processing time from 120 to 90 days. The 1995 Executive Order also revised the Advisory Committee on Export Policy structure to resolve disagreements among the agencies regarding licensing decisions.

Until its dissolution in March 1994, the Coordinating Committee on Multilateral Export Controls (COCOM) was the primary multinational export control organization through which the United States and the other 16 member countries controlled the export of items for security purposes. COCOM was created in 1949 by the United States and the other NATO countries, excluding Iceland and Spain, plus Japan. Later, Spain and Australia joined COCOM. COCOM-proscribed countries included the Soviet Union, other Warsaw Pact nations, and the People's Republic of China. Under COCOM, member countries allowed other member countries to veto their export cases that required COCOM approval.

In late 1993, the COCOM member countries agreed with the U.S. proposal to terminate COCOM and replace it with a new multilateral mechanism. The COCOM members agreed in early 1994 to continue the COCOM controls on a "national discretion" basis after the dissolution of COCOM until a new multilateral mechanism was established.

Almost two and one-half years after the dissolution of COCOM, a new multinational organization, called the "Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies," became effective in September 1996. The 33 member countries implement the Wassenaar list of controlled items to countries of concern by "national discretion." The countries of concern are Iran, Iraq, North Korea, and Libya. In addition to the Wassenaar Arrangement, the United States currently participates in three other multilateral export control regimes: the Australia Group, the Missile Technology Control Regime, and the Nuclear Suppliers Group. The items controlled under these latter three regimes are considered to be under foreign policy controls.

Beginning in 1981, the United States and COCOM members gave the PRC access to higher levels of technology compared with the Soviet Union. This policy of differentiation continued until the Tiananmen Square massacre on June 4, 1989. After Tiananmen, COCOM members did not liberalize controls on any additional items specifically for export to the PRC.

Congress passed sanctions against the PRC in response to Tiananmen, including the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991, which, among other things, required a presidential "national interest" determination, or waiver, for the export of a U.S.-manufactured commercial communications satellite for launch on a PRC rocket. There have been 13 such presidential "national interest" determinations pursuant to the Tiananmen sanctions legislation.

Although the Administration transferred the licensing jurisdiction for commercial satellites from State to Commerce by actions in 1992 and 1996, Congress moved the jurisdiction back to State in the National Defense Authorization Act for Fiscal Year 1999 due to technology transfer concerns.

Since early 1994, the United States has dramatically liberalized Commerce Department export controls on items controlled for national security purposes, which has reduced licensing activity by over 55 percent since Fiscal Year 1993. These export control liberalizations have affected computers, semiconductors, semiconductor manufacturing equipment, telecommunications equipment, oscilloscopes, and other commodities.

In the National Defense Authorization Act for Fiscal Year 1998, Congress imposed several restrictions on the export of high performance computers to countries posing proliferation, diversion, or other security risks, including the PRC.

STATUTORY AND REGULATORY CONTROLS

THE EXPORT OF OUR MILITARILY SENSITIVE TECHNOLOGY

This chapter provides a brief explanation of the nature and sources of U.S. export controls. It examines the evolution of current export policy regarding the People's Republic of China and the provisions of the relevant laws, regulations, and policies applying to the categories of exports that are the primary subjects of the Report:

- **Commercial communications satellites**
- **High performance computers**
- **Machine tools**

The two principal statutes that govern U.S. export controls are: (1) the Export Administration Act of 1979,[1] as amended, which controls "dual-use" items and is administered by the Department of Commerce; and (2) the Arms Export Control Act,[2] which controls munitions items and is administered by the Department of State. In addition, exports of certain other items are governed by other statutes administered by other U.S. Government agencies, including the Office of Foreign Assets Control of the Department of the Treasury, the Nuclear Regulatory Commission, and the Department of Energy.

Export Administration Act

Export controls in the United States date back to before World War II, when restrictions on exports were imposed to ensure that adequate supplies of commodities would be available to meet wartime needs. After the war, export controls were con-

Since early 1994, the United States has dramatically liberalized export controls on items controlled for national security purposes.

tinued with the enactment of the Export Control Act of 1949 in response to the post-war shortage of many commodities and to the political situation between the United States and the Soviet Union.

Under the Export Control Act of 1949, exports from the United States to the Soviet Union and other Communist countries were controlled based on their military significance. In addition, the Act established a "short supply" export control program to deal with the post-war worldwide shortage of many goods.

The Export Control Act of 1949 continued in effect for 20 years. It was replaced effective January 1970 by the Export Administration Act of 1969 (the 1969 Act). In October 1979, the Export Administration Act of 1979 (the 1979 Act) replaced the 1969 Act. The 1979 Act was later amended by the Export Administration Amendments Act of 1981 and the Export Administration Amendments Act of 1985. Certain revisions to the 1979 Act were also included in the Omnibus Trade and Competitiveness Act of 1988.

Due to the inability of Congress and the Executive branch to reconcile conflicting views regarding export control policy, the Export Administration Act of 1979 was allowed to expire without replacement on September 30, 1990. At that time, the provisions of the 1979 Act were maintained in force by President Bush under the International Emergency Economic Powers Act,[3] as implemented through Executive Order 12730 (Continuation of Export Control Regulations, September 30, 1990).

Also, there have been two brief extensions to the 1979 Act in recent years. Public Law 103-10 extended the 1979 Act from March 27, 1993 until June 30, 1994, and Public Law 103-277 extended it again from July 5, 1994 until August 20, 1994.[4] Although a number of bills to revise and extend the 1979 Act on a more permanent basis have been introduced in Congress since 1990, an amendment bill or an extension bill has not been passed by both Houses of Congress since July 1994.

Since the last extension of the 1979 Act expired on August 20, 1994, the Export Administration Regulations issued under the 1979 Act have been maintained under the International Emergency Economic Powers Act by Executive Order 12924 (August 19, 1994).

The Export Administration Act of 1979, as amended, provides "authority to regulate exports, to improve the efficiency of export regulation, and to minimize interference with the ability to engage in commerce." The 1979 Act authorizes export controls to be used only after full consideration of the impact on the economy of the United States and only to the extent necessary:

> *(A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;*
>
> *(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and*
>
> *(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.*[5]

These three categories of permissible restrictions through export controls are discussed in the 1979 Act in separate sections. Section 5 of the 1979 Act deals with national security controls; section 6 with foreign policy controls; and section 7 with short supply controls.[6]

National Security Controls

National security export controls are established on the export and re-export of strategic commodities and technical data to prevent the diversion of such items to countries of concern. The United States pursues this objective through multilateral means when possible.

Until its demise in March 1994, the multilateral forum for controls on exports to controlled countries was the Coordinating Committee on Multilateral Export Controls (COCOM). The United States currently cooperates in the area of dual-use national security export controls with 32 other countries that participate in the Wassenaar Arrangement.

Section 5(b) of the 1979 Act requires the President to establish a list of "controlled countries" for national security purposes.[7] The controlled countries currently are: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, Cuba, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Moldova, Mongolia, North Korea, the People's Republic of China, Romania, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.[8]

Foreign Policy Controls

Foreign policy export controls are imposed for a number of reasons in furtherance of the foreign policy of the United States.[9] Such reasons include:

- **Crime control**
- **Regional stability**
- **Anti-terrorism**
- **Chemical and biological weapons nonproliferation**
- **Missile technology**
- **Nuclear nonproliferation**[10]

Items controlled pursuant to the three other current multilateral control regimes — the Australia Group, the Missile Technology Control Regime, and the Nuclear Suppliers Group — are under foreign policy controls, rather than national security controls. The exception occurs if the item is also under national security controls pursuant to the Wassenaar Arrangement or under unilateral U.S. national security controls.

Section 6(a)(3) of the 1979 Act requires foreign policy controls to expire annually, unless extended.[11] Foreign policy controls may not be extended unless the President has submitted a report to Congress in accordance with section 6(f) of the 1979 Act.[12]

Short Supply Controls

If a commodity is in short supply, export controls may be imposed under section 7 of the 1979 Act.[13] Section 7 authorizes the President to prohibit or curtail the export of goods subject to the jurisdiction of the United States where necessary to protect the

domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.[14]

Controls Maintained in Cooperation with Other Nations

The 1979 Act provides:

> *It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments or common strategic objectives.*[15]

Until its dissolution on March 31, 1994, the Coordinating Committee on Multilateral Export Controls (COCOM) was the primary multinational export control organization through which the United States and member countries controlled exports to countries of concern.

The United States currently participates in four multilateral export control regimes: the Wassenaar Arrangement, the Australia Group, the Missile Technology Control Regime, and the Nuclear Suppliers Group.

COCOM (Coordinating Committee on Multilateral Export Controls)

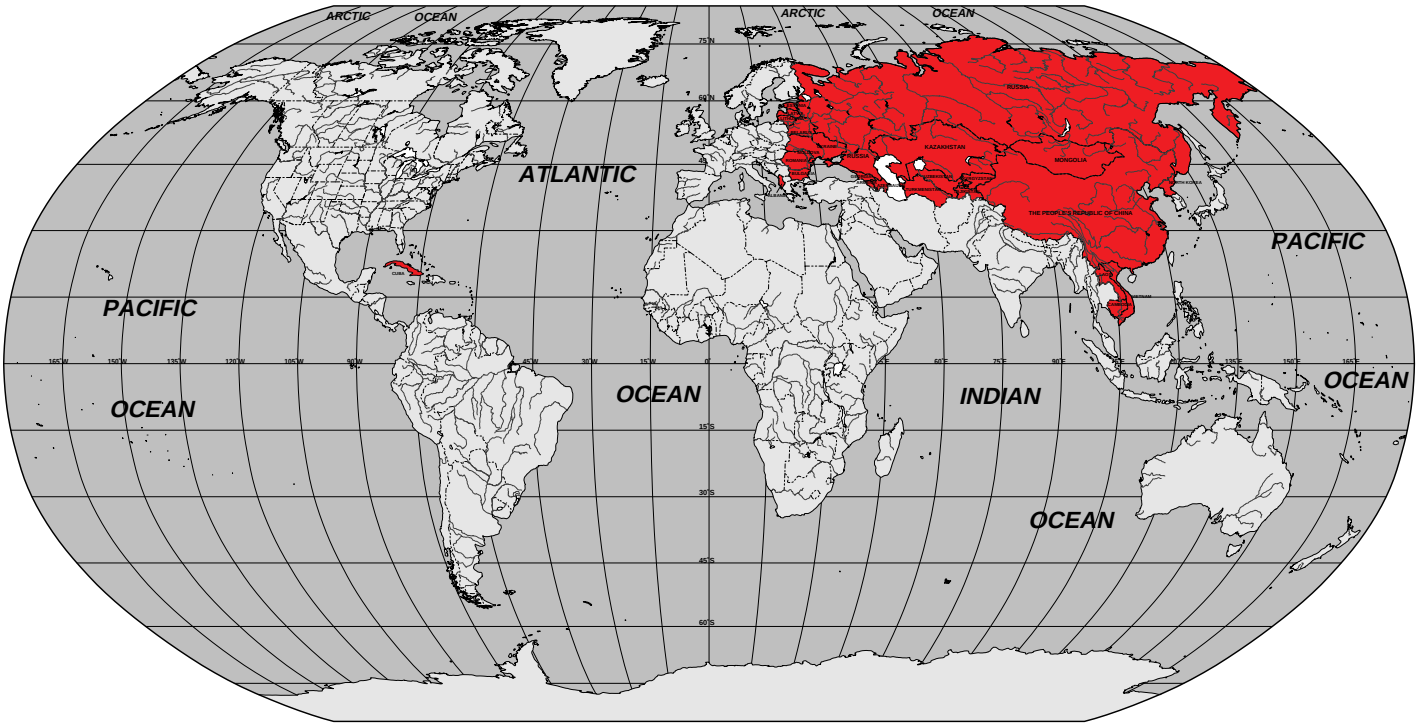
In 1949, the United States and 14 other countries created by informal agreement the Coordinating Committee on Multilateral Export Controls for security purposes.

The initial COCOM member countries were Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. Later, Spain and Australia joined COCOM.

COCOM maintained three control lists:

- **The International Atomic Energy List**
- **The International Munitions List**
- **The Industrial List**

COCOM-Proscribed Countries



In 1994, the COCOM-proscribed countries included Russia, other Warsaw Pact nations, and the People's Republic of China.

The Industrial List contained dual-use items (that is, items that have both civil and military applications) not included in the other two lists. COCOM performed a comprehensive review of each of the control lists at least every three to four years to reflect technological developments and changes in the ways in which end users could apply technologies.

Under COCOM, member countries surrendered some of their national sovereignty and national discretion by allowing other member countries to vote on export cases that required COCOM approval, according to Steven C. Goldman, Director of the Office of Chemical and Biological Controls and Treaty Compliance and Acting Director of the Office of Nuclear and Missile Technology Controls within the Bureau of Export Administration at the Department of Commerce.[16]

With the fall of the Berlin Wall and the changes in the Eastern European governments in 1989, President Bush approved in May 1990 a U.S. proposal to COCOM for a significant reduction in the COCOM controls and for the development of a new

"core list" of strategic items to replace the existing Industrial List. In June 1990, COCOM agreed with most of the elements in the U.S. proposal, and COCOM eliminated 30 items in the Industrial List while partially decontrolling 12 additional items. COCOM also agreed to a reduced "core list" of dual-use items that would be controlled for national security purposes to proscribed countries.

In view of the changing strategic environment in Central and Eastern Europe and the Newly Independent States of the former Soviet Union, COCOM adopted criteria in December 1991 for the removal of countries from the list of proscribed countries. Hungary was removed from this list in May 1992.

The United States submitted a proposal to COCOM in 1992 to establish a COCOM Cooperation Forum to discuss international standards for export controls, and to provide a way to coordinate technical assistance efforts with the countries of Eastern and Central Europe and the former Soviet Union. COCOM agreed with this proposal in June 1992, and the COCOM Cooperation Forum held its first meeting in November 1992. One of the items discussed by the Forum was a new approach to COCOM export controls that would contribute to the economic development of reforming countries by providing more access to higher levels of controlled items.

A report to Congress, dated September 30, 1993, which was submitted by the U.S. Trade Promotion Coordinating Committee, an interagency group chaired by the Commerce Department, stated that the Clinton administration was taking action to:

> *Adapt the multilateral export control system to address proliferation threats and to ensure the consistent application of export control policies and procedures by member countries.*
>
> *Continue current vigorous efforts to reorient COCOM export controls to the post-Cold War world . . .*[17]

Shortly after this report was submitted to Congress, the Clinton Administration made a proposal to the COCOM member countries to dissolve COCOM and to create a new multilateral mechanism to achieve a number of objectives, including:

- **Preventing states such as Iraq, Iran, North Korea, and Libya** from obtaining conventional weapons and other sensitive technologies
- **Furthering the process of engaging Russia** and other Newly Independent States in developing export control systems
- **Removing disadvantages to U.S. exporters** resulting from inadequate multilateral coordination on exports of sensitive technologies to terrorist states[18]

In November 1993, the COCOM member countries agreed to the U.S. proposal to establish a new multilateral mechanism, including the proposal to phase out COCOM. The Export Administration Annual Report for 1994, and the 1995 Report on Foreign Policy Export Controls, stated that:

> *As a result of [the] end of the Cold War, it was agreed by all COCOM members that COCOM should cease to exist after March 31, 1994.*[19]

Discussions among the COCOM member countries continued in early 1994 regarding the new organization to control exports of conventional weapons and sensitive dual-use goods and technologies.

At a meeting in Wassenaar, the Netherlands in March 1994, the COCOM member countries agreed to continue the use of the COCOM control lists to control exports until the new organization was formed.

Wassenaar Arrangement

The final agreement to establish a new multilateral export control organization was approved in July 1996, over two years after the dissolution of COCOM.

The new organization, called the "Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies" (Wassenaar Arrangement), became effective in September 1996.

The 33 member countries of the Wassenaar Arrangement include: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, the Republic of Korea, Romania, Russia, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States.

Negotiations regarding the items to be covered under the Wassenaar Arrangement began with the COCOM control list prior to the final agreement, according to James A. Lewis, Director of the Office of Strategic Trade and Foreign Policy Controls within the Bureau of Export Administration at Commerce.[20] Lewis says that the "essential" Wassenaar list of controlled items is not very different from the COCOM list as it existed in 1993 (that is, the same nine categories of items and the same general format and structure).[21]

Roger Majak, Assistant Secretary of Commerce for Export Administration, says the Wassenaar Arrangement includes no written agreement regarding the countries of concern.[22] However, Majak indicated that there is a verbal agreement that the countries of concern are Iran, Iraq, North Korea, and Libya.[23]

Unlike the COCOM Secretariat, the Wassenaar Secretariat — located in Vienna, Austria — does not perform a review function. That is, the Wassenaar Arrangement does not require that member countries submit export licenses for sensitive commodities and technologies to the Secretariat for review by other member countries prior to approval.

Instead, licensing by Wassenaar member countries is done by "national discretion," which means that while member countries share a common control list and a common set of objectives, each country can decide on its own how it will implement the control list and the objectives.

Commerce's Lewis says "one of the challenges for Wassenaar is achieving greater consistency in national application." [24]

Some items included in the Wassenaar control list are included in the Commerce Control List,[25] and the remainder are included in State's Munitions List.[26] Wassenaar control list items included in the Commerce Control List are considered to be subject to U.S. national security controls, although Lewis says that some of those items are subject to U.S. foreign policy controls as well.

Regarding high performance computers, Lewis indicates that Wassenaar member countries have agreed to control the export of computers capable of 2,000 millions of theoretical operations per second (MTOPS) and above, and that most member countries do not require licenses to export computers below this level of capability.[27] Lewis says that, at a recent Wassenaar meeting held to discuss control list items, the United States was the only member country that opposed moving this level up to 4,000 MTOPS.[28]

Under the Wassenaar Arrangement, member countries provide semi-annual reports to the Wassenaar Secretariat of export licenses regarding covered items they have approved or denied. Member countries receive three levels of semi-annual reports from the Wassenaar Secretariat. The member countries are provided semi-annual reports regarding approvals that include the control number and a brief description of the commodity or technology, the quantity approved, and the country of receipt. They are also provided with semi-annual reports regarding denials that include the same information. In addition, members receive semi-annual reports regarding denials of sensitive items that include the names of the intended recipients.

The Wassenaar Arrangement has a "no undercut agreement" on denials, according to Lewis, although he says "it could use a little work."[29] Under this agreement, when a member country reports a denial of a sensitive item to the Wassenaar Secretariat, no member will approve the sale of the same item to the same end user without first consulting the country that initially denied the export.

Included in the July 1996 agreement to establish the Wassenaar Arrangement was a provision for a 1999 review of the "overall functioning" of the regime.[30] Commerce's Lewis says this review will be conducted in the spring of 1999.[31] Commerce's Bureau of Export Administration has, however, only begun to review the effectiveness of the Wassenaar Arrangement in preparation for this two-year review.

Commerce Assistant Secretary Majak says that "[o]n the dual use side. . . [the Wassenaar Arrangement] has been successful in defining a common list and some common target control levels, but the implementation of those control levels by the member countries has been very uneven and in many respects unsatisfactory."[32]

Australia Group

The Australia Group was established in 1984 as an informal forum for member countries that seek to discourage and impede chemical weapons and biological weapons proliferation. The Australia Group pursues these goals by harmonizing national export controls on chemical weapons precursor chemicals, biological weapons pathogens, and dual-use equipment that may be used for chemical or biological weapons, and by sharing information on proliferation programs.[33] The Australia Group meets annually in Paris.

Currently, 30 countries are members of the Australia Group — Argentina, Australia (which chairs the Group), Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, the Slovak Republic, the Republic of Korea, Spain, Sweden, Switzerland, the United Kingdom, and the United States. All member countries are signatories of the 1993 Chemical Weapons Convention.

The Australia Group has established export controls on 54 chemical precursors and a list of chemical weapons-related production equipment. Regarding biological weapons, the Group has established export controls on certain microorganisms, toxins, and biological weapons-related production equipment.[34]

Member countries implement export controls that are identified and agreed upon by the Australia Group by "national discretion," which means that member countries individually decide how to implement the controls.

Export license applications for Australia Group items that are approved by a member country are not reported to other member countries. Goldman indicates that there is a "no undercut agreement" on denials by Australia Group members.[35]

Australia Group items are included in the Commerce Control List of the Export Administration Regulations. Such items on the Commerce Control List are considered to be subject to foreign policy controls.

Missile Technology Control Regime

The Missile Technology Control Regime (MTCR) was created in April 1987 by Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. The purpose of the MTCR is to limit the proliferation of missiles capable of delivering weapons of mass destruction.

Licensing by Missile Technology Control Regime member countries is done by "national discretion."

The Missile Technology Control Regime currently has 29 member countries. In addition to the seven original countries, the members are Argentina (joined in 1993), Australia (1990), Austria (1991), Belgium (1990), Brazil (1995), Denmark (1990), Finland (1991), Greece (1992), Hungary (1993), Iceland (1993), Ireland (1992), Luxembourg (1990), the Netherlands (1990), New Zealand (1990), Norway (1991), Portugal (1992), Russia (1995), South Africa (1995), Spain (1989), Sweden (1991), Switzerland (1992), and Turkey (1997).

MTCR controls are based upon Guidelines and an Equipment and Technology Annex. The Annex consists of a list of missile-related items subject to controls, and is divided into two categories:

- **Category 1** includes missile subsystems and production equipment for missile systems. Category 1 items are controlled by the Department of State under the U.S. Munitions List
- **Category 2** includes dual-use components, materials, and other commodities

Goldman, of Commerce's Bureau of Export Administration, says that approximately 70 percent of the items listed in Category 2 are included in the U.S. Munitions List, and about 30 percent of the items are included in the Commerce Control List.[36]

While the People's Republic of China is not a member of the MTCR, it agreed in 1992 to adhere to the original Guidelines, and the Equipment and Technology Annex agreed to in 1987 by the MTCR member countries.[37]

The PRC decision followed the imposition by the United States of missile proliferation sanctions on the PRC in 1991 because the PRC had transferred M-11 short-range ballistic missile technology to Pakistan.[38]

The PRC has not, however, agreed to adhere to revisions to the Guidelines and Annex that have been adopted since 1987.[39]

Nuclear Suppliers Group

The Nuclear Suppliers Group was established in 1992. Member countries have agreed to adhere to Guidelines and implement an Annex with respect to exports of nuclear and nuclear-related dual-use commodities.

Also, member countries adhere to safeguards established by the International Atomic Energy Agency.

The Nuclear Suppliers Group currently consists of 34 member nations — Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, the Republic of Korea, Romania, Russia, the Slovak Republic, Spain, South Africa, Sweden, Switzerland, Ukraine, the United Kingdom, and the United States.

According to Stephen C. Goldman of Commerce's Bureau of Export Administration, the Nuclear Suppliers Group export controls are similar to those that existed under COCOM's International Atomic Energy List.[40] Unlike the COCOM controls, however, the Nuclear Suppliers Group export controls are implemented on a "national discretion" basis.

The Nuclear Suppliers Group works on the basis of a consensus of the member countries, and the Guidelines call for consultations among member countries regarding sensitive export cases.

License applications for items covered by the Nuclear Suppliers Group that are approved by a member country are not reported to other member countries. However, there is a "no undercut rule" on denials by member countries.

Enhanced Proliferation Control Initiative

In December 1990, President Bush approved the Enhanced Proliferation Control Initiative. This initiative was established to control items —

- **When the exporter knows** that the export will be used in the design, development, production, or stockpiling of missiles or chemical or biological weapons; or
- **When the exporter is informed** by the Department of Commerce that there is a serious risk of diversion.

Earlier, President Bush had issued Executive Order 12735 (Chemical and Biological Weapons Proliferation, November 16, 1990), which directed the imposition of additional controls on items used in the design, development, production, delivery, stockpiling, or use of missiles and chemical and biological weapons.[41]

In December 1993, the Department of Commerce published additional guidance for exporters on the "knows or is informed" licensing requirement of the Enhanced Proliferation Control Initiative.[42]

In February 1997, the Department of Commerce began publishing an "Entity List" to inform exporters of some of the organizations and companies that may be involved in proliferation activities. The "Entity List" appears in Supplement No. 4 to part 744 of the Export Administration Regulations, and is revised and updated on a periodic basis.[43] This "Entity List" does not, however, include all of the organizations, companies, or individuals that are on the "watch lists" maintained by the Office of Export Enforcement at the Department of Commerce or by the Nonproliferation Center at the Central Intelligence Agency.

The Enhanced Proliferation Control Initiative's "knows or is informed" provision is known as a "catch-all" provision. This control imposes a licensing require-

ment in those cases where the exporter has "knowledge" of the end use or end user relating to missile and chemical or biological weapons activities.

A Department of Commerce Fiscal Year 1999 budget proposal document for the implementation of a Bureau of Export Administration internal compliance program stated:

> *Significant easing of the U.S. and multilateral export controls on West-East trade since the early 1990's; the implementation of the Enhanced Proliferation Control Initiative (EPCI) in 1991; and, the simplification of the Export Administration Regulations (EAR) which resulted in a conversion from general licenses to license exceptions have* ***shifted the burden of screening many export transactions to the exporter.***
>
> *Unfortunately, many companies have not established adequate procedures to ensure transactions no longer requiring export licenses are* ***properly screened for proscribed end-uses and end users.***[44] [Emphasis added]

The Enhanced Proliferation Control Initiative does not apply to items controlled under the Wassenaar Arrangement, according to Goldman.[45] However, the United States has obtained agreement from other member countries (except Canada) under the Australia Group, the Missile Technology Control Regime, and the Nuclear Suppliers Group to implement "catch-all" controls to some extent regarding controlled items.

Export Administration Regulations

The Export Administration Regulations are designed to implement the 1979 Act and control certain exports, reexports, and other activities.[46] They are issued and administered by the Bureau of Export Administration of the Department of Commerce.[47]

The Export Administration Regulations control "dual-use" commodities — that is, technology that can be used in military and other strategic uses, as well as in commercial applications.[48] However, the Export Administration Regulations also include some items that have solely civil uses.[49]

On May 11, 1995, the Bureau of Export Administration published a comprehensive revision and reorganization of the Export Administration Regulations after a two and one-half year effort. The revision made changes in the types of export licenses, eliminating the "general license" categories and replacing them with "License Exceptions." Also, the "special license" provisions (for example, Project License, Distribution License, Service Supply Procedure, Humanitarian License, Aircraft and Vessel Repair Station Procedure, and Special Chemical License) were removed and replaced by a "Special Comprehensive License." [50]

The Commerce Control List specifies the commodities, software, and technology that are subject to the Export Administration Regulations.[51] In addition, the General Technology and Software Notes provide guidance relevant to these items.[52] Prior to the dissolution of COCOM in March 1994, the Commerce Control List was closely related to the COCOM Industrial List.[53]

The Commerce Control List is organized into ten categories:

- Category 0: **Nuclear Materials, Facilities, and Equipment**
- Category 1: **Materials, Chemicals, Microorganisms, and Toxins**
- Category 2: **Materials Processing**
- Category 3: **Electronics**
- Category 4: **Computers**
- Category 5: **Telecommunications and Information Security**
- Category 6: **Sensors and Lasers**
- Category 7: **Navigation and Avionics**
- Category 8: **Marine**
- Category 9: **Propulsion Systems, Space Vehicles and Related Equipment**[54]

The Commerce Country Chart contains licensing requirements based on the proposed country of destination and the "Reason for Control."[55] The Country Chart is designed to be used in conjunction with the Commerce Control List in determining whether a license is required to export a given item to a particular country.[56] The Country Chart provides as "Reasons for Control":

- **Anti-terrorism**
- **Chemical and biological weapons**
- **Crime control**
- **Encryption items**
- **Missile technology**
- **National security**
- **Nuclear nonproliferation**
- **Regional stability**
- **Short supply**
- **Computers**
- **Other significant items**[57]

The Export Administration Regulations also identify 14 "License Exceptions."[58] A "License Exception" is an authorization to export or re-export without a Commerce license certain items that are subject to the Export Administration Regulations.[59]

One of the new 1995 License Exceptions — "License Exception CIV"[60] — authorizes the export and re-export of certain items that are controlled for national security reasons, provided the items are destined to civil end-users for civil end-uses in a group of countries that includes the PRC.[61]

Another License Exception — "License Exception CTP" — authorizes export and re-export of computers to various countries, including the PRC, according to criteria provided in the Export Administration Regulations.[62]

For example, the new 1995 License Exception CTP can be relied upon to export computers having a composite theoretical performance greater than 2,000 MTOPS

(millions of theoretical operations per second), but less than or equal to 7,000 MTOPS, to other than military or nuclear, biological, or missile end-users and end-uses in the PRC.[63]

Arms Export Control Act

The U.S. Government controls the export and import of "defense articles" and "defense services" pursuant to the Arms Export Control Act.[64]

Section 38 of the Arms Export Control Act authorizes the President to control the export and import of defense articles and defense services.[65]

The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 11958, as amended.

International Traffic in Arms Regulations

The Arms Export Control Act is implemented by the International Traffic in Arms Regulations (ITAR), which are administered by the State Department's Office of Defense Trade Controls within the Bureau of Political-Military Affairs. These regulations are found at 22 CFR parts 120-130.

The Arms Export Control Act provides that the President shall designate the articles and services that are deemed to be "defense articles" and "defense services."[66] These items, as determined by the State Department with the concurrence of the Department of Defense, are included on the U.S. Munitions List.[67]

No items may be removed from the U.S. Munitions List without the approval of the Secretary of Defense, and there must be 30 days advance notice to Congress.[68]

In addition to unilateral U.S. controls, the U.S. Munitions List includes controls on missile technology that are based on the multilateral Missile Technology Control Regime and its Annex.[69]

Omnibus Trade and Competitiveness Act of 1988

The "Exon-Florio" provision of the Omnibus Trade and Competitiveness Act of 1988[70] amended the Defense Production Act[71] to establish a procedure for the President to investigate the national security effects of proposed mergers, acquisitions, and takeovers of U.S. companies by foreign interests. If there is credible evidence that the foreign interest exercising control might take action that threatens to impair the national security, the President may suspend or prohibit the transaction.[72]

The Exon-Florio provision allows a maximum of 90 days to complete a review of a proposed transaction.[73] The determination whether an investigation should be undertaken must be completed in 30 days. An investigation, if undertaken, must be completed in 45 days. The decision whether action is to be taken to block the transaction must be made within another 15 days.[74]

President Reagan designated the interagency Committee on Foreign Investment in the United States to administer the Exon-Florio provision in Executive Order 12661 (Implementing the Omnibus Trade and Competitiveness Act of 1988 and Related International Trade Matters, December 27, 1988). Under that Executive Order, the Secretary of the Treasury chairs the interagency committee.

Economic Espionage Act of 1996

The Economic Espionage Act of 1996 (P.L. 104-294, October 11, 1996) was enacted for two purposes:

- **To thwart attempts by foreign entities to steal the trade secrets of U.S. companies**
- **To authorize the U.S. Government to investigate and prosecute persons, including domestic American companies, who are engaged in economic espionage**[75]

The Economic Espionage Act was a response to an appeal by the Director of the Federal Bureau of Investigation for Congress to enact new legislation to criminalize the theft of trade secrets.[76]

Under the Economic Espionage Act, penalties for economic espionage by a foreign government or its agent include:

- **Fines for an individual of up to $500,000**
- **Jail sentences of up to 15 years**
- **Fines for an organization of up to $10 million**[77]

The Economic Espionage Act applies extraterritorially to activities of non-U.S. citizens abroad, if such activities conducted abroad are illegal under the Act, and if they are connected to an act in the United States that furthered the activity abroad.[78]

Economic espionage is defined as:

> *foreign power-sponsored or coordinated intelligence activity directed at the U.S. government or U.S. corporations, establishments or persons, designed to obtain unlawfully or clandestinely sensitive financial, trade, or economic policy information, proprietary economic information, or critical technologies, or, to influence unlawfully or clandestinely sensitive economic policy decisions.*[79]

Countries identified publicly by the U.S. Government as being involved in economic espionage include the People's Republic of China, which is reported to be enhancing its collection efforts in this area.[80]

Export Licenses for Militarily Sensitive Technology: Department of Commerce

The Bureau of Export Administration within the Department of Commerce processes export license applications pursuant to the 1979 Act and the Export Administration Regulations.

The Bureau of Export Administration conducts a complete review of the license application, including any documentation submitted along with the application. This review includes an examination of the item to be exported, the proposed end use of the item, and all parties to the transaction.

Export License Processing Until December 1995

Prior to the issuance of Executive Order 12981 (Administration of Export Controls, December 5, 1995), Commerce's Bureau of Export Administration routinely referred certain license applications to:

- **The Department of State**
- **The Department of Defense**
- **The Department of Energy**
- **The Arms Control and Disarmament Agency**

Whether the Commerce Department made a referral to one of these other agencies depended upon the item to be exported and the country of destination. The protocol for these referrals evolved over the years. It was subject to change as items were controlled or decontrolled, and as concerns regarding destination countries changed.

For example, applications to export items controlled for national security purposes to end users in the People's Republic of China or Russia were routinely referred to the Department of Defense for review. License applications for items controlled for foreign policy purposes (such as regional stability, anti-terrorism, and crime control) to specific countries were referred to the State Department for review. The Department of Energy would receive referrals of license applications for items controlled by the Nuclear Suppliers Group as nuclear nonproliferation commodities.

If the reviewing departments and agencies differed regarding a specific license application, further consultation would occur in the structure of the Advisory Committee on Export Policy (ACEP). This consultation could also occur in any special groups that had been established to address specific types of items (for example, the Subgroup on Nuclear Export Coordination), or in less formal discussions between the particular departments or agencies.

The ACEP structure operated at three levels prior to December 1995:

- **The Operating Committee** of the ACEP, the first level for resolution of differences, was chaired by a Commerce Bureau

of Export Administration official, and included representatives from the Departments of Commerce, Defense, State, and Energy, as well as other departments and agencies as appropriate.

- **The ACEP itself**, the second level, was chaired by the Assistant Secretary of Commerce for Export Administration. Members of the ACEP included the same representatives of departments and agencies as the Operating Committee.
- **The Export Administration Review Board**, the third level, was chaired by the Secretary of Commerce, and consisted of cabinet-level officials.

The ACEP structure operated on a consensus basis at each level. Interagency differences that could not be resolved at the Export Administration Review Board level could be sent to the President for final resolution.[81]

Export license application processing deadlines were established by the Export Administration Amendments Act of 1985. The maximum processing time for a license application that required referral to another department or agency was 120 days. If a license application did not require referral to another department or agency, the maximum processing time was 60 days.[82]

Prior to the issuance of Executive Order 12981 in December 1995, the 1979 Act required that the Commerce Department seek information and recommendations from other U.S. Government departments and agencies that had important interests in exports in determining whether a dual-use export license should be granted or denied.

Prior to December 1995, the Commerce Department referred many, but not all, license applications to the Departments of State, Defense, and Energy, and the U.S. intelligence community for review.

Nevertheless, a number of U.S. Government reports over the years identified problems and disagreements involving U.S. Government agencies regarding which applications the Department of Commerce should refer to them.[83] One 1993 study noted that this disagreement resulted in part from ambiguities in the 1979 Act. In con-

trast, the Nuclear Non-Proliferation Act of 1978 required the Department of Commerce to consult with the Department of Energy under specific procedures regarding applications for items with nuclear-related capabilities.

License Processing Since Executive Order 12981 in December 1995

Executive Order 12981 was issued on December 5, 1995. It established new procedures and deadlines for the processing of export license applications by the Department of Commerce pursuant to the 1979 Act and the Export Administration Regulations.

Among other things, the Executive Order made a major change regarding the referral by the Commerce Department of license applications to other departments and agencies. The effect of this change was to permit the Departments of State, Defense, and Energy, and the Arms Control and Disarmament Agency, to review any license application submitted to the Commerce Department.

As was the case prior to Executive Order 12981, the Commerce Department is free to refer license applications to other departments and agencies as it deems appropriate.[84]

The Executive Order also changed the composition and operation of the Advisory Committee for Export Policy (ACEP) for resolving interagency disputes on license applications. Instead of operating on a consensus basis at each level as previously had been the case, the Executive Order authorized the Operating Committee Chair to make decisions on license applications at the Operating Committee level.

These decisions could be appealed to the ACEP. The Executive Order established that decisions on license applications at the ACEP level and at the Export Administration Review Board level would be made by majority vote.[85]

The Executive Order also changed the time requirements. It specified that all license applications submitted to the Commerce Department must be resolved, or referred to the President, no later than 90 days after the license application. This represented a 30-day, or 25 percent, reduction in the maximum time that was previously allowed to process a license application.[86]

In October 1996, export license applications for commercial communication satellites and any jet engine "hot-section" technology for the development, production, and overhaul of commercial aircraft engines were transferred from the State Department's Munitions List to the Commerce Department's Control List.[87] President Clinton issued Executive Order 13020 (Amendment to Executive Order 12981, October 12, 1996) regarding the procedure for interagency processing of these applications. Executive Order 13020 also called for a majority vote decision of the Operating Committee on disputed applications, rather than a decision by the Operating Committee Chair.[88]

By Executive Order 13026 (Administration of Export Controls on Encryption Products, November 15, 1996), President Clinton amended the process for export licensing of encryption products. The new system requires the Commerce Department to refer license applications for encryption products controlled under the Commerce Control List to the Department of Justice for review. The Executive Order includes the Justice Department as a full voting member of the Operating Committee, the ACEP, and the Export Administration Review Board when those bodies are reviewing encryption export license applications.[89]

Carol A. Kalinoski, the Commerce Department official who currently is the Chair of the ACEP Operating Committee, indicates that meetings are currently held at least weekly. The agenda for each Operating Committee meeting generally ranges between 60 and 70 license application cases. Out of that number, approximately 20 to 40 typically are new cases. The Operating Committee handled 704 export license application cases in fiscal year 1998, 634 in fiscal year 1997, and 385 in fiscal year 1996.[90]

Kalinoski says that Operating Committee meetings are getting "harder." This is occurring because the Operating Committee is reviewing license applications that are more complex than in the past. End-user concerns are a primary cause of export license disagreements.[91]

Only five percent of the license applications reviewed by the Operating Committee are escalated to the Advisory Committee on Export Policy. Currently, there is a meeting of the ACEP about every two months. Kalinoski says

there has not been an appeal to the Export Administration Review Board since December 1988.[92]

The number of license applications received by the Department of Commerce has dropped dramatically over the past ten years. Commerce received 97,902 license applications in fiscal year 1988, 26,126 in fiscal year 1993, and 11,472 in fiscal year 1997.[93] Commerce's Bureau of Export Administration explained this decline in export license applications in its 1997 Annual Report to Congress by stating:

> ***Dramatic licensing liberalizations*** *implemented following the September 30, 1993 release of the Trade Promotion Coordinating Committee's (TPCC) report to Congress on developing a "National Export Strategy" has reduced licensing activity by over 55% over the past four fiscal years.* [Emphasis added]

Pre-License Checks and Post-Shipment Verifications

The Department of Commerce or another department or agency may request a pre-license check to establish the identity and reliability of the recipient of the items requiring an export license.[94]

The 1979 Act provides that the Secretary of Commerce and designees may conduct overseas pre-license checks and post-shipment verifications of items licensed for export: [95]

- **A pre-license check** is conducted during the licensing process[96]
- **A post-shipment verification** is an on-site visit to the location to which the controlled item has been shipped under an export license, in order to ascertain that the item is being used by the appropriate end user and for the appropriate purpose

The Commerce Department's procedures for conducting pre-license checks and post-shipment verifications are similar.

A pre-license check or post-shipment verification is initiated by sending a cable with relevant information about the case to the appropriate U.S. Embassy overseas.

Specific officials at the Embassy usually have been pre-designated to conduct these checks, although special teams from Washington, D.C. also periodically conduct end-use checks.

The Embassy official initially collects background information on the end user. Next, the Embassy official visits the end user and interviews senior employees there. Upon completing the visit, the Embassy official is required to cable the Commerce Department with the information collected and an evaluation as to whether the end user is considered a reliable recipient of U.S. technology.

Based on the cabled information, the Commerce Department evaluates whether the result of the check is favorable or unfavorable.[97]

Over the years, several studies have criticized how the authority for pre-license checks and post-shipment verifications has been implemented.[98] These criticisms have included:

- **Lack of technical expertise among Embassy officials**
- **Omission of vital information in requesting cables**
- **Performance of checks by unsupervised foreign nationals**
- **Delayed or denied access to some foreign facilities, including those in the PRC**
- **Lack of strategic plans for checks and verifications**
- **Failure to follow guidelines**
- **Presence of unreliable data**

Roles of Other Departments and Agencies In Commerce's Export Licensing Policy

Department of State

Within the Department of State, the Export Control and Nonproliferation Office is responsible for reviewing most dual-use license applications referred from the Department of Commerce.

Normally, the license applications are received via a dedicated electronic link with the Commerce Department. As appropriate, the State Department coordinates the

license application with its own offices and, when necessary, with U.S. Embassies overseas. Once the State Department formulates its position on a license application, it typically transmits the recommendation back to the Commerce Department via the same dedicated electronic link.

Depending on the technology involved, some dual-use license applications are processed by other State Department organizations instead of the Export Control and Nonproliferation Office:

- **License applications relating to missile technology** are reviewed by the Missile Technology Export Control Group, an interagency group chaired by the Office of Chemical, Biological, and Missile Nonproliferation within State's Bureau of Political-Military Affairs
- **Dual-use applications for items controlled for chemical and biological weapons reasons** are reviewed by SHIELD, an interagency group chaired by State
- **License applications relating to items that are controlled for nuclear nonproliferation reasons** are reviewed by the Subgroup on Nuclear Export Coordination (SNEC), another interagency group chaired by State

As appropriate, each of these interagency groups also reviews license applications involving other technologies that are destined to a country or end user of concern.[99]

Department of Defense

At the Department of Defense, the Technology Security Operations Directorate in the Defense Technology Security Administration (DTSA)[100] reviews the end users that are identified on Commerce Department export license applications.

The Defense Department uses information from a variety of sources, such as the U.S. Customs Service, the Federal Bureau of Investigation, the Central Intelligence Agency, and the Defense Intelligence Agency, to vet the end user. Also, a "tiger team" meets at the Defense Department each morning to review a synopsis of dual-use license applications that is transmitted electronically from Commerce.

Typically, the Defense Department has seven days to determine whether to recommend that it be given time to review a license application more closely. Invoking the seven-day period to ask for more information from the Commerce Department essentially places a hold on the license for a period of up to 30 days. During that time, the Defense Department works on developing information that eventually will lead to a recommendation for its position on the license application. Within the Defense Department, the License Directorate determines which Defense organizations will be afforded the opportunity to comment on the license application.

Central Intelligence Agency

Commerce Department officials may refer license applications for dual-use items to the CIA's Nonproliferation Center for help in identifying sensitive end users.[101]

Commerce Department officials say that they refer to the CIA all license applications for exports to the People's Republic of China.[102]

In 1996, the Commerce Department began referring to the CIA information it receives from exporters about end users for all high performance computer exports to certain countries — even if an export license is not required. However, the CIA has recommended 22 general types of foreign end users that the Commerce Department should exempt from Nonproliferation Center review. These include some foreign government entities whose activities are considered to be benign, public service organizations, and some foreign trade organizations.[103]

Enforcement

Alleged violations of the 1979 Act or the Export Administration Regulations are investigated by the Department of Commerce's Office of Export Enforcement.[104]

Consisting of about 100 special agents and other personnel, the Office of Export Enforcement operates from eight field offices located in key areas of the United States. In addition to conducting criminal and administrative investigations, it performs:

- **Pre-license checks**
- **Post-shipment verifications**

- **Liaison with other law enforcement agencies**
- **Outreach programs to educate businesses engaged in export activities**

In 1993, the Commerce Department and the U.S. Customs Service signed a Memorandum of Understanding to enhance their cooperation on export enforcement. The agreement contains provisions to facilitate information sharing, to coordinate enforcement activities, and to delineate responsibilities between the two agencies.

Voluntary Disclosures

In addition to reliance on standard methods of enforcement, the Commerce Department has procedures for exporters to self-disclose their own violations.

While the Export Administration Regulations provide that voluntary self-disclosure may be considered a mitigating factor in determining the appropriate administrative penalties, the regulations also make clear that the weight to be given a self-disclosure is entirely within the discretion of the Commerce Department, and that it will not prevent transactions from being referred to the Department of Justice for criminal prosecution.[105]

Penalties for Violation of the Export Administration Regulations

Since the 1979 Act expired in August 1994, the Export Administration Regulations have been enforced under the authority of the International Emergency Economic Powers Act. The penalties that can be imposed under this law are less than the penalties provided under the 1979 Act.

Penalties Under the 1979 Act (Expired Since 1994)

The 1979 Act provided for criminal and civil penalties, as well as administrative sanctions such as debarment from the privilege of exporting.

Criminal penalties for knowing violations under the 1979 Act included:

- **Maximum fines of five times the value of exports or $50,000, whichever is greater**
- **Imprisonment for a maximum of five years**[106]

Willful criminal violations were punishable by:

- **Maximum fines of $250,000**
- **Imprisonment of five to ten years**
- **Fines of up to $1 million for companies**[107]

Civil penalties under the 1979 Act included:

- **Fines of up to $10,000 per violation**
- **In cases involving violations of national security controls, fines of up to $100,000 per violation**[108]

Civil penalties under the 1979 Act were held by at least one federal court to be subject to a strict liability standard, with no necessity to show knowledge or intent.[109]

Administrative Sanctions

Administrative sanctions imposed under the Export Administration Regulations include denial of export privileges for up to ten years.[110] Persons convicted under specified national security laws, including the 1979 Act, may also lose export license privileges for up to ten years.[111]

When necessary to prevent the occurrence of an imminent violation, the Assistant Secretary of Commerce for Export Administration can issue an order temporarily denying export privileges without a hearing.[112]

All Commerce Department export licenses and license exceptions are subject to revision, suspension, or revocation without notice whenever it becomes known that the Export Administration Regulations have been violated, or that a violation is about to occur.[113]

A further sanction prescribed in the Export Administration Regulations is the exclusion of professionals involved in the export process — such as attorneys, accountants, consultants, and freight forwarders — from practice before the Bureau of Export Administration.[114]

Finally, illegal exports are subject to seizure together with any vessel, vehicle, or aircraft used in the export or attempt to export.[115]

Penalties Under the International Emergency Economic Powers Act

The criminal and civil penalties under the International Emergency Economic Powers Act (IEEPA) are substantially less than those provided under the 1979 Act. The maximum civil fine is $10,000 per violation.[116] The maximum criminal penalties under IEEPA are $50,000 and/or ten years' imprisonment.[117]

Commerce Undersecretary for Export Administration William A. Reinsch notes that the maximum civil fine under IEEPA — $10,000 per violation — may not be a significant cost for a major company.[118]

Customs Enforcement

The U.S. Customs Service is the principal border enforcement agency in the U.S. Government. It has the authority to search any shipment that crosses the U.S. border, whether entering or exiting the country.

One role of the Customs Service is to work with the State Department's Office of Defense Trade Controls in conducting end-use checks — the BLUE LANTERN program. The State Department sets criteria for when these end-use checks should be performed, but asks the Customs Service to carry them out. (In contrast, the Commerce Department schedules its own end-use checks and uses its own staff to implement them, although they are coordinated with the Customs Service and overseas attaches.)

The Customs Service receives leads from a variety of sources, including information from licenses issued by the Commerce Department and the State Department. In turn, it also shares information with Commerce and State.

The Customs Service maintains overseas offices, including one in Hong Kong, to support its investigations. Foreign national employees hired by the Customs Service are subject to full background investigations.

Commodity Classification Requests Under the Commerce Control List

The Commerce Control List consists of categories of items grouped by Export Control Classification Number.[119] If an exporter is uncertain regarding the correct Export Control Classification Number for a commodity to be exported, the exporter may obtain the appropriate number by submitting a "Classification Request" to the

Bureau of Export Administration at Commerce.[120] The Commerce Department handles approximately 5,000 classification requests each year.

The Commerce Department rarely coordinates commodity classification requests with other U.S. Government departments or agencies. However, pursuant to procedures approved by President Clinton in April 1996, the Commerce Department shares responsibility with the State Department and the Defense Department for classification requests involving:

> *items/technologies specifically designed, developed, configured, adapted and modified for a* ***military application,*** *or derived from items/technologies specifically designed, developed, configured, adapted or modified for a* ***military application.***[121]
> [Emphasis added]

The Commerce licensing officer handling a commodity classification request would need to determine whether the request met the above criteria for referral.

Since the adoption of the April 1996 procedures, the Commerce Department indicated it had referred to the State Department only 22 classification requests out of a total of 3,374 in 1997 (that is, 0.65 percent). It referred four out of 3,191 in 1998 (that is, 0.13 percent).[122]

Commerce's commodity classification process is different from the commodity jurisdiction process administered by the State Department. At State, all commodity jurisdiction requests are sent to the Departments of Defense and Commerce.

Iain S. Baird, Deputy Assistant Secretary of Commerce for Export Administration, says that copies of classification requests are maintained and filed "consistent with normal recordkeeping." However, Baird adds that the classification requests are disbursed by the licensing divisions, and these records are archived periodically along with other documents.[123] Also, records of classification requests are not kept in the Export Control Automated Support System database maintained by Commerce.

The Commerce Department was unable to comply with a request from the Select Committee for copies of classification requests acted on since 1992, as such documents

are not readily accessible. Commerce plans to include information concerning classification requests in the anticipated redesign of the Commerce database.[124]

If, in response to a commodity classification request, the Commerce Department incorrectly decides an item does not require a license to be exported, the classification decision is not reviewed by another department or agency, and the exporter is free to export the item without a license. Only if Commerce decides the item requires a license to be exported will the Departments of State, Defense, and Energy, and the Arms Control and Disarmament Agency, have an opportunity to review the license application (including the commodity classification) pursuant to Executive Order 12981.

Since the State Department does not review the classification decision when the Commerce Department determines that no license is required under the Commodity Control List, it is possible that the State Department, if consulted, might have determined the item to be a defense article or defense service covered under the U.S. Munitions List.

Export Licenses for Militarily Sensitive Technology: Department of State

Procedures for Referral to Other Departments and Agencies of Requests to Export U.S. Munition List Items

Any license application submitted to the Department of State's Office of Defense Trade Controls to export a "defense article" or "defense service" on the U.S. Munitions List may be reviewed by the Department of Defense.

William Lowell, Director of the Office of Defense Trade Controls at State, describes the process as follows: When an application arrives at the State Department, it is assigned to a licensing officer[125] who reviews relevant information and then recommends approval or denial of the application, or approval with conditions.[126] The licensing officer's decision typically is accepted, unless another entity recommends denial.[127]

If the State Department licensing officer needs additional information to understand the technology covered by an application, the licensing officer sends the application to the Defense Department.[128] There, the Defense Technology Security Administration determines who else in the Defense Department should review the application, and provides the State Department with a coordinated Defense Department review.

In 1997, the State Department referred about 30 percent of its cases to the Defense Department.[129] The Commerce Department is not involved in the review of U.S. Munitions List license applications.[130]

There is no memorandum of understanding between the State and Defense Departments on this subject. Lowell says none is needed, given the good relations between the departments. The State Department refers applications to the Defense Department in hardcopy form, as Defense is not connected electronically to State for this purpose. Nevertheless, the Defense Department sends its comments and final position on applications to State via a Defense database.

According to Lowell, the Defense Department has a veto in the State Munitions List system on exports, based on national security grounds. The State Department also has a veto on exports, based on foreign policy grounds. State and Defense tend to defer to one another, and appeals are extremely rare.[131]

By contrast, in the Commerce Department licensing process, none of the five participating departments and agencies — Commerce, Defense, State, Energy, and the Arms Control and Disarmament Agency — has a veto over license applications.[132] In all cases except at Commerce's Operating Committee level (where the decision of the Commerce Department Chair prevails), a majority vote determines the outcome at the Advisory Committee for Export Policy and the Export Administration Review Board levels. The decision of the Operating Committee Chair, and the result of a vote by the ACEP or the Export Administration Review Board, can be appealed by any of the five participating agencies.

There is no provision in the International Traffic in Arms Regulations to consider either commercial factors or the foreign availability of a U.S. Munitions List item, according to Lowell.[133] This is because independent of whether foreigners can sell an

item, the U.S. Government may wish to preserve a technology lead, or would not want certain countries to obtain the military technology from the United States. According to the regulations:

> *The intended use of the article or service after its export (i.e., for a military or civilian purpose) is not relevant in determining whether the article or service is subject to the [International Traffic in Arms Regulations] controls. . .* [134]

For dual-use items covered by the Export Administration Regulations, the foreign availability of a commodity can be the basis for removing export controls on that commodity. It cannot, however, override national security.[135]

Commodity Jurisdiction Process

The commodity jurisdiction process involves a State Department decision as to whether and where a commodity belongs on the Munitions List. Before making its determination that an item is covered by the Munitions List, the State Department may consult the Defense Department, the Commerce Department, other U.S. Government agencies, and industry where appropriate. The determination includes an assessment of whether an article or service has predominantly civil or military applications.[136]

The State Department is required to submit a report to Congress at least 30 days before any item is removed from the U.S. Munitions List by the commodity jurisdiction process. An exporter can invoke the State Department's commodity jurisdiction procedure for either of the following reasons:

- **If doubt exists as to whether an article or service is covered by the U.S. Munitions List or the Commerce Control List**
- **To consider a redesignation of an article or service that is covered by the Munitions List**

However, a commodity jurisdiction decision cannot be used as the sole basis to justify an export, according to William Lowell, Director of the Office of Defense Trade Controls at the Department of State.[137]

Lowell says that the administration of the Munitions List via the commodity jurisdiction process started informally in the 1960s or 1970s.[138] Today, there are several hundred commodity jurisdiction cases per year. In the spring of 1996, the National Security Council disseminated new procedures on commodity jurisdiction and commodity classification approved by President Clinton. The new procedures require State to refer all commodity jurisdiction cases to Defense and Commerce, and include an escalation process. Under this process, a State Department decision can be appealed to the assistant secretary level, then to the under secretary level, and then to the President.[139] Since the new procedure was announced in early 1996, two cases have been appealed to the White House, according to Lowell and Rose Biancaniello, Deputy Director for Licensing at the Office of Trade Controls.[140]

Lowell says that although State sometimes sees a commodity classification case from the Commerce Department, referral from Commerce to State does not occur systematically. Lowell says that it has always been State's view that there should be more interagency coordination on Commerce's commodity classification cases, and that State's commodity jurisdictions cannot be determined by any agency other than State.[141]

Registration of Exporters

A fundamental difference between the State Department and Commerce Department export control systems, according to the State Department's Lowell, is that exporters of munitions are required by law to register with the State Department in order to apply for a license.

The names of the registrants are vetted with the law enforcement community, and maintained in a database of about 10,000 names. The database also contains registered munitions manufacturers who are assigned a State Department identification code.[142]

Congressional Oversight and Required Reports

Lowell notes that another difference between Commerce Department and State Department export licensing systems is the greater level of congressional oversight of U.S. Munitions List exports compared to Commerce Control List exports.

For example, the State Department is required by the Arms Export Control Act to provide Congress with quarterly reports of U.S. Munitions List exports by country. The foreign affairs committees respond to these reports with many questions.[143]

Moreover, exports of "major defense equipment" — equipment costing over $200 million or involving over $50 million in research and development — must be reported to Congress.[144] Exports of such equipment to the PRC are subject to a 30-day waiting period.

The State Department must also report to Congress regarding political fees, contributions, and commissions paid by U.S. companies overseas. It must also provide Congress with an annual report, pursuant to the Foreign Assistance Act, showing the total dollar value of exports and commodities it licenses by country per year.

The State Department processes over 150 sales of major defense equipment per year, according to Lowell. The State Department must clear these cases with Congress before it may allow the export.[145] In 1997, Congress was sent approximately 140 cases, about 40 percent of the dollar value of all the U.S. Munitions List cases. These received considerable scrutiny and were reviewed widely, with some going to the congressional armed services committees.

The State Department is not legally required to explain any licensing decision to the applicant, according to Office of Defense Trade Controls officials. However, if the decision can be explained in an unclassified way, State may explain the decision to the applicant. A company can ask for a case to be reviewed, but most often this occurs by the company calling its Representative in Congress, like any other constituent. If the case involves a denial because it exceeds the level of sophistication that may be sent to a particular country, the State Department can inform the company, which sometimes can reconfigure the item to be acceptable for export.[146]

Foreign-Origin Items with U.S. Content

U.S. Munitions List items do not lose their controlled identity when incorporated into foreign systems, according to Lowell.[147]

State has nothing like Commerce's *de minimis* rule that determines whether U.S. control of foreign-origin items is appropriate based on the percentage of U.S. content. Rather, the Department of State controls technology using a "look-through" policy: if another country wants to sell a controlled "defense article" (for example, an aircraft) with U.S. parts, it will need U.S. approval.

This requirement was not stated in the original Arms Export Control Act, but a 1996 amendment to section 3 of the Act — authorizing re-transfers between NATO partners without advance U.S. consent — indicates that the general rule is to require prior U.S. approval.

Carol Schwab of the State Department Legal Adviser's office affirms State's legal position that there is no basis in the Arms Export Control Act for a country to terminate U.S. controls by re-transferring equipment containing U.S.-origin components to a third party.[148]

Enforcement

Penalties for Violation of the Arms Export Control Act and ITAR

The Arms Export Control Act provides criminal penalties for willful violations, including one or both of the following:

- **Fines up to $1 million**
- **Imprisonment for not more than ten years**

Civil fines under the International Traffic in Arms Regulations are the same as those provided under the 1979 Act and the Export Administration Regulations, except that the maximum civil penalty imposed on the export of "defense articles" and "defense services" is $500,000.[149]

Administrative sanctions under the International Traffic in Arms Regulations include:

- **Debarment from participating directly or indirectly in the export of defense articles**
- **Interim suspension**
- **Seizure or forfeiture of illegally exported articles**

- **Seizure of any vessel, vehicle, or aircraft involved in illegal exports**[150]

Voluntary Disclosures

The International Traffic in Arms Regulations contain provisions for exporters to self-disclose their violations. Voluntary self-disclosure may be considered as a mitigating factor in determining the appropriate administrative penalties. However, the weight to be given to a self-disclosure is entirely within the discretion of the State Department. Self-disclosure does not prevent the State Department from referring transactions to the Department of Justice for criminal prosecution.[151]

BLUE LANTERN Checks

The People's Republic of China does not allow the conduct of BLUE LANTERN checks, the State Department's equivalent of Commerce's pre-license checks and post-shipment verification.

Lowell says that the State Department is not concerned for two reasons:

- **First, most items that State has approved for export to the PRC are commercial communications satellites for launch in the PRC**
- **Second, State licenses the export of U.S. munitions directly to the military of other countries,** and does not have the same requirement as Commerce to check on end users and end uses in order to avoid diversions from civil to military applications[152]

Lowell says that only a small number of State Department licenses are reviewed for civilian end users, such as private security forces. On the other hand, Lowell says, the State Department does use BLUE LANTERN checks to detect diversions of its approved exports.

The State Department also uses BLUE LANTERN end-use checks to reduce brokering and to check on dealers on its Watch List. To obtain a BLUE LANTERN check, the State Department cables the Embassy to check out the end user, and the Embassy cables back with details on the check.[153]

Export Control Policy Toward the PRC

Background

From 1949 to 1971, exports from the United States to the PRC were subject to restrictive export controls. The export control policy was liberalized in 1972, when the Coordinating Committee on Multilateral Export Controls (COCOM) agreed to change the licensing status of the PRC to allow it to be treated the same as the Soviet Union. Subsequently, beginning in 1981, the PRC was given access to higher levels of technology than the Soviet Union.[154]

In December 1985, COCOM adopted what was called a "green line" policy toward the People's Republic of China. That policy gave preferential licensing treatment for the export to the PRC of 27 categories of controlled items as compared with other COCOM-proscribed countries. Further liberalizations in the "green line" licensing policy toward the PRC by COCOM continued until early 1989.

In response to the repressive actions taken by the PRC in Tiananmen Square on June 4, 1989, COCOM decided in October 1989 to cancel plans for additional liberalization of export controls toward the PRC. However, COCOM did not make any changes to the PRC "green line" policy that was in effect at the time.

Following Tiananmen Square, the Bush Administration imposed a policy of denial regarding applications for exports to military and police entities in the PRC. In addition, the Bush Administration decided not to support further liberalization of the "green line" policy toward the PRC by COCOM.[155]

A COCOM meeting in June 1990 eliminated or significantly reduced the differences between items that could be exported to the PRC under the "green line" policy and the items that could be exported to other proscribed destinations. The PRC benefited from the decontrols adopted by COCOM for all proscribed destinations subsequent to that meeting. COCOM did not, however, adopt any additional favorable treatment specifically for the export of items to the PRC.[156]

Launches of Satellites on PRC Rockets

In September 1988, President Reagan approved a plan to permit the export of U.S. commercial communications satellites to the PRC for launch on PRC rockets. In order for such export licenses to be approved, however, the PRC was required to meet three U.S. conditions:

- **The United States and the PRC must agree on specific technology transfer safeguards**
- **The PRC must agree to take steps that would protect the U.S. launch industry from future unfair PRC pricing and trade practices**
- **An agreement had to be negotiated establishing PRC responsibility for liability in case a commercial launch caused third-party damage**

Regarding the first condition, a Memorandum of Agreement on Satellite Technology Safeguards was signed in December 1988 between the United States and the PRC.[157] The purpose of this agreement was to preclude the unauthorized transfer to the PRC of sensitive U.S. satellite technology. The agreement specified the security procedures to be followed for the proposed launch of two Aussat satellites and one Asiasat satellite, all three of which were manufactured by Hughes Aircraft Company. The agreement also addressed the disclosure of authorized technical data, and restrictions on the transfer of unauthorized technical data and assistance.

Regarding the second condition, the December 1988 Memorandum of Agreement provided that the PRC was not to launch more than nine communications satellites for international customers during the six-year period ending on December 31, 1994.[158] The agreement required the PRC to support the application of market principles to international competition among providers of commercial launch services, including the avoidance of below-cost pricing, government inducements, and unfair trade practices.

Regarding the third condition, PRC liability for satellite launches,[159] the December 1988 agreement provided, subject to conditions, that the PRC was to

assume the responsibility for, and was required to compensate the United States for, any and all amounts for which the U.S. Government might become liable under the Convention on International Liability for Damage Caused by Space Objects.

A second Memorandum of Agreement on Satellite Technology Safeguards between the United States and the PRC was signed in February 1993.[160] This agreement specified the security procedures to be followed for the launch of "U.S.-manufactured satellites" in the PRC, and was not limited, as was the December 1988 agreement, to specific satellites.

When the 1988 Memorandum of Agreement on PRC commercial launch services expired on December 31, 1994, a third Memorandum of Agreement was signed in January 1995.[161] This new agreement indicated that the PRC was not to launch more than 11 principal payloads to geosynchronous earth orbit or geosynchronous transfer orbit for international customers during the seven-year period ending on December 31,

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Prior to the June 4, 1989 massacre at Tiananmen Square in Beijing, the United States and other COCOM members differentiated between the People's Republic of China and the Soviet Union — and gave the PRC access to higher levels of technology.

2001. This January 1995 agreement was amended in October 1997 to include an annex regarding the pricing of commercial launch services to low earth orbit.[162]

Paul Freedenberg, a former Assistant Secretary for Trade Administration and Under Secretary for Export Administration at Commerce in the Reagan Administration, has commented on the 1988 policy decision to use PRC rockets for U.S. commercial communications satellites:

> *No one in the Reagan administration thought of this new policy as a long term policy, let alone the beginning of a decade-long dependence on Chinese rockets. Unfortunately, that's precisely what it's become.*[163]

Satellite Launches in the PRC Following Tiananmen Square

In addition to the policy adopted by the Bush Administration after Tiananmen Square — to deny export license applications to military and police entities in the PRC, and not to seek further COCOM liberalization in export controls toward the PRC — Congress passed PRC sanctions legislation in the fall of 1989.

In the Fiscal Year 1990 Appropriations Act for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies (P.L. 101-162, November 21, 1989), Congress prohibited the reinstatement or approval of any export license applications for the launch of U.S.-built satellites on PRC-built rockets in the PRC. This prohibition can be waived in either of two cases:

- **If the President makes a favorable report to Congress on the PRC's political and human rights reforms**
- **If the President determines that issuance of the license is in the national interest**[164]

Pursuant to this provision, President Bush submitted a "national interest" determination to Congress on December 19, 1989, regarding the Aussat-1, Aussat-2, and Asiasat commercial communications satellites.

In early 1990, Congress passed the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991 that included additional sanctions provisions regarding the Tiananmen Square crackdown.[165] Among other things, the Act suspended the issuance of licenses by the Department of Commerce or the Department of State for export to the PRC of:

- **Any defense article on the U.S. Munitions List**
- **Any crime control and detection instruments and equipment**
- **Any satellite of United States origin that is intended for launch from a rocket owned by the PRC**

The Act also provided the President with the authority to terminate the suspension of export licenses for U.S.-origin satellites by making a "national interest" determination and transmitting it to Congress.

The first "national interest" determination under the Foreign Relations Authorization Act was made by President Bush on April 30, 1991. This "national interest" determination, or "waiver," covered the Freja satellite that was to be built for Sweden. It also included a reissuance of the waiver for the Hughes-built Aussat satellites that had been identified in the December 19, 1989 "national interest" determination.

Between 1989, when Congress imposed the requirement for a Presidential "national interest" determination, and the beginning of 1998, 12 "national interest" waivers were granted for launches of commercial communications satellites on PRC rockets. President Bush made three of these "national interest" determinations, on December 19, 1989, April 30, 1991, and September 11, 1992. President Clinton made nine of these "national interest" determinations: July 2, 1993, July 13, 1994, February 6, 1996 (three determinations), June 23, 1996, July 9, 1996, November 19, 1996, and November 23, 1996.[166]

The most recent "national interest" determination regarding the launch of a U.S.-manufactured commercial communications satellite on a PRC rocket was made by President Clinton on February 18, 1998.[167] This waiver applied to the Chinasat-8 satellite manufactured by Space Systems/Loral (Loral).

The Chinasat-8 satellite waiver became controversial after the *New York Times* reported on April 13, 1998, that President Clinton had approved the "national interest" determination, or waiver, despite an ongoing Department of Justice criminal investigation of Loral's alleged earlier unauthorized transfer of missile guidance technology to the PRC.

The *Times* also reported that the Chairman of Loral Space & Communications Ltd., Bernard L. Schwartz, was the largest individual donor to the Democratic Party in 1997.[168]

On May 22, 1998, the White House publicly released a number of documents regarding the Chinasat-8 waiver. One of the released documents, a decision memorandum for the President, discussed the pending criminal investigation and concluded:

> *We believe that the advantages of this project outweigh the risk, and that we can effectively rebut criticism of the waiver. . . .*
>
> *The project is in the national interest because the development of China's civil communications infrastructure will promote access by Chinese citizens in remote areas to people and ideas in democratic societies. . . .*
>
> *The current project also will help the competitiveness of U.S. satellite exporters in a most important satellite market.*[169]

This decision memorandum for the President was accompanied by a transmittal memorandum, dated February 18, 1998, from Phil Caplan (Executive Clerk, Office of the White House) which stated:

> *Chuck Ruff, the cousel to the President, notes that there have been **extensive** discussions with Justice on this matter.*
>
> *The Department [of Justice] realizes the potential adverse impact on a potential criminal prosecution but has chosen not to oppose the waiver.*

> *Therefore, in balancing national security and criminal justice interests, Chuck agrees that the balance, under these special circumstances, is properly struck by granting the waiver.*[170] [Emphasis added]

Robert S. Litt, Principal Associate Deputy Attorney General in the Department of Justice, recalls he had two conversations with Charles F. C. Ruff, the Counsel to the President, on this matter. Litt also indicates that there were one or more conversations between Mark M. Richard, Deputy Assistant Attorney General in the Criminal Division, and James E. Baker, the Special Assistant to the President and Legal Adviser to the National Security Council. Litt does not characterize these conversations as "extensive."

Regarding whether the Justice Department had chosen not to oppose the waiver, Litt says:

> *Certainly the Department was put on notice that there was a waiver application, and in that sense, we had an opportunity to weigh in.*
>
> *On the other hand, as I said, I didn't believe that we were being asked for our views on whether or not the waiver should be granted as a matter of policy.*[171]

The transmittal memorandum from Caplan to the President also stated:

> *Commerce must issue a second license within 90 days of this waiver; if the Justice Department's evidence warrants, Commerce could withhold this license and block the project.*[172]

Litt does not recall whether Justice was contacted by the Commerce Department prior to the approval of the Chinasat-8 license application by Commerce on March 23, 1998.[173]

A January 1998 draft of a National Security Council memorandum for the President regarding the request for a "national interest" waiver for the Loral Chinasat-8 communications satellite project included a reference to the ongoing review of the

PRC's transfers to Iran of C-802 anti-ship cruise missiles.[174] These transfers by the PRC were included in the list of "Essential Factors for the President to Consider in Deciding Whether to Waive Restrictions on U.S.-Origin Exports to China for the Chinasat-8 Satellite Program" that was attached as Tab A to the State Department's memorandum to the NSC regarding the Chinasat-8 waiver.[175]

The reference to the transfers was deleted from the memorandum that ultimately was sent to the President.[176]

Missile Proliferation Sanctions on the PRC

The National Defense Authorization Act for Fiscal Year 1991 requires mandatory U.S. sanctions against foreign persons who export an item on the Missile Technology Control Regime (MTCR) Annex to a country that is not an MTCR member country.[177]

The sanctions are to be applied even though the Annex item is not subject to U.S. export controls.

If the exported items are MTCR Category I items (that is, missile systems and key subsystems), all export licenses are required to be denied for two years. If the exported items are MTCR Category II items (dual-use items), all export licenses for controlled missile technology items are required to be denied for two years.[178]

The State Department Bureau of Political-Military Affairs announced the imposition of missile proliferation sanctions on entities in the PRC and Pakistan in May 1991, because of PRC transfers to Pakistan of technology related to the M-11 short-range ballistic missile.[179] These sanctions denied export licenses for two years for:

- **High-speed computers**
- **Commercial communications satellites for launch by the PRC**
- **Missile technology or equipment**

The sanctions were effective on June 25, 1991, and applied to the following foreign entities:

- **China Great Wall Industry Corporation**
- **China Precision Machinery Import-Export Corporation**
- **The Space and Upper Atmosphere Research Commission of Pakistan**[180]

The sanctions also denied U.S. Government contracts relating to such items.[181]

These May 1991 sanctions were lifted by President Bush on March 23, 1992, after the PRC agreed to adhere to the initial MTCR 1987 Guidelines and Annex.[182] But MTCR Category II (dual use) sanctions were again imposed on entities in the PRC and Pakistan on August 24, 1993, as a result of the PRC's sale of M-11 missile-related equipment to Pakistan.[183]

The August 1993 missile proliferation sanctions were imposed on the PRC Ministry of Aerospace Industry, including China Precision Machinery Import-Export Corporation (CPMIEC), and the Pakistani Ministry of Defense.[184] The sanctions also applied to the divisions, subunits, and any successor organizations to these entities, including:

- **China National Space Administration**
- **China Aerospace Corporation**
- **Aviation Industries of China**
- **China Precision Machinery Import-Export Corporation**
- **China Great Wall Industries Corporation or Group**
- **Chinese Academy of Space Technology**
- **Beijing Wan Jun Industry Corporation**
- **China Haiying Company**
- **Shanghai Astronautics Industry Bureau**
- **China Chang Feng Group**[185]

The August 1993 sanctions affected seven planned launches of U.S. commercial communications satellites in the PRC.

On November 1, 1994, President Clinton lifted the sanctions after the PRC issued a statement agreeing not to export ground-to-ground missiles inherently capable of delivering at least a 500-kilogram payload with a range of at least 300 kilometers.[186]

Authority to impose missile proliferation sanctions pursuant to the National Defense Authorization Act for Fiscal Year 1991 has been delegated by the President to the Secretary of State. There have been reports of additional possible violations of the missile technology control provisions of this Act by the PRC.[187] No additional sanctions, however, have been imposed as a result.

U.S. Munitions List Changes Regarding Satellites

COCOM used three lists to control the export of items to proscribed destinations: the International Munitions List, the Industrial List, and the International Atomic Energy List.[188] "Dual-use" items were identified on the Industrial List, if not included in another COCOM list. Except for the United States, most COCOM countries conformed their national lists to correspond to the COCOM International Munitions List and the Industrial List.[189]

In the United States, the State Department's Munitions List contained items listed in COCOM's International Munitions List, and a few items listed in COCOM's Industrial List. The Commerce Control List, meanwhile, included most but not all of the items on COCOM's Industrial List.

Relaxation of Satellite Export Rules

When President Bush pocket-vetoed the Omnibus Export Amendments Act of 1990 (H.R. 4653), which contained amendments to the 1979 Act, he issued a Memorandum of Disapproval that directed:

> *By June 1, 1991, the United States will remove from the U.S. munitions list all items contained on the COCOM dual-use list [that is, the COCOM Industrial List] unless significant U.S. national security interests would be jeopardized.*[190]

At the time, commercial communications satellites were on the COCOM "dual-use" Industrial List, not the COCOM International Munitions List. But in the United States, they were included on the State Munitions List rather than on the Commerce Control List. In accordance with the directive in the Memorandum of Disapproval, therefore, the State Department formed an Interagency Space Technical Working Group in August 1991 to evaluate whether jurisdiction over the export of such satellites should be removed from the U.S. Munitions List, and placed instead on the Commerce Control List.

On October 23, 1992, the Departments of State and Commerce issued regulations transferring only certain commercial communications satellites from the State Munitions List to the Commerce Control List.[191] The regulations provided that satellite parts, components, accessories, attachments, and associated equipment, including ground support equipment, would remain on the State Department Munitions List. These items could, however, be included on a Commerce Department export license application if the items were needed for a specific launch of a commercial communications satellite under Commerce Department jurisdiction.

All detailed design, development, manufacturing, and production technical data for satellites continued to be controlled under the State Department Munitions List. Technical data, including marketing data, necessary to launch, operate, and maintain satellites and associated ground equipment for satellites was to be controlled under the Commerce Control List by the Department of Commerce.

The October 1992 regulatory changes did not transfer all commercial communications satellites to the jurisdiction of the Commerce Department. Commercial communications satellites that had any of the following nine characteristics would continue to be licensed by the State Department:

- **Anti-jam capability**
- **Antennas with certain characteristics**
- **Intersatellite data relay links**

- **Space-borne baseband processing equipment**
- **Cryptographic items controlled under the U.S. Munitions List**
- **Radiation-hardened devices**
- **Certain on-orbit propulsion systems**
- **Certain attitude control and determination systems**
- **Permanent orbit transfer engines (that is, kick motors)**[192]

The Trade Promotion Coordinating Committee Recommends Moving Satellites to Commerce Department Jurisdiction

The Export Enhancement Act of 1992 required the President to establish the Trade Promotion Coordinating Committee:

> *(1) to provide a unifying framework to coordinate the export promotion and export financing activities of the United States Government; and*
>
> *(2) to develop a governmentwide strategic plan for carrying out the Federal **export promotion** and **export financing** programs.*[193] [Emphasis added]

The 1992 Act stated that the Trade Promotion Coordinating Committee would include representatives from the Departments of Commerce, State, Treasury, Agriculture, Energy, and Transportation, the Office of the United States Trade Representative, the Small Business Administration, the Agency for International Development, the Trade and Development Program, the Overseas Private Investment Corporation, and the Export-Import Bank of the United States.

The Secretary of Commerce chairs the Trade Promotion Coordinating Committee.

One of the duties of the Committee was to develop and implement a strategic plan for U.S. trade promotion efforts. The 1992 Act indicated that the strategic plan should:

- **Establish a set of priorities for Federal activities in support of U.S. exports**
- **Review current programs to promote U.S. exports**
- **Identify areas of overlap and duplication**
- **Propose an annual unified Federal trade promotion budget**
- **Review efforts by the states to promote U.S. exports**

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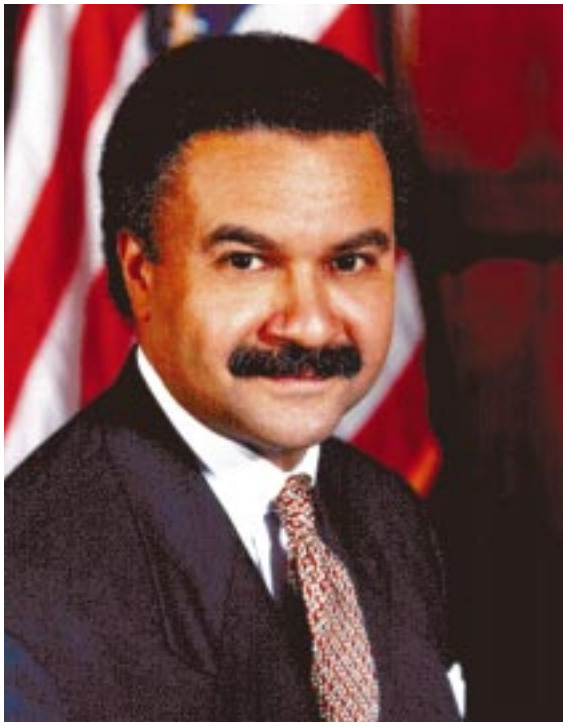

Secretary of Commerce Ronald H. Brown issued the first Trade Promotion Coordinating Committee report in the fall of 1993. The report cited "numerous consultations with exporters," but did not indicate whether the national security implications of the proposed liberalization of export controls had been analyzed.

The 1992 Act stated that the Trade Promotion Coordinating Committee was to "coordinate export promotion and export financing activities of the U.S. Government." The Act did not state expressly that the Committee was a mechanism to conduct a review of the Commerce Department's export control program under the Export Administration Act, or a review of the State Department's export control program under the Arms Export Control Act.

However, under the direction of Secretary of Commerce Ronald H. Brown, the Trade Promotion Coordinating Committee seized the opportunity to review the nation's export controls. The controls were viewed in terms of "regulatory obstacles to exports" in developing the congressionally-mandated strategic plan report.[194] On September 29, 1993,

Commerce Secretary Brown issued the first Trade Promotion Coordinating Committee report, "Toward a National Export Strategy — Report to the United States Congress."

This report indicated that there had been "numerous consultations with exporters" in preparation of the section on export controls. But it did not indicate whether the Department of Defense, or the Intelligence Community, analyzed the national security implications of the proposed liberalizations of export controls. Chapter 5 of the report, "Regulatory Obstacles to Exports," quoted the President:

> *[F]or some time the United States has imposed stringent export controls on many of our most competitive exports . . . One reason I ran for President was to tailor export controls to the realities of a post-Cold War world.*
>
> *Let me be clear. We will continue to need strong controls to combat the growing threat of proliferation of weapons of mass destruction and dangerous conventional weapons, as well as to send a strong signal to countries that support international terrorism. But we also need to make long overdue reforms to ensure that we do not unfairly and unnecessarily burden our important commercial interests.*[195]

Chapter 5 of the report described a number of specific actions the Clinton administration was taking to liberalize export controls on computers (see the chapter on *High Performance Computers* for a more detailed discussion of the Select Committee's investigation of these matters) and telecommunications products. In addition, it stated that the administration was taking the following action:

The administration will review immediately those COCOM International Industrial List items that currently are contained on the US Munitions List (e.g., civil developmental aircraft, commercial satellites) in order to expedite moving those items to the Commerce Control List.[196]

An outgrowth of the Trade Promotion Coordinating Committee is the Advocacy Center within Commerce's International Trade Administration. The Advocacy Center is designed as a coordination point to marshal the resources of the U.S. Government agencies in the Trade Promotion Coordinating Committee to assist the sales of U.S.

products and services abroad. The Advocacy Center's web site home page indicates that assistance can include "a visit to a key foreign official by a high-ranking U.S. government official" and "direct support by U.S. officials (including Commerce and State Department officers) stationed at U.S. embassies." Businesses interested in being considered for acceptance as a "client" of the Advocacy Center are requested to submit a "background data form" and a "bribery agreement form" to Commerce's Advocacy Center.[197]

The 1996 Transfer of Jurisdiction Over Commercial Satellites To Commerce

In January 1995, the Department of Commerce began to work with other departments and agencies to transfer the rest of the commercial communications satellites, including those which possessed any of the nine militarily sensitive characteristics, from the State Department's Munitions List to the Commerce Department's Control List.

This effort included a joint industry meeting in March 1995 with Commerce Department representatives hosted by C. Michael Armstrong, Chairman and Chief Executive Officer of GM Hughes Electronics.[198] Also, Armstrong submitted in March 1995 a report, "White Paper on Commercial Communications Satellites: Issues and Answers," to Anthony Lake, Assistant to the President for National Security Affairs.[199]

In 1995 the State Department, then headed by Warren Christopher, objected to transferring control of commercial communications satellite licenses from the Department of State to the Department of Commerce.

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An interagency working group chaired by the State Department started in April 1995 to review and clarify the commercial satellite jurisdiction issue.[200]

During 1995, the Clinton administration was lobbied by companies interested in transferring the responsibility for commercial satellite export licensing from the State Department to the Commerce Department. For example, Armstrong sent a letter to Samuel R. Berger, Assistant to the President for National Security Affairs, in September 1995, following a meeting with him on September 20, that stated:

> *Efforts by the State Department to keep commercial communications satellites on the State Department Munitions List should not be allowed to succeed.*[201]

Also, Armstrong, along with Bernard L. Schwartz, Chairman of Loral, and Daniel M. Tellep, Chairman and Chief Executive Officer of Lockheed Martin Corporation, sent a letter to the President on October 6, 1995, that stated:

> *Continuing to license export of these technologies under the more stringent and cumbersome Munitions List places American companies at a distinct disadvantage in global markets.*[202]

After a series of meetings of the State-chaired interagency working group formed in April 1995, there was no interagency agreement on the commercial satellite jurisdiction issue. In particular, Secretary of State Warren Christopher and the State Department objected to the transfer to Commerce.

At this point, the National Security Council "took charge of the process" and conducted "high-level, informal discussions" that resulted in the March 1996 decision by President Clinton to include all commercial communications satellites in the Commerce Control List, with interagency appeal procedures that appear to have satisfied Secretary Christopher.[203]

Commercial communications satellites having the nine identifying characteristics that remained under the jurisdiction of State's U.S. Munitions List were transferred formally to the Commerce Control List in October 1996. At the same time, the jurisdiction for jet engine "hot section" technology for the development, production,

or overhaul of commercial aircraft engines was moved from the U.S. Munitions List to the Commerce Control List.

Commerce's *Federal Register* notice regarding this change imposed foreign policy controls on all commercial communications satellites and jet engine hot section technology under the Commerce Control List. The *Federal Register* notice also clarified that technical data provided to the launch provider (form, fit, function, mass, electrical, mechanical, dynamic/environmental, telemetry, safety, facility, launch pad access, and launch parameters) for commercial communications satellites would be under the Commerce Control List.

In addition, the October 1996 notice clarified that all other technical data, defense services, and technical assistance for satellites and rockets — including compatibility, integration, or processing data — would continue to be controlled under the State Department's Munitions List.[204]

Other items that were moved from the U.S. Munitions List to the Commerce Control List included:

- **Commercial products with image intensifier tubes (1994)**
- **Commercial encryption items (December 1996)**
- **Satellite fuels (April 1998)**[205]

The 1999 Return of Jurisdiction Over Commercial Satellites to the State Department

The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 directed that all satellites and related items that are included in the Commerce Control List should be transferred on March 15, 1999 back to the State Department's Munitions List and controlled under the Arms Export Control Act.[206]

The Act also required that all export licenses for satellites and related items have a Technology Transfer Control Plan that is approved by the Secretary of Defense and an Encryption Technology Transfer Control Plan that is approved by the Director of the National Security Agency.[207]

The Act included a requirement for a detailed report to Congress that must accompany any Presidential "national interest" determination pursuant to the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991 to waive the Tiananmen Square sanctions and permit the export of satellites for launch in the PRC.[208] The detailed justification must include:

- **Detailed description of all militarily sensitive characteristics integrated within, or associated with, the satellite**
- **Estimated number of U.S. contractor personnel required in the PRC to carry out the satellite launch**
- **Detailed description of the U.S. Government's plan to monitor the satellite launch, including the estimated number of required U.S. personnel**
- **Estimated cost to the Department of Defense for monitoring the satellite launch, and the amount to be reimbursed to the Defense Department**
- **Reasons why the satellite launch in the PRC is in the national security interest of the United States**
- **Impact of the proposed export on employment in the United States on a state-by-state basis**
- **Impact of the proposed export on reducing the current U.S. trade deficit with the PRC**
- **Impact of the proposed export on the PRC transition from a nonmarket to market economy**
- **Impact of the proposed export on opening new markets in the PRC to U.S. products**
- **Impact of the proposed export on reducing significant PRC trade barriers to U.S. export and foreign direct investment**[209]

In early December 1998, *Space News* reported that the White House and the Commerce Department, in coordination with the U.S. aerospace industry, were developing an executive order that would give Commerce the right to appeal State licensing decisions on license applications regarding items on the U.S. Munitions List.[210]

At the present time, these applications are not referred to Commerce for review. The proposed executive order reportedly would allow Commerce to review the license applications and to appeal State's decisions on them. As reported, the change would permit Commerce to review State license applications for all items in the U.S. Munitions List, including commercial communications satellites.

High Performance Computers

After Tiananmen Square in June 1989, COCOM did not adopt any further favorable treatment applying specifically to the export of items to the PRC. And as a result of the transfer of ballistic missile technology by the PRC to Pakistan in May 1991, President Bush imposed restrictions on the export to the PRC of computers above a composite theoretical performance of 41 MTOPS (millions of theoretical operations per second) in June 1991.[211]

In May 1992, the United States imposed foreign policy controls on "supercomputers" (defined then as 195 MTOPS and above).[212] This decision was based on a 1991 bilateral agreement with Japan, the other major supercomputer exporting country.[213] Supercomputers are also subject to special safeguard conditions.

President Clinton wrote to a number of industry leaders who attended a White House luncheon in mid-September 1993 regarding the issue of export controls. In his letter to Edward McCracken, Chief Executive Officer, Silicon Graphics, the President stated:

> *As a part of [the Trade Promotion Coordinating Committee] process, the National Security Council has led an effort to develop specific export controls reforms . . .*
>
> *I am optimistic that the steps we take will help liberalize controls on many of our most competitive exports, while protecting important national security concerns . . .*

> *I am also engaged in seeking major reforms to COCOM, which should lead to significant liberalization of controls on computers, telecommunications and machine tools . . .*[214]

The first Trade Promotion Coordinating Committee report, "Toward a National Export Strategy," which was issued by Secretary of Commerce Brown in September 1993, indicated that the Clinton Administration was planning to make a number of proposals to COCOM, including:

- **Proposing an increase in the level of computers** that would not require an export license to most destinations from 12.5 MTOPS to 500 MTOPS
- **Proposing an increase in the definition of a supercomputer** from 195 MTOPS to 2,000 MTOPS and an update to the safeguard requirements for supercomputers[215]

Discussions were held within COCOM during December 1993 and January 1994 regarding computers.

The COCOM member countries reached an agreement in January 1994 to raise the level of computers that would not require an export license to most destinations, including the PRC, from 12.5 MTOPS to 260 MTOPS. On February 24, 1994, Commerce published in the *Federal Register* an amendment to the Export Administration Regulations that reflected this COCOM decision.[216]

The February 1994 *Federal Register* notice also lifted the licensing requirement for computers with a performance level of 500 MTOPS or less that were exported to "free world countries" as listed in the Nuclear Nonproliferation Special Country List.[217] And it raised the supercomputer threshold from 195 MTOPS to 1,500 MTOPS and above.[218] Prior to February 1994, exporters were required to obtain a Commerce Department license to export to most destinations computers with a performance level of 12.5 MTOPS or more.[219]

On March 30, 1994, one day before the demise of COCOM, the Administration announced that it would be taking another step to "balance" the proliferation of dangerous weapons and sensitive technologies with U.S. economic growth: removing

the licensing requirement for the export of computers and telecommunications equipment with less than 1,000 MTOPS to civil and nonproliferation end-users in the formerly COCOM-controlled countries (except North Korea), effective April 4, 1994.[220] This included the PRC, the former Soviet Union, and countries in Eastern Europe.[221]

The Clinton administration indicated that this action was consistent with national security requirements, because licenses still would be necessary for the export of "high-end" computers and for the transfer of such items to military end-users.[222]

In October 1995, the President announced that further changes in export controls for high performance computers would be made to "balance" national security and nonproliferation interests with the rapid developments in computer technology. Also, the Clinton administration cited the need for a computer export control policy that would remain effective for 18 to 24 months.

The computer export control changes were based on a study prepared by Seymour Goodman and others with the Center for International Security and Arms Control at Stanford University.[223] The study was performed under a sole-source contract awarded by the Bureau of Export Administration within the Department of Commerce. The cost of the contract was approximately $60,000, which was funded by both Commerce and Defense.[224]

The Department of Defense did not prepare a formal threat assessment related to changes in the export control policy for high performance computers to the People's Republic of China. However, Mitchel B. Wallerstein, then Deputy Assistant Secretary for Counter-Proliferation Policy at the Department of Defense, remembers a conversation with his Joint Staff counterpart:

> *I will say that he had concerns, but he made it clear that on the whole, given the alternatives, that he felt that the risks were not unreasonable.*[225]

The concept underlying the Clinton administration's 1995 decision to liberalize computer export controls based on the level of computer performance that would be available 18 to 24 months in the future is called "forward looking foreign availability"

by Reinsch.[226] He explains that this concept was applied to computers "because of the applicability of Moore's law." Moore's law — devised by Gordon Moore, one of the founders of Intel — essentially is that microprocessor capabilities double every 18 months. The concept of "forward looking foreign availability" has not been applied by the Department of Commerce to the liberalization of controls on items other than computers.[227]

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Department of Commerce Under Secretary for Export Administration William Reinsch says the concept underlying the 1995 decision to liberalize computer export controls is known as "forward looking foreign availability." Thus, controls are based on the level of computing performance that it is expected will become available in the next 18 months to two years.

Neither Reinsch nor other Commerce officials were apparently aware of the PRC's possible use of HPCs in nuclear weapons development when the policy decision to liberalize computer export controls was made. Commerce published the changes in computer export controls as amendments to the Export Administration Regulations in the *Federal Register* on January 25, 1996.[228] The *Federal Register* notice stated that, in developing these reforms,

> *the Administration has determined that computers capable of up to 7,000 million theoretical operations per second (MTOPS) will become widely available in open international markets within the next two years [i.e., by January 1998]. The Administration has also determined that computers with performance capabilities at and above 10,000 MTOPS have a significant number of strategic applications.*

The revised Export Administration Regulations identified four Computer Country Groups for export controls on computers:

- **Tier 1 — most industrialized countries.** Exporters may ship computers with any level of performance without a license to these countries. The exporter is required to maintain records and must submit certain information to the Commerce Department if requested regarding shipments of computers with 2,000 MTOPS and above.

- **Tier 2 — countries with mixed proliferation and export control records.** Exporters may ship computers up to 10,000 MTOPS without a license to these countries. The exporter is required to maintain records on computer exports at 2,000 MTOPS and above, and to submit this information to the Commerce Department if requested. Exports of computers over 10,000 MTOPS require a license from the Commerce Department. (*Hong Kong is included in Tier 2.)*

- **Tier 3 — countries posing proliferation, diversion, or other security risks.** Exporters are allowed to ship computers up to 7,000 MTOPS without a license to these countries. The exporter must obtain a license from the Commerce Department to export computers above 2,000 MTOPS to military and proliferation end uses and end users, or to export computers above 7,000 MTOPS for all end uses and end users. Also, exporters must maintain records of exports of computers from 2,000 MTOPS to 7,000 MTOPS. (*The People's Republic of China is included in Tier 3.)*

- **Tier 4 — terrorist countries.** A license is required for exports or re-exports of any computer, regardless of MTOP level, to Cuba, Iran, Iraq, Libya, and North Korea. Exports or re-exports of computers to Syria and Sudan with a performance of 6 MTOPS and above are permitted with a license from the Commerce Department. *(Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria are included in Tier 4.)*[229]

The National Defense Authorization Act for Fiscal Year 1998 required that exporters provide advance notification to the Commerce Department for the export or re-export of a high performance computer over 2,000 MTOPS and up to 7,000 MTOPS to end users in Tier 3 countries.[230] The PRC is included in the list of Tier 3 countries. Prior to this Act, the Export Administration Regulations allowed exports of high performance computers up to 7,000 MTOPS to civil end-users in the PRC with no notice to Commerce.

Under the 1998 Act, the Commerce Department is required to notify the Departments of Defense, Energy, and State, and the Arms Control and Disarmament Agency, within 24 hours of receipt of advance notification from an exporter.[231] If within nine days Defense, Energy, State, or ACDA provides specific objections in writing to Commerce, then Commerce is to inform the exporter by the tenth day after receipt of the advance notification that an export license will be required for the proposed export.

The 1998 Act provides that the President can revise the composite theoretical performance threshold level of 2,000 MTOPS regarding export of computers to Tier 3 countries. This would take effect 180 days after the President submits a report, with a justification for the revision, to the appropriate congressional committees.

Finally, the Act requires the Commerce Department to perform post-shipment verifications on all exports of high performance computers over 2,000 MTOPS to Tier 3 countries.

In addition to high performance computer export controls, the Clinton administration has undertaken export licensing liberalization efforts in a number of other categories, including:

- **Semiconductors**
- **Semiconductor manufacturing equipment**
- **Telecommunications equipment**
- **Nuclear-controlled items (e.g., oscilloscopes)**
- **Chemicals**[232]

In January 1994, Commerce's Bureau of Export Administration published the first quarterly edition of "Deregulation in Export Controls," which measured the "progress being made in eliminating dual-use licensing obstacles." [233]

Machine Tools

Under COCOM, export controls on machine tools did not change significantly from the mid-1970s until 1990. In 1990, the COCOM member countries agreed to a U.S. proposal — the "core list" proposal that is discussed above — that resulted in significant reductions in the COCOM Industrial List, including those relating to machine tools.

This relaxation in export controls permitted about 75 percent of advanced machine tools produced in the United States to be exported without a license. Prior to the 1990 COCOM changes, only about 10 percent of these did not require a license.[234]

For the most part, the 1990 export control changes pertained to the degree of positioning accuracy of the machine tool as measured in microns (that is, millionths of a meter). In general, the pre-1990 COCOM controls required an export license for machine tools that had a positioning accuracy exceeding 10 microns.[235] Depending on the type of machine tool, the post-1990 COCOM controls — generally continued under the Wassenaar Arrangement — require an export license if the machine tool has a positioning accuracy exceeding 6 microns. [236] Grinding machines are controlled at 4 microns.[237]

Machine tools capable of simultaneous five-axis motion were controlled under COCOM, and remain so under the Wassenaar Arrangement.[238]

Under the Wassenaar Arrangement, certain dual-use commodities, including machine tools, require the unanimous consent of the member states to renew the controls that are currently in effect.

Unless changed or extended again, the current export control criteria for machine tools will remain valid until December 5, 2000.[239]

Treatment of Hong Kong

In 1992, the United States granted preferential licensing treatment to Hong Kong as a result of its designation as a COCOM "cooperating country."[240] The same year, the United States expressed its support for Hong Kong's autonomous status in the United States-Hong Kong Policy Act of 1992.[241]

The 1992 Act called upon the U.S. Government to continue to treat Hong Kong as a separate territory in regard to economic and trade matters. It also provided for Hong Kong's continued access to sensitive U.S. technologies for so long as such technologies are protected.

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On July 1, 1997, legal control of Hong Kong reverted to the People's Republic of China, and troops from the People's Liberation Army entered Hong Kong. U.S. export policy, however, has continued to give Hong Kong the pre-1997 liberal controls on militarily sensitive technologies. As a result, export controls on the PRC were effectively liberalized on July 1, 1997, permitting the transfer of many additional technologies of potential use to the PLA without prior review by the Department of Commerce.

The result of the 1992 Act has been to continue a less restrictive export control policy for Hong Kong than for the rest of the PRC. Many more dual-use items may be exported to Hong Kong without prior Commerce review than may be exported to the PRC without review. Even when prior review is required, Commerce more readily grants export licenses to Hong Kong.

In contrast, more categories of dual-use items require prior review before export to the PRC, and the U.S. Government has refused to export certain items to the PRC that would have been allowed to go to Hong Kong without prior review or approval.[242]

Hong Kong reverted to the PRC in July 1997 under a negotiated arrangement between the PRC and the United Kingdom. Under the terms of a 1984 Joint Declaration, Beijing and London pledged that Hong Kong would become a Special Administrative Region of the PRC with a "high degree of autonomy" for 50 years. The U.S. Government has made clear its intent to change its export control policy towards Hong Kong only if there is evidence that Hong Kong authorities are unable to operate an effective export control system. The U.S. Government has pledged to monitor various indicators of Hong Kong's autonomy in export controls.[243] The Commerce Department has reported to the General Accounting Office that it has established comprehensive benchmarks and gathered baseline information on each benchmark, and that it intends to evaluate this data on a monthly basis.[244]

State Department officials Lowell and Biancaniello say that the current level of diversion activity in Hong Kong is consistent with that which occurred in the period prior to Hong Kong's reversion to PRC sovereignty. However, Biancaniello says that checks are done more to ensure that all pre-reversion policies were still in place.[245]

The more relaxed controls on the export of militarily-sensitive technology to Hong Kong have been allowed to remain in place even though Hong Kong was absorbed by the PRC and PLA garrisons took control of the region on July 1, 1997. U.S. trade officials report that no inspections by the Hong Kong regional government nor by any other government, including the United States, are permitted when PLA vehicles cross the Hong Kong border.

Various U.S. Government analyses have raised concerns about the risk of the diversion of sensitive U.S. technologies not only to the PRC, but to third countries as well through Hong Kong because of the PRC's known use of Hong Kong to obtain sensitive technology.[246] Some controlled dual-use technologies can be exported from the United States to Hong Kong license-free, even though they have military applications that the PRC would find attractive for its military modernization efforts.

The Select Committee has seen indications that a sizeable number of Hong Kong enterprises serve as cover for PRC intelligence services, including the MSS. Therefore, it is likely that over time, these could provide the PRC with a much greater capability to target U.S. interests in Hong Kong.

U.S. Customs officials also concur that transshipment through Hong Kong is a common PRC tactic for the illegal transfer of technology.[247]

John Huang, Classified U.S. Intelligence, and the PRC

In late 1993, the U.S. Department of Commerce hired John Huang as the Principal Deputy Assistant Secretary of Commerce for International Economic Policy.[248]

Prior to starting at the Department of Commerce, Huang had been the Lippo Group's principal executive in the United States. Lippo's principal partner in the PRC is China Resources (Holdings) Co., a PRC-owned corporation based in Hong Kong.[249]

According to Nicholas Eftimiades, a Defense Intelligence Agency analyst writing in his personal capacity, and Thomas R. Hampson, an investigator hired by the Senate Governmental Affairs Committee, China Resources is "an agent of espionage, economic, military, and political."[250]

China Resources is also one of several PRC companies (including China Aerospace Corporation) that share a controlling interest in Asia Pacific Mobile Telecommunications Satellite Co., Ltd (APMT).[251] The PRC-controlled APMT is preparing to use China Great Wall Industry Corporation to launch a constellation of Hughes satellites on PRC rockets.[252] The launches scheduled to date have required

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In late 1993, John Huang was appointed to be the Clinton administration's Principal Deputy Assistant Secretary of Commerce for International Economic Policy. He had been the chief U.S. executive for the Lippo Group, a partner of the PRC-owned China Resources Company.

Commerce Department approval and presidential waivers of the Tiananmen Square sanctions.[253]

While at the Department of Commerce, Huang was provided with a wealth of classified material pertaining to the PRC, Taiwan, and other parts of Asia. He had a Top Secret clearance, but declined suggestions by his superiors that he increase that clearance to the Sensitive Compartmented Information (SCI) level (the level held by his predecessor).[254]

Between October 1994 and November 1995, Huang received 37 briefings from a representative of the Office of Intelligence Liaison at the Department of Commerce.[255] While Huang's predecessor was briefed weekly, Huang received approximately 2.5 briefings per month.[256]

The vast majority of Huang's briefings focused on the PRC and Taiwan, including "raw intelligence" that disclosed the sources and methods of collection used by the U.S. intelligence community.[257] The Office of Intelligence Liaison representatives indicated that Huang was not permitted to keep or take notes on raw intelligence reports and did not ask many questions or otherwise aggressively seek to expand the scope of his briefings.[258]

During the briefings, Huang reviewed and commented on raw intelligence reports about the PRC. Huang also signed receipts to retain finished intelligence products. The classified finished intelligence that Huang received during his tenure at Commerce included PRC economic and banking issues, technology transfer, polit-

ical developments in the PRC, and the Chinese Communist Party leadership. Huang commented on or kept copies of materials on these topics.

Huang was also given access by the Office of Intelligence Liaison to diplomatic cables classified at the Confidential or Secret level.[259] Specifically, 25 to 100 classified cables were set aside for Huang each day.[260]

No record exists as to the substance of the cables that were reviewed by Huang.[261] Huang could have upgraded the level of the cable traffic made available to him to include Top Secret information, but never did so.[262]

Huang also had access to the intelligence reading room at the Commerce Department, as well as to classified materials sent to his supervisor, Charles Meissner,[263] who had a higher level clearance.[264] The three Office of Intelligence Liaison representatives who were interviewed by the Senate Committee on Governmental Affairs indicated that they were not personally aware of any instance in which Huang mishandled or divulged classified information.[265]

Huang maintained contact with representatives of the Lippo Group while he was at the Department of Commerce. During the 18 months that he was at Commerce, Huang called Lippo Bank 232 times, in addition to 29 calls or faxes to Lippo Headquarters in Indonesia. Huang also contacted Lippo consultant Maeley Tom on 61 occasions during the same period. Huang's records show 72 calls to Lippo joint venture partner C. Joseph Giroir.[266]

During his tenure at the Commerce Department, Huang used a visitor's office across the street at the Washington, D.C. branch of Stephens Inc., an Arkansas-based brokerage firm with "significant business ties to the Lippo Group."[267] Stephens employees indicated that these visits were short in duration.[268] Huang used this office "two, three times a week" most weeks, making telephone calls and "regularly" receiving faxes and packages addressed to him.[269]

China Resources (Holdings) Co., a PRC-owned corporation that is the Lippo Group's principal partner in the PRC, has been identified as "an agent of espionage, economic, military, and political.

No one at the Commerce Department, including Huang's secretary, knew of this additional office.[270]

Huang met with PRC Embassy officials in Washington, D.C. on at least nine occasions. Six of these meetings were at the PRC Embassy.[271] When informed of these contacts, Jeffrey Garten, the Department of Commerce Under Secretary for Trade Administration, was "taken aback" to learn that Huang ever dealt with anyone at the PRC Embassy.[272] The purpose of the contacts is unknown.

On December 1, 1998, the Select Committee served Huang with a subpoena through his attorney. On December 3, 1998, Huang's attorney indicated that Huang would only testify before the Select Committee pursuant to a grant of immunity.[273] The Select Committee declined to immunize Huang from prosecution, and Huang refused to appear before the Select Committee, invoking his Fifth Amendment rights.