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REVIEW ESSAY

The Future of National Security Export Controls

BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION. By The National Academy of Sciences. Washington, D.C.: National Academy Press, 1987. Pp. xiii, 321. \$25.95.

*Reviewed by Donald H. Caldwell, Jr.**

I. INTRODUCTION

When the Export Administration Act comes before Congress for reauthorization in September 1989, business leaders seeking to eliminate many of its burdensome controls will find in this study a cache of powerful ammunition. Following a lengthy examination of American export regulation, this National Academy of Sciences panel¹ concludes that the export control policies of the 1980s may have become so restrictive in seeking to plug technology leakage from the United States to its adversaries that they have seriously impeded exports of United States high technology goods to legitimate purchasers. The unintended consequences have been twofold; first, an increase in sales of Asian and European high technology goods that are subject to less stringent restrictions and second,

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1. The 21-member panel was organized by the Committee on Science, Engineering, and Public Policy, a joint unit of the National Academy of Sciences, National Academy of Engineering, and Institute of Medicine. It was chaired by Lew Allen, Jr., director of the Jet Propulsion Laboratory at the California Institute of Technology and former Air Force Chief of Staff and National Security Agency Director. Other members included Rensselaer Polytechnic Institute President Daniel Berg, International Trade Relations Manager for Hewlett-Packard Co. Thomas A. Christiansen, Massachusetts Institute of Technology Provost John M. Deutch, former National Security Agency Director and former Central Intelligence Agency Deputy Director B. R. Inman, former Defense Secretary Melvin R. Laird, and Director of Economic Research of the AFL-CIO Rudolph A. Oswald. The study was supported by the Commerce, Defense, Energy, and State Departments; NASA; the National Science Foundation; the National Research Council Fund; and various scientific and engineering societies and industrial trade organizations.

a hastened decline of this country's technological supremacy. Controls on high technology goods now cost the nation's economy \$9 billion annually, resulting in a direct loss of 188,000 jobs.² The loss of export sales coupled with reduced investment in research and development raises the associated annual loss of domestic GNP to approximately \$17 billion.³

Faced with an alarming United States trade deficit,⁴ it would have been tempting for the panel to have labeled current national security export controls⁵ anachronistic and unworkable and to have called for their elimination. The panel instead patiently waded through uncoun- ted government documents—many of them highly classified—and inter- viewed hundreds of corporate and government officials here and abroad before reaching two conclusions. First, national security export controls should be made less complex and burdensome, focusing on critical tech- nologies rather than on ones of peripheral military significance. Second, the responsibility for safeguarding technological secrets should be spread throughout the Western alliance⁶ instead of resting primarily upon the United States. Implementing these proposals, the panel suggests, would result not in the "liberalization" of controls that the American military has feared but rather in greater efficiency in protecting the West's criti- cal technological assets.

2. NATIONAL ACADEMY OF SCIENCES, *BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION* 264 (1987) [hereinafter *BALANCING THE NATIONAL INTEREST*].

3. *Id.* This compares with total licensed United States trade of \$62 billion, *id.* at 269, and total United States exports of \$360 billion in 1985. *Id.* at 56. In 1985 approxi- mately 40% of all United States exports of manufactured goods were subject to govern- mental review and approval for national security purposes. See 4 Int'l Trade Rep. (BNA) 179 (Feb. 11, 1987)

4. The 1987 trade deficit reached a record \$171.22 billion. Wall St. J., Feb. 16, 1988, at 2, col. 3. The 1986 trade deficit totaled \$169.78 billion. The 1985 figure was \$139.69 billion. Wall St. J., Feb. 2, 1987, at 2, col. 2.

5. The phrase "national security export controls" refers to controls defined in the Export Administration Act of 1979. That act authorizes such controls "to restrict the export of goods and technology which would make a significant contribution to the mili- tary potential of any other country or combination of countries which would prove detri- mental to the national security of the United States." Export Administration Act of 1979, § 3(2)(A), Pub. L. No. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. § 2402(2)(A)). In addition to national security export controls, the United States imposes foreign policy export controls, controls to protect the domestic economy from the short supply of specific items, and controls to prevent United States companies from aiding the Arab boycott of Israel.

6. Throughout this review, West or Western includes Japan.

II. SIMPLIFYING EXPORT CONTROLS

Since 1949, the United States and its allies have imposed controls on exports to Warsaw Pact nations that would enhance the military capabilities of those nations.⁷ The aim of these restrictions since their inception has been to make it more difficult for the USSR to upgrade its military systems through Western technology and, at the same time, to force the USSR to commit substantial domestic resources to military research and development instead of profiting from the research successes and failures of the West.⁸ As evidence mounted during the 1970s of widespread diversion of American technology, particularly electronics and computers, to Soviet military production facilities, Congress took two further steps designed to improve the effectiveness of national security controls. First, in 1977, it extended the extraterritorial authority of the Department of Commerce to prohibit export of goods or data exported by any person subject to United States jurisdiction.⁹ Second, it substantially strengthened controls on dual use technology, defined as items with both commercial and military applications.¹⁰

These increasingly complex controls, however, provoked concerns about unintended results that might dampen the vigor of domestic re-

7. The United States imposed these controls under the Export Control Act, Act of Feb. 26, 1949, ch. 11, 63 Stat. 7 (codified as amended 50 U.S.C. app. §§ 2021-32 (1964)) (terminated 1969). This legislation was superseded by the Export Administration Act of 1969, Pub. L. No. 91-84, 83 Stat. 841 (codified at 50 U.S.C. app. §§ 2401-2413 (1976)) (superseded by the Export Administration Act of 1979).

The renewed international tensions that contributed to Congress' decision to maintain what were essentially wartime export controls also led, in 1949, to the founding of NATO and the other regional treaty organizations. To ensure the effectiveness of NATO and the other regional alliances, the United States transferred military technology (mostly in the form of hardware) directly to its allies. In addition, as Western Europe and Japan recovered from the war, they began to revitalize their industrial capabilities and to challenge what had been virtually a U.S. monopoly on advanced technology. . . . To prevent such technology from reaching the hands of potential adversaries, it became necessary to establish a mechanism to coordinate allied export control policies.

BALANCING THE NATIONAL INTEREST, *supra* note 2, at 73.

8. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 29.

9. Export Administration Amendments Act of 1977, Pub. L. No. 95-223, Title III, 91 Stat. 1625, 1629 (expired 1979). In June 1982 the Department of Commerce issued regulations banning the sale of oil and gas industry equipment to the USSR by foreign companies owned or controlled by United States firms. Although the Reagan Administration ultimately dropped the restrictions, this broad assertion of United States jurisdiction provoked outrage among European governments and business groups.

10. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. §§ 2401-2420 (1982)).

search and development and unnecessarily inhibit trade of high technology goods. The Export Administration Regulations (EAR) that exporters must comply with have expanded today to fill more than 570 pages of the Code of Federal Regulations. The EAR list of commodities subject to control contains 240 entries with classification descriptions ranging from the very specific ("e.g., 'pulse modulators capable of providing electric impulses of peak power exceeding 20 MW or of a duration of less than 0.1 microsecond, or with a duty cycle in excess of 0.005'") to the extraordinarily general ("e.g., 'other electronic and precision instruments, including photographic equipment and film, n.e.s. [not elsewhere specified], and parts and accessories, n.e.s.'").¹¹ One corporate executive has commented that the irrationality of current export regulations brings to mind the Talking Heads' film "Start Making Sense."¹²

As an illustration of this byzantine process, consider the following stumbling blocks for any company exporting controlled goods:

- The company must classify each item within the proper category set forth in the regulations.

- If the regulations require prior government approval for export of the item, the company must prepare and submit license applications. The company must train its staff to prepare the applications and to monitor their progress to insure they are not delayed or lost once submitted.

- The company must maintain detailed records of each shipment under an export license, submit to United States Customs a shipper's export declaration listing the license authority for each shipment, and make certain that all shipping papers contain the required destination control statements.

- The company must keep track of changes in the regulations and additions to the Table of Denial Orders, the list of companies denied the privilege of buying United States origin goods or technology.

- The company must monitor all of its transfers of technical data including employment of foreign nationals, servicing and installation activities abroad, and international telephone conversations to ensure that it has obtained the necessary license authority. The company often must gain prior United States government approval for a technology transfer or obtain a written assurance of compliance with federal law from the recipient of the technical data.

11. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 81-82.

12. See Transcript of A UNITED STATES CHAMBER [OF COMMERCE] CONFERENCE ON THE EXPORT ADMINISTRATION AMENDMENTS ACT OF 1985, at 59 (July 18, 1985) (statement of Dresser Industries executive Ardon Judd).

- The company must keep tight control over servicing, including the export of spare parts, to make sure it has first gained the necessary license authority before shipment.

- The company often must advise foreign affiliates and customers in procuring license authority for reexports of United States origin goods from one foreign country to another or for exports from a foreign country of a foreign-made final product containing United States origin components.¹³

The total processing time to obtain a license averages 54 days.¹⁴ It is therefore hardly surprising that 52 percent of high technology exporters report lost sales primarily as a consequence of export controls.¹⁵

One of the primary goals of the Export Administration Amendments Act of 1985¹⁶ was to reduce the burden of complex controls and thereby improve the competitive position of American goods in the world market.¹⁷ The panel flatly states that this has not occurred.¹⁸ It concludes that executive branch decisions on national security export controls should put greater weight on maintaining American technological strength, economic vigor, and allied unity. It recommends several specific changes in procedures. First, the government should implement prior legislation requiring the elimination of controls on technology widely available from other countries. The panel suggests that as a way of doing so Congress should set specific time limits for completion of foreign availability determinations in order to reduce the number of items controlled.¹⁹ Second, the Commerce Department should upgrade significantly the capacity and sophistication of its automated systems and the

13. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 111-12.

14. *Id.* at 113. In Japan, by contrast, the Ministry of International Trade and Industry (MITI) usually responds within three days to applications for exports to Free World nations. *Id.* at 113-14.

15. *Id.* at 116. In addition, 26% had business deals turned down by Free World customers because of controls and 38% had existing customers actually express a preference to shift to non-United States sources of supply to avoid entanglement in United States controls. *Id.*

16. Pub. L. No. 99-64, 99 Stat. 120 (1985).

17. See Note, *The Export Administration Amendments Act of 1985: A Reassessment and Proposals for Further Reform*, 19 VAND. J. TRANSNAT'L L. 811, 813 (1986).

18. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 17-18.

19. *Id.* at 27. The Commerce Department's decision in July 1986 to lift restrictions on automatic silicon wafering saws represents only the first time under the Export Administration Act of 1979 that controls have been relaxed for reasons of foreign availability. 3 Int'l Trade Rep. (BNA) 942 (July 23, 1986). See also 3 Int'l Trade Rep. (BNA) 1274 (Oct. 22, 1986); 3 Int'l Trade Rep. (BNA) 1535 (Dec. 24, 1986); and 4 Int'l Trade Rep. (BNA) 367 (Mar. 18, 1987).

quality of its in-house technical and analytic staff. Third, the President and Congress should lend a more attentive ear to industry in formulating an export policy. The panel recommends periodic meetings between the senior staff of the Economic Office of the President and the President's Export Council or other representatives of business to relay their concerns to the President. Fourth, technical judgment and overall balance should be restored to the licensing process. The panel pointed out that the center of decision making within the Defense Department has shifted from the office charged with research and engineering to the office responsible for policy. The government should reestablish a major role for the technical side of the Defense Department and reduce that Department's role in detailed license review as the Commerce Department takes parallel steps to further strengthen its licensing procedures.²⁰

Of these four specific proposals, only the first two are sufficiently concrete to reduce the drag of export controls on the domestic manufacturing economy. Clear deadlines and a larger, better trained staff could significantly reduce time delays. It is unlikely, however, that President Reagan will give greater weight to calls for free trade after consistently supporting Defense Department positions on export matters for seven years. Indeed, under a classified but highly publicized directive of the National Security Council, the Defense Department has been authorized to review export applications to fifteen free-world countries.²¹ Industry attempts to get a better hearing at the White House may have to await the outcome of the 1988 elections.

In addition, the panel's call for a reduced Pentagon role in formulating an export policy fails to adequately acknowledge the deep seated distrust between the Defense and Commerce establishments on export matters. Advocates of tighter national security export controls charge that the Commerce Department is a captive of the business interests it regulates and that its pro-trade bias inclines it to discount military concerns about dual use technology.²² Business groups counter that the Pentagon's focus on undermining Soviet military power predisposes it to ignore the damage that controls inflict on fragile high technology industries. The panel

20. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 26-27. In testimony before the House Science, Space and Technology Committee, Panel Chairman Lew Allen stated that the Defense Department exercises a "de facto veto" over export control proposals of the Commerce Department, which by law has authority over controls. See 4 Int'l Trade Rep. (BNA) 179 (Feb. 11, 1987).

21. Letterman, *United States Regulation of High-Technology Exports*, 20 INT'L LAW. 1147, 1176 (1986).

22. See 131 CONG. REC. S8922-23 (daily ed. June 27, 1985) (statement of Sen. Jake Garn (R-Utah)).

should have addressed these fears by considering Utah Senator Jake Garn's suggestion that the United States consolidate all export control administration within a new cabinet-level Office of Strategic Trade.²³ Although such an office would not eliminate the deep philosophical disputes over export control, it would place each view's advocates under one roof and subject them to a single chain of authority, making resort to White House arbitration between bureaucracies less frequent.²⁴

III. ENHANCING COCOM'S ROLE

In addition to calling for less complex and burdensome controls, the panel concluded that the responsibility for safeguarding Western technological secrets should be shared to a greater extent by our allies instead of resting primarily upon the United States. In order to limit availability of economic and military exports to communist countries, the United States and six of its European allies in 1949 formed the Coordinating Committee on Export Controls (COCOM).²⁵ COCOM today coordinates the efforts of its sixteen member-countries to block the export of any strategic commodities to any communist nation. By virtue of the hegemony it exercised over emerging technologies during the 1950s and

23. *Id.* Lawrence J. Brady, a former Deputy Director and Acting Director of the Commerce Department's Office of Export Administration, originally proposed the idea in 1980. Brady argues that the failure of government agencies in the control process to cooperate highlights the need for such an office. The proposal, he has testified, "is the only solution which will give the business community a central point of contact on all controls and give the Congress and [sic] organization accountable to the intent of the law." 4 Int'l Trade Rep. (BNA) 372 (Mar. 18, 1987). The General Accounting Office has opposed the proposal on grounds that it would be impossible to keep other agencies out of the control policy process. *Id.*

24. Assistant Secretary of Commerce for Trade Administration Paul Freedenberg testified before a congressional sub-committee that a primary reason controls have not been reduced as directed by the 1985 Export Administration Amendments Act is the absence of "an interagency consensus that the letter and spirit of the law be carried out." 3 Int'l Trade Rep. (BNA) 1247 (Oct. 15, 1986).

25. 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, 427 n.19 (1985). Headquartered in Paris, COCOM now includes Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom and the United States. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 137 (1987); *Reauthorization of the Export Administration Act: Hearings Before the Subcomm. on International Finance and Monetary Policy of the Sen. Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. 172, 177 (1983) (statement of William Schneider, Jr., Under Secretary of State for Security Assistance, Science and Technology).

1960s, the United States was able to carry out COCOM's mission with little help from its allies.²⁶ But the relative decline of its technological preeminence during the 1970s coupled with expansive East-West trade since the advent of the Détente era have forced the United States for the first time to seek much closer cooperation from its allies.²⁷

No event has fostered greater allied cooperation on exports, however, than the Soviet invasion of Afghanistan. Since December 1979, the United States has persuaded its fellow members to deny all exceptions for exports to the USSR that fall under COCOM's general embargo list.²⁸ In addition to tightening its own unilateral controls, the United States led a major effort to revitalize COCOM.²⁹ President Reagan persuaded allied leaders in July 1981 to organize the first ministerial level meeting of COCOM since the era of John Foster Dulles a quarter of a century before.³⁰

Since these initial agreements, COCOM has tightened some of its enforcement and licensing procedures, upgraded its Paris headquarters operations, and sought through diplomatic means to obtain the cooperation of non-member countries.³¹ Furthermore, it has admitted Spain into its

26. See Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255, 263 (1981).

27. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 75. "During this same period there were shifts in the economies of the Western nations that significantly changed the dynamics of export controls. Most important was that for many areas of advanced technology the civil sector began to lead the military, and sophisticated dual use items increased in relative importance in international trade. As a result, export controls reached an ever-growing share of U.S. Commercial exports." *Id.*

28. *Id.* at 136.

29. *Id.*

30. *Id.* This ministerial meeting, held in January 1982, launched a thorough review of COCOM's control lists and produced agreement on the need for national controls of "equal effectiveness." *Id.* at 136-37. A February 1985 meeting adopted expedited processing attention to the diversion of goods in transit and endorsed work on the means of controlling export of intangible know-how. *Id.* The member states agreed in January 1988 to raise the level of technology that could be exported and to focus controls on goods and technologies that are strategically significant. See *West is Easing Policy on Sales to Soviet Bloc*, N.Y. Times, Feb. 15, 1988, at 1A.

31. The current Austrian government has agreed to stiffen its controls to the level of COCOM. See 4 Int'l Trade Rep. (BNA) 1147 (Sept. 23, 1987). The Commerce Department has eased controls on goods shipped to Switzerland and Finland following the imposition of COCOM-like controls in those nations. See 4 Int'l Trade Rep. (BNA) 1062 (Aug. 26, 1987). It has also removed some licensing requirements for goods shipped to Sweden following imposition of more effective controls on illegal reexports and intransit shipments of United States origin commodities there. See 4 Int'l Trade Rep. (BNA) 959

ranks and created a group of advisors with military expertise.³² COCOM also reached a critical compromise on computer hardware and related technology, removing lower level computers from its control lists.³³

Although COCOM members today have reached a consensus that the West needs a system of common national security export controls, disagreement persists over the range of items that should be subject to control and the extent to which controls are necessary and workable.³⁴ The United States has traditionally favored controls over a broad scope of items and technologies. Canada, the Federal Republic of Germany, France, Japan, and the United Kingdom have pushed for significant reductions in the range of coverage.³⁵ They argue that the multilateral COCOM control list is too broad and that member nations could monitor sensitive exports more carefully if the list were more focused.³⁶

Recent United States legislation has sought to strengthen COCOM,³⁷ but the panel suggests that Congress go further and work with foreign allies to construct a common external "wall" of export controls to the East accompanied by a significant relaxation of controls within the West.³⁸ To this end, it makes several specific proposals. First, the United States should virtually eliminate unilateral controls and instead join COCOM in restricting only the export items whose acquisition would significantly enhance Soviet bloc military capabilities.³⁹ Second, it should obtain agreement on a common approach to reexports of COCOM-origin items.⁴⁰ Such an agreement would eliminate the need for American reexport authorization, a policy that has consistently angered the

(July 29, 1987).

32. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 137.

33. *Id.*

34. *Id.* at 98.

35. *Id.*

36. *Id.* Since 1985 COCOM has conducted annual reviews of dual use and other control lists covering 25% of the list every year. Moreover, it now expedites publication of the results of the review, printing the additions and deletions to the list at the end of each year instead of waiting for all items to be reviewed. Before 1985, COCOM reviewed these lists only every 3 years. *Id.* at 98-99.

37. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985) § 105(f), amending the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) § 5(i) (codified as amended at 50 U.S.C. app. § 2404 (1985)).

38. BALANCING THE NATIONAL INTEREST, *supra* note 2, at 135-36 (1987).

39. *Id.* at 168. At the same time, the panel recommends that the United States maintain its current controls on the transfer to any nation of technical data considered militarily sensitive. *Id.* at 171-72.

40. *Id.* at 171.

Europeans and Japanese. At the same time, the United States should eliminate the requirement that exporters obtain a validated license⁴¹ for shipments to those trading partners with which it has reached agreement on the control of exports to third countries.⁴² Third, the United States and COCOM should remove restrictions on items such as personal computers whose control is no longer feasible because of widespread availability on the world market.⁴³ Fourth, the United States should eliminate reexport authorization requirements in countries participating in a community of export controls on dual use technology, including both COCOM members and cooperative neutral countries.⁴⁴ Fifth, the United States and its allies should reduce the scope of COCOM's control lists to improve credibility and enforcement.⁴⁵ The panel recommends that COCOM impose a four-year sunset rule automatically removing lower level items from the list (unless an extension could be justified) when they come up for periodic review.⁴⁶ In addition, as a procedural matter, decontrol should no longer require unanimity; this change would increase the effectiveness of multilateral enforcement.⁴⁷ Finally, the United States government should maintain a clear distinction between national security and foreign policy export controls.⁴⁸

Given widespread evidence of weak enforcement of export controls in many COCOM nations, it is reasonable to ask whether greater American reliance on multilateral controls in place of unilateral restrictions amounts to a de facto elimination of effective national security export controls. In spite of the reinvigoration of COCOM since 1980, Japan's Toshiba Machine Co. and Norway's Kongsberg Vaapenfabrikk were

41. A validated license is a written government approval allowing limited permission to export restricted commodities or technical data, either on a single or multiple transaction basis. In the United States, validated licenses are necessary under some circumstances to reexport domestic commodities to new destinations abroad. *Id.* at 284.

42. *Id.* at 169. The panel suggests that for those COCOM nations unwilling to accept or unable to implement controls on exports to third countries, the United States should retain its present system of validated licenses and reexport authorization. *Id.*

43. *Id.* at 170.

44. *Id.* at 171. See *supra* note 29.

45. *Id.* at 172.

46. *Id.*

47. *Id.*

48. *Id.* Foreign policy controls, statutorily separate from national security export controls, are unilaterally imposed political sanctions. Many United States allies have sharply disagreed with United States imposition of foreign policy export controls, and the panel warns that if not effectively isolated, foreign policy controls could corrode the resolve of COCOM allies to cooperate in carrying out national security export controls. *Id.* at 172-73.

still able to sell computer-guided multi-axis propeller milling equipment to the USSR, enabling the Soviet Navy to make its submarines harder to detect.⁴⁹ While the Japanese and Norwegian governments have since adopted more stringent export control regulations,⁵⁰ the COCOM regulatory structure will only be as strong as its most permissive member. Furthermore, compliance with COCOM controls can be expected to decline in periods of economic recession as competing manufacturers struggle for sales. Additionally, COCOM decisions to restrict the sale of a technology are often no more than a consensus to accept the least stringent measures to which all members will agree. Yet, because no American technology was involved, American domestic controls would have prevented neither the Japanese nor the Norwegian sale of milling equipment.⁵¹ Consequently, as the cutting edge of technology shifts from North America to Europe and Asia, the United States, as the leader of the Western Alliance, may have no choice but to rely increasingly on COCOM for its own military security.

IV. DISCUSSION

For some years to come, *Balancing the National Interest* will be the blueprint for national security export control reform. The range of corporate and government information the panel gathered and made public is unprecedented, and the extensive interviews it and its staff conducted animate what could otherwise have been a dry statistical recitation. While generally skeptical of Defense Department participation in the export control process, the panel grants that the Pentagon's attempts to reinvigorate the national security export mechanism has raised awareness of the need for export regulation. The authors of this report also display admirable skill in distilling complex technological and regulatory issues into clear English prose.

The panel neglected to address two significant proposals put forward in recent years to improve export control procedures. The first is the suggestion that export control mechanisms be made subject to the Ad-

49. 4 Int'l Trade Rep. (BNA) 812, 813 (June 24, 1987). See also Packard, *The Coming U.S.-Japan Crisis*, 66 FOREIGN AFF. 348 (1987-88).

50. 4 Int'l Trade Rep. (BNA) 813 (June 24, 1987). During 1987, MITI increased the number of officials in charge of checking export license applications from 40 to 60 and plans to add another 20 people in April 1988. In the United States, approximately 500 people in the Commerce Department alone check applications, not counting Defense Department personnel. 4 Int'l Trade Rep. (BNA) 1106, 1107 (Sept. 16, 1987).

51. 4 Int'l Trade Rep. (BNA) 812, 813 (June 24, 1987).

ministrative Procedures Act.⁵² The goal of this change would be the creation of an appeals system whereby manufacturers seeking an export license could challenge a denial or delay from the Commerce or Defense Departments. The benefits of this change would be stricter government compliance with deadlines and reduced industry frustration with delays. Moreover, it would shift the burden from the exporter, who must prove that his technology would not threaten United States security, to the government, which would have to prove that such a threat exists if the item were exported. In addition, the threat of interminable hearings over denied export licenses would push the Commerce and Defense Departments to remove from their control lists items that are either obsolete or widely available abroad.

The chief counterargument to this proposal is that interjecting judicial power into the export process would merely increase the current fragmentation of regulatory power over exports. Although the APA technically confers only the power to oversee procedure, this power can quickly become authority over substance as well. Instead of achieving policy cohesiveness in export regulation, the result might be even more extended waiting periods for licenses as the battle ground shifts from the offices of the executive branch to the courtroom. In addition, widely separated judicial views on correct regulatory policy rarely congeal into a consistent strategy.⁵³ Finally, it is highly questionable whether an already overburdened judiciary would welcome the grant of such vast new jurisdictional territory.

The second proposal not discussed in the book but meriting serious attention is the creation of a public rule-making system for export control similar to that in the public securities area.⁵⁴ Exporters would be able to petition for government opinions on whether items could be exported and under what circumstances. A regular publication written in ordinary English would identify interpretive findings and rulings without identifying parties.⁵⁵ This system would provide guidance to exporters who are uninformed of current regulatory policies and would be particularly beneficial to companies new to exporting. It would also cast light into a now dim regulatory arena and thereby allay industry concerns that licensing decisions are being made capriciously.

52. 5 U.S.C. § 551-576 (1982).

53. For a study of the problems of regulatory fragmentation in the context of federal energy policy, see Huber, *Electricity and the Environment in Search of Regulatory Authority*, 100 HARV. L. REV. 1002, 1036 (1987).

54. 2 Int'l Trade Rep. (BNA) 1437-38 (Nov. 13, 1985).

55. *Id.*

V. CONCLUSION

In calling for more narrowly focused controls, this study echoes the Bucy Report of 1976, one that called for restrictions on revolutionary rather than evolutionary technology.⁵⁶ Yet more than a decade after that report was issued, United States export control lists are still weighted toward restricting all exports containing useful technology whether or not the export of an item would advance the capabilities of American adversaries to any degree.⁵⁷ Unless industry leaders seize the opportunity to reduce the scope of national security export controls as Congress prepares to reauthorize the Export Administration Act, this report, like the Bucy Report before it, may be ignored. The result would be a failure to achieve reforms, consistent with national security interests, that are necessary to allow American exporters to compete fairly in world markets.

56. 4 Int'l Trade Rep. (BNA) 371 (Mar. 18, 1987). The official name of that Defense Science Board Task Force study is "An Analysis of Export Control of U.S. Technology - A DOD Perspective." See Ellicott, *Trends in Export Regulation*, 38 BUS. LAW. 533, 536 (1983).

57. 4 Int'l Trade Rep. (BNA) 371 (Mar. 18, 1987) (statement of Lawrence J. Brady before the Senate Banking Subcomm. on International Finance and Monetary Policy).

