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Rebuilding a Broken Regime: Restructuring the Export Administration Act

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Rebuilding a Broken Regime: Restructuring the Export Administration Act

ABSTRACT

The Export Administration Act (EAA) authorizes the President to control the export of “dual-use” goods and technology for national security and foreign policy purposes. “Dual-use” items are goods or technology that are commercial or civil in nature and can be used to produce sophisticated, dangerous weaponry. The EAA expired ten years ago, and although it has been continued by various Executive Orders since, Congress has failed to renew the legislation. As part of the larger export control regime in the United States, the EAA has been an utter failure. Dual-use goods have made their way into the hands of a number of dangerous nations, and the EAA has done little to prevent the illegal or undesirable transfers.

There are many flaws in the present export control regime. A multitude of statutes and regulations govern dual-use technology transfers, forming a bureaucracy that is impossible to adhere to for the private sector and impossible to manage for the government. An international regime, the Wassenaar Arrangement offers a glimmer of hope for global cooperation in dual-use transfers, though it also has shortcomings. U.S. companies waste time seeking to comply with the EAA and the regime is also unable effectively to follow up on the end-use and end-user of dual-use technology

This Note argues that a four-pronged approach is necessary to improve export controls on dual-use items. It calls for strengthening end-use and end-user verification, increasing transparency in dual-use transfers, and bolstering the Wassenaar Arrangement. In addition, this Note proposes that the newly created Homeland Security Department should be given oversight of dual-use technology transfers in the new Export Administration Act. By developing an EAA reflective of the need for improved security and increased flexibility, the twin goals of the U.S. export control regime can be realized: the protection of national security and promotion of U.S. industry in the international marketplace.

TABLE OF CONTENTS

I.	INTRODUCTION	300
II.	BACKGROUND ON THE UNITED STATES EXPORT CONTROL REGIME	301
	A. <i>The Current State of Affairs</i>	301
	B. <i>Breakdowns in Export Controls</i>	304
	C. <i>The EAA Legislation</i>	307
III.	TROUBLES WITH THE SYSTEM.....	309
	A. <i>Confusion and Chaos for U.S. Business</i>	309
	B. <i>Bureaucratic Issues</i>	311
	C. <i>End-use and End-user Issues</i>	313
	D. <i>The International Regime</i>	316
IV.	RESOLUTIONS	319
	A. <i>End-use/End-user Verification</i>	320
	B. <i>Strengthen the Wassenaar Arrangement</i>	322
	C. <i>Develop transparency in the U.S. export control regime</i>	325
	D. <i>Give the Department of Homeland Security Oversight</i>	328
V.	CONCLUSION.....	329

I. INTRODUCTION

On September 6, 2001, the U.S. Senate passed Senate Bill 149, legislation designed to overhaul the "Export Administration Act" (EAA). The EAA was designed to establish "an effective, modern framework for export controls by reforming and replacing the Export Administration Act of 1979, a statute that authorizes the President to control the export of dual-use items for national security, foreign policy, and short supply purposes."¹ One analysis of the bill concluded "this under-the-radar legislation would allow U.S. companies to export products that could make it far easier for . . . sinister leaders to build up their war-making capabilities. In essence we would be helping the very people we may well find ourselves fighting."² The legislation is now considered dead and the bill will have to be redrafted, but the world is a vastly different place than it was when the Senate passed this bill. The issue has received scant attention

1. S. 149, 107th Cong. (2001); see also S. REP. NO. 107-010 (2001).

2. Larry M. Wortzel, *Marketplace for Terror Trinkets?*, WASH. TIMES, Oct. 17, 2002, available at <http://www.washtimes.com/commentary/20021017-57404.htm> (last visited Nov. 21, 2003).

from a press and public focused on high-profile conflicts in Iraq and North Korea.³ In light of the large number of terrorist attacks occurring in recent years, the recent war against Iraq, and threatening behavior by unfriendly nations, perhaps it is time to pay more attention to legislation that could come back to haunt the United States in a very deadly sense.

Section II of this Note describes the current U.S. export control regimes. Part A describes the two main statutes governing dual-use goods and technologies. Part B details some of the fissures in the regimes and noted failures over the past decade. Part C discusses the EAA legislation currently before Congress. Section III explores the many problems associated with the current export control regimes. Part A of Section III discusses the bewilderment businesses often experience when trying to comply with export controls, and Part B details the bureaucratic obstacles faced by U.S. companies. Part C describes the lack of end-use and end-user verification inherent in the current regime. Part D explores how Wassenaar Arrangement, an international attempt to control dual-use exports, has failed to achieve its goals. Section IV introduces a proposal for fixing the current export control regime. It is a four-pronged approach that calls for strengthening end-user verification, increasing transparency, and strengthening the Wassenaar Arrangement. In addition, this Note will also propose that the newly created Homeland Security Department should be given oversight of dual-use technology transfers in the new Export Administration Act.

II. BACKGROUND ON THE UNITED STATES EXPORT CONTROL REGIME

A. *The Current State of Affairs*

Two major statutes govern the export of “dual-use” goods and technology, the Export Administration Act (EAA)⁴ and the Arms Export Control Act (ACEA)⁵. “Dual-use” goods are goods or technology that are commercial in nature that can be used either directly or indirectly to produce sophisticated weaponry.⁶ The ACEA declares that

[A]n ultimate goal of the United States continues to be a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule

3. *Id.*

4. 50 U.S.C. § 2401 (1994).

5. 22 U.S.C. § 2751 (2002).

6. R. Aylan Broadbent, *U.S. Export Controls on Dual-Use Goods and Technologies: Is the High Tech Industry Suffering*, 8 CURRENTS: INT'L TRADE L.J. 49, 49 (1999).

of law; and in which international adjustments to a changing world are achieved peacefully.⁷

To that end, under the ACEA, the Department of State promulgated the International Traffic in Arms Regulations (ITAR) in order to monitor and control the shipment of military and “dual-use” technologies or goods.⁸ The EAA, continued by presidential order under the IEPPA⁹, purports to monitor the shipment of dual-use technology and goods.¹⁰ The Export Administration Regulations (EAR),¹¹ (promulgated under the EAA) and continued by Presidential order under IEPPA,¹² are used by the Department of Commerce (through the Bureau of Industry and Security—the BIS) to control the export of non-military technology and goods, which also include dual-use technologies and goods. Thus, problematic dual-use technologies and goods can be covered by the ACEA or the EAA under ITAR, EAR, neither, or both.¹³

Although the Senate approved legislation, designed to renew the EAA in September 2001, the House never passed its version of the legislation even though the House International Relations Committee (HIRC) and the House Armed Services Committee (HASC) separately approved different versions of the bill.¹⁴ The Bush White House and key House Republicans set March 1, 2003 as the target date for House passage of new EAA legislation,¹⁵ but that deadline passed without any effort by Congress to renew the EAA.¹⁶

In addition to the above-mentioned statutes and regulations, various other export statutes and regulations are designed to further the U.S. security interests.¹⁷ This includes a virtual alphabet soup of names such as the Trading with the Enemy Act (TWEA)¹⁸,

7. 22 U.S.C. § 2751 (2002).

8. See *infra* note 16 and accompanying text.

9. Exec. Order No. 12924, 59 Fed. Reg. 43,437 (Aug. 19, 1994). When the EAA expired in 1994, President Clinton continued the export authority by executive order.

10. See *id.*

11. 15 C.F.R. §§ 730-74 (2002).

12. Exec. Order No. 12924, *supra*, note 9.

13. Ronald J. Sievert, *Urgent Message to Congress—Nuclear Triggers to Libya, Missile Guidance to China, Air Defense to Iraq, Arms Suppliers to the World: Has the Time Finally Arrived to Overhaul the U.S. Export Control Regime?—The Case for Immediate Reform of Our Outdated, Ineffective, and Self-Defeating Export Control Regime*, 37 TEX. INT'L L.J. 89, 93 (2002).

14. Gary G. Yerkey, *Once More into the Breach for EAA Legislation*, 20 INT'L TRADE REP. (BNA) No. 3, Jan. 16, 2003, at 145.

15. Gary G. Yerkey, *White House, GOP Leaders Set March 1 as New Target for House Approval of EAA Bill*, 19 INT'L TRADE REP. (BNA) No. 49, Dec. 12, 2002 at 2116.

16. Gary G. Yerkey, *Rep. Dreier Says Prospects for Passage of Export Control Legislation Not Good*, 20 INT'L TRADE REP. (BNA) No. 16, at 664 (Apr. 17, 2003).

17. *Id.* at 90.

18. Trading With the Enemy Act, 50 U.S.C. §§ 1-44 (2002).

International Emergency Economic Powers Act (IEEPA)¹⁹, Anti-Terrorism and Effective Death Penalty Act (AEDPA)²⁰, Nuclear Non-Proliferation Act (OFAC)²¹, and various U.S. Treasury directives.

The United States is also party to a number of international agreements regarding dual-use technologies and goods. During the Cold War, the main international control regime was the Coordinating Committee for Multilateral Export Controls (COCOM).²² It was disbanded in 1994, and two years later the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar) was established.²³ Wassenaar's primary objectives are "to promote transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilizing accumulations and to enhance cooperation to prevent the acquisition of armaments and sensitive dual-use items for military end-users."²⁴ To this end, Wassenaar is designed to promote transparency and greater responsibility in transfers by providing a forum for countries to exchange information so that they can have a better understanding of the risks of various transfers.²⁵ However, Wassenaar is not a legally binding treaty and has no enforcement or monitoring regimes.²⁶ Its force is derived mainly from the voluntary political commitments of its members.²⁷ This is a major roadblock in achieving Wassenaar's goals.

Wassenaar establishes export controls based on two "pillars."²⁸ The dual-use pillar divides goods into two different tiers, depending upon their sensitivity.²⁹ When a member state denies an export license to a non-member state, they agree to notify the other members.³⁰ For more sensitive items, members notify the other members twice a year of any transfers made to non-members on an aggregate basis.³¹ There is no obligation to consult with other

19. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (2002).

20. Anti-Terrorism and Effective Death Penalty Act, 18 U.S.C. §§ 2332(d), 2339(B) (2002).

21. Nuclear Non-Proliferation Act, 22 U.S.C. § 3201 (2002).

22. Kenneth A. Dursht, *From Containment to Cooperation: Collective Action and the Wassenaar Arrangement*, 19 CARDOZO L. REV. 1079, 1080 (1997).

23. *Id.*

24. *Id.* at 1081.

25. *Id.* at 1108.

26. Wade Boese, *GAO Says Multilateral Export Control Regimes Too Weak*, ARMS CONTROL TODAY, Nov. 2002, available at http://www.armscontrol.org/act/2002_11/gaonov02.asp (last visited Nov. 21, 2003).

27. Dursht, *supra* note 22, at 1109.

28. *Id.* at 1110.

29. *Id.*

30. *Id.*

31. *Id.*

member states prior to granting a license, even if they have previously denied the transfer of the exact same item.³² There is a weak "no-undercut" provision, whereby states are required to notify all other member states within 30 to 60 days of an approval of a transfer that another state has denied in the last three years.³³ This attempt at transparency, while a good start, does not go far enough.³⁴

B. Breakdowns in Export Controls

The policy interests of the EAA, ACEA, Wassenaar, and others are rarely achieved under the current export control regime. Iraq provides one example of the shortcomings of the export control statutes and regulations. Many of the products Saddam Hussein attempted to acquire—aluminum tubes, triggers, carbon fibers and other products useful for constructing nuclear weapons—would be considered "mass market items" under the bill approved by the Senate to renew the EAA. Thus, they would be fit for export without restriction.³⁵ Many of the biological samples Saddam used in his bioweapons program were sent directly from the Centers for Disease Control and Prevention in the 1980s.³⁶ They were legal transfers at the time.³⁷ According to recently released materials, the United States has allowed the export of a wide variety of dual-use equipment and supplies to Iraq, including computerized databases (presumably to help track political opponents), helicopters to transfer Iraqi officials (though it is believed they were later used to spray poison gas on the Kurds), surveillance equipment, and chemical analysis equipment for the Iraq Atomic Energy Commission.³⁸ A cache of missiles, manufactured in the United States, was also found after the war.³⁹ They were sent legally to Iraq in the years before the first gulf war.⁴⁰

32. *Id.*

33. Dursht, *supra* note 22, at 1111.

34. For example, an October 2002 Government Accounting Office (GAO) Report evaluated numerous multilateral export control regimes the United States was a member of, and found with the Wassenaar Arrangement that members submitted these aggregate reports on schedule only about 36 percent of the time. See GAO Report, *Nonproliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes* (Oct. 25, 2002) [hereinafter October 2002 GAO Report].

35. Wortzel, *supra* note 2.

36. Matt Kelley, *U.S. Supplied Germs to Iraq in '80s* (Sep. 30, 2002), available at www.story.news.yahoo.com/news?tmpl=story&u=/ap20020930/ap_on_go_ca_st_pe/us_iraq_b_ioweapons_2 (last visited Nov. 21, 2003).

37. Christopher Dickey & Evan Thomas, *How Saddam Happened*, NEWSWEEK, Sep. 23, 2002, at 35, 35.

38. *Id.*; see also 148 CONG. REC. S8,987 (2002).

39. Mark Hosenball, *Return to Sender*, NEWSWEEK, June 9, 2003, at 12.

40. *Id.*

U.S. intelligence officials expected to find many types of dual-use items made by Western companies as they sifted through the wreckage after the war in Iraq ended.⁴¹ However, it appears they underestimated the extent of what U.S. troops would find. Assortments of French military equipment and German-made chemical weapon protective gear have been found in Iraq.⁴² Fifty-one Roland-2 missiles, made by a French-German partnership of arms manufacturers, were found in two military compounds at Baghdad International Airport.⁴³ Iraqi military trucks were found with radios bearing the label "Made in France."⁴⁴ RPG night sights and Nissan pick-up trucks were also found with the French display.⁴⁵ All of the above can be classified as dual-use equipment or were made with parts that are dual-use.

Potentially deadly weapons transactions extend beyond Iraq. Between 1989 and 1990, a Texas company sent to Libya pulse neutron generators that could be used as nuclear trigger mechanisms.⁴⁶ In the trial of al-Queda operatives convicted of bombing U.S. embassies in Kenya and Tanzania, it was discovered that al-Queda had been shopping for uranium in South Africa.⁴⁷ China illegally received information and technology in 1996 from Loral Space & Communications Ltd. and Hughes Electronics Corporation that could be used to increase the accuracy of Chinese intercontinental ballistic missiles.⁴⁸ In fact, according to the Commerce Department, China is the most frequently listed destination on export license applications, accounting for ten percent of all applications filed in 2002.⁴⁹ In a related incident, the State Department charged Boeing Satellite Systems and Hughes Electronics Corporation of illegally giving technical data to China following failed Chinese launches of rockets carrying American satellites in 1995 and 1996.⁵⁰ A Justice Department investigation of Loral, Boeing, and Hughes did not result in any criminal charges.⁵¹ Loral reached a civil settlement with the State Department, while

41. *Id.*

42. *Id.*

43. Arian Campo-Flores et al., *I'm Shocked, Shocked!*, NEWSWEEK, Apr. 21, 2003, at 8.

44. *Id.*

45. *Id.*

46. Sievert, *supra* note 13, at 90 n.14.

47. *Know Thine Enemy—Weapons Proliferation*, ECONOMIST, Feb. 2, 2002, at 24.

48. Broadbent, *supra* note 6, at 54.

49. William New, *Exports, Meet National Security*, 34 NAT. J. No. 44, Nov. 2, 2002, at 3216.

50. *Boeing, Hughes Accused of Giving Rocket Data to Chinese Illegally*, SAN DIEGO UNION-TRIB., Jan. 2, 2003, at A6.

51. *Id.*

Hughes and Boeing still face restrictions of sales overseas and heavy fines.⁵²

Syria, which has been accused of supporting terrorism through the Iranian-backed Lebanese group Hezbollah, has fewer U.S. sanctions than any other country on the State Department's list of nations that support terrorism.⁵³ Congress recently passed the "Syrian Accountability and Lebanese Sovereignty Restoration Act of 2003" which bans the export of dual-use items until Syria meets several conditions.⁵⁴ Even then, Syria may continue to receive shipments of dual-use items from the United States, mostly because the administration frequently turns a blind eye as a way of thanking Syria for its help on other fronts of the war on terror.⁵⁵

There are other concerns beyond the direct transfer of illicit technology between U.S. companies and foreign countries. Due to an ability to follow-up on the end-use of many dual-use technologies, the dilemma often arises where one buyer, who may be approved for exporting certain technology, transfers that same technology to an unapproved buyer. For example, the air defense system used by the former Iraqi government was upgraded with fiber optic technology sold to China by the United States and then installed in Iraq by Chinese engineers.⁵⁶ Similar situations arise when a business partner in an international joint venture transfers shared U.S. technology to a buyer not approved under any U.S. regulatory export scheme, such as North Korea, or when a U.S. company receives technology from one country (for example, Russia), and then transfers that information to another country (like France). Once in U.S. hands, the government considers it U.S. technology and the subsequent transfer may violate export restrictions.⁵⁷ Siemens, a German company, legally sold krypton electronic switches to Iraq, supposedly for use by doctors to break up kidney stones.⁵⁸ When Saddam asked for another 120 parts, the company became suspicious, and then realized that the switches could also be used to trigger nuclear devices.⁵⁹

52. *Id.*

53. Susan Taylor Martin, *Experts Disagree on Dangers of Syria*, ST. PETERSBURG TIMES, Nov. 3, 2002, available at http://www.sptimes.com/2002/11/03/Worldandnation/Experts_disagree_on_d.shtml (last visited Nov. 21, 2003).

54. *Id.*; see also S. 982, 108th Cong. (2003).

55. *Id.*

56. Sievert, *supra* note 13, at 91 n.19.

57. This is true even if Russia and France directly share technology.

58. See Wortzel, *supra* note 2.

59. *Id.*

C. The EAA Legislation

Senate Bill 149 (S.149), intended to revamp the EAA, passed the Senate in September 2001. Since that time, the world has changed. Yet Congress has made no effort to reintroduce EAA legislation. More than ever, the United States needs an export control regime that advances the twin goals of protecting national security and promoting the international competitiveness of U.S. industries.⁶⁰

The bill approved by the Senate to renew the EAA "recognizes and seeks to balance three important U.S. policy interests."⁶¹ First, there is the U.S. national security interest in controlling the export of dual-use goods, services, and technologies to (a) limit the military potential of countries that threaten the United States or its allies; (b) impede the proliferation of weapons of mass destruction and the means to deliver them; and (c) deter international terrorism.⁶² Second, there are the U.S. interest in promoting U.S. exports and maintaining U.S. leadership in the global economy.⁶³ Third, the United States has strong foreign policy interests in promoting international peace, stability, and respect for fundamental human rights, and this legislation establishes the principles for effective use of economic sanctions, including foreign policy export controls, to promote such interests.⁶⁴

Senator Michael Enzi (R-Wyo.), the principal author of S.149, plans to reintroduce the bill in the near future with changes designed to attract House support.⁶⁵ He still believes the bill is a "good piece of legislation" but considers the bill dead in terms of congressional approval.⁶⁶ In an odd twist of fate for Republicans, Senator Richard Shelby (R-Ala.) took over as chairman of the Senate Banking Committee when the Republicans recaptured control of the Senate in November 2002.⁶⁷ Shelby is a longtime opponent of easing controls over exports and was the only member of the committee to vote against S.149.⁶⁸ Some predict Shelby may try to rewrite the

60. Chart summarizing status of key legislation, 19 INT'L TRADE REP. (BNA) No. 34, Aug. 22, 2002, at 1473 (quoting Undersecretary of Commerce for Industry and Security Kenneth Juster).

61. S. REP. NO. 107-010 (2001).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Sen. Enzi Plans to Reintroduce EAA Bill with Changes to Attract House Support*, 19 INT'L TRADE REP. (BNA) No. 48, Dec. 5, 2002, at 2077.

66. *See Yerkey, supra* note 15; *see also Yerkey, supra* note 15.

67. *See discussion supra* note 60.

68. *Id.*

legislation to bring it in line with the legislation approved by two committees in the House (the HIRC and HASC).⁶⁹

Supporters of the HIRC and HASC versions of the bill argue that S.149 would threaten national security by loosening U.S. export controls.⁷⁰ Supporters of S.149 (including the Bush White House and U.S. industry) argue that the House versions effectively tighten restrictions on high-tech exports to the detriment of U.S. competitiveness abroad without enhancing U.S. national security in a significant way.⁷¹ Enzi believes the rewritten bill will address many of the concerns raised by Shelby and supporters of the House versions.⁷² In a letter to National Security Advisor Condoleezza Rice in early 2003, Shelby and other senators said they wish to work with the administration to craft a new EAA that will improve the ability of the government to prevent dual-use technologies from aiding potential enemies.⁷³ Specifically, Shelby has proposed providing the State, Defense, and Homeland Security departments with the lead decisionmaking roles in the export licensing process.⁷⁴ He wants to provide a predictable and durable regulatory environment for U.S. companies, allowing them to be competitive in the global market. At the same time, he wants to ensure that the Defense Department can add or remove items from the list of controlled items.⁷⁵ Shelby would also require the concurrence of all the national security agencies for the approval of licenses and would eliminate the ability to decontrol critical products through foreign availability or mass-market determinations.⁷⁶ These are effective and fair proposals that are a step in the right direction toward repairing the EAA.

U.S. companies support S.149 as passed by the Senate two years ago and have called on Shelby to rethink his long-standing opposition to relaxing restrictions on dual-use and high technology exports.⁷⁷ The President of the National Foreign Trade Council has called the bill S.149 a "solid compromise" and said it would be "very hard to imagine that this administration would support it if it in any way

69. *Id.*

70. *See generally* Yerkey, *supra* note 14.

71. *See generally* Yerkey, *supra* note 15.

72. *Id.*

73. *See* Yerkey, *supra* note 16, at 664-65.

74. Gary G. Yerkey, *Sen. Shelby Plans New Export Control Bill with National Security Agencies Taking Lead*, 20 INT'L TRADE REP. (BNA), Mar. 13, 2003, at 450, 450 n.11.

75. *Id.*

76. *Id.*

77. Gary G. Yerkey, *Companies Urge Shelby to Rethink Approach to Export Controls as Senate Banking Chair*, 19 INT'L TRADE REP. (BNA), Nov. 21, 2002, at 1983, 1983 n.46.

compromised our country's security."⁷⁸ Industry leaders stress that exporters of dual-use items face challenges in the competitive global marketplace that justify relaxing certain restrictions of exports, even in a time of increasing security concerns and growing terrorist threats.⁷⁹ They argue that if commercial items comparable to those made in the U.S. are available elsewhere in the world, then tight restrictions and long waits for licenses merely punish U.S. businesses without preventing enemies from gaining access to the items they seek.⁸⁰ This argument fails for two reasons. First, if the items were truly available from other countries, enemies of the United States would not be so eager to get their hands on the U.S. technology when it was available elsewhere.⁸¹ Second, just because enemies of the U.S. can get dual-use items from other places does not mean the United States should just hand them over.⁸² There is an interesting analogy for this argument: we do not tell the local Wal-Mart it is okay to sale guns and weapons to felons just because they can get illegal guns and weapons on the black market.⁸³ We should follow similar principals for dual-use items.

However the legislation turns out in the end, the Bush administration believes any EAA bill should reflect important principles such as the notion that dual-use export controls must advance U.S. national security and foreign policy interests while reducing illegal traffic in dual-use goods.⁸⁴ This echoes the tension that legislation in the area of export controls has always faced, tension between companies that want to export high-tech products to countries such as China and the U.S. government that wants to protect national security interests.⁸⁵ In light of September 11, 2001, it is likely that the new EAA will not ease restrictions on exports, but instead will strengthen protections for national security.

III. TROUBLES WITH THE SYSTEM

A. Confusion and Chaos for U.S. Business

Under the EAR, there is a highly technical 170-page manual called the Commerce Control List (CCL).⁸⁶ To determine if exporting

78. *Id.*

79. *Id.*

80. *Id.*; see also Broadbent, *supra* note 6, at 53.

81. Sievert, *supra* note 13, at 107.

82. *Id.*

83. *Id.*

84. See Yerkey *supra* note 14, at 145.

85. *Id.*

86. 15 C.F.R. § 774.2 (2003); see also Sievert, *supra* note 13, at 93.

to a particular country is even permitted, a company must get an Export Control Classification Number (ECCN) from the CCL that it then applies to a country chart.⁸⁷ In addition, other sections of the EAR have lists of countries, institutions, and individuals that must be denied exports.⁸⁸ The regulations further advise the companies against exporting an item if they know or have reason to know the product will be used in chemical, biological, or nuclear activities.⁸⁹ U.S. companies also have to ensure they do not engage in additional export and acquisition violations.⁹⁰ Finally, there are exceptions, and exceptions to the exceptions, for all of the above.

All of this is extremely confusing for U.S. companies attempting to determine whether they can legally ship certain goods or transfer certain technologies to buyers ranging from governments to individuals. While larger companies can afford a compliance staff, such as an "empowered official" under ITAR, to decipher the myriad of rules and regulations, smaller firms have little or no expertise or experience in U.S. export laws.⁹¹ The cost to companies in the form of lost sales, and the decrease in foreign market share attributed to the perceived inability of U.S. firms to deliver the goods is significant.⁹² In a case before the Eighth Circuit, the defendant was an expert in the area of export control and defended himself on the grounds that the laws were too confusing to understand.⁹³ The court rejected his argument.⁹⁴ Unconstitutional vagueness challenges to the export licensing criminal statutes and regulations have been consistently rejected by federal courts.⁹⁵ Thus, the judiciary offers little hope to businesses that were confused by the regulations and inadvertently violated them in a technology transfer.

Another complication to the U.S. export regime is how to verify compliance with the many treaties, regulations, and rules (both U.S. and international), while protecting confidential business information (CBI). The threat to CBI grows out of the need to gather information regarding the use of dual-use technology and substances widely

87. Sievert, *supra* note 13, at 93.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 94-95.

92. Broadbent, *supra* note 6, at 51, citing Steven D. Overly, *Regulation of Critical Technologies Under the Export Administration Act of 1979 and the Proposed Export Administration Amendments of 1983: American Business Versus National Security*, 10 N.C. J. INT'L L. & COM. REG. 423, 446 n.157 (1985). See generally Michael T. Burr, *Post 9/11 Regulations Force In-House Counsel to Re-Evaluate Governmental Relations and Compliance Programs*, CORP. LEGAL TIMES, Nov. 2002, at 1.

93. See *United States v. Gregg*, 829 F.2d 1430, 1436 (8th Cir. 1987).

94. *Id.*

95. See *United States v. Geissler*, 731 F. Supp. 93 (E.D.N.Y. 1990).

possessed by private industry.⁹⁶ Technology and products used in sophisticated weaponry also has important commercial applications; thus, the industries regulated by export controls are often leading-edge industries that have invested heavily in research and development.⁹⁷

CBI has such high value to the companies in these industries that its loss is a serious threat to firms, and if it may put them out of business, they will likely oppose more strict regulation.⁹⁸ To protect national security, regulation needs to be increased to ensure the terrorists of the world do not get their hands on U.S. dual-use technology. At the same time, companies are worried about other countries or companies stealing their technology for commercial advantage. International cooperation can be achieved only if private firms have assurances that their CBI will be protected. If companies feel secure that their technology will be protected, they are more likely to cooperate with regulation.

B. Bureaucratic Issues

The expired version of the EAA recognizes the U.S. export policy restrictions and places a premium on exports, while continuing to acknowledge national security concerns and emphasizing the need to control dual-use technology transfers.⁹⁹ It attempted to simplify licensing under the multi-tiered group of rules, regulations and federal agencies. Unfortunately, it still failed to streamline licensing procedures.¹⁰⁰ Simple licensing procedures were impossible to implement,¹⁰¹ as a company attempting to ship one product might have to deal with six agencies—Departments of State, Commerce, Customs, Defense, Energy, and Treasury.¹⁰² In the case of dual-use items, it is often unclear whether such technologies and goods should be governed by the ITAR or EAR.¹⁰³

For example, the Bureau of Industry and Security (BIS) (formerly the Bureau of Export Administration),¹⁰⁴ part of the Department of Commerce, publishes the EAR, maintains the

96. Barry Kelman et al., *Disarmament and Disclosure: How Arms Control Verification Can Proceed Without Threatening Confidential Business Information*, 36 HARV. INT'L L.J. 71, 74 (1995).

97. *Id.* at 74-75.

98. *Id.* at 76.

99. Broadbent, *supra* note 6, at 51.

100. *Id.*

101. *Id.*

102. Sievert, *supra* note 13, at 95.

103. Berne C. Kluber, *Global Distributions: The Effects of Export Controls*, 23 HOUS. J. INT'L L. 429, 456 (2001).

104. Industry and Security Programs; Change of Agency Name, 67 Fed. Reg. 20,630 (Apr. 26, 2002) (to be codified at 15 C.F.R. Chapter VII).

Commerce Control List (CCL), and is charged with enforcing the EAR.¹⁰⁵ However, the Office of Defense Trade Controls (ODTC), part of the State Department, is in charge of determining which licensing regime applies to dual-use items.¹⁰⁶ This means that an exporter of a dual-use item goes to ODTC to see which licensing regime applies to the item, and if it falls under the EAR, the BIS has identified twenty-nine steps involved in determining whether an export is subject to the EAR. At this point, the exporter has not even begun to determine licensing requirements if the item is subject to the EAR.¹⁰⁷ Bear in mind that this is an oversimplified example of what a company must actually undergo with all its dual-use items.

Extensive bureaucracy is a critical problem, often confusing companies more than assisting them, and hindering the ability of the regulations to protect national security.¹⁰⁸ It also adversely affects commerce by sending buyers elsewhere to find goods.¹⁰⁹ The existing bureaucracies and administrative mechanisms make sales more difficult for U.S. companies. In one example, a U.S. manufacturer developed a longstanding relationship selling aircraft components to a U.K. aircraft manufacturer.¹¹⁰ In 1989, the Customs Service prevented the export of these components because it unilaterally determined that the parts had potential military uses.¹¹¹ This mistake was eventually cleared up, but had caused unnecessary delay, costing the U.K. importer and blemishing a lucrative relationship with the U.S. exporter.¹¹²

Much of the problem stems from policy disputes among the agencies involved in export regulation. For example, the Department of Commerce might approve the shipment of certain technology even after the Department of Defense objected to it.¹¹³ It is not hard to understand why such disagreements are so common. Each agency has

105. Kluber, *supra* note 103, at 440.

106. *Id.* at 441.

107. *See id.*

108. Sievert, *supra* note 13, at 95-96.

109. *See* Broadbent, *supra* note 6, at 51 (overly restrictive unilateral export controls are self defeating); *see also* Sievert, *supra* note 16, at 96.

110. Trevor Hiestand, *Swords into Plowshares: Considerations for the 21st Century Export Controls in the United States*, 9 EMORY INT'L L. REV. 679, 683 (1995).

111. *Id.*

112. *Id.*

113. *See* Sievert, *supra* note 13, at 96. One such dispute involved the shipment of glass fiber technology to Iraq before the Gulf War. *Id.* Though the technology could be used in missile nose cones, military aircraft, and nuclear weapons, it could also be used in boat hulls and golf clubs. *Id.* The Department of Commerce permitted a U.S. firm to ship the technology despite objections from the Department of Defense (who incidentally had requested other countries not ship similar products to Iraq). *Id.*

a different mission. Commerce is supposed to advance trade,¹¹⁴ while Defense concentrates on national security and military.¹¹⁵ State is involved in promoting international relations and Customs is left with the job of enforcement. With so many competing goals, it is no wonder that agreement on exporting already complex dual-use technology and products is nearly impossible.

C. End-use and End-user Issues

End-user and end-use verification are related concepts. The goal of end-use verification is to determine *what* a technology or a good is used for after it is shipped to the purchaser.¹¹⁶ This is relevant for dual-use items, which by their very nature have differing uses, and the manner in which they are used is very important. For example, there is a huge difference between using glass fiber technology for sporting goods and using it to improve weapons such as guided missile components.¹¹⁷ As an example of the failure of the EAA to effectively regulate end-use, in the 1980s the glass fiber technology was shipped to Iraq despite the fact that the end-user was known to be involved in developing missile technology (thus possibly having an end-use of military nature) because the Commerce Department's BIS did not require an export license for the sale of "civilian" glass fiber technology.¹¹⁸

On the other hand, end-user verification concerns *who* is actually going to use the dual-use item.¹¹⁹ For example, after the legal (and licensed) transfer of dual-use technology from a U.S. company to a Russian company, the Russian business then sells the technology to China or Iran. There is no mechanism for the government to track the item once it approves the initial sale and thus no way for the U.S. to verify which country is getting which technology.¹²⁰

The EAR lists a number of prohibitions that are based on the identity of the end-user or the end-use.¹²¹ An exporter should refrain from exporting any product without a license to any party if that exporter knows that the product will directly or indirectly be in used in the research or production of nuclear, chemical, or biological weapons.¹²² However, under the current approval system, once a

114. Commerce appears to have adopted a hands-off policy to regulation, giving only grudging support to curb exports of dual-use goods. See Neil Munro, *Hands Off on High Tech*, 35 NAT. J. No. 3, Jan. 18, 2003.

115. See generally Sievert, *supra* note 13; Munro, *supra* note 114.

116. See generally *id.*

117. Hiestand, *supra* note 110, at 700.

118. *Id.*

119. See *id.*

120. See Kluber, *supra* note 103, at 451-52.

121. *Id.*

122. *Id.*

dual-use technology license is given, the BIS finds it difficult to monitor the actual uses of that item.¹²³ In the international arena, among other proposals to strengthen export controls, the United States has been pushing for closer examination of the end-use of exported items.¹²⁴ As of the December 2002 annual plenary meeting, the proposal had not been adopted by Wassenaar.¹²⁵ A U.S. official remarked, "We see no good reason why any country that claims to be serious about nonproliferation and antiterrorism would oppose these proposals to strengthen the credibility and effectiveness of the Wassenaar Arrangement."¹²⁶

Although the United States has long known that China, Russia, and North Korea provide materials that can be used for military purposes to dubious states, U.S. allies have contributed this danger.¹²⁷ As can be seen from the examples in Section IIB, many U.S. and European goods end up in the wrong hands overseas.¹²⁸ This is the problem with most export control regimes—while raising fences on certain goods and lowering them on others, there is no effective mechanism in place to monitor what happens to those dual-use goods that are shipped to approved countries. While a license may be granted allowing the sale of aluminum tubing that can be used for bikes or nukes to France, we do not know what France may subsequently do with the good. France could sell it to China (they allegedly did sell certain illicit items to Iraq), and while only political pressure from the U.S. could be used to stop the subsequent sale, the most likely scenario is that the U.S. will not even know of the sale to China (the U.S. certainly did not know of the sales to Iraq until after Saddam was ousted).¹²⁹ This is because there is nothing in the EAA or any other export control regime that has a follow-up requirement for the U.S. company making the original sale or for an end-use verification by the U.S. government.¹³⁰ In Congressional hearings after the Gulf War it was revealed that of 771 export licenses granted for Iraq, only one was ever checked for its end-use to ensure it was being utilized for civilian purposes.¹³¹ A former Chairman of the

123. Hiestand, *supra* note 110, at 722.

124. Jamil Jaffer, *Strengthening the Wassenaar Export Control Regime*, 3 CHI. J. INT'L L. 519, 520 (2002).

125. *U.S. Again Fails to Win Full Support for Tightening Export Controls in Wassenaar*, 19 INT'L TRADE REP. (BNA) No. 50, Dec. 19, 2002, at 2146.

126. *High-Level U.S. team traveling to Europe to press case for strengthening Wassenaar*, 19 INT'L TRADE REP. (BNA) No. 18, May 2, 2002.

127. *Know Thine Enemy—Weapons Proliferation*, ECONOMIST, Feb. 2, 2002, at 28, 28.

128. *Id.*

129. *Id.*

130. Sievert, *supra* note 13, at 98.

131. *Id.*

House Oversight Committee complained that the “Commerce Department issues licenses for commodities not knowing if the goods are what they purport to be; ever reach their intended destination; or are used for the stated legitimate purpose.”¹³²

Further, if an U.S. company determines in good faith it does not need a license to ship to an overseas purchaser, the exporter never has to ask the buyer exactly how the item will be used by that particular buyer,¹³³ much less others down the line who might acquire the item from the initial purchaser. In such general delivery cases (where no license is required), there is absolutely no statutory “duty to inquire” as to the end-use of an item.¹³⁴ At least with those goods and technologies that require a license, there is some inquiry that the company must do as to the end-use of a product.¹³⁵ The lack of a duty to inquire in general delivery cases might have its greatest effect when a U.S. company sells items to an intermediate or affiliate in a country where no license is required and with an export system less restrictive than our own. For example, if an Italian company orders a dual-use good or technology with the unstated intent of reselling it to China, most U.S. companies will not think twice about shipping the item.¹³⁶ Technically speaking, they can do it guilt-free because they have not broken the law.

The BIS does advise companies to look for “red flags” that a product is destined for a nuclear, chemical, or biological weapon use.¹³⁷ When a license is necessary, companies might have to obtain an “end-user certificate” from the buyer stating that the product will neither be used for a nuclear, chemical, or biological weapons program nor be resold or transferred without approval of the U.S. Department of State.¹³⁸ However, there is a big distinction between requiring a company to verify end-use for fear of criminal sanctions and to simply ask them to be on the “look out” for questionable exports in a fiercely competitive global market.¹³⁹ Without a comprehensive follow-up program, the government must rely on the end-user certificates signed by foreign buyers to provide they will not transfer the product to others.¹⁴⁰ The problem is that many countries have a fundamental objection to the extraterritorial application of U.S. export control regulations over items once they have left U.S. borders.¹⁴¹ It should be clear that the certificates not to re-export are

132. *Id.*

133. Sievert, *supra* note 13, at 97.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See Sievert, *supra* note 13, at 98.

140. See *id.*

141. See *id.*

little more than “paper salve to the conscience of the government and U.S. corporations,” and they cannot prevent the repeated transfer of sensitive dual-use technology to U.S. adversaries.¹⁴²

D. *The International Regime*

On October 25, 2002 the General Accounting Office (GAO) released the results of a 13-month study of four international regimes intended to halt weapons proliferation.¹⁴³ Among these four regimes was the Wassenaar Arrangement.¹⁴⁴ While the report notes that experts believe the four regimes included helped limit worldwide exports of dangerous goods and technologies, the GAO also found that measuring the success of each regime was difficult.¹⁴⁵ The two main shortcomings identified in the report are: “(1) members do not share adequate information with each other in a timely manner about their approval and denial of exports, and (2) they fail to implement regime decisions quickly and consistently enough so that members’ export controls are uniform.”¹⁴⁶ The voluntary nature of the regimes also encumbers them, as well as the lack of monitoring and enforcement mechanisms.¹⁴⁷ The report cites Russia as a state pursuing policies at odds with the regimes’ purposes, offering as evidence “a January 2001 shipment of nuclear fuel to India despite the objections of 32 other states.”¹⁴⁸ Other obstacles to effectiveness include the resistance of European and former communist countries to U.S. pressure to tighten export controls, some members lack institutional capacity and resources effectively to implement controls, and a growing inability to agree upon which countries require stricter controls.¹⁴⁹

Specifically looking at Wassenaar, the report called a “notable accomplishment” its “successful development of an agreement among its members for guidelines on shoulder-fired missiles such as the Stinger”.¹⁵⁰ However, the report also quotes the former Secretariat as saying “the achievements of the Wassenaar Arrangement are limited and that ‘there have been no spectacular results,’ but that the situation would be worse without the Arrangement.”¹⁵¹ The

142. *See id.*

143. Boese, *supra* note 26.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Michael Beck & Seema Gahlaut, *Creating a New Multilateral Export Control Regime*, ARMS CONTROL TODAY (Apr. 2003), available at http://www.armscontrol.org/act/2003_04/beckgahlaut_apr03.asp (last visited Nov. 21, 2003).

150. October 2002 GAO Report, *supra* note 34.

151. *Id.*

“reporting information on export denials for Wassenaar members is generally slow,” and the report also notes the lack of a “no-undercut” policy in the Arrangement, a provision present in the other three regimes.¹⁵² Though Wassenaar does require members to share information on approved licenses, it cannot be used beneficially to identify “undercuts of license denials, items approved and transferred, or recipients of the items.”¹⁵³ In other words, the information is useless by the time the United States receives it. The GAO noted that some members take longer to adopt agreed upon changes, and in the case of Wassenaar, the United States was frequently the guilty party.¹⁵⁴ For example, “while the European Union was able to adopt December 2000 plenary changes within 3 months, the United States did not adopt all the changes until 15 months later,” in March 2002.¹⁵⁵

The GAO found three interrelated obstacles to strengthening multilateral export control regimes.¹⁵⁶ First, “efforts to strengthen the regimes have been hampered by a requirement to reach consensus among all members about every decision made and by the inability to enforce compliance with commitments in arrangements that are voluntary and non-binding.”¹⁵⁷ Second, the accelerating growth of technology and the increasing trade in sensitive items complicates efforts to bring into line export controls and keep control lists current.¹⁵⁸ Third, “the U.S. government has no specified or agreed-upon criteria for assessing regimes’ effectiveness.”¹⁵⁹

Applying these barriers to Wassenaar, “a single member’s objection can stalemate a regime decision.”¹⁶⁰ At the December 2002 plenary meeting, Russia blocked two U.S. proposals that would have improved the exchange of information among members and taken action to strengthen controls on exports of conventional arms and dual-use goods and technologies that could wind up in the hands of terrorists.¹⁶¹ Efforts by Wassenaar members to agree upon countries of concern and regions of unrest have failed because of a lack of accord.¹⁶² As a result, each member unilaterally determines which countries to target when implementing export controls.¹⁶³ Arrangement members have been able to agree upon Iran, Iraq,

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. October 2002 GAO Report, *supra* note 34.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. October 2002 GAO Report, *supra* note 34.

163. *Id.*

Libya, and North Korea as countries of serious concern.¹⁶⁴ Noticeably missing are states like Syria and other middle-eastern countries that might harbor terrorists.

The rapid pace of technological change and growing supply of sensitive items have further complicated efforts to harmonize Wassenaar. These quickly evolving technologies have a specific impact on dual-use items, such as computers, semiconductor manufacturing, and information technologies.¹⁶⁵ Wassenaar has "experienced prolonged discussion and disagreements over how or even whether to maintain such items as high-speed computers on its control lists."¹⁶⁶ The very nature of dual-use items further spurs debate on what should be on a control list and what should be excluded from an export control regime.¹⁶⁷ The trade of controlled items among nonmember countries with weapons programs further undermines efforts to control the spread of sensitive technology.¹⁶⁸

Despite the U.S. government's policy of strengthening the effectiveness of multilateral export control regimes, neither the U.S. government, member governments in the regimes, nor the regimes themselves have established clear measures for evaluating the regimes' effectiveness.¹⁶⁹ The EAA bill as passed by the Senate in 2001 would require monitoring and annual reporting on the regimes' effectiveness,¹⁷⁰ though currently the U.S. export control regime contains nothing to evaluate the efficiency of Wassenaar.¹⁷¹ The GAO further found "that several government officials and industry representatives noted that the mission, obligations, and political commitment of the Wassenaar Arrangement are not as clear as those of other regimes."¹⁷²

Recalling that Wassenaar succeeded COCOM, the most notable difference from the previous regime was the lack of a veto mechanism in Wassenaar.¹⁷³ This was a result of a lack of consensus among nations that established the regime in 1996.¹⁷⁴ The net result of this situation is that members who deny exports are essentially notifying all other regime members that there may be an export opportunity available to them.¹⁷⁵ Notification to the denying country is only

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. October 2002 GAO Report, *supra* note 34.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Jaffer, *supra* note 124, at 521.

174. *Id.*

175. *Id.*

required after the granting country has actually granted the export license.¹⁷⁶ Essentially, the current Wassenaar agreement offers little chance for an export-denying country to exercise any influence over other members prior to their transfer of dual-use items.¹⁷⁷ One proposal the United States has advanced (and Russia has blocked) recognizes that a veto mechanism is unworkable in a broad agreement like Wassenaar, and so advocates the use of mandatory denial consultations.¹⁷⁸

IV. RESOLUTIONS

There are a number of different proposals and ideas aimed at improving the U.S. export control regime. Few commentators argue that strengthening the multilateral export control regime would fail to enhance the U.S. ability to track and control those who get sensitive dual-use technology and goods.¹⁷⁹ As discussed earlier, the twin objectives of the U.S. export control regime are (1) protecting and enhancing national security and (2) promoting the international competitiveness of U.S. industry in the global marketplace.¹⁸⁰ The delicate balance that must be struck between these two goals requires careful thought and tough decisions. U.S. industries will continue to push for relaxed export controls, while proponents of regulation (particularly the Defense and Homeland Security Departments) will continue to fight for ever higher fences and stricter licensing requirements. As Congress takes up the issue of refining the Export Administration Act in the near future, there are four considerations that can help improve national security without too severely restricting exports. They focus on improving the information available regarding exports and their end-uses, on strengthening Wassenaar because it offers perhaps the most promising chance for international cooperation on the transfer of dual-use items, and finally on eliminating some of the bureaucratic red tape that has confused U.S. businesses over the years and cost them millions, which can be achieved by moving oversight of dual-use exports to the Homeland Security Department.

176. *Id.*

177. *Id.*

178. *Id.*

179. *See Jaffer, supra* note 124, at 521.

180. *See id.*

A. End-use/End-user Verification

Any effective export control regime should have mechanisms in place that can identify the end-uses and end-users of dual-use goods and technologies. Despite the fact that there is a list in the EAR that regulates exports based on the identity of end-users and end-uses, it has fallen short of adequately addressing national security concerns.¹⁸¹ Further, leaving it to the private sector to be on the watch for "red flags" is unrealistic because it assumes that businesses are spending time actually looking for suspicious behavior and that it is in their best interest to do so. There must be a system established to check the end-use of products as well as their end-user. Thus, an extensive verification provision should be written into the new EAA legislation. Senator Shelby has proposed that end-users that refuse to permit post-shipment verifications to ensure dual-use products are not being used for military purposes be barred from receiving any controlled items until verifications have been allowed.¹⁸²

One suggestion for such a mechanism has been to take advantage of ever-improving computer technology to eliminate difficulties in interpreting the regulations.¹⁸³ This would reverse the burden on companies in determining whether a license is required for exports of dual-use goods and technologies.¹⁸⁴ In sum, the system might work as follows. The government designates certain items that it wants to review (probably the most sensitive dual-use goods and technologies); the company sends a notice to the government that it wants to export technology or goods falling under the definition; and lastly, the government determines if a license is necessary and decides whether to grant the license.¹⁸⁵ This would allow the government and the exporting company to communicate with each other, a great benefit for both parties when faced with a hard decision concerning the necessity of a license. The company can ensure it is properly complying with the law, and the government will become more aware of the technology flowing out of the country. In addition, a database containing information on past exports could allow an

181. See generally Sievert, *supra* note 13, at 104; Yerkey, *supra* note 14.

182. Yerkey, *supra* note 14.

183. Sievert, *supra* note 13, at 104.

184. *Id.* at 105.

185. For a more detailed explanation of such a system, see *id.* For the purposes here, it is enough to say that a computer system can greatly enhance end-use and end-user verification.

exporter to check for similar goods and technologies when considering whether a license is necessary.¹⁸⁶

There is no reason to worry about the potential bureaucracy necessary to handle the system. First, if UPS can track the position of a package in transport within an hour of its last location, it is rather difficult to believe the government could not handle a similar system when national security is at issue. Second, the BIS already fields questions and inquiries; it would probably be more efficient to centralize them on a computer where the history of such requests could be viewed by future importers. Third, once the database is established, companies will be able to search for similar technology and rely in good faith on past results in determining whether a license is necessary to export certain dual-use goods and technologies. When a license is not required, companies could be required to send a simple email notifying the government of the purchaser and product.¹⁸⁷ Finally, the Customs Bureau has already begun to implement an electronic data interchange system to collect cargo information on imports and exports.¹⁸⁸ Linking this system to a database of licenses would be very effective in tracking the shipment of dual-use items.

A computer system with a database such as this will improve end-use and end-user verification in a number of ways. First, it removes the burden to watch for "red flags" from the companies and puts it back where it should be, with the government. What better way for a government to track the end-uses and end-users of certain dual-use goods than to have a database with easily accessible information on products and purchasers? If the government wants to understand the kind of technology Iran has been importing in the last two years, it can go to the database and call up all the U.S. exports to Iran. If the government notices suspicious patterns, it can take the appropriate action. A company trying to compete in a global market is less likely to notice "red flags" because it is not their first priority, however, the Department of Homeland Security and the Department

186. This database need not be extremely detailed, because most businesses would object to specific and probably confidential information being available for competitors to view. This is a CBI problem, however, the database can have enough general information about a product to give an inquiring company the ability to analyze whether a license was required in the case on the database, thus helping the company make a more informed decision about their own export. The database probably would not need to have the names of company's making license requests, just whether a license was determined by the government to be necessary, and if so, whether the government granted such license.

187. Taking this suggestion one step further, see Sievert, *supra* note 16, at 106 (discussing advantages of a computer system that would require exporters to make a reasonable inquiry regarding end-use in all cases, even where a license is not required).

188. R.G. Edmonson, *Exporters Face New Rules; They'll Have to Comply with Requirements Similar to Those Already Faced by Importers*, J. COM., Jan. 13, 2003, at 144, 144.

of Defense¹⁸⁹ are primarily concerned with national security and thus more likely to see the warning signs.

Second, the computer database creates a system whereby the government can follow up on the end-user of a good or technology. For example, say the United States is worried that France is selling technology legally acquired from an American company to Syria, a transaction that U.S. export controls would otherwise prohibit. Currently, there is no mechanism for checking what France is doing with the technology. This is partly because the U.S. is mostly unaware of France's exports because France is probably not on any list that requires an exporter to get a license for the transfer. With the database on a computer system, the government can track the technology that has been transferred to France, and then the government can follow up with the party in France to determine how they have used the technology. This, of course, requires cooperative efforts and general agreements among the international community to allow such a follow up.¹⁹⁰ Proposals for Wassenaar that focus on end-use verification have been made by the United States, but continue to be blocked by other countries (specifically Russia).¹⁹¹ Notably, Wassenaar implemented an electronic information sharing system in January 2002 called WAIS (Wassenaar Arrangement Information System).¹⁹² It allows members to post export denial notices as soon as the state's government denies the license.¹⁹³ This information could also be integrated into the system set up by the United States and used to further enhance the ability of the government to verify end-use. In the final analysis, a computer database would give the U.S. government a chance to determine the true end-user, whether French or Syrian.

B. Strengthen the Wassenaar Arrangement

In today's truly global marketplace, any effective U.S. export control regime must have an international multilateral agreement that can implement policies similar to those the United States recognizes in its own export control regime. Strengthening Wassenaar is the key to many of the proposals in this note.¹⁹⁴ Calls to strengthen Wassenaar are nothing new after September 11, 2001.

189. As opposed to the Department of Commerce, whose priority is promoting American exports.

190. See Wassenaar Arrangement discussion *infra* Part IV.B.

191. See generally Hiestand, *supra* note 110.

192. See October 2002 GAO Report, *supra* note 34.

193. *Id.*

194. See Part IV.A *supra* (discussing end-use/end-user verification) and Part IV.C. (discussing transparency).

Often the criticism focuses on member's incentives to act outside the regime, a lack of effective information sharing, and an absence of pre-export consultation.¹⁹⁵ In addressing these weaknesses, several proposals have been put forth. However, one common thread is that strengthening Wassenaar may be the most effective way of regulating dual-use exports.

Because Wassenaar is not a legally binding international treaty, a breach of the agreement does not violate international law.¹⁹⁶ Thus, only the voluntary commitment of each member that drives the regime. There is no concrete incentive, aside from acting in a politically acceptable or moral manner, that can prevent member states from acting outside the regime. This temptation to act outside the regime is exacerbated by the lack of consultations and deficient information sharing. By amplifying the distribution of information and implementing a denial consultation system, transparency can be increased. Transparency increases opportunities for negotiation or counter-measures designed to prevent future transfers.¹⁹⁷ Because transparency is the guiding principal behind achieving the objectives in Wassenaar,¹⁹⁸ increasing transparency will mean greater honesty in transfers, which means there is a greater likelihood of cooperation among members of Wassenaar. This all results in a stronger multilateral export regime for dual-use technologies and goods.

Information sharing was a problem identified in the recent GAO report on multilateral export control regimes.¹⁹⁹ Despite the fact that Wassenaar members are expected to share information on export licenses, according to U.S. officials, the data is gathered only twice a year and is aggregated to such a degree that it is virtually useless to identify who is granting which licenses to what country.²⁰⁰ In addition, due to the rapid pace of technological development any list of restricted items will frequently fall short of accurately reflecting the current concerns of member nations. The implementation of the electronic WAIS system is a step in the right direction toward increasing the sharing of information. It allows members almost instant access to license denials and grants. This makes it easier to identify countries undercutting the regime and also gives other

195. See Dursht, *supra* note 22, at 1079; Jaffer, *supra* note 124, at 519; see also October 2002 GAO Report, *supra* note 34. See generally Nicole Day, *The Canadian Connection: Why the State Department is Ignoring a Loophole in the Arms Export Control Act*, 28 GA. J. INT'L & COMP. L. 171 (1999); Karim K. Shehadeh, *The Wassenaar Arrangement and Encryption Exports: An Ineffective Export Control Regime that Compromises United States Economic Interests*, 15 AM. U. INT'L L. REV. 271 (1999).

196. See Dursht, *supra* note 22, at 1114.

197. Hiestand, *supra* note 110, at 721.

198. Because it is a voluntary arrangement, one member cannot mandate specific actions over another. See Dursht, *supra* note 20, at 1114.

199. See October 2002 GAO Report, *supra* note 34.

200. *Id.*

members a chance to exert political pressure before a state grants a license previously denied by another member.

The member states also need to increase the pace at which they share information. As mentioned earlier, a member could get away with reporting the grant of an export license where another member has previously denied such export until after the item has already been exported. In this situation, the other members could not really do anything to prevent the export. Requiring the exporting nation to report the export earlier is one way to allow other members to exert pressure in cases in which one member is acting outside the interests of the regime. In addition, more frequent reporting of license denials and grants would greatly enhance members' ability to determine what items should or should not be denied export licenses. Finally, with technology growing and changing at such a rapid rate, members need to be able to adapt to the changing international environment as necessary. As information is exchanged among members on a more frequent basis, they can assess more effectively the needs of the Arrangement regarding what items should be removed from or added to the restricted list.

Perhaps the most effective change to Wassenaar would be the implementation of a denial consultation system. There is no veto mechanism in Wassenaar and it contains only the weakest of "no undercut" provisions.²⁰¹ They require members to provide information about exports they deny and notification when a member transfers items that are identical to products denied by other members.²⁰² However, member nations can push these notification requirements to the point that they only notify the other members *after* the product is exported. While a veto provision sounds good in theory, allowing any one nation to absolutely prohibit the transfer of technology to a non-member in such a broad multinational agreement as Wassenaar is unrealistic and unworkable.

Mandatory denial consultations can provide the necessary mechanism for increasing transparency and dealing with states acting outside the interests of Wassenaar.²⁰³ The United States has been unsuccessfully pushing this denial consultation approach for years.²⁰⁴ Under this proposal, member states would be forced to

201. Jaffer, *supra* note 124, at 521.

202. *Id.* at 521-22.

203. One study suggests replacing the current consensus decision-making process with majority voting, formalizing the operations of the regime, introducing a dispute resolutions mechanism, creating a tiered list of end-users, and strengthening information-sharing requirements to include not only denial notifications, but approvals as well. See generally Beck & Gahlaut, *supra* note 149.

204. *High-level U.S. Team Traveling to Europe to Press Case for Strengthening Wassenaar*, 19 INT'L TRADE REP. (BNA) No. 18, May 2, 2002, at 787.

consult with one another before issuing an export license on a good that has already been denied to a non-member.²⁰⁵ If the member decides to go ahead with the transfer anyway, it would have to provide the denying nation with an explanation for its decision to grant the license.²⁰⁶

This system would increase transparency and strengthen Wassenaar in a number of ways. First, it provides members with a chance to exert pressure on other members before they grant an export license to a non-member. If France were considering granting an export license for a dual-use good to be transferred to a non-member, and the United States had denied a similar license previously, denial consultation would force the French to consult with the United States before granting the license. This affords the United States a chance to pressure France into denying the export license through political or diplomatic means. It also allows the United States to make clear the penalties France would suffer if it granted the export license.

Second, it keeps all members aware of the actions of other members. In this, it would prevent a member state from acting outside Wassenaar because the rogue member could no longer export dual-use items under the radar. No longer would member nations have an incentive not to report when they grant export licenses; mandatory denial consultations require nations to consult with one another. Without denial consultation, member nations can risk exporting dual-use goods previously denied exportation by other members because they only have to report the sale within 30 to 60 days of granting the license, which may possibly be after the transfer has occurred. Even then, member nations might hide the transfer to avoid inciting other members. With denial consultation, member nations must consult whenever a member nation has previously denied a license the exporting state is considering granting. Thus, other members will always know what goods might be going to which countries. If other countries go ahead with the export, at minimum the other members know which non-member has acquired a possibly dangerous technology. This increases transparency within the Wassenaar regime, which will strengthen its authority.

C. Develop transparency in the U.S. export control regime

As important as it is to increase transparency within Wassenaar, thereby strengthening the arrangement, it is just as important to strive for increased transparency within the U.S. export control regime. When countries are able to effectively track dual-use

205. Jaffer, *supra* note 124, at 523.

206. *Id.*

technology transfers, nations concerned with the potential development of weapons from such items are able to assess the threat posed by the unfriendly states that import such items.²⁰⁷ Such a system is considered "transparent." The mutual disclosure that is a characteristic of transparent systems and as opposed to supply-side regulation, fosters free trade.²⁰⁸ Thus, mutual disclosure should be a part of the government's relationship with U.S. businesses. The administration has made some effort to improve transparency in export controls with its Transshipment Country Export Control Initiative (TECI) led by the BIS and announced in October 2002.²⁰⁹ It has two main branches: government-to-government initiatives and government-to-private sector initiatives.²¹⁰ The goal of TECI is to build public-private partnerships with all the players involved in moving a product, thus building awareness of the problem of diverted goods. Other goals include developing channels of communication between industry and government and creating best practices standards.²¹¹ In other words, the TECI is an attempt to improve transparency. Its success remains to be seen.

It should be apparent by now that since Wassenaar is part of the U.S. export control regime, strengthening Wassenaar will enhance transparency within the U.S. regime. Through more efficient and timelier information sharing, and with the implementation of a mandatory denial consultation system, the driving principal of transparency behind Wassenaar can be strengthened. Naturally, as the United States becomes more aware of what other countries are doing in the international export arena, it will gain a better understanding of exports at home. If other countries are granting licenses for a particular item that the United States had previously restricted, and after denial consultations the United States reversed its position, then U.S. businesses benefit from the increased transparency because they can now transfer a good previously denied an export license.

Similarly, the United States needs to increase transparency vis-à-vis U.S. businesses. In May 2003, the BIS began seeking comments on best practices guidelines to help companies minimize the risk of sensitive exports being diverged illegally to countries or end-users of concern.²¹² To truly and effectively regulate exports in a manner

207. Hiestand, *supra* note 110, at 720.

208. *Id.* at 721.

209. William New, *Pushing Out the Borders*, 34 NAT'L J. No. 51, Dec. 21, 2002.

210. *Id.*

211. *Id.*

212. *Commerce Department Seeks Comments on Export Control "Best Practices" for Industry*, Bureau of Industry and Security press release (May 16, 2003), available at www.bxa.doc.gov (last visited Nov. 21, 2003).

consistent with the stated goals of protecting national security and enhancing U.S. competitiveness abroad, transparency (not to mention cooperation) must be key in the relationship between the government and the industry. A mandatory disclosure system established on a computer database can greatly advance this interest. Recently, U.S. Undersecretary of Commerce Kenneth Juster emphasized this need. In the context of the bombing of an Indonesian nightclub in October 2002 and other bombings in the Philippines, Juster said, “[t]his is not an issue government alone can handle. It has to be done in partnership with the private sector.”²¹³

Under a mandatory disclosure system, the BIS should have an easier time tracking the true application of dual-use technology.²¹⁴ The U.S. government could systematically verify the end-use by using the computer database system.²¹⁵ By requiring companies to register the transfer of certain items on this system, the company is making a necessary disclosure to the U.S. government. By maintaining the system in a way that allows companies to rely on previous licensing grants and denials, the U.S. government is disclosing to the industry what it requires of exports, making it easier for U.S. companies to comply with regulations. Thus, everyone benefits as transparency increases.

To garner the cooperation of U.S. industry in the endeavor, the government must make assurances that confidential business information will be protected. As mentioned, any computer database that allows companies to search past technology transfers will need to ensure that a company feels secure in its disclosure to the government. That means ensuring that the information accessible to the industry must protect the confidentiality of technology involved in these transfers. While a general description of the technology adequate to assist a company in determining whether a license is needed for an export should be on the system, more sensitive details necessary for the government in determining whether to grant the license request should not be included.

213. Reuters AlertNet, *U.S. Monitors Bali Blast Probe for Technology Used* (Oct. 21, 2002), available at <http://www.alertnet.org/thenews/newsdesk/BKK290352> (last visited Nov. 21, 2003).

214. See Hiestand, *supra* note 110, at 722. A central database would allow the U.S. government to track what kind of technology an American company has legally transferred to other countries. They can search by country or by the item of concern. This way, the government can follow up and make sure a country exported a dual-use item six months ago is not using it for military purposes.

215. See discussion *supra* at Part IV.A.

D. Give the Department of Homeland Security Oversight

Finally, the record of dual-use technology regulation is littered with obstacles in determining which agency has oversight of which technologies, uncertainty over who to get the correct license from, and inter-agency disputes over granting or denying licenses. Another consideration for Congress in drafting new EAA legislation must be whether to move regulatory power from Commerce to the new Homeland Security Department. The Bureau of Industry and Security should be moved, in its entirety, to the Department of Homeland Security. Already, the bill establishing the Department moved the BIS's Critical Infrastructure Assurance Office (CIAO) from Commerce to Homeland Security, but not its export control unit.²¹⁶ The issue has come up in early staff-level discussions, and may be pushed by members of the House and Senate when the legislation comes before Congress.²¹⁷ Senator Shelby has already pushed for giving the national security agencies the lead,²¹⁸ putting Homeland Security in charge simplifies the process of deciding who is in charge of what aspects of export control. The rationale for such a move would be that Commerce cannot be trusted with protecting national security because one of its principal responsibilities is promoting exports.²¹⁹ It also would be to eliminate bureaucratic confusion for U.S. companies and disputes among the differing departments that regulate dual-use exports.

Even before the Department of Homeland Security was created, arguments were being made for consolidating this important work.²²⁰ This approach called for staffing one export control office with members of each concerned agency.²²¹ The difficulty in this approach lies in determining which organization would be in charge of all the others (clearly it should be the Defense or Homeland Security Department rather than Commerce).²²² The reasoning is that national security trumps promoting the interests of U.S. exports.²²³ Finding the political will for such a move would prove difficult and potentially embarrassing for any administration. This problem is ameliorated by the creation of an entirely new department. Now that

216. *Congress May Weigh Moving Export Controls From Commerce Dept. to Homeland Security*, 20 INT'L TRADE REP. (BNA) No. 3, Jan. 16, 2003, at 92.

217. *Id.*

218. *See Yerkey*, *supra* note 14.

219. *Id.*; *see also* discussion *supra* at Part III.B.

220. Sievert, *supra* note 13, at 106.

221. *Id.*

222. *Id.*

223. *Id.*

the Homeland Security Department exists, moving control of dual-use export controls to it solves the political problems associated with moving multiple agencies.

Once oversight of dual-use technology is transferred to Homeland Security, that Department can create a central licensing authority in order to streamline the export control regime. This central licensing authority can maintain the computer database discussed above. It can administer the national mandatory disclosure system for U.S. industry exports and manage denial consultations for export issues that arise under Wassenaar. Supervising these various aspects of the dual-use export regime will only make the office more efficient and knowledgeable once it gets up and running.

In addition, though Homeland Security is primarily concerned with protecting the country from deadly threats, it is supposed to do so in a way that does not significantly alter the U.S. way of life. Thus, with dual-use goods and technology, national security can be protected without strangling U.S. industry in the international marketplace. It is also important to consider that Homeland Security is relatively new and still in the process of defining the exact contours of its mission. Thus, there is room for the new export control office to grow in its role within that Department.

This idea has received strong support from U.S. technology exporters, mainly because it could potentially erase inefficient and costly delays in export licensing.²²⁴ It would increase transparency, making it easier for businesses to identify which items need licenses. Having a central licensing authority would also give the industry a single agency to work with, furthering the two goals of the U.S. export control regime, which benefits us all.

V. CONCLUSION

Soviet leader V.I. Lenin went to his grave believing that one day the West would sell its adversaries the rope with which it would be hanged.²²⁵ The events of September 11, 2001 and recent revelations concerning the export of dual-use goods and technologies demonstrate that this belief is not unrealistic. As Congress and the White House attempt to write legislation recreating the EAA, it is imperative they keep in mind the balance they want to strike between the often competing goals of the U.S. export control regime: protecting national security and promoting U.S. industry in the international marketplace.

224. *Id.*

225. Wortzel, *supra* note 2.

The current dual-use export control regime suffers from many flaws. The myriad of statutes and regulations that govern dual-use technology transfers have created a bureaucracy that is unmanageable for both the private sector and the government. Wassenaar offers perhaps the best chance for truly effective international controls, though it suffers from deficient information sharing and lacks any effective provisions to prevent undercutting. Trying to understand and comply with the current system costs U.S. companies time, money, and business. Agency disagreements are well-known and often accepted as part of the process. Also, there is a serious inability to follow up on the end-use of dual-use technology as well as the end-user of such items.

The starting point for solving the many imperfections associated with the current dual-use export control regime is with the new EAA legislation. Congress should attempt to enhance end-use and end-user verification through the establishment of a computer database that can centralize and maintain records regarding export licenses. The U.S. needs to continue pressuring the members of Wassenaar to approve denial consultations and institute better information sharing provisions. Establishing the computer database and strengthening Wassenaar follow the principal of enhancing transparency, which is the backbone of any effective export control regime. By instituting a mandatory disclosure system for U.S. businesses, transparency will be further increased, as well as the ability to verify end-use and end-users. Finally, moving control over all dual-use items to the Department of Homeland Security will create a central licensing authority with the political ability to execute the many needed improvements.

It has become apparent that as the twenty-first century has dawned, the peace and prosperity of the late twentieth will not come as easily in the future as it has in the past. If anything, it will involve striking difficult balances between national security and economic viability. The importance of the Export Administration Act cannot be underestimated in establishing this balance. It can strengthen the U.S. export control regime while promoting the economic health of those in U.S. industry who export dual-use items. This issue must be dealt with soon; history has demonstrated crisis is usually required to invoke reform. As Micheal Beck and Seema Gaulaut of the Arms Control Association have put it:

Two possible futures await us. Either international efforts to strengthen the norms and legal barriers to weapons of mass destruction will be bolstered through a significantly improved regime or international efforts to monitor dangerous technologies and weaponry

will falter. If our choice is the latter, we will have repeated the mistake of selling the rope used to hang ourselves.²²⁶

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226. Beck & Gahlaut, *supra* note 149.

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