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WITHDRAWAL SHEET

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. report 68	re: meeting on export control legislation (2pp, partial)	1/28/87	P-5
2. report 69	re: legislation requested (1p)	n.d.	P-5 Folder 5
3. report 70	re: section by section analysis, page 4 (1p, partial)	n.d.	P-5 Folder 6
4. report 71	re: export administration act (3pp)	n.d.	P-5 US 10/26/00
COLLECTION: DANZANSKY, STEPHEN I.: Files			db
FILE FOLDER: International Trade XV. (E) {3 of 9} (5 of 16) RAC Box 8			11/8/94

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

Freedom of Information Act - [5 U.S.C. 552(b)]

- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].
- C. Closed in accordance with restrictions contained in donor's deed of gift.

AMENDMENTS TO THE EXPORT ADMINISTRATION ACT OF 1979

The Export Administration Act of 1979, as amended, (50 U.S.C. App 2401-2420) is further amended as follows:

SEC. 1. Multiple Validated License Authority for Controlled Countries

(a) Section 4(a)(2)(A) is amended by adding at the end thereof the following:

"The Secretary may also require a type of distribution license appropriate for a consignee within a controlled country."

(b) Section 4(a)(2)(B) is amended by adding at the end thereof the following:

"The Secretary may also require a type of comprehensive operations license appropriate for a consignee within a controlled country."

SEC. 2. Domestic Sales to Commercial Entities of Controlled Countries

Section 5(a)(1) is amended by adding the following sentence before the last sentence of the paragraph:

"The term 'affiliate' includes both governmental entities and commercial entities that are controlled in fact by controlled countries."

SEC. 3. Procedures for Determining Foreign Availability to
Controlled Countries

(a) Section 5(f) is amended as follows:

- (1) By adding to the heading the words "to Controlled Countries" after the word "Availability";
- (2) In paragraph (1) by inserting the word "controlled" between the word "to" and the word "countries";
- (3) In paragraph (1) by striking the words "to which exports are controlled under this section";
- (4) In paragraph (1) by striking the words "may not, after the determination is made, require" and by inserting the following in lieu thereof:

"shall submit such determination for review to the Secretary of Defense and other departments and agencies as the Secretary considers appropriate. The preceding sentence does not require the concurrence or approval of any official, department or agency to which such a determination is submitted. Within 60 days following such submission the Secretary shall remove the requirement for";

- (5) In paragraph (2) by inserting the word "controlled" in lieu of the word "particular";
- (6) In paragraph (2) by adding the words "and procedures" after the word "exception";
- (7) In paragraph (3) by inserting after the first sentence the following:

"The Secretary shall make such a determination within 120 days of receipt of an allegation of foreign availability"; and,

- (8) By striking paragraph (7) in its entirety and substituting the following in lieu thereof:

"(7) For purposes of this subsection--

- (A) "Foreign availability" for national security-controlled goods or technology exists when the Secretary of Commerce determines that non-U.S. origin goods or technology of comparable quality are available-in-fact to a controlled country or countries in quantities sufficient to satisfy their need so that U.S. exports of such goods or technology would not make a significant contribution to the

military potential of such country or countries; and

- (B) A commodity or technology is of 'non-U.S. origin' when it is not subject to U.S. export or reexport controls, except that foreign made products of U.S. origin technology and foreign made products containing U.S. origin parts and components may be considered to be of 'non-U.S. origin' if so determined by the Secretary."

SEC. 4. Foreign Availability to Other than Controlled Countries - Expedited Licencing.

(a) Section 5 is amended by adding at the end thereof the following new paragraph:

"(r) Foreign Availability to Other Than Controlled Countries. --

The Secretary shall review, on a continuing basis, the availability to countries, other than controlled countries, from sources outside the United States, of any goods or technology the export of which requires a validated license under this section. In any case in which the Secretary finds that any such goods or technology from foreign sources are of similar quality and are available to such country or countries without effective restrictions, the Secretary shall designate such goods or technology as eligible for export to such country or countries pursuant to the procedures set forth in section 10(o) of the Act. The Secretary may make such a foreign availability determination on the Secretary's own initiative, upon receipt of an allegation from an export license applicant that such availability exists or upon the submission of a certification by a Technical Advisory Committee of appropriate jurisdiction as to the goods or technology involved."

(b) Section 10(o) is amended as follows:

(1) By adding to the heading the words "and Other Designated Countries" after the word "Committee";

(2) In paragraph (1) by striking the comma after the word "Committee" and inserting the following in lieu thereof:

"or the export of goods or technology to a country designated pursuant to subsection (r) of section 5,"; and,

(3) In paragraph (3) by inserting after the words "the application" the following words ",the sensitivity of the goods or technology involved".

SEC. 5. Ineffectiveness of Unilateral Controls - Negotiations
To Improve Multilateral Cooperation

Section 5(i) is amended as follows:

(a) By adding before the words "The President" the words "Recognizing the ineffectiveness of unilateral controls and the importance of enforcement measures to the effectiveness of multilateral controls,"; and,

(b) By adding at the end thereof the following:

"(10) Agreement to enhance cooperation among members of the Committee in obtaining the agreement of governments outside the Committee to restrict the export of goods and technology on the International Control List (ICL), to establish an ongoing mechanism in the Committee to coordinate planning and implementation of export control measures related to such agreements, and to remove items from the ICL if such items continue to be available to controlled countries or if the control of the items no longer serves the common strategic objectives of the members of the Committee."

SEC. 6. Prior Convictions

Section 11(h) is amended as follows:

(a) By inserting "(1)" immediately before the word "No" in the first sentence;

(b) By inserting the words "this Act, Sections 1701-1706 of Title 50, United States Code," immediately before the words "Section 793," in the first sentence of paragraph (1); and,

(c) by adding a new paragraph as follows:

"(2) The authority given the Secretary in paragraph (1) of this subsection may be extended to any person, firm, corporation or business organization related, through affiliation, ownership, control, position of responsibility or other connection in the conduct of trade or related services, to any party convicted of violating any of the statutory provisions specified in paragraph (1) of this subsection".

SEC. 7. Issuance of Temporary Denial Orders

Section 13(d) is amended as follows:

(a) By inserting in the first sentence of paragraph (1) the words ", or otherwise to facilitate enforcement of this Act," following the words "under this Act,";

(b) By substituting for the number "60" wherever it appears in the second sentence of paragraph (1), the number "180";

(c) By inserting in the first sentence of paragraph (2) the words "or the need to facilitate enforcement of this Act" following the word "violation"; and,

(c) By inserting in the last sentence of paragraph (2) the words ", or otherwise to facilitate enforcement of this Act" before the period.

REQUEST FOR APPOINTMENTS

To: Officer-in-charge
Appointments Center
Room 060, OEOB

Please admit the following appointments on Friday, January 30, 19 87
for Stephen I. Danzansky of NSC
(NAME OF PERSON TO BE VISITED) (AGENCY)

State

Dean, Robert 1/16/42

Defense

Bryen, Stephen 6/30/42

Hunt, William B. 9/10/43

Lindstrom, Talbot 12/8/34

Maloof, Michael 3/12/43

Muller, Robert

Commerce

Farren, J. Michael 11/21/52

Mercer, Lee 7/16/43

Sloniewsky, Roman 4/22/39

Anderson, M. Jean 9/27/43

MEETING LOCATION

Building White House Requested by Patricia Battenfield

Room No. Situation Room Room No. 365 Telephone 4985

Time of Meeting 2:30 p.m. Date of request January 30, 1987

Additions and/or changes made by telephone should be limited to three (3) names or less.

APPOINTMENTS CENTER: SIG/OEOB - 395-6046 or WHITE HOUSE - 456-6742

DETERMINED TO BE
AN ADMINISTRATIVE MARKING
E.O. 12356, Sec. 1.1(a)
By NARA a Date 11/8/94

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RECOMMENDATIONS

Within the context of the declaratory policy set forth above, the panel makes two basic recommendations, together with a series of corollary prescriptions.

I. STRENGTHEN THE COCOM MECHANISM

The panel recommends that the United States take the lead in further strengthening the CoCom mechanism so that it can function as the linchpin for a fully multilateral national security export control regime for dual use technologies. Under current and prospective global circumstances, such a multinational system is essential to achieve maximum export control effectiveness without impairing Western economic vitality. To strengthen the current system of multilateral controls will require greater harmonization of the current U.S. approach and that of our technologically advanced allies through closer consultation and through the adoption of policies that promote cooperation. The two most immediate objectives are: (1) to limit the coverage of items covered on the U.S. Control List and the CoCom

International List to those items whose acquisition would significantly enhance Soviet bloc military capabilities and that are feasible to control, and (2) to obtain agreement on a common approach to reexports of CoCom-origin items.

The United States should strive to create a community of common controls on dual use technology--that is, a set of trade relationships unimpeded by national security restrictions--among those Free World nations that share an expressed willingness to adhere to common or equivalent export control restraints on the transfer of strategic and controllable goods and technologies to the Soviet Union and its Warsaw Pact allies. While recognizing that there are certain systemic deficiencies in the existing national security export control regime that will require sustained effort to overcome, there remain a number of initiatives that can be undertaken to advance this objective.

Accordingly, the panel recommends the following changes in U.S. policy:

1. CONTROL ONLY COCOM-PROSCRIBED ITEMS

As a general policy the United States should seek to control only the export of CoCom-proscribed items, and then only when they are destined for a proscribed country or for a non-CoCom country that has not entered into an arrangement* to protect items controlled by CoCom.

2. WITHIN COCOM, SEEK CONTROLS ON EXPORTS TO THIRD COUNTRIES

With respect to CoCom, the United States should:

- o Negotiate agreements with member countries** regarding control of their exports and reexports from their territory to third (i.e., Free World non-Cocom) countries, thereby obviating the need for U.S. reexport authorization. These control agreements might involve a variety of mechanisms appropriate to national policies and legal

* Such an arrangement might be implemented either through a formal memorandum of understanding or an informal arrangement that achieves the same result.

** It may be most feasible to begin this process initially with such key members of CoCom as Japan, France, the Federal Republic of Germany, and the United Kingdom.

practices, including the use of import certification/delivery verification procedures, end user checks, export denial lists, and so on. Such agreements should stipulate that participating countries share and act on information regarding potential diverters.

- o For almost all goods, eliminate the requirement to obtain validated licenses and reexport authorizations for exports to those trading partners with which the United States has reached agreement on the control of exports to third countries. Validated licenses should be required only for exports of extremely sensitive high-level technology (e.g., supercomputers). Reliance should be placed on cooperating foreign governments to prevent diversions from their own territory. There also should be a provision for reinstating validated licensing requirements for CoCom countries that subsequently fail to implement and enforce national security export controls on trade with non-CoCom Free World countries.

- o For those CoCom countries unwilling to agree to or unable to implement controls on exports to third countries, retain the present system of validated licenses and reexport authorization while continuing to pursue adequate control arrangements.

3. NEGOTIATE COMPREHENSIVE UNDERSTANDINGS WITH THIRD COUNTRIES

With respect to non-CoCom Free World countries, the United States should:

- o In coordination with other key members of CoCom, negotiate comprehensive understandings--or equally effective informal arrangements deemed acceptable by the U.S. Department of State--that specify controls on the export of all CoCom-proscribed goods and technology (including those produced indigenously) to the Warsaw Pact countries and to other noncooperating third countries. A graduated scheme of incentives should be developed for third countries that agree to less than comprehensive controls.

- o Accord full "CoCom-like" treatment (meaning that exporters to those countries should not be required to seek validated licenses or reexport authorization) for exports to those third countries that have agreed to comprehensive arrangements, or that have been judged by the State Department to maintain equivalent standards, as soon as these countries can demonstrate their ability and willingness to enforce export controls. Such a commitment to enforcement should include formal or informal sharing of information on possible diverters.

 - o Continue existing licensing requirements, as appropriate to their Commerce Department country group classification, for exports to third countries that are unwilling or unable to enter into comprehensive understandings or informal arrangements.
4. REMOVE ITEMS WHOSE CONTROL IS NO LONGER FEASIBLE

Regardless of the rate of progress on CoCom and third country negotiations, the United States should actively seek to remove from both the U.S. Control List and the CoCom International List items whose control is no

longer feasible or necessary. This would include goods and technologies:

- o for which there is demonstrated foreign availability from any country that has not agreed to adhere to export controls and for which this availability has not been eliminated within a reasonable period of time through negotiated agreements (see item II.4 below); or
- o for which control at the source is not practicable, that enter into world trade channels through multiple entrepôt points, and that are manufactured and shipped in volumes so large they have in effect become "technological commodities" (e.g., certain computer memory chips and some personal computers).

5. MAINTAIN UNILATERAL CONTROLS ONLY ON A TEMPORARY BASIS OR FOR LIMITED, UNIQUE NATIONAL SECURITY CIRCUMSTANCES

Regardless of the rate of progress on CoCom and third country negotiations, the United States should eliminate the use of unilateral national security export controls except in those circumstances in which active efforts are

under way to negotiate multilateral controls within and outside of CoCom--in which case unilateral controls could be maintained on a temporary basis--or in those situations in which unique national security circumstances warrant the imposition of such controls for limited periods of time. Where a decision has been taken to impose or maintain unilateral national security export controls, such restrictions should be subject to a 3-year "sunset provision" requiring their periodic rejustification.

The panel wishes to emphasize that the phrase "unique national security circumstances" does not justify retaining the present U.S. unilateral control list. Rather, it recommends that controls be established on a multilateral basis and that, in cases in which the United States or another CoCom member country cannot achieve unanimity on the need to control a particular item, no unilateral controls should be imposed. In rare cases the United States or another CoCom country may believe that critical national security concerns are at stake and may wish to reserve the right to establish a unilateral restriction on their domestic industry. This exception should be used sparingly.

For these few exceptions, it would be useful for CoCom countries to report their exports of new, uncontrolled items going to the Soviet bloc. Such reporting would over time better inform CoCom on the advisability of establishing controls on the proposed item and better inform U.S. and other CoCom policymakers on the effectiveness of the unilateral control. The panel recommends that the United States explore within CoCom the feasibility of developing a practical reporting system for this category of items.

6. ELIMINATE REEXPORT AUTHORIZATION REQUIREMENTS IN COUNTRIES PARTICIPATING IN A COMMUNITY OF COMMON EXPORT CONTROLS ON DUAL USE TECHNOLOGY

To further the objective of developing a community of common controls on dual use technology among cooperating countries of the Free World and to encourage international cooperation and trust, the United States should eliminate any requirement that a buyer seek authorization for a reexport that is subject to CoCom or "CoCom-like" controls by the country of initial export. Reliance should be placed instead on foreign governments that participate in CoCom or that have agreed (formally

or informally) to impose "CoCom-like" controls on exports to prevent diversions from their territory.

7. MAINTAIN CURRENT CONTROL PROCEDURES ON THE TRANSFER WITHIN COCOM OF SENSITIVE INFORMATION, TECHNICAL DATA, AND KNOW-HOW

The United States should continue to rely on current security classification procedures and the protection afforded by general license GTDR and individual proprietary interests to control the transfer within CoCom of information, technical data, and know-how that are considered to be militarily sensitive. This approach is based on the recognition that the benefits of additional controls on technical data are outweighed by the potential damage of such restrictions to international business operations and R&D activities in the West. The attempt to exercise broader control of technical data is likely to prove unnecessarily restrictive to all such international cooperative ventures.

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8. REDUCE THE SCOPE OF THE COCOM LIST AND MODIFY COCOM
DECISION-MAKING POLICIES AND PROCEDURES

There are a number of steps the United States--together with its CoCom allies--should take to improve the efficiency and effectiveness of the multilateral process. The most important step is to reduce the overall scope of the CoCom International List to improve its credibility and enforcement. List credibility also would be improved by the imposition of a 4-year "sunset provision" that would cause lower-level CoCom items to be removed automatically from the list--unless their inclusion can be rejustified--when they come up for periodic review. The panel further recommends that the general procedure for decontrolling International List items be modified--decontrol should no longer require unanimity--to improve the effectiveness of multilateral enforcement.

To ensure balanced consideration of economic and military factors, the panel also supports greater participation by defense officials of the allied countries, as initiated through the establishment of the CoCom military experts

group, in the multilateral decision-making process. Finally, the panel recommends that the uncertainty industry often associates with CoCom decision making be reduced through greater transparency. This could be accomplished by encouraging member governments to provide industry with appropriately sanitized and delayed information regarding approval and denial precedents.

9. MAINTAIN A CLEAR SEPARATION BETWEEN NATIONAL SECURITY AND FOREIGN POLICY EXPORT CONTROLS

Existing statutory authority describes separate systems and procedures for the control of exports for foreign policy versus national security reasons. Therefore, the U.S. government should maintain the clearest possible separation between the unilateral control of exports for political--that is, foreign policy--purposes and the system of multilateral controls that are maintained for national security purposes. Although examination of the system of foreign policy export controls was beyond the scope of this study, the panel notes that many of our CoCom allies continue to disagree profoundly with some U.S. foreign policy export controls. If not effectively

isolated, such controls can have a corrosive effect on the resolve of the CoCom allies to cooperate in the implementation of national security export controls.

II. ACCORD GREATER IMPORTANCE IN U.S. NATIONAL SECURITY EXPORT CONTROL DECISIONS TO MAINTAINING U.S. TECHNOLOGICAL STRENGTH, ECONOMIC VITALITY, AND ALLIED UNITY

The panel recommends that executive branch decisions concerning national security export controls accord greater importance than they currently do to maintaining U.S. technological strength, economic vigor, and allied unity. Ultimately, an effective, multilateral national security export control regime can be established only through the commitment and support of the President and Congress. Nevertheless, the decision-making and advisory mechanisms of the executive branch also must be constituted and tasked appropriately to facilitate the effective implementation of the policy approach proposed above.

As a general policy the United States should strive to achieve clarity, simplicity, and consistency in its national security export control procedures, as well as in the multilateral CoCom structure, and to obtain broader consensus on the need for national security export controls among the Free World nations that use and/or produce dual use technology. To achieve this goal the United States should design policies and procedures that emphasize efficiency and effectiveness over comprehensiveness. Over the long term, U.S. national security export control policies also should remain flexible to political and economic changes in the world situation.

Toward these ends, the panel recommends the following specific changes in U.S. policy and procedures.

1. BALANCE THE PROTECTION OF MILITARY SECURITY WITH THE PROMOTION OF NATIONAL ECONOMIC VITALITY THROUGH AFFIRMATIVE POLICY DIRECTION

The President should require that the National Security Council (NSC) implement the existing policy mandate--as set forth in the Export Administration Act of 1979, as amended--which calls both for the protection of military

security and for the promotion of national economic interests. Currently, because of insufficient attention and leadership from above, the existing policy mechanisms either are not being used or are producing results that fail to take adequate account of important national interests. This problem can be ameliorated by providing regular, affirmative policy direction to the responsible line agencies.

Accordingly, NSC should take steps to fulfill its responsibility on national security export control matters by providing the necessary, balanced policy guidance. The secretaries of commerce and treasury should participate in NSC meetings at which export control matters are to be addressed. Moreover, as a matter of urgency, NSC should be staffed properly to deal with these matters and a senior NSC staff member should be given responsibility for bringing representatives of conflicting agencies together to resolve policy differences. Although NSC can assume such responsibility without legislation, the panel further recommends that Congress consider whether the National Security Act of 1947 (as amended) ought to be modified to reflect the

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growing importance of international trade as a fundamental element of U.S. national security.

2. PROVIDE SUFFICIENT RESOURCES AND AUTHORITY TO THE DEPARTMENTS OF COMMERCE AND STATE TO ALLOW THEM TO FULFILL THEIR ROLES IN THE EXPORT CONTROL PROCESS

To establish a more balanced policymaking process within the federal government, the Departments of Commerce and State should be allocated sufficient resources dedicated to the implementation of national security controls. In particular the Department of Commerce should upgrade significantly the capacity and sophistication of its automated systems and the quality of its in-house technical and analytical expertise. The Export Administration Act specifies that the Department of Commerce has primary responsibility for export licensing policy and procedures. In the case of national security export controls, Commerce has lost much of that leadership role because of its ineffective performance in the past and must now establish the organization, competence, and drive to merit regaining that role.

It is also essential that the Department of State vigorously fulfill its traditional role of ensuring that the U.S. government speaks with a single, coherent voice when dealing with foreign governments and foreign firms on national security export control matters. Another State Department responsibility should be to work to reduce conflicts within the ranks of CoCom, conflicts that stem in part from differences among the respective national delegations over how to prioritize conflicting economic and military objectives. Although the United States has had some modest success in encouraging allied defense officials to participate in the CoCom process, it is essential that State Department officials now play a more assertive leadership role in the U.S. CoCom delegation so as to create a balanced representation of U.S. economic and defense interests.

3. RESTORE TECHNICAL JUDGMENT AND OVERALL BALANCE TO THE NATIONAL SECURITY EXPORT LICENSING PROCESS

The locus of responsibility and decision making within the Department of Defense has shifted from the office responsible for research and engineering to the office

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responsible for policy. This shift has resulted in greater attention to extant deficiencies of the CoCom process and increased efforts to stem the leakage of technology to the Soviet bloc. Although the pursuit of these policy objectives has led to the resolution or improvement of a number of long-standing problems, there has been at the same time a significant reduction in the weight accorded to technical factors and a resultant imbalance in the policy process. It should now be the goal (1) to establish greater balance within DoD between its technical and policy elements and (2) to reduce the DoD role in detailed license review as parallel steps are taken within the Department of Commerce to strengthen its capability to implement national security export control licensing procedures. The role of the policy side of DoD on export control issues should focus on the broader goal of maintaining the strategic balance and the contribution of technology to military systems.

4. IMPLEMENT THE DECONTROL PROCEDURES REQUIRED BY LAW WHEN
FOREIGN AVAILABILITY IS FOUND TO EXIST

The lack of action by the federal government on foreign availability determinations is contrary to the statutory language expressed in the Export Administration Act of 1979, as amended. This is due in part to the fact that no specific time lines for the completion of foreign availability determinations are specified in the legislation. Moreover, apart from the broad statutory criteria, there is still no generally accepted definition of foreign availability. Serious effort should be devoted to developing an interagency consensus on such a definition and reasonable deadlines for decisions.

The Department of Defense has overstepped its legitimate statutory role of providing technical input to foreign availability determinations and has exercised de facto veto authority by delaying the review of such determinations. The result of this situation has been that, in 4 years, the Departments of Commerce and Defense have been able to reach preliminary agreement on the decontrol of only 3 items (out of more than 20 foreign availability assessments). At the very least the Export

Administration Act should impose specific and equal time constraints on all responsible agencies. Because the process for determining foreign availability is not now functioning effectively, there is a need for effective remedial action by both the executive and legislative branches.

5. WITHDRAW THE STATUTORY REQUIREMENT TO INTEGRATE THE MCTL INTO THE COMMERCE DEPARTMENT'S CONTROL LIST

Congress should withdraw the statutory requirement to integrate the Militarily Critical Technologies List (MCTL) into the U.S. Control List. The fundamentally different nature and functions of the two lists--the former an exhaustive list of all technologies with military utility and the latter a specific list of items requiring an export license--make this goal unattainable. The Department of Defense should develop guidance for use of the MCTL as a reference document within DoD and as a basis for developing proposals to CoCom.

6. PROVIDE EFFECTIVE, TWO-WAY COMMUNICATION AT THE HIGHEST LEVELS BETWEEN GOVERNMENT AND THE PRIVATE SECTOR

A mechanism should be established (or upgraded) to provide effective, two-way communication between the highest levels of government and of the private sector on the formulation and implementation of coordinated national policies that balance military security and national economic vitality. One such group already exists: the President's Export Council (PEC) and its Subcommittee on Export Controls. However, its advice currently is not receiving appropriate attention at senior policy levels within the government. The panel recommends therefore that senior policy staff of the Executive Office of the President meet periodically with the PEC (or with other respected representatives of the private sector) and inform the President of their concerns regarding national security export controls. It may be necessary, however, for Congress to establish a mechanism to ensure appropriate consideration of industrial concerns in the formulation of national security export control policy.

7. DEVELOP RELIABLE DATA REGARDING THE OPERATION AND IMPACT OF U.S. NATIONAL SECURITY EXPORT CONTROLS

This study has revealed serious shortcomings in both the quality and quantity of information maintained and analyzed by the U.S. government on the operation of national security export controls and their domestic and international impacts. The panel recommends therefore that the Department of Commerce be instructed by Congress to develop and analyze such data and that the department be given sufficient resources to carry out the task.

8. MAKE MORE SYSTEMATIC USE OF INTELLIGENCE EVIDENCE ON CURRENT AND ANTICIPATED SOVIET ACQUISITION EFFORTS

The Intelligence Community should structure its efforts with regard to West-East technology transfer so as to anticipate future Soviet technology acquisition efforts. The line agencies of the U.S. government, for their part, should strive to make more systematic use of existing intelligence resources for modifying the composition of the U.S. Control List, proposing changes to the CoCom International List, and reviewing sensitive individual

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export licensing cases. In addition, the Intelligence Community should increase its efforts to sanitize and declassify "finished" intelligence products to provide a more informed public understanding of the technology transfer problem.

CODA

The panel notes in conclusion that there is a need for national security export controls and that current statutory authority recognizes the necessity to accommodate both military security and economic vitality. But the recent performance of the U.S. government on this matter has not been satisfactory--and will be increasingly less so because of prevailing trends in international trade and technology diffusion--because it has tended to focus on tightening controls while giving little attention to their effectiveness and costs. Although most of the necessary mechanisms appear to be in place, the U.S. policy process for national security export control continues to lack proper direction and affirmative leadership at the highest level. As a result the executive branch has failed to implement the existing provisions of law in a coherent and effective manner, which

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has in turn created uncertainty, confusion, and criticism both at home and abroad. In the absence of appropriate corrective measures, these continuing problems will exact ever-higher tolls--on both Western economic vitality and innovative capacity and on the military security of the United States and its allies.

cally reviewed and revised in the light of developments in the field of information technology.

(e) **SIMPLIFICATION OF REGULATIONS.**—The Secretary, in consultation with appropriate United States Government departments and agencies and with appropriate technical advisory committees established under section 5(h), shall review the regulations issued under this Act and the commodity control list in order to determine how compliance with the provisions of this Act can be facilitated by simplifying such regulations, by simplifying or clarifying such list, or by any other means.

ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

SEC. 13. (a) **EXEMPTION.**—Except as provided in section 11(c)(2) and subsection (c) of this section, the functions exercised under this Act are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5, United States Code.

(b) **PUBLIC PARTICIPATION.**—It is the intent of the Congress that, to the extent practicable, all regulations imposing controls on exports under this Act be issued in proposed form with meaningful opportunity for public comment before taking effect. In cases where a regulation imposing controls under this Act is issued with immediate effect, it is the intent of the Congress that meaningful opportunity for public comment also be provided and that the regulation be reissued in final form after public comments have been fully considered.

(c) **PROCEDURES RELATING TO CIVIL PENALTIES AND SANCTIONS.**—(1) In any case in which a civil penalty or other civil sanction (other than a temporary denial order or a penalty or sanction for a violation of Section 8) is sought under Section 11 of this Act, the charged party is entitled to receive a formal complaint specifying the charges and, at his or her request, to contest the charges in a hearing before an administrative law judge. Subject to the provisions of this subsection, any such hearing shall be conducted in accordance with Sections 556 and 557 of Title 5, United States Code. With the approval of the administrative law judge, the Government may present evidence in camera in the presence of the charged party or his or her representative. After the hearing, the administrative law judge shall make findings of fact and conclusions of law in a written decision, which shall be referred to the Secretary. The Secretary shall, in a written order, affirm, modify, or vacate the decision of the administrative law judge within 30 days after receiving the decision. The order of the Secretary shall be final and is not subject to judicial review.

(2) The proceedings described in paragraph (1) shall be concluded within a period of 1 year after the complaint is submitted, unless the administrative law judge extends such period for good cause shown.

(3) An administrative law judge referred to in this subsection shall be appointed by the Secretary from among those considered qualified for selection and appointment under Section 3105 of Title 5, United States Code. Any person who, for at least 2 of the 10 years immediately preceding the date of the enactment of the Export Administration Amendments Act of 1985, has served as a hearing commissioner of the Department of Commerce shall be included among those considered as qualified for selection and appointment to such position.

(d) **IMPOSITION OF TEMPORARY DENIAL ORDERS.**—

(1) In any case in which it is necessary, in the public interest, to prevent an imminent violation of this Act or any regulation, order, or license issued under this Act, the Secretary may, without a hearing, issue an order temporarily denying United States export privileges (hereinafter in this subsection referred to as a "temporary denial order") to a person. A temporary denial order may be effective no longer than 30 days unless renewed in writing by the Secretary for additional 30-day periods in order to prevent such an imminent violation, except that a temporary denial order may be renewed only after notice and an opportunity for a hearing is provided.

(2) A temporary denial order shall define the imminent violation and state why the temporary denial order was granted without a hearing. The person or persons subject to the issuance or renewal of a temporary denial order may file an appeal of the issuance or renewal of the temporary denial order with an administrative law judge who shall, within 10 working days after the appeal is filed, recommend that the temporary denial order be affirmed, modified, or vacated. Parties may submit briefs and other material to the judge. The recommendation of the administrative law judge shall be submitted to the Secretary who shall either accept, reject, or modify the recommendation by written order within 5 working days after receiving the recommendation. The written order of the Secretary under the preceding sentence shall be final and is not subject to judicial review. The temporary denial order shall be affirmed only if it is reasonable to believe that the order is required in the public interest to prevent an imminent violation of this Act or any regulation, order, or license issued under this Act, or otherwise to facilitate enforcement of this Act.

Or otherwise to facilitate enforcement of this Act

10. Amend Section 13(d)-

(a) by inserting in the first sentence of subsection (1) the words ", or otherwise to facilitate enforcement of this Act," following the words "under this Act,";

(b) by substituting for the number "60" wherever it appears in the second sentence of subsection (1), the number "180";
and

(c) by inserting in the last sentence of subsection (2) the words ", or otherwise to facilitate enforcement of this Act" before the period.

DEFENSE PROPOSAL: To add language to the proposed amendment to section 5 by adding the following:

"(r) Foreign Availability to Other Than Controlled Countries. The Secretary, in coordination with the Secretary of Defense, shall review, on a continuing basis, the availability to countries, other than controlled countries, from sources outside the United States, of any goods or technology the export of which requires a validated license under this section. In any case in which the Secretary finds that any such goods or technology from foreign sources are of similar quality and are available to such country or countries without effective restrictions, the Secretary shall designate such goods or technology as eligible for export to such country or countries pursuant to the procedures set forth in section 10(o) of the Act, provided however that any such goods or technology which would aid the military or intelligence Services of such countries, and would harm U.S. national or mutual security interests or any such goods or technology for which there is a risk of diversion to a controlled country shall not be eligible for export to such country or countries pursuant to the procedures set forth in section 10(o) of the Act. The Secretary may make such foreign availability determination on the Secretary's own initiative, upon receipt of an allegation from an export license applicant that such availability exists or upon the submission of a certification by a technical Advisory Committee of appropriate jurisdiction as to the goods or technology involved."

or contribute to international Terrorism

DEFENSE PROPOSED LEGISLATIVE CHANGES TO THE EXPORT ADMINISTRATIVE ACT
SECTION 5(f)
FOREIGN AVAILABILITY

(f) FOREIGN AVAILABILITY TO CONTROLLED COUNTRIES: (1) The Secretary, in consultation with the Secretary of Defense and other appropriate Government agencies and with appropriate technical advisory committees established pursuant to subsection (h) of this section, shall review on a continuing basis, the availability, to controlled countries (to which exports are controlled under this section) from sources outside the United States, including countries which participate with the United States in multilateral export controls, of any goods or technology the export of which requires a validated license under this section. In any case in which the Secretary determines, in accordance with procedures and criteria which the Secretary shall by regulations establish, that any such goods or technology are available in fact to controlled countries from such sources in sufficient quantity and of comparable quality so that the requirement of a validated license for the export of such goods or technology is or would be ineffective in achieving the purpose set forth in subsection (a) of this section, the Secretary (may not, after the determination is made, require) shall submit such determination for review to the Secretary of Defense and other departments and agencies as the Secretary considers appropriate.

The preceding sentence does not require the concurrence or approval of any official, department or agency to which such a determination is submitted.] The Secretary shall immediately notify the Secretary of State of such request and the Secretary of State shall, where feasible, immediately undertake consultations with such sources to remove such availability. In the event that such availability cannot be removed, the Secretary of State shall so notify the Secretary and the Secretary shall request the President to impose on the exports of such sources to the United States pursuant to USC as shall be commensurate with the ~~assessed~~ damage to U.S. national security arising from such availability. An assessment of such damage shall be prepared by the Secretary of Defense and forwarded to the Secretary. In the event that the imposition of such duties is not feasible, the Secretary shall, pursuant to U.S.C., deny export privileges to the United States from such sources. Within 60 days following such submission the Secretary with the concurrence of the Secretary of Defense shall remove the requirement for a validated license for the export of such goods or technology during the period of such foreign availability, unless the President determines that the absence of export controls under this section would prove detrimental to the national security of the United States. In any case in which the President determines that export controls under this section must be maintained notwithstanding foreign availability, the Secretary shall publish that determination together with a concise statement of its basis, and the estimated economic impact of the decision.

- (1) Increased cost of goods
- (2) Very detrimental to foreign policy

(2) The Secretary shall approve any application for a validated license which is required under this section for the export of any goods or technology to a controlled (particular) country and which meets all other requirements for such an application, if the Secretary determines that such goods or technology will, if the license is denied, be available in fact to such country from sources outside the United States, including countries which participate with the United States in multilateral export controls, in sufficient quantity and of comparable quality so that denial of the license would be ineffective in achieving the purpose set forth in subsection (a) of this section, subject to the exception and procedures set forth in paragraph (1) of this subsection. In any case in which the Secretary makes a determination of foreign availability under this paragraph with respect to any goods or technology, the Secretary shall determine whether a determination of foreign availability under paragraph (1) with respect to such goods or technology is warranted.

(3) The Secretary shall make a foreign availability determination under paragraph (1) or (2) on the Secretary's own initiative or upon receipt of an allegation from an export license applicant that such availability exists. The Secretary shall make such a determination within 90 days of receipt of an allegation of foreign availability. In making any such determination, the Secretary shall accept the representations of applicants made in writing and supported by reasonable evidence, unless such representations are contradicted by reliable evidence, including scientific or physical examination, expert opinion based upon adequate factual information or intelligence information. In making the determinations of foreign availability, the Secretary may consider such factors as cost, reliability, the availability and reliability of spare parts and the cost and quality thereof, maintenance programs, durability, quality of end products produced by the item proposed for export, and scale of production. For purposes of this paragraph, "evidence" may include such items as foreign manufacturers' catalogues, brochures, or operation or maintenance manuals, articles from reputable trade publications, photographs, and depositions based upon eyewitness accounts.

(4) In any case in which export controls are maintained under this section notwithstanding foreign availability, on account of a determination by the President that the absence of the controls would prove detrimental to the national security of the United States, the President shall actively pursue negotiations with the governments of the appropriate foreign countries for the purpose of eliminating such availability. If, within 6 months after the President's determination, the foreign availability has not been eliminated, the Secretary may not, after the end of that 6-month period, require a validated license for the export of the goods or technology involved. The President may extend the 6-month period described in the preceding sentence for an additional period of 12

months if the President certifies to the Congress that the negotiations involved are progressing and that the absence of the export control involved would prove detrimental to the national security of the United States. Whenever the President has reason to believe goods or technology subject to export control for national security purposes by the United States may become available from other countries to controlled countries and that such availability can be prevented or eliminated by means of negotiations with such other countries, the President shall promptly initiate negotiations with the governments of such other countries to prevent such foreign availability.

(5) The Secretary shall establish in the Department of Commerce an Office of Foreign Availability which, in the fiscal year 1985, shall be under the direction of the Under Secretary of Commerce for Export Administration. The Office shall be responsible for gathering and analyzing all the necessary information in order for the Secretary to make determinations of foreign availability under this Act. The Secretary shall make available to the Committee on Foreign Affairs of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate at the end of each 6-month period during a fiscal year information on the operations of the Office, and on improvements in the Government's ability to assess foreign availability, during that 6-month period, including information on the training of personnel, the use of computers, and the use of Foreign Commercial Service officers. Such information shall also include a description of representative determinations made under this Act during that 6-month period that foreign availability did or did not exist (as the case may be), together with an explanation of such determinations.

(6) Each department or agency of the United States with responsibilities with respect to export controls, including intelligence agencies, shall, consistent with the protection of intelligence sources and methods, furnish information to the Office of Foreign Availability concerning foreign availability of goods and technology subject to export controls under this Act, and such Office, upon request or where appropriate, shall furnish to such departments and agencies the information it gathers and receives concerning foreign availability.

(7) (The Secretary shall issue regulations with respect to determinations of foreign availability under this Act not later than 6 months after the date of the enactment of the Export Administration Amendments Act of 1985.)

(a) "Foreign availability" for national security-controlled goods or technology exists when the Secretary of Commerce with concurrence of the Secretary of Defense determines that non-U.S. origin goods or technology of comparable quality are available-in-fact to a controlled country or countries in quantities sufficient to satisfy their need so that U.S. exports of such goods or technology would not make a significant contribution to the military potential of such country or countries; and

(b) A commodity or technology is of "non-U.S. origin" when it is not subject to U.S. export or re-export controls, except that foreign made products of U.S. origin technology and foreign made products containing U.S. origin parts and components may be considered to be of "non-U.S. origin" if so determined by the Secretary with concurrence of the Secretary of Defense. In the event the Secretary of Commerce and the Secretary of Defense cannot agree within the statutory time frame the matter shall be immediately submitted to the President ~~the National Security Council as designated by the President~~ ~~for~~ ~~the~~ ~~purpose~~ ~~of~~ ~~resolution.~~

5(h)(6) The Secretary shall investigate the foreign availability so certified and, not later than 90 days after the certification is made, shall submit a report to the technical advisory committee and the Congress stating that .-

(A) the Secretary will remove within 90 days (has removed) the requirement of a validated license for the export of the goods or technology, on account of the foreign availability.

Meeting on Export Control Legislation

January 28, 1987

On January 9 I was asked to chair a meeting in this room with representatives of each of your agencies (except OMB). State: Bob Dean and Doug McMinn; DOD: Steve Bryan; Commerce: Bruce Smart; and Lou Pugliaresi from NSC. Purpose of the meeting:

-- Develop a position for the President to take in the State of the Union address on export controls in light of the general "competitiveness" theme of the address and the growing public pressure, evidenced by the National Academy of Sciences (NAS) report to revisit the Administration's program. DOD and Commerce had passed drafts back and forth and apparently had not reached closure.

-- Address a Commerce Department proposal to include several legislative changes in the President's legislative package on competitiveness along with the Administration's trade proposals.

After considerable discussion the following was agreed to:

-- That no legislative proposals should be sent to the Hill at this time.

-- That the President should direct an interagency study on export controls (NSSD), to report back by a date certain (March 1) with specific legislative and/or administrative proposals; with terms of reference which address the issues and questions about the program raised by the NAS report and by businessmen and members of Congress, i.e. public consciousness.

The reasons for the decisions at the time were as follows:

-- State: Dean felt COCOM negotiating position could be compromised by a showing of panic on the part of the Administration by going to the Hill with legislation at this time (following NAS report), e.g. proposing that control list be shortened at the same time we are asking allies to raise the barriers. Bargaining position could be disadvantaged.

-- DOD felt that introducing piecemeal legislative proposals at this time, however meritorious, could risk triggering Congressional legislative action before the Administration could get its act together with a thorough review of the program and decide what administrative or legislative changes it wanted to propose.

We reported this to the EPC and attempted to work with each of the agencies on the specific language of the State of the Union message and accompanying fact sheets.

The meeting today is to revisit this issue. Secretary Baldrige feels strongly that, for strategic reasons, we cannot wait until March to submit our proposals, that the train is leaving the station and we must do something now in the trade package to be

submitted this Friday. DOC has three or four proposals which it would like to have this group consider.

It seems to me that the issues before this group today are as follows:

-- We had (January 9) decided on a process for review of our current program which is now a part of the President's State of the Union package. Is the submission of legislation now, inconsistent with our January 9 decision?

-- Have the political demands changed since our January 9 decision requiring us to reassess the wisdom of that approach?

-- Has anything happened in our COCOM negotiations this week which would alter the Department of State's view of negotiating strategy?

To lead off, I might ask Secretary Baldrige to describe his current view of the situation and lay on the table the specific proposals which DOC would include in the trade package.

Legislation Requested

1. §1(a)

Eliminate authority to require validated export license for AEN (Administrative Exception Note) technology and goods shipped to West (non-COCOM).

-- comprises 9% of licenses

-- U.S. only COCOM to require

-- AEN -- non-critical

-- 1985 Congress eliminated license for AEN from U.S. to other COCOM

-- much paperwork -- little benefit

2. §1(b)

Eliminate authority to require validated export license for sales to agencies, companies, etc. under effective control of COCOM governments or non-COCOM which U.S. determines secure.

-- government already has a national security export control program acceptable to U.S.

-- reduce licenses by 20,000

3. §2 & 3

(a) definition of "foreign availability" -- codify regs.

(b) Commerce consults with other agencies but does not need approval

4. §4

§3 presumes qualification for export license in West-West trade if foreign availability is found.

§4 license would be issued after 15 working days (poss. 15 day extension) unless slowing of unacceptable risk of diversion.

-- still requires license -- not total decontrol

§10(o) expands 15 day admin. procedure now available to COCOM to include exports to other free world countries when foreign availability is found.