Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s

Kenneth W. Abbott
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"Perhaps it's some reflection of my early upbringing, but I could never . . . hear the word 'linkage' without thinking of the word 'bologna.'"**

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** George Ball, in testimony before the Senate Banking Committee, Use of Export Controls and Export Credits for Foreign Policy Purposes: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 2d Sess. 17 (1978).
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I. INTRODUCTION

During the late 1970s, particularly during the early years of the Carter Administration, the executive branch imposed an unprecedented variety of restrictions on private commercial exports in efforts to further particular goals of United States foreign policy. This linkage of American trade to political ends abroad strikingly altered the nature of American export controls: the number of controls imposed for foreign policy purposes increased markedly; the range of products and countries subject to restriction was significantly expanded; and most important of all, new, still poorly defined foreign policy objectives were asserted as the basis for curtailing exports.

The principal source of executive power during this period

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Nor does this Article examine the many other forms of political control on international trade: import controls, blockades and other devices to enforce trade restrictions, freezing or vesting of assets, restrictions on governmental export credits or other forms of public support for international economic transactions, interruption of private payments, discrimination in tariff treatment, and the like. See M. McDougall & P. Feliciano, Law and Minimum World Public Order 30-32, 325-28 (1961). Although political trade controls may be employed singly or in combination, unilaterally or multilaterally, and for a multitude of ends, this Article focuses on unilateral export controls used to further national foreign policy goals. Even in the context of total or partial trade embargoes, the export control element is singled out. Such a focus is in some ways overly restrictive, but it is justified by the following considerations:

1. The United States, particularly during the 1970s, has often imposed unilateral foreign policy export controls not in combination with other trade controls;
2. the particular considerations relevant to the appropriateness of export controls must be examined separately, even when export controls are used in conjunction with other forms of trade control; and
3. most American export controls are imposed under a statute that does not authorize other forms of controls—a statute that was amended in 1979 with a particular view to reforming its treatment of foreign policy export controls.

Of course, many of the observations made here as to export controls are equally applicable, either directly or by analogy, to other types of political trade control.

2. Controls on ordinary commercial exports were also in force during the 1970s under two other pieces of legislation: the United Nations Participation
was the Export Administration Act of 1969 (EAA '69),³ which


The Security Council may call for economic sanctions pursuant to Article 41 after first determining that a threat to the peace exists or that a breach of the peace or an act of aggression has occurred. See id. at arts. 39, 41. Member nations are obligated under the Charter to impose sanctions so approved. Non-mandatory sanctions may also be called for by the Security Council and the General Assembly. See id. at art. 10. The Security Council has been able to use Article 41 sanctions only sparingly; its failure to invoke the sanctions against Iran that the United States had requested following the seizure of the American Embassy in Teheran illustrates the limits of the procedure. See Nossiter, Moscow Vetoes Plan to Impose Penalty on Iran, N.Y. Times, Jan. 14, 1980, at 1, col. 5. If mandatory sanctions are imposed by the Council, the President may under the Act "investigate, regulate or prohibit, in whole or part, economic relations or [any] means of communication" between the United States and any foreign country, its nationals, or other persons in its territory. 22 U.S.C. § 287c(a) (1976).

Two economic sanctions imposed under Article 41 will be referred to herein. The first and most extensive use of Article 41 was against Rhodesia. (For convenience, the name "Rhodesia" will be used throughout, although when sanctions were imposed, the colonial name "Southern Rhodesia" was generally used; following the internal settlement of 1978, "Zimbabwe-Rhodesia" was temporarily adopted; in late 1979, the nation briefly resumed colonial status and was again called "Southern Rhodesia"; and since full independence, the nation is called "Zimbabwe.") Voluntary sanctions were called for in 1965. 20 U.N. SCOR 8-9, U.N. Doc. S/RES/217 (1965). Mandatory sanctions were imposed in 1966. S.C. Res. 217, 21 U.N. SCOR, Resolutions and Decisions of the Security Council, U.N. Doc. S/RES/232, S/INF/20 Rev. 1 (1966). Ultimately, a total embargo was imposed; the policy of the Commerce Department was to prohibit all exports but for humanitarian items. Sanctions were terminated by the United States in December 1979, Exec. Order No. 12,183, 44 Fed. Reg. 74,787 (1979), reprinted in 22 U.S.C. § 287c app., at 478 (Supp. III 1979), and by the Security Council soon afterward. N.Y. Times, Dec. 27, 1979, at 8, col. 4. The second sanction discussed was imposed in 1977 when the Security Council called for an embargo on shipments of arms, munitions, military equipment, and material for their manufacture and maintenance to South Africa. S.C. Res. 418, 32 U.N. SCOR 1, Resolutions and Decisions of the Security Council 1977 at 5, U.N. Doc. S/RES/418, S/INF/33 (1977). This sanction followed a call for a voluntary arms embargo in 1963, S.C. Res. 181, 18 U.N. SCOR, Resolutions and Decisions of the Security Council 1963 at 7, U.N. Doc. S/RES/181, S/INF/18/Rev. 1 (1963), with which the United States had complied. 15 C.F.R. § 385.4(a)(1) (1980).

Section 5(b) of the TWEA, 50 U.S.C. app. § 5(b) (1976 & Supp. III 1979), grants extraordinary powers to the President to control trade, payments, and other economic transactions. Originally applicable only in wartime, the Act was amended in 1933 to make these powers available to the President whenever he declared a national emergency. Act of Mar. 9, 1933, ch. 1, § 2, 48 Stat. 1. Four national emergencies—one declared in 1933, another in 1950—remained in effect as of 1976. See Senate Special Comm. on National Emergencies and Delegated Emergency Powers, National Emergencies and Delegated Emergency Powers, S. Rep. No. 94-922, 94th Cong., 2d Sess. 3 (1976).

Three sets of political trade controls imposed under the TWEA during the long period of official national emergency also were in effect in 1976. (1) The
delegated to the President the authority to prohibit or curtail exports for the purposes set forth in the Act.4 The furtherance of United States foreign policy had always been one of the purposes specified by EAA '69,5 but by the late 1970s Congress and the President had given the term "foreign policy" new content.


(3) The Transaction Control Regulations, id. at §§ 505.101-505.60, prohibit trade and payment transactions involving strategic materials, arms, or nuclear material between any United States person (including any controlled foreign corporation) acting abroad and the Soviet Union, other Communist nations (excluding Yugoslavia and Cuba), and the nations embargoed under the FACR.

Under all three sets of controls, regulated transactions can be licensed by the Treasury Department, id. at §§ 500.201, .204, 505.30, 515.333, but all three rely upon the Commerce Department to license exports from the United States. Id. at §§ 500.533, 505.30, 515.533. Treasury's involvement, then, is usually limited to non-United States origin exports by controlled foreign subsidiaries. See generally Berman & Garson, United States Export Controls—Past, Present, and Future, 67 Colum. L. Rev. 791, 808-09 (1967).


5. See id. at § 3(2)(b), 50 U.S.C. app. § 2402(2)(B).
and scope. In 1974 and 1977, two provisions incorporating recently established foreign policy goals were added to the Act: the first approved the use of export controls to combat restrictions imposed by other nations on access to raw materials and other supplies; the second authorized the use of controls to discourage other nations from assisting international terrorists. Another major objective of American foreign policy, though never reflected in an amendment to the Act, began to emerge at the same time—the promotion of respect abroad for internationally recognized human rights. The pursuit of these goals in the late 1970s changed the character of American export controls.

Ironically, the growth of political export controls occurred while Congress and the executive branch were vigorously seeking to encourage American exports to cope with a large, persistent United States trade deficit. That growth also coincided with the onset of a widespread realization that the United States could no longer, by curtailing its exports, unilaterally prevent foreign nations from obtaining most sophisticated products and technologies.

Such ironies led many to question the growing American reliance on foreign policy export controls. As the expiration date of EAA '69 approached, new legislation was introduced and extensive congressional hearings were held. This activity culminated in the Export Administration Act of 1979 (EAA '79), which attempts to restrict presidential authority to insti-

8. See text accompanying notes 170-200 infra.
tute political export controls. As the 1980s began, however, foreign policy controls continued to flourish despite the restraints imposed by the complex provisions of EAA '79.

Part II of this Article describes the United States export control system as it operated under EAA '69 and, in most respects, as it operates today. Part III reviews the growth of the new policies pursued by means of export controls during the 1970s and briefly describes several important controls imposed in 1977 and 1978 that are used as examples in the remainder of the Article. Part IV critically analyzes the rationales for the use of export controls to further foreign policy and suggests that controls are appropriate in relatively few situations. Part V considers the foreign policy provisions of EAA '79 in light of this analysis. Part VI concludes the Article with recommendations for further limiting the use of foreign policy export controls.

II. THE EXPORT CONTROL SYSTEM

EAA '69 delegated to the President the power to prohibit, curtail, and otherwise regulate the export of "any articles, materials or supplies, including technical data or any other information, subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States," regardless of destination. This power, however, could only be exercised to effectuate the policies set forth in the Act. Thus the congressional declarations of policy in section 3 of EAA '69 were crucial in defining the scope of executive

12. An initial description of the export control system as it operated under EAA '69 permits a clearer presentation of the growth of new policies under that act and facilitates an understanding of the changes brought about by EAA '79. The general outlines of the system are unchanged by EAA '79, although the more important changes effected by EAA '79 will be noted.


EAA '79 covers exports of "goods" and "technology," §§ 5(a)(1), 6(a)(1), 50 U.S.C. app. §§ 2404, 2405, which for present purposes are substantially equivalent to the "articles, materials, or supplies" formerly described. See id. at § 16(3)-(4), 50 U.S.C. app. § 2415.


15. Id. at § 3 (codified at 50 U.S.C. app. § 2402 (1976 & Supp. I 1977)).
A. POLICIES

Section 3 expressed inherently conflicting policies. On the one hand, it stated that the policy of the United States was to "encourage" trade with all countries with which the United States had diplomatic or trading relations and to use the economic resources and trade potential of the United States "to further the sound growth and stability of its economy." On the other hand, section 3 asserted three broad policies that justified restrictions on exports.

First, EAA '69 declared it was the policy of the United States to use export controls "to the extent necessary to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States." "National security controls" were intended to restrict exports that would make a "significant contribution to the military potential of any other nation or nations which would prove detrimental to the national security of the United States." With exports of arms and purely military equipment controlled under separate statutory authority, national security controls under EAA '69 were directed at products and technologies primarily civilian in nature but with potential military applications: so-called "dual-use" items. National security controls...
were intended to restrict dual-use exports to the Communist nations—the only nations considered threats to United States national security—but fear that exports to other countries might be diverted to Communist destinations meant that controls on most items restricted their export to all destinations.\(^2\) National security controls under EAA '79 are substantially similar in purpose and scope.\(^23\)

Second, EAA '69 stated a national policy of using export controls "to the extent necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand."\(^24\) "Short supply controls" were imposed on many commodities in the years immediately following the Second World War and during the Korean War but otherwise have been used infrequently.\(^25\)

Finally, EAA '69 declared that it was United States policy to use export controls "to the extent necessary to further significantly the foreign policy of the United States and to fulfill its international responsibilities."\(^26\)

By the mid-1970s, leaving aside the embargoes under TWEA, see note 2 supra, national security controls constituted the bulk of United States export controls.

22. A 1979 report from the President to Congress, required by a 1977 amendment to EAA '69, concluded that only the Communist nations (except Yugoslavia) were subject to export controls for national security reasons because no other nations posed an immediate national security threat. National security controls were said to extend to other nations when necessary to avoid diversion of exported goods to the Communist nations. See House EAA Hearings Part I, supra note 21, at 646 (statement of William Root, Director, Office of East-West Trade, Department of State). This has been a longstanding orientation of the controls. See, e.g., Secretary of Commerce, Export Control and Allocation Powers, Eleventh Quarterly Report to Congress 1 (1950) [hereinafter cited as Eleventh Quarterly Report].


26. EAA '69, Pub. L. No. 91-184, § 3(2) (B), 83 Stat. 841 (codified at 50 U.S.C. app. § 2402(2)(B) (1976)) (expired 1979). Foreign policy also figured in the Export Control Act of 1949, ch. 11, § 2, 63 Stat. 7, and before that in the Second Decontrol Act of 1947, ch. 248, 61 Stat. 321, which extended certain production and allocation controls beyond the end of World War II. In the Second Decontrol Act, however, foreign policy was used in an affirmative sense: controls on production and distribution were justified so that the United States could fulfill its economic commitments abroad, principally Marshall Plan aid to Western
These three policies have been stated in almost identical form since the adoption of general peacetime export control legislation in 1949. Congress has legislated some subtle changes in emphasis, added subsidiary policies from time to time, and made the Export Administration Act the site of the legislative provisions governing compliance with the Arab League boycott of Israel and other boycotts of friendly nations. Since 1949, however, the President’s power to control exports for national security, short supply, and foreign policy purposes has remained generally constant and, particularly in the case of foreign policy controls, largely unrestricted.

B. Administration

Since 1945, presidential “power, authority, and discretion” over export controls has been largely delegated to the Department of Commerce, where most control and licensing deci-
EXPORT CONTROLS

sions have been made by a group of regulators now called the Office of Export Administration (OEA). The OEA and its predecessor agencies have been able to operate with an unusually free hand because virtually all export control functions have been exempted from the Administrative Procedure Act. The administrative hearings, rulemaking procedures, and judicial review that operate as a check on most other executive agencies have not restricted the activities of the Department of Commerce, which continues to operate free of these constraints under EAA '79. Nonetheless, criminal, civil, and administrative penalties can be imposed for violations of the regulations, orders, or licenses issued by the OEA, as well as for violations of the statute itself.

and Defense are to a large degree mandated. See id. at §§ 5(a), 6(a), 15, 50 U.S.C. app. §§ 2404, 2405, 2414. Finally, authority may only be delegated to an official of a department or agency whose head is appointed by the President with the advice and consent of the Senate. See id. at § 4(e), 50 U.S.C. app. § 2403. This limitation was intended to restrict the role of the National Security Council (NSC) in export controls, largely because of NSC refusal to share information with Congress. See generally S. Rep. No. 96-169, 96th Cong., 1st Sess. 15 (hereinafter cited as S. Rep. No. 96-169), reprinted in [1979] U.S. Code Cong. & Ad. News 1147, 1162. The effort to limit the role of the NSC appears to have been less than successful. For example, the review of export licenses and control policy toward the U.S.S.R. (undertaken in January, 1980) following the Soviet invasion of Afghanistan was carried out under the direction of the NSC. See U.S. Export Weekly (BNA) No. 239, A-5 (Jan. 8, 1980). A government source stated that the role of the Commerce Department in the review was minimal, and that the change in actual authority of the NSC amounted to the "emasculcation" of the Commerce Department. Id., No. 291, A-1 (Jan. 22, 1980). The role of the NSC has become a serious political and legal issue. See generally Comment, The Constitutional and Legal Position of the National Security Adviser and Deputy Adviser, 74 Am. J. Int'l L. 634 (1980).


EAA '69 did seek to impose some procedural restraints on the Executive by calling for periodic reports to Congress and consultation with American exporters and other nations. The statute also attempted to provide "an element of due process" for exporters by, for example, setting time limits for OEA action on license applications, requiring that exporters be allowed to respond to questions raised about their applications in difficult cases, and mandating that applicants be informed of the statutory basis for denial of their applications. Even the authors of these procedural safeguards, however, intended them to hold the Executive accountable only "to some minimal degree." The adequacy of the safeguards was severely criticized, and additional procedural requirements were included in EAA '79.

C. LICENSING

1. Types of Licenses

Operational details of the export control system are set out in the Export Administration Regulations (Regulations) of the Commerce Department. The scheme of the system is to prohibit, with few exceptions, all exports from the United States to any destination unless licensed by the OEA. This approach is


40. See, e.g., COMPTROLLER GENERAL REPORT 1978, supra note 32 at 1; Note, supra note 32, at 353-55.


42. The Regulations, published by the Department of Commerce in looseleaf form, are also published in the Federal Register as issued and are codified at 15 C.F.R. §§ 368-389 (1980). See generally Berman & Garson, supra note 2, at 813-34.

43. See 15 C.F.R. § 370.3(a) (1980). The principal exceptions are: (1) most exports to Canada for consumption there, id. at § 370.3(a)(1); (2) certain exports to the United States armed forces, id. at § 370.3(a)(2); (3) exports regu-
not as burdensome as it might first appear. The bulk of American exports leave the country under one of several "general licenses," which are OEA regulations of general applicability that permit the export of certain types of goods and information to certain destinations without any specific authorization for individual transactions and without the issuance of any authorizing documents. Even under a general license, however, an exporter must file a "Shipper's Export Declaration" at the port of exit or place of mailing, giving certain information about the transaction (partly for statistical and partly for control purposes), and an exporter may also be required to place warnings against diversion of the goods from their original destination on its bill of lading and commercial invoice. Further, an exporter may not without authorization transfer its bill of lading, Shipper's Export Declaration, or any other "export control document" to any person except as necessary to complete the originally contemplated transaction or in connection with certain commercial liens.

When the executive branch determines that stricter control over a particular class of exports is necessary for reasons of national security, foreign policy, or short supply, the specific prior approval of OEA for individual transactions within that class may be required. A license of this sort, covering a particular transaction and embodied in a particularized document issued upon application, is known as a "validated license." Generally, the term "imposition of export controls" and similar phrases refer to the adoption of a validated license requirement for a certain class of export transactions. This Article will follow that usage, but doing so should not obscure the fact that

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44. 15 C.F.R. § 370.2 (1980). By far the most important is General License G-DEST, which authorizes the export of any commodity listed on the Commodity Control List (CCL) to any destination for which the CCL does not require a validated license. *Id.* at § 371.3. See text accompanying notes 69-72 infra.

45. 15 C.F.R. § 371.2(a) (1980).

46. *Id.* at § 386.6(a). "Destination control statements" are required for every export under a validated license. *Id.* at § 386.6(a) (1)(i).

47. *Id.* at § 387.9(a)(1)(i).

48. *Id.* at § 387.9(b)(1).

49. *Id.* at § 372.2(a).

under the Regulations all exports are subject to some degree of control.

A validated license authorizes a specific export transaction: the export of specific goods (or information) to a specific buyer in a specific country for a specific end use.\(^\text{51}\) The applicant must specify each of these factors in the license application and be prepared to substantiate them with documentary evidence;\(^\text{52}\) in particular, an applicant must usually include not only its own statement of the contemplated end use of the export, but also that of the ultimate purchaser.\(^\text{53}\) In the case of certain strategic exports to friendly nations,\(^\text{54}\) the purchaser's government will become involved in supervising the disposition of the goods exported to prevent their diversion to Communist nations.\(^\text{55}\)

The Regulations make it unlawful to reexport, transship, or divert, directly or indirectly and in whole or in part, any United States export from its originally authorized ultimate destination, unless a new license covering the reexport has been obtained from the OEA or unless the Regulations permit reexport.\(^\text{56}\)

2. Country Groups

Although most validated license requirements based on national security considerations apply to the export of controlled items regardless of their destination, the export licensing system does distinguish among importing nations with respect to both validated license requirements and licensing policy.\(^\text{57}\) These distinctions are based on both national security and foreign policy considerations. The Regulations reflect the distinctions primarily by assigning nations to various "country

\(^{51}\) 15 C.F.R. § 372.9(a) (1980).

\(^{52}\) Id. at § 372.6(a)(2).

\(^{53}\) Id. at § 375.2.

\(^{54}\) Participants are the NATO nations, Austria, Hong Kong, and Japan; Switzerland and Yugoslavia cooperate with similar programs. Id. at §§ 375.3(b)-375.5.

\(^{55}\) The government may issue an International Import Certificate (IC), id. at § 375.3(a)-(h), or a Delivery Verification (DV), id. at § 375.3(i). See Berman & Garson, supra note 2, at 817.

\(^{56}\) Id. at § 374.1. The permissive reexport provisions include instances in which goods could be exported directly from the United States to the new destination under certain general licenses, reexports back to the United States, and most reexports to Canada. Id. at § 374.2. See text accompanying notes 591-617 infra.

\(^{57}\) See notes 22 supra, 105 infra and accompanying text.
Country Group Z includes North Korea, Vietnam, Cambodia, and Cuba. A validated license is required for virtually all exports to Group Z, and the general policy of the Commerce Department is to deny all such license applications, although humanitarian exports are sometimes approved.

Group Y consists of the U.S.S.R. and several Eastern European Communist nations as well as Outer Mongolia and Laos. The Regulations state that licenses for exports of controlled items to these countries will be approved if the items are for a civilian end use and do not contribute to the military potential of the importing nation in a way detrimental to United States national security, but further restraints are in fact imposed for foreign policy reasons. Group W (Poland and Hungary), Group Q (Romania), and Group P (The People's Republic of China) are subject to similar validated license requirements but to more lenient licensing policies than those applicable to Group Y.

Group T encompasses the countries of the Western Hemisphere, other than Canada and Cuba. While most national security controls apply to Group T, licenses for exports to

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59. Id. This Article sometimes refers to these countries as the "embargoed nations." The Group Z requirements implement the export portion of the embargoes imposed under the TWEA.
61. Periodic reports submitted to Congress by the Commerce Department contain several examples of humanitarian exports: $9,720 of contraceptives approved for export to Cuba; $807,760 of hospital supplies and $389,390 of relief commodities to Vietnam, see SECRETARY OF COMMERCE, EXPORT ADMINISTRATION, 113TH SEMI-ANNUAL REPORT TO CONGRESS 29 (1976); $1,643,000 of DDT to Cambodia for control of malaria epidemic, see SECRETARY OF COMMERCE, EXPORT ADMINISTRATION, 115TH SEMI-ANNUAL REPORT TO CONGRESS 29 (1977).
63. Id. at § 385.2(a).
65. The validated license requirements for exports to these four nations have been virtually identical to those applicable to Group Y for some time. The CCL of June 1, 1979, for example, contained no entries that distinguished Group Q or Group W from Group Y. The People's Republic of China was at that time included in Group Y, but the validated license requirements for exports to Group P, established in 1980, remain identical to those for Group Y. Group P was created to permit the application of national security licensing standards different from those applied to Group Y, particularly to the U.S.S.R. 45 Fed. Reg. 27, 922 (1980). While Groups Q and W are treated in the same statement of licensing policy as Group Y, 15 C.F.R. § 385.2 (1980), it seems certain that applications for exports to Poland, Hungary, or Romania are received more favorably than those for exports to the U.S.S.R., East Germany, or Bulgaria.
destinations in Group T are usually approved without objection.

Group V contains all countries not specifically included in any other country group, except Canada, to which most exports can be made without a validated license. Most national security controls also extend to exports destined for Group V, but licenses are usually approved if there is no concern with diversion to Communist destinations. Within Group V, however, certain nations are subject to special validated license requirements and unusually strict licensing policies for foreign policy reasons.

3. Commodities

All commodities that require a validated license for export to any destination are identified in a single comprehensive schedule, the Commodity Control List (CCL). The CCL groups commodities into general categories, such as metalworking machinery, electrical equipment, and chemicals, then into more specific entries identified by an Export Commodity Control Number (ECCN). An exporter, having located the ECCN for the goods to be exported, can determine from the CCL whether export to a particular country group requires a validated license, whether any special restrictions apply to particular nations within a group, whether the purchaser's government must confirm delivery, and whether any of several special licensing procedures are available. Virtually all commodities are in fact listed on the CCL, but the great majority are in-

66. 15 C.F.R. § 385.6 (1980).
67. Id. at § 385.4(b).
69. The CCL is published by the Commerce Department and incorporated by reference at 15 C.F.R. § 399.1 (1980). A single schedule has been used only since 1965. See Berman & Garson, supra note 2, at 820.
70. See The Commodity Control List and How to Use It ¶ (b) (introduction to the CCL) (available from the OEA, Department of Commerce) [hereinafter cited as The Commodity Control List], incorporated by reference in 15 C.F.R. § 399.1 (1980).
cluded only as part of several broad "basket entries," which function to require a validated license for all exports to Group Z and other embargoed destinations.\textsuperscript{72}

4. Information

The export licensing system regulates exports of information as well as goods. The kind of information subject to control—"technical data" under EAA '69\textsuperscript{73} and "technology" under EAA '79\textsuperscript{74}—is industrial information that can be used in the design, production, manufacture, utilization, or reconstruction of goods.\textsuperscript{75} It may be in tangible form, such as a prototype, blueprint, or manual, or in intangible form, such as "know-how" or the performance of technical services.\textsuperscript{76} Information in tangible form is normally considered to be exported when it is physically sent abroad, while intangible information is considered to be exported when it is "released" either abroad or in the United States with knowledge that it will be transmitted abroad.\textsuperscript{77} Release may occur through visual inspection of American equipment or facilities, oral communication, or the application abroad of know-how acquired in the United States.\textsuperscript{78} As with commodities, exports of controlled information must be made under either a general or a validated license.\textsuperscript{79}

The export of information that has been made generally available to the public, and of nonpublic scientific or educational data not related to industrial processes, is authorized by the most important technical data general license—General License GTDA.\textsuperscript{80} Some technical data not eligible for export under this license, such as proprietary information about man-

\textsuperscript{72} The Commodity Control List, \textit{supra} note 70, at ¶ (c). Compare the operation of General License G-DEST, \textit{supra} note 44. If an item appears on the CCL only as part of a typical basket entry (e.g., "all other electrical and power generating equipment n.e.s. [not elsewhere specified]" (ECCN 6299)), it may be exported to any destination other than Group Z and any other embargoed destinations specified on the CCL (e.g., certain South African institutions, see text accompanying notes 245-55 \textit{infra}) under this General License.


\textsuperscript{74} EAA '79, §§ 5-6, 50 U.S.C. app. §§ 2404-2405 (Supp. III 1979).

\textsuperscript{75} Id. at § 16(4), 50 U.S.C. app. § 2415(4); 15 C.F.R. § 379.1(a) (1980).

\textsuperscript{76} 15 C.F.R. § 379.1(a) (1980).

\textsuperscript{77} Id. at § 379.1(b)(1).

\textsuperscript{78} Id. at § 379.1(b)(2).

\textsuperscript{79} Id. at § 379.2. A major innovation in EAA '79 is an attempt to focus national security controls on technology rather than goods. EAA '79, §§ 2(8), 5(d), 50 U.S.C. app. §§ 2401(8), 2404(d) (Supp. III 1979).

\textsuperscript{80} 15 C.F.R. § 379.3 (1980).
ufacturing processes, may be exported under a more limited general license—GTDR—to most non-Communist nations, subject in some cases to a requirement that the importer give certain written assurances concerning later disposition of the data and its "direct product." Nonpublic technical information on certain subjects requires a validated license for export to virtually all destinations (usually with the exception of Canada).

Reexport controls also apply to information exports and in some circumstances the controls extend beyond reexport of the information itself and forbid the unauthorized export of foreign-produced direct products of the information to Country Groups Q, W, Y, P, and Z.

III. THE GROWTH OF FOREIGN POLICY EXPORT CONTROLS

A. THE EXPANDING MEANING OF FOREIGN POLICY UNDER THE EXPORT ADMINISTRATION ACT OF 1969

1. The Traditional Role of Foreign Policy

Since American peacetime export controls began following World War II, the control program has been predominantly concerned with restricting exports to Communist nations. By 1950, most exports to the Soviet Union and Eastern Europe had been placed under control, and out of concern with diversion

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81. Id. at § 379.4. No technical data may be exported to Group Z under General License GTDR, id. at § 379.4(a), and there are strict limits on exports to Groups P, Q, W, and Y without a validated license.
82. 15 C.F.R. § 379.4(f) (1980).
83. Id. at § 379.4(c)-(d).
84. Id. at § 379.8.
85. Id. at § 379.8(a)(3). See also text accompanying notes 591-617 infra.
86. See Berman & Garson, supra note 2, at 796.
87. Id. at 796, 818-19. Controls were instituted as early as 1948 to prevent strategic items from going to Eastern Europe. See Third Quarterly Report, supra note 19, at 14. By 1950, this effort was the major focus of the program. See Eleventh Quarterly Report, supra note 22, at 1-2. By 1951, an export license was required "before shipment to the Soviet bloc of all United States goods" and technical data. See Secretary of Commerce, Export Control, Fifteenth Quarterly Report to Congress 1 (1951). At least some licenses for nonstrategic items were granted. See Secretary of Commerce, Export Control, Twenty-Eighth Quarterly Report to Congress 4 (1954); Secretary of Commerce, Export Control, Twenty-Fifth Quarterly Report to Congress 5 (1955); [hereinafter cited as Twenty-Fifth Quarterly Report]. Furthermore, some nonstrategic items were eventually allowed to be sold to the Communist nations under a special General License, GLSA. See Secretary of Commerce, Export Control, Fifty-Second Quarterly Report to Congress 8 (1960).
many exports to other nations were controlled as well. At first, in spite of their extensive product coverage, these East-West trade restrictions were justified primarily on national security grounds, based on the threat perceived in the establishment of Soviet dominance in Eastern Europe. Later, American involvement in the Korean conflict led to a total embargo of North Korea and the People's Republic of China under the Trading with the Enemy Act and provided an additional national security justification for controlling exports to their European Communist allies.

The national security rationale for strict controls on American trade with the European Communist states became less compelling after the truce in Korea and the partial relaxation of tension in Europe associated with the death of Stalin. Although Western Europe took advantage of this change in climate to expand trade with the East, United States export policy remained highly restrictive. The broad unilateral export controls of the late 1950s and 1960s—which continued to cover many commodities that could not have contributed significantly to Communist military strength—may therefore be


89. See Berman & Garson, supra note 2, at 796. Commerce Department quarterly reports on the export control system began to discuss national security issues, along with short supply problems, as early as 1948. See Secretary of Commerce, Export Control and Allocation Powers, Fourth Quarterly Report to Congress 2, 4 (1948). Thereafter, the reports indicate the increasing importance of security controls. See, e.g., Secretary of Commerce, Export Control and Allocation Powers, Eighth Quarterly Report to Congress 2 (1953); Seventh Quarterly Report, supra note 88, at 3. By 1953, a separate section of the reports was devoted to security controls. See, e.g., Twenty-Fifth Quarterly Report, supra note 87, at 3. Originally, the needs of European recovery had provided a foreign policy justification for export controls. See note 26 supra.

90. See Berman & Garson, supra note 2, at 792-93; note 2 supra.

91. See Secretary of Commerce, Export Control, Thirteenth Quarterly Report to Congress 1-3 (1950); Berman & Garson, supra note 2, at 799.


93. A. Lowenheim, supra note 92, § 1.1, at 148, § 1.23 at 164-65; Berman & Garson, supra note 2, at 799.

94. A. Lowenheim, supra note 92, § 1.1, at 148; Berman & Garson, supra note 2, at 799. Controls on Poland and Romania, however, were relaxed in 1957 and 1964, respectively. See note 65 supra.
said to have been based largely upon American foreign policy.95

Outside of Europe, the embargo of the People's Republic of China and North Korea was extended to Cuba in 1962,96 to North Vietnam in 1964,97 then to all of Vietnam98 and Cambodia in 1975.99 Both in Cuba and Southeast Asia, national security considerations—growing out of the Bay of Pigs incident, the Cuban missile crisis, and the Vietnam War—originally supported the imposition of trade controls. Subsequently, however, foreign policy became the express rationale for these embargoes,100 and except for the embargo of the People's Republic of China, they have remained fixtures of American trade policy.

The American controls on trade with Eastern Europe, on the other hand, began to decline by the late 1960s;101 EAA '69 was intended to spur this trend.102 With the change in attitude

95. See Berman & Garson, supra note 2, at 799-800, 822. Quarterly reports of the Commerce Department during this period often included statements to the effect that controls were established under the national security policy of the Export Control Act, "but are of course administered within the broad context of United States foreign policy . . . . [F]requently these controls are exercised predominantly to further foreign policy objectives." See, e.g., Secretary of Commerce, Export Control, Twenty-Sixth Quarterly Report to Congress 1 (1954). Cf. Secretary of Commerce, Export Control, Fifty-Eighth Quarterly Report to Congress 3 (1962) (considers both national security and foreign policy as supporting controls on the Communist bloc).

The broad unilateral controls may also be said to have rested on a belief that any contribution to the industrial strength of the Soviet Union was as great a threat to American national security as a contribution to military strength. A 1962 amendment to the Export Control Act seems explicitly to have adopted this view. Act of July 1, 1962, Pub. L. No. 87-515, § 2, 76 Stat. 127 (expired 1969).

96. The Cuban Import Regulations of 1962 were replaced in 1963 by the more comprehensive Cuban Assets Control Regulations. See note 2 supra. In addition to the general authority of the Trading with the Enemy Act, see id., the Cuban embargo had specific Congressional sanction. See 22 U.S.C. § 2370(a)(1) (1976 & Supp. III 1979).


98. South Vietnam was included on April 30, 1975. 31 C.F.R. § 500.204(a)(1) (1975).

99. The embargo was extended to Cambodia on April 17, 1975. Id. at § 500.201(d).


101. The first, largely symbolic, step was taken by President Johnson in 1966. See Berman & Garson, supra note 2, at 822-83.

102. The more liberal attitude of EAA '69 toward trade with the East was symbolized in the language of its title, which used the neutral term "administration" instead of the more negative word "control." See A. Lowenfeld, supra
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represented by the 1972 trade agreement between the United States and the U.S.S.R.,\textsuperscript{103} the dismantling of controls accelerated. American restrictions on trade with Eastern Europe came to approach, though always exceeding, the level of controls—a level which called for restrictions on only those commodities with military applications—that for some time had been maintained by other major Western countries operating through an international organization known as COCOM.\textsuperscript{104} By the mid-1970s, only a relatively small number of high technology, dual-use items required a validated license for export from the United States.\textsuperscript{105}

Thus foreign policy considerations had played a major role in supporting the broad anti-Communist restrictions that had been the almost exclusive preoccupation of the export control program since its inception. By the mid-1970s, however, the role of foreign policy in anti-Communist controls had declined to providing justification for the Group Z embargoes and for occasional variations in the strictness with which exports to particular Communist nations were controlled.\textsuperscript{106} American

\textsuperscript{103} See A. Lowenfeld, supra note 92, § 2.2, at 187-190.

\textsuperscript{104} G. Adler-Karlsson, supra note 92, at 7-8, 89-90. Multilateral controls administered through COCOM are discussed further at text accompanying notes 393-401 infra.

\textsuperscript{105} A. Lowenfeld, supra note 92, § 4.21, at 230-32. Most items on the CCL since the mid-1970s have been dual-use products multilaterally controlled to all destinations through COCOM. For example, on the CCL issued as of June 1, 1979, 126 entries were of this character, 46 were dual-use items unilaterally controlled by the United States to all destinations for national security purposes, and another 26 were unilaterally controlled to specific destinations. Many of the controls in the latter group applied only to exports to Communist nations, but the group included some foreign policy controls that are discussed herein. In addition, ten “basket” entries extended controls over all exports to the embargoed nations. See also 15 C.F.R. §§ 385.2(a), .4(b) (1980).

\textsuperscript{106} See Berman & Garson, supra note 2, at 819-20. Such refinements have included (1) extension of favorable treatment to Yugoslavia, Poland, Hungary, and Romania, see note 65 supra; (2) reduction of controls on third country exports containing United States-origin components to Cuba, 15 C.F.R. § 385.1 (1980), as amended by 45 Fed. Reg. 1585 (1980); Cuban Assets Control Regulations, 31 C.F.R. § 515.559 (1980), in line with the policy of the Organization of American States, see U.S. Takes Steps to Conform with OAS Action on Cuba, 73 DEP'T ST. Bull. 404, 404 (1975); and (3) the transfer of the People’s Republic of China from the embargo list to Country Group Y, 15 C.F.R. Part 370, Supp. 1 (1972), then to a newly established country Group P. See note 65 supra. The more favorable treatment given exports to the People’s Republic of China in 1980 contrasts sharply with a tightening of controls on exports to the U.S.S.R. following the Soviet invasion of Afghanistan. See text accompanying notes 802-03 infra. While the People’s Republic of China was in Country Group Y, the United States sought to maintain a “balanced” export control policy toward it and the U.S.S.R. See U.S. Export Control Policy and Extension of the Export
controls on East-West trade had become predominantly national security controls in the modern sense, concentrating on goods and technology with military applications and, out of necessity, regulating the export of such items to all destinations.107

Until recently, export controls based predominantly on foreign policy considerations and not within the prevailing anti-Communist focus of the control program have been quite rare. Three types can be identified: controls implementing actions of the United Nations, controls restricting the export of nuclear items, and controls aimed at preserving stability in volatile regions of the world.108

The principal set of controls implementing United Nations action has been the embargo on trade with Rhodesia (1966 to 1979).109 Controls on arms exports to South Africa are also in effect as a result of United Nations action.110

Most controls on nuclear power exports are administered under special statutes by agencies other than the Commerce Department,111 but Commerce has retained licensing jurisdiction over many items with nuclear applications.112 Validated licenses are required for the export of any such items to be


107. See note 105 supra. The ECCN of an item controlled multilaterally to all destinations ends with the letter “A”; that of an item controlled unilaterally to all destinations ends with the letter “B.” The IC procedure, see note 55 supra and accompanying text, applies only to “A” Commodities, although the DV procedure may apply to others. 15 C.F.R. §§ 375.3(a), (i) (1980).

108. A section entitled Special Foreign Policy Controls was added to the periodic reports of the Commerce Department in 1966. See Secretary of Commerce, Export Control, Seventy-Fifth Quarterly Report to Congress 28 (1965). Until recently, this section only noted antiboycott activities and the three types of controls referred to in text.

109. See 15 C.F.R. § 385.3 (1979) (repealed 1979); note 2 supra. The Commerce Department drew on authority under the EAA as well as under the United Nations Participation Act to enforce the export side of the embargo. See 15 C.F.R. § 385.3 (1979) (repealed 1979). Further, the Rhodesian embargo, like the South African arms embargo, was temporarily implemented voluntarily, before the authority of the United Nations Participation Act could become effective. See note 2 supra.

110. See 15 C.F.R. § 385.4(a) (1980); note 2 supra.

111. See note 1 supra.

used in making or testing nuclear weapons\textsuperscript{113} or in the construction or operation of various nuclear facilities.\textsuperscript{114} Since late 1980, all items controlled for national security purposes have been subject to review under the United States nonproliferation policy before export for nuclear-related uses or to nuclear-related purchasers.\textsuperscript{115}

Finally, controls are sometimes imposed on exports of dual-use items to promote "regional stability" in situations of hostility or near hostility\textsuperscript{116} and for related political objectives.\textsuperscript{117} The prime examples of such controls have been the subjection of many Middle East nations to restrictive licensing policies and a few unique validated license requirements since the 1967 war\textsuperscript{118} and the denial of licenses for exports to those


\textsuperscript{115} 45 Fed. Reg. 85,446 (1980).

\textsuperscript{116} Under the regional stability policy, the Commerce and State Departments review proposed exports of items that might contribute to the military capabilities of countries engaged, or expected to be engaged, in local military conflicts or that might otherwise contribute to regional tensions. See U.S. Export Control Policy and Extension of the Export Administration Act: Hearings on S. 737 and S. 937 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, Part III, 96th Cong., 1st Sess. 41 (1979) (statement of Frank Wel) [hereinafter cited as Senate EAA Hearings Part III]; Senate EAA Hearings Part I, supra note 106, at 223 (statement of Department of State). Regional stability concerns usually lead to restrictive policies on licensing exports of items that already require validated licenses for national security reasons, rather than new validated license requirements. See note 118 infra.

\textsuperscript{117} The United States has occasionally restricted exports that would improve the military capabilities of a friendly nation in situations in which American political relations with third countries might be jeopardized. See Senate EAA Hearings Part III, supra note 116, at 41-42 (statement of Frank Wel); Senate EAA Hearings Part I, supra note 106, at 65-66 (statement of Juanita Kreps). During the 1970s, special restrictions were applicable to India, South Korea, and Taiwan on this ground. See Senate EAA Hearings Part I, supra note 106, at 66 (statement of Juanita Kreps). Such controls most often take the form of restrictive licensing policies applicable to items controlled for national security purposes. See Senate EAA Hearings Part III, supra note 116, at 16-26 (validated license requirements unilaterally maintained by United States in 1979; no validated license requirements specifically applicable to India, South Korea, or Taiwan); Bingham & Johnson, A Rational Approach to Export Controls, 57 FOREIGN AFF. 894, 909-10 (1979), reprinted in Senate EAA Hearings Part III, supra note 116, at 44, 59-60 (denial of license to export to Taiwan machinery usable in the fabrication of missiles). Such policies, however, are not set forth in the Regulations.

\textsuperscript{118} In June 1967, "precautionary" controls were imposed over the issuance of validated licenses to all states in the Middle East. SECRETARY OF COMMERCE, EXPORT CONTROL, EIGHTY-THIRD QUARTERLY REPORT TO CONGRESS 15 (1968). In 1979, a number of commodities were still said to be controlled for export to all nations in the region, see Senate EAA Hearings Part I, supra note 106, at 65-66
countries of items that could be used in military operations.119

(statement of Juanita Kreps); they included aircraft, computers, advanced electronics, and certain vehicles. See Senate EAA Hearings Part III, supra note 116, at 41 (statement of Frank Wel). These "controls" have generally constituted strict licensing policies, applicable to items already requiring validated licenses for national security reasons for export to any destination. See notes 116-17 supra. Cf. Senate EAA Hearings Part I, supra note 106, at 223 (statement of Richard Cooper) (explanation of State Department policy on refusing export licenses for regional stability reasons). As of 1980, however, the Regulations do not mention such policies. Validated license requirements are rarely imposed under the regional stability policy. But see note 119 infra. On the CCL issued as of June 1, 1979, for example, only three ECCN entries required a validated license for export to only Middle Eastern nations, and only one entry required a license for export to Middle Eastern nations but not to any other destinations in Group V. Some of these controls might also be based on the anti-terrorism policy. See text accompanying notes 141-69 infra. As of 1980, only one validated license requirement—for the export to Libya of certain tractors useful in desert warfare—is identified as based on the regional stability policy. 45 Fed. Reg. 1597 (1980) (to be codified in 15 C.F.R. § 385.4(e)). A licensing policy applicable to this category was established. Id.

119. Probably the best known license denial occurred in May 1978, when the Oshkosh Truck Corporation was advised by the Commerce Department, first, that its proposed export to Libya of 400 heavy duty trucks could not be made without a validated license, and second, that the license had been denied. See Bingham & Johnson, supra note 117, at 910; Ibrahim, U.S. Delays Sales Made to Libyans, N.Y. Times, June 24, 1978, at 25, col. 3. The Commerce Department had apparently confirmed to Oshkosh previously that the export could be made under general license. Oshkosh Awaits Ruling on Truck Sale to Libya, Automotive News, June 12, 1978, at 39. The last-minute reversal appears to have been the result of pressure by the State Department and the NSC that in large part grew out of concern expressed by Egypt (Libya's eastern neighbor). Although the trucks were designed to haul oil drilling equipment, they were also capable of towing tanks for use in desert warfare. In spite of pressure by congressmen representing Oshkosh, a license was only issued when lighter trucks were substituted. See Bingham & Johnson, supra note 117, at 910; Ibrahim, supra, at 26; Automotive News, supra at 39. This action was also motivated by the Administration's anti-terrorism policy, see text accompanying notes 141-69 infra, which frequently overlaps with regional stability efforts, particularly in the Middle East and in cases involving Libya. See House EAA Hearings Part I, supra note 21, at 646 (statement of William Root); Use of Export Controls and Export Credits for Foreign Policy Purposes: Oversight Hearings on the Increasing Use by the Executive Branch of Restrictions on U.S. Exports and Export Credits for the Purpose of Promoting Foreign Policy Objectives of the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 2d Sess. 229 (1978) (statement of Sen. Case) [hereinafter cited as Senate Foreign Policy Hearings].

Licenses for the export to Libya of certain commercial aircraft—Boeing 727s and 747s and L-100 civilian cargo planes—have also been denied. Hovey, Ethiopia Sends U.S. Promise on Somalia, N.Y. Times, Feb. 22, 1978, at 3, col. 1; Ibrahim, supra, at 26; Johnson, U.S. Policies Hamper Exports of C-130, Av. Week, Nov. 13, 1978, at 57; N.Y. Times, March 3, 1979, at 5, col. 6. Mixed concern over regional stability and terrorism has been behind these denials as well. See generally Hovey, supra; Ibrahim, supra. Libya already had nine Boeing 727s, those that were blocked being the last to be delivered out of a single order, and Libya could substitute the European Airbus for the American planes. See Ibrahim, supra. Boeing's congressional delegation, headed by Senator Henry Jackson, appealed on its behalf and the 727s and 747s were ultimately licensed.
While these restraints were of importance, by the mid-1970s foreign policy controls seemed a peripheral part of the United States export control program. In terms of country coverage, product coverage, and underlying goals, their field of application seemed narrowly defined and stable. Subsequent developments, however, broke sharply with this understanding.

2. The Access to Supplies Policy

Congress initiated the first expansion in the meaning of foreign policy under EAA '69 in 1974, following the OPEC oil embargo of the United States. Section 3 of EAA '69 was amended, to declare it to be United States policy to use export controls, within the limits of the section, as a means to secure the removal of restrictions imposed by foreign nations on access to supplies.123

The new policy followed from the belief that the President needed additional powers to respond to OPEC-style embar-

See id.; N.Y. Times, March 3, 1979, at 5, col. 6. Some of the 727s previously delivered were later found to have been used to airlift troops in support of Idi Amin. Those licensed in 1976 were sold on the basis of assurances of exclusively civilian use and were apparently not used in the Ugandan operation. See House EAA Hearings Part I, supra note 21, at 128 (statements of Rep. Pease, Stanley Marcuss); Extension and Revision of the Export Administration Act of 1969—Part 2, Hearings and Markup Before the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 187 (1979) (statement of Robin Schwartzman) [hereinafter cited as House EAA Hearings Part II].

120. Non-Communist nations were subject to foreign policy controls only in such limited circumstances as United Nations sanctions or regional hostilities. By the mid-1970s, even exports to the European Communist states were controlled primarily for national security reasons, see note 105 supra, although foreign policy had previously played a role in justifying these controls. See notes 95, 106 supra and accompanying text.

121. The products controlled under foreign policy authority were usually limited to arms (as in the United Nations embargo of South Africa), materials with nuclear uses, or dual-use items first controlled for national security purposes (as in the case of regional stability controls). The United States attempted to deny a wide range of industrial and consumer goods only to Rhodesia (under United Nations auspices), Cuba, and the Asian Communist nations.

122. See note 108 supra and accompanying text.

Without such powers, it was said, the President would be "virtually powerless" to oppose a foreign embargo and the United States would have to "take it lying down."\(^\text{125}\) If the United States could respond by cutting off exports, however, it was thought that the President could deter or dismantle foreign embargoes that were "lying in wait for us down the road" by threatening or engaging in "economic warfare."\(^\text{126}\) In fact, the amendment was probably not necessary to empower the President to respond to foreign embargoes: retaliatory export controls could have been imposed under the general foreign policy authority of EAA '69,\(^\text{127}\) or the President could have called on even broader powers under the Trading with the Enemy Act\(^\text{128}\) (particularly in 1974 when the required state of national emergency was in effect).\(^\text{129}\) In 1974, however, the use of export controls to respond to foreign trade embargoes was an unfamiliar concept. The new policy declaration may thus have served important functions in clarifying presidential authority and in enunciating congressional support for the use of retaliatory controls.

The access to supplies policy limited presidential authority in three ways. First and most important, it provided that export controls could be used to respond to only two categories of foreign supply restrictions: those having or possibly having serious economic effects (in the form of either inflation or supply shortages), and those imposed to affect the foreign policy of the United States.\(^\text{130}\)

The differing operation of these two categories is noteworthy. To come within the first, the foreign supply restriction need only have a sufficient actual or potential economic impact on the United States; motive is immaterial.\(^\text{131}\) The foreign na-


\(^{125}\) Id.

\(^{126}\) Id. (remarks of Sen. Stevenson, Sen. Chiles).

\(^{127}\) Presidential authority would have been buttressed by the antiboycott provisions in EAA '69, which declared opposition to "restrictive trade practices or boycotts" aimed at either friendly nations or at "any United States person." EAA '69, Pub. L. No. 91-184, § 3(5)(A), 83 Stat. 841 (codified at 50 U.S.C. app. § 2402(5)(A) (1976 & Supp. II 1978)) (expired 1979).


\(^{129}\) After 1977, the President could have invoked the IEEPA by declaring a national emergency. 50 U.S.C. §§ 1701-1706 (Supp. III 1979). See note 2 supra.


\(^{131}\) Some possible motives for imposing restrictions on foreign access to
tion's purpose may be simply to increase export earnings; indeed the legislative history of the 1974 amendment indicates that mere price increases, if capable of producing the economic effects described in the statute, were restrictions against which the United States might properly retaliate.\textsuperscript{132} To fall within the second category, however, no economic effect at all is necessary; the motive of the nation imposing the restriction is all-important. If, for example, South Africa cut off diamond exports to the United States to influence American policy toward continued South African control of Namibia, there might be little economic effect,\textsuperscript{133} but because the embargo was intended to affect United States foreign policy, it would trigger the President's authority to retaliate with controls on American exports to South Africa.

The grant of authority to retaliate against foreign restrictions intended to affect American foreign policy now appears ironic. It was not long after 1974 that the United States began to use export controls on a significant scale for just the purpose condemned in the statute: attempting to influence the policies of other nations. The irony is heightened by the obvious indignation with which Congress viewed foreign export controls designed to influence United States policy.\textsuperscript{134}

The second limitation placed on presidential authority under the access to supplies amendment was the requirement

certain commodities are discussed in C. Bergsten, Completing the GATT: Toward New International Rules to Govern Export Controls 4-10 (1974).


133. For example, industry could turn to other sources or alternate materials, and financees could make do with other gems.

134. See 120 Cong. Rec. 26,055-56 (1974). The same sort of irony is apparent in other contexts as well. The United States legislation aimed at cooperation with the Arab boycott of Israel, EAA '79, § 8, 50 U.S.C. app. § 2407 (Supp. III 1979), for example, loses some of its force as a moral statement when one reads that Congress forbade complicity in only those boycotts the target of which is not the object of any United States boycott. See generally Lowenfeld, "... Sauce for the Gander:" The Arab Boycott and United States Political Trade Controls, 12 Tex. Int'l L.J. 25 (1977).

The irony of the access to supplies policy is evident within the history of the legislation itself. Section 3(7) was added by amendment on the Senate floor, 120 Cong. Rec. 26,056 (1974); the bill reported out of committee, S. 3792, 93d Cong., 2d Sess. (1974), would have added to EAA '69 only a finding and policy declaration opposing restrictions on access to supplies. Although the Committee report spelled out numerous adverse consequences of international supply restrictions, it noted that the Committee expected the President and the Commerce Department to consider those consequences when imposing controls on United States exports, stating that the "serious dangers" presented by unreasonable controls should "play an important role" in their deliberations. S. Rep. No. 93-1024, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 6234, 6238.
that the President make "every reasonable effort" to secure removal of foreign restrictions through international cooperation and agreement before imposing controls.\textsuperscript{135} This requirement is sound for several reasons. A foreign supply restriction might be imposed to deal with legitimate domestic economic problems; in such cases negotiations could address those problems or at least mitigate the effects of the supply restriction. Similarly, a restriction imposed to influence United States policy might be lifted if negotiations revealed the possibility of American retaliation or other costs which might be incurred by the foreign nation in maintaining the restriction.\textsuperscript{136} In these and similar situations, negotiations might preclude the destructive "economic warfare" that retaliatory controls could produce.

Finally, the amendment provided that retaliatory controls could not apply to medicine or medical supplies.\textsuperscript{137} This exemption was a compromise proposed by Senator Weicker who had earlier sought to exempt both medicine and food.\textsuperscript{138} Although the United States has traditionally been reluctant to control food exports,\textsuperscript{139} the Senate was unwilling to bind the President even to this extent, believing that controls on food exports would be one of the strongest American weapons in a confrontation with an OPEC-style natural resources embargo.\textsuperscript{140}

3. The Anti-Terrorism Policy

In 1977, Congress again added a new policy declaration to EAA '69, authorizing use of export controls "to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to" international terrorists (including those who direct and support


\textsuperscript{136} These are among the issues considered in Part IV infra.


\textsuperscript{138} 120 CONG. REC. 26,056 (1974) (remarks of Sen. Weicker).

\textsuperscript{139} The controls on grain exports to the U.S.S.R. imposed in 1980, \textit{see} text accompanying notes 803-04 infra, were in fact the first instance in which the "food weapon" has been used for political purposes. U.S. EXPORT WEEKLY (BNA) No. 289, at A-2 (Jan. 8, 1980). In EAA '79, Congress retained unusual power to overturn controls on food exports. \textit{See} EAA '79, § 7(g)(3), 50 U.S.C. app. § 2406(g)(3) (Supp. III 1979); text accompanying note 784 infra.

\textsuperscript{140} \textit{See} 120 CONG. REC. 26,056 (1974) (remarks of Sen. Stevenson).
Throughout the 1970s, the United States and other Western governments had grappled with many aspects of international terrorism. The 1977 amendment to EAA '69, which continues unchanged in EAA '79, was designed to deal with only one part of the terrorism problem: the role played by a small group of nations, so-called "subversive centers," in aiding and harboring terrorists.

The anti-terrorism amendment to EAA '69 was not the first American effort to exert pressure on subversive centers. As

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142. See, e.g., Joint Statement, 14 WEEKLY COMP. OF PRES. DOC. 1308-10 (July 17, 1978). Considerable debate on the proper response to terrorism has taken place internationally, though few agreements have been reached. See Browne, Terrorism, in THE U.S. ROLE IN A CHANGING WORLD POLITICAL ECONOMY: MAJOR ISSUES FOR THE 96TH CONGRESS 2344-35 (M. Lowenthal & R. Kaufman eds. 1979). The International Civil Aviation Organization has adopted three treaties aimed at protection of civil aviation, all of which the United States has ratified. Id. at 231, 237. The Organization of American States adopted a convention in 1971 aimed at "Acts of Terrorism Taking the Form of Crimes Against Persons," and the United States ratified this treaty in 1976. Id., at 231. In 1973, the United Nations adopted a treaty aimed at "Crimes Against Internationally Protected Persons," such as diplomats, which the United States has also ratified. Id. at 233, 237. Numerous actions to promote the safety of civil aviation have been taken in the United States. See id. Responsibility for coordinating efforts to combat terrorist activities rests with the Special Coordination Committee of the National Security Council. An interagency executive committee under this committee meets regularly to consider anti-terrorism measures, and a military unit trained to deal with terrorist incidents has been created. Id. at 235, 236. In Congress, extensive hearings on the problem have been held. See id. at 240 (bibliography of congressional documents).


144. See Murphy, State Self-Help and Problems of Public International Law, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM, 555, 563-65 (A. Evans & J. Murphy eds. 1978). In July 1976, the New York Times reported that Libya was training, arming, and financing "[a] broad terrorist network, stretching from the Middle East to Africa and Europe," and described its operation in some detail. N.Y. Times, July 16, 1976, at 1, col. 1. In 1977, the State Department, responding to an information request from Senator Javits, publicly stated that Libya had "actively assisted" terrorist groups and individuals since at least 1972. See N.Y. Times, May 9, 1977, at 4, col. 3. The correspondence is reprinted in International Terrorism: Hearing Before the Subcomm. on Foreign Assistance of the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 2-5 (1977) (statement of Sen. Javits) [hereinafter cited as International Terrorism Hearings]. The Department also named Iraq, South Yemen, and Somalia, id. at 3-4, though Somalia was later removed from its list. See S. REP. No. 95-908, 95th Cong., 2d Sess. 18 (1978) [hereinafter cited as S. REP. No. 95-908]. Depending on one's definition, other governments can be said to support terrorist activities at least occasionally. See Murphy, supra, at 563. The question of definition may become a major issue under the Reagan Administration. See note 813 infra and accompanying text.
early as 1972, following the terrorist attacks at the Munich Olympics, the Senate had adopted a nonbinding resolution that favored "the suspension of United States aid to and the imposition of economic and other sanctions against any nation which provides sanctuary for terrorists." Between 1972 and 1977, Congress took, or authorized the President to take, a number of actions of the kind contemplated by the Senate resolution, principally:

—The 1974 Antihijacking Act empowering the President to suspend civil air service to nations aiding or harboring terrorists and to third countries that continue to fly to such nations;

—The 1976 Wolff Amendment to the Foreign Assistance Act requiring the President to terminate economic and military assistance to any nation that aids or abets an international terrorist by granting sanctuary, except when the President finds that national security requires a continuation of aid;

—A 1976 amendment to the Generalized System of Preferences legislation providing that no nation that grants sanctuary to international terrorists may be designated a beneficiary of preferences unless—the restriction is waived by the President in the "national economic interest;"

—A 1977 statute supplementing the Arms Export Control Act with the language of the Wolff Amendment, thereby requiring termination of arms sales to countries harboring terrorists, again subject to presidential waiver in the interest of national

145. This event brought about a major increase in anti-terrorism activity in the United States. See Browne, supra note 142, at 231.
146. S. Con. Res. 100, 92d Cong., 2d Sess., 118 CONG. REC. 32,651 (1972) [hereinafter cited as S. Con. Res. 100].
148. 49 U.S.C. § 1514 (1976). The United States may also revoke or limit the rights of air carriers of nations that do not meet ICAO minimum standards for airport security. Id. at § 1515. None of these sanctions has been implemented. See Browne, supra note 142, at 237-38.
security;153 and

—A 1977 provision directing the executive branch to use its “voice and vote” in the several international financial institutions154 to channel assistance away from countries whose governments provide refuge to international airline hijackers.

By 1977, then, Congress had injected the issue of assistance to terrorists into many facets of American foreign policy, and it has continued to do so in subsequent legislation resembling that outlined above.155 Further measures have been extensively debated, but not yet enacted.156

Most of the measures adopted prior to 1977 were seen as ineffective because of limited American contact with terrorist-supporting states.157 The United States has no air transport agreement with either Libya or Iraq, for example, and neither country receives American aid.158 At best, most measures were regarded as politically symbolic.159 Export controls, however, were thought to have some potential for influencing the subversive centers largely because they could prevent sales of commercial aircraft, a product that was sought in large numbers by many nations known to assist terrorists,160 was believed to

154. International Bank for Reconstruction and Development Act of 1977, Pub. L. No. 95-118, § 701(a), 91 Stat. 1067 (codified at 22 U.S.C. § 262d(a) (Supp. III 1979)). The wording of the legislation suggests that opposition to assisting terrorists was seen as part of the broader human rights policy, described below. See id. Aircraft hijacking is the only activity covered by the statute. Id. at § 701(a)(2).
156. See Browne, supra note 142, at 239. As of 1980, major anti-terrorism bills were before both houses. See generally S. 333, 96th Cong., 2d Sess. (1980); H.R. 2441, 96th Cong., 2d Sess. (1980).
157. See, e.g., Murphy, supra note 144, at 566.
158. See International Terrorism Hearings, supra note 144, at 8 (statement of Sen. Heinz).
160. Libya, in particular, had ordered many aircraft from the United States. See note 119 supra.
have a logical connection with international terrorism, and was supplied mainly by United States companies.

Oddly, the legislative history of the 1977 amendments to EAA '69 is virtually silent on the anti-terrorism policy. Nevertheless, the adopted policy authorized use of export controls to combat a broader range of conduct than had any of the prior legislation directed at subversive centers: all forms of assistance (not merely sanctuary) given to any persons involved (not just active participants) in any form of terrorism (not simply hijacking).

Like the 1974 policy on access to supplies, the anti-terrorism provision directed the President, before resorting to export controls, to "make every reasonable effort" to discourage assistance to terrorists through "international cooperation and agreement." The President apparently determined almost immediately, and probably correctly, that in some cases exhaustion of these remedies would be futile, for exports of aircraft and other controlled items to subversive centers were restricted in succeeding years. In May 1980, every item on

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162. According to the former President of the Export-Import Bank, the United States is the "dominant producer" of short-range aircraft and long-range, wide-bodied aircraft, although there is strong competition from Europe for sales of mid-range, wide-bodied aircraft. Oversight Hearing on the Export-Import Bank: Hearing Before the Subcomm. on Int'l Trade, Investment and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs, 96th Cong., 1st Sess. 3-4 (1979) (statement of John L. Moore).
165. Id.
166. The principal targets of anti-terrorism controls have been the three subversive centers identified in 1977. Most prominent has been Libya. See S. REP. No. 95-908, 95th Cong., 2d Sess. 23 (1978); An Act to Combat International Terrorism: Hearings Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 11 (1978) (statement of Cyrus Vance); Ibrahim, supra note 119, at 25, col. 3. The others have been Iraq and South Yemen. See Senate EAA Hearings Part III, supra note 116, at 41 (statement of Frank Weil). Since 1980 anti-terrorism controls also have applied to Syria. See 45 Fed. Reg. 1595 (1980) (to be codified in 15 C.F.R. § 385.4).

Commerce has provided little information about the items subject to control under the anti-terrorism policy, using such phrases as "equipment particu-
the CCL already controlled for national security purposes for export to Libya, Iraq, South Yemen, or Syria\textsuperscript{167} was made subject to concurrent foreign policy controls for export (in transactions of $7 million or more) to military purchasers in those countries.\textsuperscript{168} Thus, the State Department now has express authority to review most substantial exports of dual-use items to subversive centers under the anti-terrorism policy.\textsuperscript{169}

\begin{footnotesize}
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\item \textsuperscript{167} This includes most items on the CCL, because most national security controls apply to exports to all destinations.
\item \textsuperscript{168} \textit{45 Fed. Reg.} 33,956 (1980) (to be codified in 15 C.F.R. § 385.4(d)). The new controls were prompted by a notification requirement in EAA '79. \textit{See} note 169 infra.
\item \textsuperscript{169} In fact, the Commerce and State Departments have for years reviewed exports of items controlled for national security reasons under the anti-terrorism policy as well. The Oshkosh Truck case and the denials of licenses for aircraft exports to Libya, \textit{see} note 119 supra, were explicitly linked to the anti-terrorism policy as well as to considerations of regional stability. \textit{See} Ibrahim, \textit{supra} note 119, at 25, col. 3; \textit{N.Y. Times}, Feb. 22, 1978, at 3, col. 2. No statement of licensing policy applicable to the range of items on the CCL has been included in the Regulations, however. Regional stability and anti-terrorism controls frequently seem almost interchangeable, in large part because both have focused on the Middle East, where the support of Libya and others for extreme elements in the Palestine Liberation Organization involves them in a major regional conflict. \textit{See} S. REP. No. 95-908, \textit{supra} note 144, at 18-20.
\item EAA '79 requires the Secretaries of State and Commerce to notify certain committees of Congress before approving any license for the export of goods or technology valued at over $7 million, when the purchasing country has been determined by the State Department to have repeatedly provided support for acts of terrorism and when the goods or information to be exported would make a significant contribution to its military (including logistical) capability or would enhance its ability to support international terrorism. EAA '79, § 6(1), 50 U.S.C. app. § 2405(1) (Supp. III 1979). This provision reflects the continuing interrelationship between the anti-terrorism and regional stability policies. Recently, proposed exports of aircraft and marine engines to Iraq, favored by the Carter Administration but strongly opposed by some members of Congress, led to controversy over compliance with the new notification provision. \textit{See} U.S. EXPORT WEEKLY (BNA) No. 309, at A-1 to A-2 (May 27, 1980); \textit{id.} No. 313, at A-1, A-3 to
\end{itemize}
\end{footnotesize}
4. The Human Rights Policy

More important to the expansion of foreign policy export controls than either of the policies added to EAA '69 was the emergence of concern for the promotion of "internationally recognized human rights" as an integral part of American foreign policy—a development never explicitly incorporated in the Act. Although this Article will attempt neither to discuss the many difficult and divisive issues raised by the American human rights policy nor to render a complete history of the policy, an outline of the major developments is essential.

Intense American involvement with international human rights can be said to date from 1973 when a House subcommittee chaired by Representative Donald Fraser of Minnesota initiated hearings that produced extensive evidence of torture and other "rampant violations of human rights" around the world. The subcommittee concluded that American foreign policy had accorded little importance to opposing such conduct and strongly criticized the Nixon Administration for embracing governments that had "unabashedly violate[d] al-

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171. Among the issues often discussed are the following: What are internationally recognized human rights? What order of priority should American policy assign to various rights? What is the morality of attempting to change the social practices of other cultures? Do efforts to do so violate international law? These issues are discussed at length elsewhere. In addition to sources cited in note 170 supra, see generally R. LILlich & F. NEwMAN, INTERNATIONAL HUMAN RIGHTS (1979); Symposium—Human Rights and U.S. Foreign Policy, 8 DEN. J. INT'L L. & POL. 517 (1979); Symposium—Human Rights, The National Interest, And U.S. Foreign Policy: Some Preliminary Observations, 14 VA. J. INT'L L. 597 (1974).

172. Human Rights Hearings, supra note 170, at 55. The United States has of course had a history of involvement in issues that would now be considered part of a "human rights" policy. See Weissbrodt, supra note 170, at 232-34.

173. See also AMNESTY INTERNATIONAL, REPORT ON TORTURE (1973).

most every human rights guarantee pronounced by the overall world community." The subcommittee's general recommendation was clear from the title of its 1974 report: Human Rights in the World Community: A Call for U.S. Leadership. The subcommittee also issued numerous specific recommendations for action by both the executive branch and Congress.

While the Republican Administration acted on some of these recommendations, the subcommittee's most significant product was a stream of legislation injecting the human rights issue into many facets of foreign policy. The bulk of these enactments have affected American foreign assistance programs, a policy area in which Congress is particularly active due to the need for frequent appropriations. Initially, a "sense of Congress" provision urged the President to deny economic and military aid to foreign governments that practiced "internment or imprisonment of [their] citizens for political purposes." Building on this modest foundation, subsequent legislation now requires the executive branch to consider the human rights practices of recipient countries in decisions on virtually all forms of foreign assistance—including security assistance, economic assistance, concessional food

175. FRASER REPORT, supra note 174, at 9; see Weissbrodt, supra note 170, at 239-40.

176. See generally FRASER REPORT, supra note 174. The work of the subcommittee, by initiating widespread official involvement in international human rights, has been regarded as "herald[ing] a new era in United States foreign policy." Weissbrodt, supra note 170, at 239; cf. Buergenthal, International Human Rights: U.S. Policy and Priorities, 14 VA. J. INT'L L. 611, 611 (1974) (Fraser Committee provided long overdue opportunity to review American foreign policy in regard to human rights).


179. See Salzberg & Young, supra note 177, at 269-78; Weissbrodt, supra note 170, at 241-78.


sales,183 and American aid through international financial institutions.184 Such considerations also must be taken into account


182. In enacting the International Development and Food Assistance Act of 1975, Congress added § 116 to the Foreign Assistance Act. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 310, 89 Stat. 849 (codified at 22 U.S.C. § 2151n (1976)). Section 116, always a binding enactment, prohibits the granting of economic aid to any country which falls within the definition of a violator of human rights included in § 502B. See note 181 supra. Aid may, however, be provided to a violator of human rights if it will "directly benefit the needy people" in the recipient country. 22 U.S.C. § 2151n (1976). The foreign affairs committee of either house of Congress can require the Agency for International Development to justify any continuation of aid under the exception. Id. Either committee, or either house, may initiate a procedure by which Congress can overrule a grant of aid by concurrent resolution. Id. at § 2367 (1976).


184. The International Bank for Reconstruction and Development Act of 1977, Pub. L. No. 95-118, § 701, 91 Stat. 1067 (codified at 22 U.S.C. § 262d (Supp. III 1979)), directs American representatives to the international financial institutions to "advance the cause of human rights" through the use of the "voice and vote" of the United States, and specifically, to channel aid to countries which do not engage in a consistent pattern of gross violations of internationally recognized human rights and to oppose aid to countries which do, unless the aid would serve the "basic human needs" of their citizens. As passed, the Act is a compromise between the original House bill, which required a negative vote on loans to human rights violators, and the Administration's desire for-
in the operations of both the Export-Import Bank and the Overseas Private Investment Corporation. Congress has in addition restricted aid to specific nations as a result of their human rights practices and has required the executive branch to prepare extensive public reports on human rights conditions around the world.


gress explicitly established the promotion of international human rights as an essential component of United States foreign policy. Congress declared that, in accordance with American obligations under the United Nations Charter and in keeping with American traditions and constitutional heritage, "a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights by all countries." This declaration may have been the most significant provision in the human rights legislation of the 1970s in that it transcended individual assistance programs to provide direction for the whole of American foreign policy. It was without doubt the most significant in terms of its effect on export controls. By requiring that the promotion of human rights be considered a major part of "the foreign policy of the United States," perhaps even one of its "international responsibilities," the 1976 declaration had the same effect as an amendment of EAA '69 itself—it expanded the purposes for which foreign policy export controls were explicitly authorized.

Much of the impetus for the steady enactment of human rights legislation prior to 1977 came from the perceived unwillingness of the Republican Administration to pursue human rights issues. The Carter Administration, however, had a markedly different attitude toward human rights. President Carter had campaigned on his intention to include human rights considerations in foreign policy and came into office with a "clear commitment" to an active international human rights policy. In his inaugural address and his March 1977

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190. Foreign Assistance and Related Programs Appropriations, Fiscal Year 1980—Part I: Hearings Before the Subcomm. on Foreign Assistance of the Senate Comm. on Appropriations, 96th Cong., 1st Sess. 728 (1979) (statement of Patricia Derian, Assistant Secretary of State for Human Rights and Humanitarian Affairs); see Weissbrodt, supra note 170, at 251.


192. See Weissbrodt, supra note 170, at 241 n.39, 244 n.49.

193. See id. at 231 nn. 1 & 2.

194. Human Rights Hearings, supra note 170, at 57.

speech to the United Nations General Assembly, President Carter reiterated his Administration's commitment to international human rights as a central tenet of American foreign policy. State Department officials likewise stated their dedication to the promotion of human rights. In 1977 and 1978, diplomatic initiatives and other actions aimed at promoting human rights became common. The actions encompassed not only important symbolic gestures, but more tangible measures as well; limitations on aid, arms transfers, and concessional food sales, among other measures, were imposed against nations that had violated human rights.

In such an atmosphere, it was perhaps inevitable that export controls would be identified as another potential policy tool, and the human rights policy became the basis for some of the most controversial export controls of the 1970s. The specific controls described below illustrate the Carter Administration's use of export controls in pursuit of international human rights.

B. FOREIGN POLICY EXPORT CONTROLS, 1977-1978

A number of widely publicized and controversial foreign policy export controls, involving validated license requirements, restrictive licensing policies, and denials of individual licenses, were imposed during 1977 and 1978. The controls described in this section were based largely on the human

196. The President's Address to the General Assembly, 13 WEEKLY COMP. OF PRES. DOC. 397, 401 (1977).

197. See, e.g., Human Rights Hearings, supra note 170, at 2-7 (statement of Mark L. Schneider, Deputy Assistant Secretary of State for Human Rights); Vance, Human Rights and Foreign Policy, 7 GA. J. INT'L & COMP. L. 223 (1977) (Law Day Address).

198. See Human Rights Hearings, supra note 170, at 4-5; Vogelgesang, supra note 170, at 822-26; Weissbrodt, supra note 170, at 278-79.

199. See Human Rights Hearings, supra note 170, at 57.

200. See id., at 4-5, 8-9, 10-11, 39, 57-58; International Financial Institutions Hearings, supra note 184, at 180-83; DEPARTMENT OF STATE, REPORT ON HUMAN RIGHTS PRACTICES IN COUNTRIES RECEIVING U.S. AID: REPORT SUBMITTED TO THE SEN. COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS, 96th Cong., 1st Sess. 6 (1979) [hereinafter cited as REPORT ON HUMAN RIGHTS PRACTICES]; Vogelgesang, supra note 170, at 826.


201. The descriptions of validated license controls and licensing policies are based primarily on official documents, regulations, and other statements of the relevant executive departments or Congress. Descriptions of license denials—and to some extent the other controls as well—are of necessity based on testimony in congressional hearings and on press reports.
rights policy embraced by the Carter Administration. It was these actions to which Congress was reacting when it adopted the foreign policy sections of EAA '79; they thus form part of the legislative history of EAA '79 and should be understood before considering the legislation itself. These incidents can also serve to illustrate the more general discussion of export controls as a tool of foreign policy in Part IV. With the illustrative function in mind, this section of the Article first examines the 1978 embargo on trade with Uganda, imposed not by the President, but by Congress.

1. **Uganda: A Foreign Policy Embargo**

   The bizarre history of the reign of Idi Amin in Uganda is well known. From his rise to power in 1971, Amin subjected the country to a "reign of terror" perhaps unique in recent history, involving an unfathomable series of human rights violations.

   Between 1971 and 1978 the United States took a number of steps to "distance" itself from Amin: the American Embassy in Uganda was closed, American officials vigorously spoke out against Amin, economic and military assistance was terminated, the Export-Import Bank and the Overseas Private...
Investment Corporation ceased financing Ugandan transactions, imports from Uganda were excluded from the Generalized System of Preferences, and American representatives to international lending institutions voted against loans to Uganda.

There were few direct controls on trade with Uganda prior to 1978, however, despite Congressional pressure. Exports of arms were prohibited, and commercial exports of items already subject to validated license requirements were reviewed by the State Department. The Department recommended that licenses for exports that could contribute directly to human rights violations be denied, but exports that would not assist the Ugandan government or military were approved. State Department review was limited, furthermore, to exports of those high technology items controlled for national security purposes and a few other products controlled under the human rights policy. All other commercial exports, and all imports,


215. See id. at 106-08 (statement of Rauer Meyer).
216. In 1978, Uganda was in Country Group V, 15 C.F.R. Part 370, Supp. No. 1 (1978). The only exports which ordinarily require a validated license for export to destinations in Group V are those unilaterally or multilaterally controlled to all destinations. See *The Commodity Control List, supra* note 70. As of June 1978, only dual-use national security items, nuclear power items, and three categories of items requiring validated licenses so their export could be scrutinized under the human rights policy were so controlled. The human rights controls applied to certain nonmilitary aircraft, ECCN 4460B, certain crime control and detection equipment, see notes 266-90 infra and accompanying text, and certain listening devices, ECCN 4517B. See *Senate EAA Hearings Part I, supra* note 106, at 65 (statement of Commerce Department); id. at 219-22 (statement of State Department). All were unilaterally controlled to all or most destinations in Group V, including Uganda. By way of contrast, several
The Administration opposed additional trade controls, arguing that restrictions on exports would have little effect because export volume to Uganda was small and the United States was not the sole supplier of any significant Ugandan import. Even though the United States imported one-third of Uganda's coffee exports (its major source of foreign exchange), the Administration contended that restrictions on imports would have little effect, reasoning that high coffee prices would induce other nations to purchase any part of the Ugandan crop not bought by the United States. Other coffee importing nations had shown no interest in cooperating with an American ban on imports.

In Congress, however, it was widely believed that the magnitude of American coffee imports gave the United States substantial influence over Uganda, perhaps enough to oust Amin. Others argued that, whatever the economic or political effect, an American embargo would be symbolically important. In October 1978, Congress swept aside the Administration's arguments and imposed a mandatory ban on both imports from and exports to Uganda. This was the first commodities required validated licenses for export to other countries in Group V, notably South Africa and certain Middle East nations. Id.


218. Id. at 106, 128 (statement of Rauer Meyer).


220. Id. at 128 (statement of William Harrop).

221. Senator Hatfield, for example, argued that while an import embargo could not “guarantee the overthrow of Amin,” it could be imposed “with expectations of success” since other importing nations might go along. Id. at 6-7 (statement of Sen. Hatfield). Representative Pease felt that coffee imports gave the United States “real power to affect events in Uganda. . . . Whether Amin would fall from power if he lost his coffee revenue from the West is an open question; but the impact upon him would be very severe.” Id. at 32-33, 35 (statement of Rep. Pease).

222. Id. at 17-18 (statement of Michael Posner).

unilateral American embargo that did not have its origin in armed hostilities or similar circumstances.\textsuperscript{224} It was based instead on congressional findings that the government of Uganda had committed "genocide" and that the unique economic relationship of the United States justified "an exceptional response."\textsuperscript{225}

The embargo statute prohibited the importation of "any article grown, produced or manufactured in Uganda" until the President certified to Congress that the government of Uganda was no longer "committing a consistent pattern of gross violations of human rights."\textsuperscript{226} The import ban was to be administered by the Treasury Department, in consultation with the State Department,\textsuperscript{227} but regulations were never promulgated because American companies had already ceased buying Ugandan coffee under the pressure of congressional and other public criticism.\textsuperscript{228}

The ban on exports to Uganda, enacted as an amendment to EAA '69,\textsuperscript{229} was similar in form to the import prohibition, but with two significant differences. First, it permitted the continued exportation of food products, a major part of American exports to Uganda. Second, it prohibited the export of all other items "subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States."\textsuperscript{230} Under the American approach to national jurisdiction, and in line with a 1977 amendment to EAA '69,\textsuperscript{231} this language made the export prohibition applicable to foreign firms controlled by Americans, a controversial extension of American

\textsuperscript{1981]}

\textit{EXPORT CONTROLS}

about change in Uganda and required the Secretary of State to report the steps taken. It had also expressed the "sense of the Congress" that the President should prohibit exports of military, paramilitary, and police equipment to Uganda and should propose a United Nations arms embargo, among other measures.

\textsuperscript{224.} See Note, \textit{supra} note 205, at 209.


\textsuperscript{226.} Id. at § 5(c) (repealed 1979). The statute did not refer to "internationally recognized" human rights as most similar statutes do.


\textsuperscript{228.} See \textit{Uganda Hearings}, \textit{supra} note 202, at 129 (statement of William Harrop).


\textsuperscript{230.} Id.

\textsuperscript{231.} Act of Dec. 28, 1977, Pub. L. No. 95-223, § 301(a), (b)(1) (expired 1979); \textit{see} note 13 \textit{supra}.
law beyond United States territory.\textsuperscript{232} The import ban, in contrast, prohibited only imports into the United States, its territories, and possessions, even though the potential for diversion of Ugandan coffee purchases to foreign subsidiaries of American companies had been acknowledged by Congress.\textsuperscript{233}

The Commerce Department hastily adopted a regulation that simply repeated the terms of the statute, superseding any inconsistent provisions in the Regulations.\textsuperscript{234} Detailed permanent regulations—including controversial provisions to implement the embargo as to controlled foreign firms—were proposed in December 1978,\textsuperscript{235} but events overtook the American embargo before the regulations could be finally adopted. In April 1979, a force of Tanzanian soldiers and Ugandan exiles captured Kampala, driving Amin from the capital and establishing a provisional government.\textsuperscript{236} Welcoming Amin's overthrow, the United States moved to establish normal relations with the new government.\textsuperscript{237} President Carter certified an end to human rights violations (fulfilling the condition imposed by the statute),\textsuperscript{238} the temporary export control regulation was deleted, and the proposed regulations were withdrawn.\textsuperscript{239} In September 1979, Congress repealed the embargo legislation.\textsuperscript{240}

2. \textit{The South African Military and Police: An Embargo of Disfavored Institutions}

Because of its racial policies, South Africa has been the target of various trade restrictions imposed by the United Nations, the United States, and other nations.\textsuperscript{241} The American restric-

\begin{itemize}
\item \textsuperscript{232} See text accompanying notes 618-55 infra.
\item \textsuperscript{233} See, e.g., \textit{Uganda Hearings}, supra note 202, at 64-65 (statement of Sen. Church).
\item \textsuperscript{234} 43 Fed. Reg. 49,304 (1978) (repealed 1979). The regulation was made effective retroactively to the date of the statute.
\item \textsuperscript{235} 43 Fed. Reg. 58,571 (1978).
\item \textsuperscript{236} See \textit{N.Y. Times}, April 12, 1979, at A-1, col. 1.
\item \textsuperscript{237} \textit{Id.} at A-16, col. 3.
\item \textsuperscript{238} Memorandum of May 15, 1979, 3 C.F.R. 485 (1980).
\item \textsuperscript{239} 44 Fed. Reg. 31,010 (1979).
\item \textsuperscript{241} Most notable is the embargo on arms sales mandated by the Security Council. \textit{See} note 2 supra. While the arms embargo is primarily administered by the State Department, the Commerce Department controls exports of arms-related commodities within its jurisdiction. \textit{See} 15 C.F.R. § 385.4(a)(1) (1980); Mehlmam, Milch & Toumanoff, \textit{United States Restrictions on Exports to South Africa}, 73 Am. J. INT'L L. 581, 587 n.40, 589 n.53 (1979). The commodities so controlled are listed in 15 C.F.R. Part 379, Supp. No. 2 (1980). Related technical data are also controlled. \textit{See id.} at § 385.4(a)(3), 379.4(e) (1979). Licensing pol-
tion with the greatest effect on commercial exports dates from 1978, when the Carter Administration embargoed all exports and reexports of United States-origin goods and unpublished technical information to or for the use of any "military and police entities" in South Africa. Although the Administration asserted that its action was intended both to strengthen American implementation of a United Nations arms embargo and to further United States foreign policy regarding human rights, the President had authority to impose the controls only under the foreign policy clause of EAA '69, because the relevant Security Council resolutions related only to exports of arms and related equipment.

The South African embargo extends to "any commodity, including commodities that may be exported to any destination in Country Group V under a general license." As in the case of Uganda, many sensitive exports already required validated licenses for export to South Africa in 1978. A restriction relating to exports of these arms-related items was made more restrictive in 1978. 43 Fed. Reg. 7311 (1978); see Mehlman, Milch & Toumanoff, supra at 582-85, 589.


The validated license requirements applicable to certain advanced computers (ECCN 1565A), already controlled for national security purposes, were extended in 1980 (with certain exceptions) to exports to certain South African government agencies on foreign policy grounds. 45 Fed. Reg. 1599 (1980) (to be codified at 15 C.F.R. § 385.4(a) (9)). Early in 1981, a validated license was required for the export of any computer, regardless of performance level, to such governmental agencies. 46 Fed. Reg. 1258 (1981).

242. 43 Fed. Reg. 7311 (1978) (amending 15 C.F.R. Parts 371, 373, 379, 385, 386 & 399). The controls also apply to exports to Namibia. Id. 43 Fed. Reg. 43,450 (1978) (adding 15 C.F.R. Part 385, Supp. No. 2), designated the following controlled entities: The Armaments Development and Production Corporation (ARMSCOR), the Department of Prisons, the Bureau of State Security, and the South African Railways Police Force; the National Institute of Defense Research, in cases where the exported goods or information will be used in a research project for the military or police; and certain other law enforcement officials, not associated with the specified agencies, who perform duties similar to those of police in the United States.


244. See notes 2, 241 supra.


246. See text accompanying notes 212-16 supra.

247. These items included equipment related to arms, certain aircraft, crime detection devices, and the dual-use items controlled to all destinations.
tive licensing policy had been in effect for arms-related items;\footnote{248} licensing policy for dual-use items had fluctuated with changes in administration.\footnote{249} The embargo, however, meant that no validated licenses would be issued for exports of any of these products to the South African military and police.\footnote{250} The embargo regulations also went much further: a validated license became necessary to export any product to the designated entities, even ordinary vehicles, office equipment, or other commercial items, and no such license would be granted. The embargo was intended to deny the controlled organizations access to all United States-origin goods and information.\footnote{251}

The embargo regulations prohibit not only exports and reexports to military and police consignees, but also exports and reexports to civilian South African\footnote{252} and third-country buyers when the exporter or reexporter knows (or has reason to know) that the goods are to be sold to or used by or for the regulated entities, or used to service equipment used by or for them.\footnote{253} Moreover, the regulations prohibit foreign purchasers from using American-origin parts or components to manufacture products abroad when the purchasers know (or have reason to know) that their products will similarly reach the controlled entities.\footnote{254}

\begin{footnotes}
\footnote{249} See Mehlman, Milch & Toumanoff, supra note 241, at 583-85.
\footnote{252} A special destination control statement is required on bills of lading and commercial invoices used in exports to civilian consignees in South Africa, giving notice that the goods may not be resold or otherwise delivered to or for the use of the designated entities. 15 C.F.R. § 386.6(a)(2), (d)(3) (1980).
\footnote{253} Id. at §§ 385.4(a)(2), 371.2(c)(11), 373.1(a). Foreign consignees and distributors approved for participation in special licensing procedures must certify that goods originating in the United States will not be made available to the designated entities. Id. at § 373.1(a)(2).
\footnote{254} The fact that the controls apply to American exports to third-country purchasers and civilian South African purchasers only when the American exporter has reason to know that the goods are to be made available to the military or police is criticized as a "key weakness" of the controls in Mehlman, Milch & Toumanoff, supra note 241, at 593, 595. The authors' suggested remedies for this and other weaknesses include expansion of the controls, the addition of reporting requirements for United States exporters, and stronger penalties for violations. Id. at 597-602.
\footnote{254} 15 C.F.R. § 385.4(a)(4) (1980).}

The embargo applies just as expansively to the export and reexport of all nonpublic technical data under the licensing jurisdiction of Commerce, and extends to transactions in which the "direct product" of the data (which might be an item of equipment, a process, or a service), or any "subsequent product of the direct product" (such as an item manufactured or produced by the equipment or process that is the direct product of the data), is to be delivered to, or used by or for, any of the designated South African organizations.

The technical data regulations of the South African embargo appear to extend further than the realistic enforcement capabilities of the United States, especially in the area of reexports. The regulations, for example, purport to prohibit a French firm licensed to use an American company's technology from sub-licensing that technology to a private South African corporation when the French firm "knows or has reason to know" that equipment to be constructed with the aid of the technology will be used in the manufacture of an item that will be used to service equipment owned by one of the designated South African police organizations. Assuming that the foreign parties involved would not advertise their agreement to American authorities, it would be very difficult to ascertain, let alone prove, the existence of the sub-license, the use made of the products of the data in South Africa, or the knowledge of the

255. Id. at § 385.4(a)(3). The only information not subject to the embargo is that eligible for export under General License GTDA. Id. at §§ 385.4(a)(3), 379.3. When nonpublic technical data qualifies for export to civilian purchasers under General License GTDR (that is, when the United States exporter has no reason to know of any intended retransfer to the designated South African entities, id. at §§ 385.4(a)(3), 379.4(e)) the regulations require that the buyers be notified in writing that the direct product of the data—though apparently not the data itself, and in this case apparently not the subsequent products of the direct product—may not be made available in any direct or indirect way to the designated entities. Id. Exports to third countries appear to be covered only by a general provision in the regulations making it impermissible to export technical data from the United States to any destination when the exporter knows that the data is to be reexported, directly or indirectly, to any other destination without specific permission of OEA. Id. at §§ 379.8(a)(2), 371.2(c)(5). An exception from this prohibition is available when the contemplated reexport is to a destination to which the data could have been exported directly under General License GTDA or GTDR. Id. at § 379.8(b)(1). This exception would not be available if the contemplated reexport were of nonpublic data and were destined to or for the use of the South African military or police, since General License GTDR would not be available for such a direct export. Id. at § 379.4(e).

256. Id. at §§ 385.4(a)(3), 379.4(e). This extension of the restrictions on technical data exports appears not to apply to exports to third countries, however. See id. at § 379.8(a)(2).
French firm.257

Even more severe enforcement problems arise if, in the same transaction, the original licensee of the American technology is a private South African company.258 Information on internal transfers may be more difficult to obtain than information on reexports,259 and a prohibition on internal retransfers might run afoul of South African law.260 The only available penalty, if a violation could be established, would seem to be disqualification of the South African licensee from participation in subsequent American export transactions.261 Moreover, the South African government could commandeer needed information or equipment from the civilian sector in an emergency.262

Many of the problems of coverage and enforcement in the South African embargo stem from the "middle road" policy of embargoing only particularly disfavored institutions.263 This and certain other South African trade restrictions264 are the only American export controls that formally apply only to par-

257. See Mehlman, Milch & Toumanoff, supra note 241, at 593-96.
258. See Senate EAA Hearings Part II, supra note 250, at 264 (statement of Charles W. Stewart). The embargo regulations appear to contain no provision prohibiting an internal transfer, although exporters of technical data to South African buyers must notify their buyers that the products of the data may not be made available to the military or police. See note 255 supra. The applicable regulations speak only of "exports" and "reexports"; a transfer of technical data or its products from a civilian buyer to a police agency within South Africa is clearly not a United States export and does not fall within the definition of a reexport either, 15 C.F.R. § 370.2 (1980). But see Mehlman, Milch & Toumanoff, supra note 241, at 593 n.63, 596.
259. See Mehlman, Milch & Toumanoff, supra note 241, at 593-97; House EAA Hearings Part I, supra note 21, at 126 (statement of Stanley Marcuss). Information on diversion is obtained primarily from foreign service officials and intelligence agencies. Id.
260. See Mehlman, Milch & Toumanoff, supra note 241, at 596 n.76.
261. See id. at 593 n.63. This penalty has not been applied on a regular basis.
262. See id. at 593 n.64; Senate EAA Hearings Part II, supra note 250, at 91 (statement of W. Robert McLellan).
263. See Mehlman, Milch & Toumanoff, supra note 241, at 597. Short of moving to a total embargo, the authors suggest ameliorating some of the enforcement problems by prohibiting exports to all South African purchasers of any item which would be useful to the police and military in counterinsurgency operations; or by permitting such exports only when the exporter could establish that the items "would never reach governmental forces," id. at 598, a showing that seems impossible in light of the ability of such forces to commandeer civilian goods.
264. Aircraft, for example, can only be exported with written assurances that they will not be used by military or paramilitary forces, and computer exports are controlled to particular South African government agencies. See note 241 supra.
ticular institutions in a target nation. In practice, however, other controls, particularly those under the anti-terrorism and regional stability policies and the crime detection equipment controls discussed below, also focus on exports to foreign military and police forces and share similar enforcement problems.\(^{265}\)


The Uganda and South Africa embargoes were products of American attitudes toward particular countries and their governments. Controls on exports of crime detection equipment, in contrast, have grown out of a more generalized American attitude toward particular conduct, wherever practiced: torture, suppression of dissidents, and other violations of basic human rights.\(^{266}\)

Validated license controls on crime detection equipment were first imposed under EAA '69 in 1974.\(^{267}\) The items subject to control have remained constant to the present day. In general terms, they include "any commodity particularly useful in crime control and detection,"\(^{268}\) ranging from relatively simple items, such as fingerprinting equipment, riot guns, bullet proof vests, helmets and restraint devices, to sophisticated devices such as infrared and ultra-violet photographic equipment, mobile crime science laboratories, voice print identification equipment, and lie detectors.\(^{269}\) Initially, however, the validated license requirement applied only to exports to Country Groups

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\(^{265}\) For example, aircraft and other items controlled under the anti-terrorism and regional stability policies, see notes 116-19, 166, 169 supra, are by their nature likely to be purchased by governmental agencies. The same is true for crime detection devices. See text accompanying notes 266-90 infra. Most items on the CCL are also closely scrutinized under the human rights policy when exported to military and police consignees. See text accompanying notes 276, 340-42 infra.

\(^{266}\) Advocates of controls on such equipment refer to it as "citizen control equipment" to make the point that it can be used to monitor and control dissidents, minorities, or ordinary citizens in the hands of a repressive regime. See Senate EAA Hearings Part II, supra note 250, at 145, 157-58 (statement of Jerry Goodman).


\(^{268}\) 15 C.F.R. § 376.14(a) (1980).

\(^{269}\) Id. These examples in the Regulations are intended to supplement the more specific listings of controlled items in the CCL, including items under ECCNs 4997B, 5490B, 5597B, 5680B, 5998B and 5999B (1979). ECCN entries may list specific controlled items in some detail, such as "leg irons, shackles, handcuffs, [and] thumbscrews." ECCN 5680B. In 1980, related nonpublic technical data was also placed under control. See 15 C.F.R. § 376.14(a) (1980), as amended by 45 Fed. Reg. 1598 (1980).
Q, W, and Y,\textsuperscript{270} then including the U.S.S.R., Eastern Europe, and the People's Republic of China.\textsuperscript{271} Although the Commerce Department stated only that these controls were imposed because the affected exports "would be contrary to the foreign policy interests of the United States,"\textsuperscript{272} the timing of the measure suggests that it was a response to the problems of emigration and treatment of dissidents in the U.S.S.R., then major issues in the United States.\textsuperscript{273} Soon after the Carter Administration came into office, validated license controls were extended to all purchasers in South Africa.\textsuperscript{274}

The regulations were expanded in 1978\textsuperscript{275} to require a validated license for exports of crime detection equipment to all destinations except the member nations of NATO, Japan, Australia, and New Zealand. The stated purpose of these expanded controls was to allow the Commerce and State Departments\textsuperscript{276} to review proposed exports and determine whether the equipment to be sold would be used in consonance with the American human rights policy.\textsuperscript{277}

Congress in 1978 wrote the existing controls into EAA '69,\textsuperscript{278} calling for particular scrutiny by the State Department of proposed sales to police and internal security forces with

\begin{itemize}
\item \textsuperscript{270} 15 C.F.R. § 376.14(a) (1975) (current version at 15 C.F.R. § 376.14 (1980)). All exports, including crime detection equipment, were of course embargoed to the nations in Group Z and, at that time, Group S (Rhodesia). 15 C.F.R. §§ 385.1, .3 (1975).
\item \textsuperscript{273} The major American response was the well-known Jackson-Vanik Amendment. See generally Note, \textit{An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade and Human Rights: The Romanian Example}, 8 LAW & Pol'y Int'l Bus. 193 (1976).
\item \textsuperscript{274} 42 Fed. Reg. 36,991 (1977) (codified at 15 C.F.R. § 376.14 (1978)). Namibia was also included in the controls. \textit{Id}.
\item \textsuperscript{275} 43 Fed. Reg. 27,985-86 (1978) (codified at 15 C.F.R. §§ 376.14, 385.2, .4, .5 & Pt. 373, Supp. No. 1 (1980)). These regulations were made retroactively effective. See Bingham & Johnson, supra note 117, at 914.
\item \textsuperscript{276} The State Department reviews applications for licenses to export crime detection equipment and many other items on the CCL to police and military consignees in most countries from a human rights perspective. See Senate EAA Hearings Part I, supra note 106, at 219-22 (statement of Richard Cooper).
\item \textsuperscript{277} 43 Fed. Reg. 27,985-86 (1978). A similar rationale supported controls on the export to all destinations of "bugging" equipment, used for surreptitious listening to wire or oral conversations, such as the "martini olive transmitter." See 15 C.F.R. § 376.13 (1980).
\end{itemize}
records of torture and other abuses of human rights.\textsuperscript{279} Legislation was said to be required to ensure that enforcement of the existing controls would not be subject to "administrative discretion."\textsuperscript{280} To strengthen enforcement, the statute provided that no licenses were to be issued for exports of controlled equipment to any country whose government engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certified that extraordinary circumstances warranted the granting of licenses.\textsuperscript{281}

Given the stated intent to focus controls on nations with records of extreme human rights abuse, some were concerned that the statute made Sweden, Switzerland, and other nations with exemplary human rights records subject to the same validated license controls as the worst violators of human rights.\textsuperscript{282} Acting on this concern in EAA '79, Congress gave the President authority to exempt individual nations,\textsuperscript{283} but no country has yet been formally exempted.\textsuperscript{284} The State Department has endeavored instead to minimize unnecessary trade disruption by waiving review of license applications for exports to "clean" nations like Sweden and Switzerland;\textsuperscript{285} for foreign relations reasons, this procedure was preferred over a publicly promulgated list of nations whose purchases were thought to require scrutiny under the American human rights policy.\textsuperscript{286}

The result, however, is still a burden on trade in the controlled items. Even if review is waived by the State Department, exports to "clean" countries continue to require validated licenses from the Commerce Department, involving both expense and delay. Exports to all nations not considered "clean" must be reviewed by both departments, involving further delay. The State Department routinely approves the applications it reviews unless they involve exports to military or police forces (which most presumably do) and unless the gov-

\textsuperscript{279} Id. 124 \textsc{Cong. Rec.} S11,814 (daily ed. July 26, 1978) (remarks of Sen. Stevenson).
\textsuperscript{280} Id.
\textsuperscript{281} 22 \textsc{U.S.C}. § 2304(a)(2) (Supp. III 1979).
\textsuperscript{282} \textit{See S. Rep.} No. 96-169, \textit{supra} note 31, at 19.
\textsuperscript{283} 50 \textsc{U.S.C}. app. § 2405(j)(2) (Supp. III 1979).
\textsuperscript{284} \textit{See 45 Fed. Reg.} 1595, 1596 (1980) (President's extension of foreign policy controls beyond Dec. 31, 1979, states that validated licenses are required to all destinations except those named in statute).
\textsuperscript{285} \textit{See Senate EAA Hearings Part I, supra} note 106, at 221 (statement of Richard Cooper); \textit{House EAA Hearings Part I, supra} note 21, at 149 (statement of William Root).
\textsuperscript{286} \textit{See House EAA Hearings Part I, supra} note 21, at 148 (statement of William Root).
ernment of the importing nation commits "serious" human rights abuses.287 A recently adopted statement of licensing policy delineates the considerations applied by the State and Commerce Departments in unusual detail and indicates that applications are generally considered favorably.288 Still, a large number of applications are reviewed on a case-by-case basis,289 and there have been significant delays in processing even un-controversial applications.290


In 1978, on the personal decision of President Carter,291 the Commerce Department placed under validated license control exports to the Soviet Union of most equipment used in exploring for and producing petroleum and natural gas.292 The Commerce Department release that announced the new controls stated, somewhat opaquely, that the purpose of the controls was to assure that petroleum equipment exports "would be consistent with the foreign policy objectives of the United States."293 No national security purpose was mentioned. In fact, exports of any petroleum equipment thought to have national security implications because of the technologies involved were already subject to controls.294

The foreign policy context in which these controls were im-

287. Senate EAA Hearings Part I, supra note 106, at 221 (statement of Richard Cooper).
291. See Senate EAA Hearings Part I, supra note 106, at 211 (statement of Richard Cooper).
294. Senate EAA Hearings Part I, supra note 106, at 50 (statement of Stanley Marcus). The Defense Department has stated that exports of petroleum exploration and production equipment of the kinds controlled in 1978 do not contribute significantly to Soviet military strength, since Soviet military requirements are only a small fraction of domestic oil production and would in any case have priority in the allocation of domestic supplies. See House EAA Hearings Part I, supra note 21, at 177 (statement of Ellen Frost). The Administration was of course concerned with Soviet petroleum production capabilities because of the implications for Soviet industrial strength and foreign policy, and Commerce had been monitoring petroleum equipment exports before the controls were imposed. See Senate EAA Hearings Part I, supra note 106, at 58 (letter from Sen. Proxmire).
posed was shaped by a series of incidents in mid-1978 that had placed a "serious strain" on relations between the U.S.S.R. and the United States.\textsuperscript{295} They included the arrest and trial of an American businessman on charges of violating Soviet currency laws;\textsuperscript{296} the trial of American journalists;\textsuperscript{297} and the trial and sentencing of the dissidents Anatoly Shcharansky and Aleksandr Ginzburg.\textsuperscript{298} The State Department has characterized the petroleum equipment controls as "a signal to the USSR that business could not continue completely as usual" in light of these incidents,\textsuperscript{299} and as "a signal to the Soviet Union of [United States] displeasure at various things that they were doing."\textsuperscript{300} It is widely believed, however, that the controls were triggered primarily by the Shcharansky and Ginzburg sentencing,\textsuperscript{301} and subsequent Administration statements described the petroleum equipment controls as part of the American human rights policy.\textsuperscript{302}

Although virtually all commodities used primarily to ex-

\textsuperscript{295} Senate EAA Hearings Part I, supra note 106, at 31 (statement of Juanita Kreps).

\textsuperscript{296} See N.Y. Times, August 13, 1978, at 1147 (microfilm ed.). The businessman, Jay Crawford, an employee of International Harvester Corporation, was tried in September 1978 and received a suspended sentence. \textit{Id.}, Sept. 7, 1978, at 71 (microfilm ed.); \textit{id.}, Sept. 8, 1978, at 31 (microfilm ed.). He was allowed to leave the U.S.S.R. in October amidst a general relaxation of tensions. \textit{Id.}, Oct. 20, 1978, at 37 (microfilm ed.).

\textsuperscript{297} \textit{id.}, July 24, 1978, at 2, col. 1.

\textsuperscript{298} \textit{id.}. Shcharansky and Ginzburg went on trial July 10, 1978, on charges of espionage and subversion. \textit{Id.}, July 11, 1978, at 1, col. 5. The trials were condemned by President Carter. \textit{id.}, July 13, 1978, at 1, col. 6. On July 13 and 14, 1978, the two were given harsh sentences. \textit{Id.}, July 14, 1978, at 1, col. 5; \textit{id.}, July 15, 1978, at 1, col. 6.

\textsuperscript{299} Senate EAA Hearings Part I, supra note 106, at 224 (statement of Richard Cooper); House EAA Hearings Part I, supra note 21, at 954 (statement of William Root).

\textsuperscript{300} Senate EAA Hearings Part I, supra note 106, at 211 (statement of Richard Cooper).


\textsuperscript{302} Senate EAA Hearings Part I, supra note 106, at 64-66 (statement of Commerce Department); \textit{id.} at 109 (statement of Duane Sewell). When existing foreign policy controls were extended as required by EAA '79, however, the petroleum equipment controls were not identified with human rights, as were, for example, the controls on crime detection equipment. They were separately identified, and not associated with any underlying policy. See 45 Fed. Reg. 1596-97 (1980).
plore for or produce oil and gas were subject to the new requirement, the controls applied only to exports to the Soviet Union, not to exports to Eastern Europe or other Soviet allies, where a danger of transshipment presumably exists. Special restrictions were imposed on exports of nonpublic information relating to the designated equipment. Such data already required a validated license for export to the U.S.S.R. and other Communist countries; the 1978 regulations provided that such information could only be exported to other destinations under general license if written assurances were obtained from the importer that neither the data itself nor its "direct product" would be shipped, directly or indirectly, to the U.S.S.R. In addition, validated licenses were required for exports of this information to any destination when the American exporter knew or had reason to believe that the direct products of the data, to be produced abroad, were intended to be exported or reexported, directly or indirectly, to the U.S.S.R.

The controls were implemented through extensive case-by-case review of proposed transactions. In fewer than eight months, some 113 applications were considered, seven agencies were involved in the review process, and on average licensing decisions required some forty-five days, with some not made for more than ninety days. Despite the complexity of the bureaucratic procedures set in motion, however, the Administration apparently had no intention of denying any petro-

303. Validated licenses had previously been required only if these items were to be exported to the embargoed nations in Country Groups S and Z. 15 C.F.R. §§ 385.1(a), 385.3 (1979). The regulations added a number of new entries to the CCL, all of which were controlled for export to Group S (Group S was terminated with the end of the Rhodesia embargo), Group Z and the U.S.S.R., including Latvia, Estonia, and Lithuania. 43 Fed. Reg. 33,700 (1978).

304. 15 C.F.R. § 379.4(b) (1977).


306. 15 C.F.R. § 379.4(f)(1) (1980). The Regulations provide generally that technical data may not be exported when the exporter knows that the data itself is to be reexported to any destination other than that authorized. 15 C.F.R. § 379.8(a)(2) (1980).


308. Senate EAA Hearings Part I, supra note 106, at 66 (statement of Malcolm Browne). The agencies were the Departments of Commerce, State, Defense, Energy, and Treasury, the National Security Council, and the CIA.

309. Id.
leum equipment licenses, and none were in fact denied until a freeze on high technology exports to the U.S.S.R. was imposed in January 1980. According to the Commerce Department, before the freeze not one of the reviewing agencies had even recommended denial of a single license application.

The United States did not request other nations to follow the American lead by imposing parallel controls, and none did so. Although some studies had been conducted to determine whether and how quickly the Soviets could obtain similar equipment from other countries, it does not appear that an extensive effort was made, and no firm conclusions were reached. Representatives of the petroleum equipment industry contend that the controlled items are in fact available elsewhere, but their position has been disputed by others.

The manner in which the validated license requirement for petroleum equipment exports was implemented accords well with the State Department's description of the requirement as a "signal" to the U.S.S.R. It has been suggested that the requirement was intended as a "reprisal" for Soviet actions or as a means to force the U.S.S.R. to improve its treatment of dissidents or make other political concessions. Under either of these assumptions, however, its later implementation (or lack thereof) seems baffling. The petroleum equipment controls appear to be simply a diplomatic gesture, a move in a game of largely symbolic actions, an effort to "fine tune" trade relations

311. Senate EAA Hearings Part I, supra note 106, at 198 (statement of Richard Cooper); Senate EAA Hearings Part III, supra note 116, at 41 (statement of Frank Weil).
312. See text accompanying notes 805-07 infra.
314. Id. at 210 (statement of Richard Cooper).
315. Id. at 66 (statement of Malcolm Browne).
316. E.g., Senate Foreign Policy Hearings, supra note 119, at 67-69 (statement of C. William Verity); House EAA Hearings Part I, supra note 21, at 67-68, 83-84 (statement of James Giffen).
317. See Huntington, Trade, Technology, and Leverage: Economic Diplomacy, 32 Foreign Pol'y 63, 73 (1976), reprinted in Senate Foreign Policy Hearings, supra note 119, at 157, 161. See generally House EAA Hearings Part I, supra note 21, at 914-33 (report of Congressional Research Service on energy technology controls).
319. Id. See generally Huntington, supra note 317.
to the political relations of the day.320

5. The TASS Computer: The Uses of Licensing Policy

All four of the controls considered so far have involved the imposition of validated license requirements—what is generally meant by “export controls.” The requirement of a validated license, however, is only a beginning: a licensing policy must also be established.321 The policy may be one of embargo, as in the cases of Uganda and South Africa, or it may be to approve all applications, as in the case of the petroleum equipment controls. In many cases, however, the administrators of the controls will wish to retain the ability to “open and close the economic door”322 by granting or denying licenses on a case-by-case basis as in the case of crime detection equipment.

The denial of individual licenses may be seen as a separate form of foreign policy export control; the regional stability and anti-terrorism policies, among others, have been largely implemented through denials of licenses that were initially required for quite different purposes, usually national security. License denial is a popular technique for several reasons. License denial affects only the particular transaction involved; it need not prejudice future transactions. It may thus be seen by the target nation as less threatening than the imposition of new validated license controls or a hardening of licensing policy. Moreover, a license can often be denied more rapidly than new controls or licensing policies can be drafted; this gives foreign policy makers greater flexibility because a license for the export of any item on the CCL can be quickly denied whenever action is called for. License denials also permit greater flexibility to reverse or modify policy toward the target nation; vali-

320. One possibility may be that the controls were imposed prematurely. Later, evidence of other sources for the equipment—see Senate EAA Hearings Part I, supra note 106, at 66 (statement of Malcolm Browne); House EAA Hearings Part I, supra note 21, at 939 (statement of Stanley Marcus)—along with consideration of the possible political and even military consequences of a Soviet oil shortage—see Senate EAA Hearings Part I, supra note 106, at 87, 103-04 (statements of Duane Sewell); No Barrier to Soviet Trade Seen Under U.S. Export Regulations, Oil & Gas J., Aug. 7, 1978, at 53—may have led to the decision not to deny any licenses.

321. The licensing policies followed in regard to most controls are spelled out in the Regulations, though often only in the broadest terms. See 15 C.F.R. Parts 376, 385 (1980) (special commodity and country policies). In 1980, some statements of policy were added, and others made more specific. 45 Fed. Reg. 1595 (1980) (to be codified at 15 C.F.R. §§ 376.14, 385.1, .2, .4).

322. Huntington, supra note 317, at 160.
dated license requirements, in contrast, are difficult to remove discreetly when they have outlived their usefulness.

A number of recent license denials based on foreign policy considerations have involved proposed exports of computers to the Soviet Union. The best known case may be the decision of President Carter in July 1978 to deny Sperry Rand Corporation's application for a license to export a Sperry Univac computer to TASS, the official news agency of the Soviet Union. The computer, to be sold for $6.8 million, was to be used for coverage of the 1980 Olympic Games in Moscow.

The President's decision was made simultaneously with the decision to control petroleum equipment exports to the U.S.S.R. Like the petroleum equipment controls, denial of Sperry Rand's application—and others known to be pending—had been urged during the trials of Shcharansky and Ginzburg by the President's National Security Advisor and his staff, and by Senator Jackson and other members of Congress. The Administration indicated that both actions had been taken primarily to protest the sentences imposed on the two dissidents.

After denying the license, the Administration requested other computer-exporting nations to refrain from selling to TASS. While some countries responded ambiguously, France left no doubt as to its position: "[I]t is not the habit in

323. A similar episode occurred in October 1979. While Washington considered how to deal with disclosures of Soviet troops in Cuba, it was reported that the Defense Department had withdrawn its approval of the export of a Control Data Corporation computer to the U.S.S.R. at the urging of National Security Advisor Brzezinski. According to Control Data, the computer used ten-year old technology and was an "add on" to similar equipment sold three years before. The Defense Department had already cleared the sale on two occasions in reviews conducted on the basis of national security. While the reversal in policy was formally based on security considerations, Defense Department officials made clear that the decision was political, "to express to Moscow Washington's displeasure" over the troops. N.Y. Times, Oct. 7, 1979, at E-5, col. 1.


328. Asking Allies to Snub TASS, Too, BUS. WEEK, Aug. 21, 1978, at 123; N.Y. Times, Aug. 17, 1978, at 126. In the past, France, Germany, Japan, and other nations had supplied the U.S.S.R. with computers that the United States had refused to sell on national security grounds.
France to subordinate the sales abroad of industrial material for civilian uses to political considerations. Where would we sell if that were the practice?"  

A French firm eventually secured the order for the TASS system.

License denials affecting items already on the CCL are often difficult to analyze: the proposed export of an item like the Sperry Rand computer may raise legitimate national security concerns while simultaneously presenting administrators with a tempting foreign policy opportunity. Sperry Rand's application had been under consideration for several months, presumably because of its national security implications, when the decision to deny the license was made. The President stated that approval of the export would have led to a "quantum leap" in Soviet computer capability and that the capabilities of the Univac computer were "far in excess" of the needs of TASS. Sperry Rand, on the other hand, denied that its computer posed a danger to American security, arguing that a nearly identical system had previously been sold to the Soviet airline Aeroflot and that Sperry had already lowered the capabilities of the computer ordered by TASS at the request of the Commerce Department. The computer industry generally believed that denial of the license on national security grounds would have been unwarranted, while foreign nations and many other observers were simply confused as to the relative weight given national security and foreign policy considerations in the decision to deny the license. The timing and context of the Sperry Rand case, however, strongly suggest that, even if the license might ultimately have been denied on

330. Senate EAA Hearings Part III, supra note 116, at 27-29, 38-39 (statement of Frank Wel). Several months later, Sperry Rand was issued a license to export a modified system. Id.
331. See id. at 27-29.
333. Id. at 425.
335. An ironic statement of the industry position was that the only "quantum leap" involved in the transaction was that executed by the White House staff over the licensing officials at the Commerce Department. Asking Allies to Snubb TASS, Too, Bus. Week, Aug. 21, 1978, at 123; see also text accompanying note 333 supra.
national security grounds, the actual decision was "a political call."\textsuperscript{337}

The qualities that make license denials popular within the executive branch as a technique of foreign policy make them highly unpopular with exporters. Cases like the Sperry Rand episode lead exporters to believe that their transactions can be prohibited simply because of the coincidence that their license applications are pending when American foreign policy makers are seeking a means of expressing American displeasure over some event abroad. Exporters may also conclude that they cannot predict what considerations will affect decisions on their applications. Although some licensing policies are delineated in the Regulations,\textsuperscript{338} these statements typically fail to bring any great degree of predictability to trade in the controlled items. Many other licensing policies are never made explicit. There is no statement in the Regulations, for example, of the policies followed in applying regional stability, military balance, or anti-terrorism considerations to decisions on licenses originally required for national security purposes.\textsuperscript{339} Even more potentially disruptive of commerce, it is clear from the Sperry Rand case that human rights considerations are also applied to such licensing decisions even though no statement in the Regulations delineates or even acknowledges such a policy. It is known that recommendations based on human rights considerations are made by the State Department, and that the Department reviews exports of some items on the CCL to military and police-related purchasers in most nations,\textsuperscript{340} yet the nations or institutions whose purchases are regularly reviewed or prohibited are not identified,\textsuperscript{341} since the State Department

\textsuperscript{337} See id. at 141 (statement of William Root); Senate EAA Hearings Part III, supra note 116, at 27, 38 (statement of Frank Weil); Senate EAA Hearings Part I, supra note 106, at 191 (statement of Richard Cooper); Bingham & Johnson, supra note 117, at 910-11; Wade, supra note 332, at 425.

\textsuperscript{338} Applications for the export of crime detection equipment, for example, will generally be considered favorably . . . unless there is evidence that the government of the importing country may have violated internationally recognized human rights and that the judicious use of export controls would be helpful in deterring the development of a consistent pattern of such violations or in distancing the United States from such violations.


\textsuperscript{339} See Bingham & Johnson, supra note 117, at 910; notes 116-19, 166 supra.

\textsuperscript{340} Senate EAA Hearings Part I, supra note 106, at 219-22 (statement of Richard Cooper); House EAA Hearings Part I, supra note 21, at 147-49 (statement of William Root).

\textsuperscript{341} COMPTROLLER GENERAL REPORT 1978, supra note 32, at 20.
sees publication of such information as "politically undesir-able." Consequently, from the point of view of the exporter, review of exports on human rights grounds is almost totally ad hoc. In cases like the Sperry Rand denial, licensing policy appears even more unprincipled, since such licensing "signals" are sent not in response to human rights conditions in the importing country, but in response to particular, unpredictable events.

IV. THE THEORY OF FOREIGN POLICY EXPORT CONTROLS

There has been little systematic analysis of the rationales, costs, and effectiveness of American political export controls, but there is a substantial body of relevant literature concerning the use of multilateral economic sanctions to enforce international law and to implement decisions of international organizations such as the League of Nations and the United Nations. This part of the Article draws upon that literature to analyze the two principal arguments advanced in support of foreign policy export controls—what this Article will call the instrumental and the symbolic rationales. The instrumental rationale, which is discussed first, argues that controls on exports—and on other forms of economic intercourse—can and should be used as sanctions to force other nations (the "target" nations) to con-


343. The implications of the unpredictability of licensing policy and other types of foreign policy export controls are considered at notes 552-76 infra and accompanying text.

344. In social science terms, sanctions are the processes by which societies regulate the behavior of their members in support of social norms. See 14 INT'L ENCYCLOPAEDIA OF SOCIAL SCIENCE 1, 5 (1968). Some American export controls are said to have been imposed in support of norms of the international community ("internationally recognized human rights"), but even these have been imposed without authority from that community, except in the case of Security Council-mandated embargoes. Other United States export controls implement what are basically unilateral policies; such actions conform less closely to the definition of sanctions as instruments of social control.

In the generally accepted taxonomy of sanctions developed by Johan Galtung, American export controls would be classified as negative, unilateral, external economic sanctions. Galtung, On the Effects of International Economic Sanctions, with Examples from the Case of Rhodesia, 19 WORLD POL. 378, 381-83 (1967). Galtung analyzed negative, collective, external economic sanctions, such as the United Nations-mandated embargo of Rhodesia. Id. at 378-83. Such collective measures obviously correspond more closely to the social science understanding of sanctions.

American export controls are occasionally explicitly described as sanctions. See S. Con. Res. 100, supra note 146.
form their conduct to norms of behavior approved by the United States. It asserts that, assuming a rational target nation government, the desired changes in target nation conduct will occur if the economic costs created by the denial of American goods or technology outweigh the benefits perceived by the target nation to flow from the challenged conduct. The symbolic rationale, the second theory to be analyzed, holds that export controls, even if not instrumentally effective, can and should be used for expressive or symbolic purposes—to manifest American disapproval of the conduct of a target nation or to disassociate the United States from the target, for example—primarily as an ethical matter. The final section of this part of the Article examines the costs incurred by the nation imposing political export controls and argues that controls should not be used without a careful weighing of those costs.

A. THE INSTRUMENTAL RATIONALE

1. The Instrumental View of Trade Controls

In a recent article concerning United States relations with the Soviet Union, Samuel P. Huntington presents one of the most explicit statements of the instrumental rationale. Professor Huntington calls for an economic policy of "conditioned flexibility" in American dealings with the U.S.S.R. Such a policy would differ from both the trade-denial approach of the Cold War years and the "laissez-faire" approach said to have characterized the period of "detente" in the early 1970s by encouraging American policy makers to "open and close the economic door" as security and political developments dictate. Under this approach, American exports would be conditioned on specific actions by the Soviet Union—reflecting restraint in overseas troop deployment, support for Cuban military intervention, or repression of dissidents, for example—consistent with United States foreign policy. In this way, the United States would capitalize on its economic resources to induce the

345. See Huntington, supra note 317. He observes that "as good Marxist-Leninists, [the Soviets] are perfectly willing to calculate economic-political tradeoffs and make such exchanges when the benefits are, in their view, worth the cost." Id. at 73.
346. Id. at 70-74. Professor Huntington is Director of the Center for International Affairs at Harvard University. In 1977 and 1978, he was coordinator of security planning for the National Security Council.
347. Id. at 65-70.
348. Id. at 65-67, 71.
349. Id. at 67, 69.
U.S.S.R. to be more "cooperative" in areas important to American foreign policy. Huntington cites the controls on petroleum equipment exports as an example of "conditioned flexibility."

Professor Huntington sees formidable obstacles to the implementation of his economic strategy: "bureaucratic pluralism . . .; congressional and interest group politics; . . . and most important, . . . a pervasive ideology that sanctifies the independence, rather than the subordination, of economic power to government." He believes that the obstructive "intellectual and psychological environment" is changing. Nonetheless, he proposes to overcome the obstructions posed by Congress, interest groups, and bureaucrats by centralizing control over almost all significant economic relations with the Soviet Union in the executive branch, specifically in the National Security Council.

Achievement of the changes in target nation conduct predicted by Professor Huntington and other advocates of the instrumental rationale depends on the accuracy of two premises: first, that American export controls can effectively prevent controlled items from reaching the target nation so that economic costs are imposed on the target (economic effectiveness); and second, that such costs can successfully induce change in the target nation's policies (political success). Each of these premises requires analysis.

2. Economic Effectiveness of Controls

a. Foreign Availability

If a target nation can easily and economically obtain from other sources goods or technology comparable to those denied

350. Id. at 79; cf. note 345 supra (Soviet political cooperation when economically advantageous).
351. Id. at 76-77.
352. Id. at 71.
353. Id. at 74-75.
354. Industrial and agricultural exports, export credits, technology transfers, and "scientific contacts" would come within the jurisdiction of the National Security Council. Id. at 75. At the time Professor Huntington was writing, the President had already assigned to the National Security Council responsibilities in connection with grain sales, technology transfers, and export controls. Id. Since that time, the responsibilities of the National Security Council have been expanded despite efforts by Congress to limit its role. See note 31 supra.
355. The distinction between economic effectiveness and political success is drawn in D. Losman, INTERNATIONAL ECONOMIC SANCTIONS: THE CASES OF CUBA, ISRAEL AND RHODESIA 1, 43-44, 125 (1979).
by the United States, the economic costs it incurs will be minimal.\textsuperscript{356} The existence of alternative sources for controlled items—foreign availability—is the most critical factor in assessing economic effectiveness,\textsuperscript{357} yet it has never been given appropriate prominence in American export control legislation.

Although EAA '69 from its adoption directed the President to consider the foreign availability of items proposed to be controlled for national security purposes,\textsuperscript{358} a finding of foreign availability was never a bar to the imposition of such controls.\textsuperscript{359} The Act prohibited controls on items available "without restriction from sources outside the United States in significant quantities and comparable in quality,"\textsuperscript{360} but it also contained an exception that permitted the President to impose controls notwithstanding such foreign availability if "adequate evidence has been presented to [the President] demonstrating that the absence of such controls would prove detrimental to the national security."\textsuperscript{361} Under this exception, the United States has historically controlled the export of many items available elsewhere,\textsuperscript{362} and a number of such unilateral controls continue in effect today.\textsuperscript{363} Although the soundness of the

\textsuperscript{356} A range of costs may be created by export controls in spite of foreign availability. At one extreme, a target nation might incur only the administrative expense of finding and contracting with an alternative supplier. For example, the United States prohibits the export of writing paper to the South African police, see note 245 supra and accompanying text, but this prohibition can be nothing more than an inconvenience to police purchasing agents, who can easily obtain fully equivalent paper, at an equivalent price and transport cost, from a reliable supplier in another country. In other situations, the target nation may have to pay somewhat higher prices or transport costs, accept products of lesser quality, experience longer shipment delays, or the like. See D. Losman, supra note 355, at 10-14.

\textsuperscript{357} Even under multilateral sanctions, target nations are able to redirect trade to nonparticipating states, \textit{id.} at 127, to minimize the economic effects of the sanctions. Wallensteen, \textit{Characteristics of Economic Sanctions}, 5 J. PEACE RES. 248, 262 (1968).


\textsuperscript{361} \textit{Id.}

\textsuperscript{362} Berman & Garson, supra note 2, at 840-41.

\textsuperscript{363} \textit{See e.g.,} Senate EAA Hearings Part I, supra note 106, at 67-68 (statement of Juanita Kreps). Secretary Kreps described the results of a Commerce Department review of all unilaterally controlled categories on the Commodity Control List (the Department's report is reprinted in \textit{House EAA Hearings Part I, supra} note 21, at 1137-60). As a result of that review, eight ECCN entries
EAA '69 exception has been questioned\textsuperscript{364} and no wholly persuasive justification for it has been advanced,\textsuperscript{365} a similar "safeguard" provision was included in EAA '79.\textsuperscript{366}

Even this minimal requirement for consideration of foreign availability applied only to national security controls; prior to EAA '79, export control legislation had never required that foreign availability be considered in connection with foreign policy controls. President Carter was the first to address this anomaly: in a major 1978 statement on export policy, the President named foreign policy controls as one of the significant "domestic barriers to exports" and stated that "[w]eight will be given" to foreign availability in considering future controls.\textsuperscript{367} Administration officials subsequently indicated that this policy was being implemented,\textsuperscript{368} but their assertions were often little more than recitals of the President's general statement, usually accompanied by provisos that controls might still be imposed


\textsuperscript{365} See, e.g., H.R. Rep. No. 95-190, 95th Cong., 1st Sess. at 8-9 (1977). The Carter Administration argued that controls imposed when foreign availability exists allow the government to monitor the destination of controlled items, Senate EAA Hearings Part III, supra note 116, at 34 (statement of Frank Weil), and to prevent their sale while negotiating with foreign supplier nations to eliminate foreign availability, House EAA Hearings Part II, supra note 119, at 140-43, 158-65 (remarks of Stanley Marcus).

\textsuperscript{366} See EAA '79, § 4(c), 50 U.S.C. app. § 2403(c) (Supp. III 1979); note \textsuperscript{736} infra and accompanying text.

\textsuperscript{367} Statement by the President on United States Export Policy, 14 WEEKLY COMP. OF PRES. Doc. 1631, 1633 (Sept. 26, 1978).

\textsuperscript{368} See, e.g., Senate EAA Hearings Part I, supra note 106, at 188-90 (statement of Richard Cooper); House EAA Hearings Part I, supra note 21, at 141-52 (statement of William Root).
in spite of foreign availability. Moreover, although comprehensive assessments of foreign availability had not been made for all foreign policy controls then in effect, no restriction was limited or withdrawn. Satisfied with the flexibility preserved by the "weight will be given" to foreign availability formula, the Administration proposed that this language be included in the legislation extending or replacing EAA '69, thereby hoping to deflect congressional concern over foreign availability. In enacting EAA '79, Congress went beyond that formulation and imposed a foreign availability limitation on foreign policy controls similar to that previously applicable to national security controls. This provision, however, seems to have had little effect so far.

Analyzing the potential impact of foreign availability involves two separate inquiries: whether other nations produce items that can be economically substituted for those controlled, and if so, whether they will sell those items to the target nation.

With regard to the first inquiry, the situation is much different today than in the years immediately following World War II. Then, the United States was able to deny a wide range of

369. E.g., Senate EAA Hearings Part III, supra note 116, at 26 (statement of Frank Weil); Senate EAA Hearings Part I, supra note 106, at 188-89 (statement of Richard Cooper); id. at 79 (statement of Juanita Kreps); House EAA Hearings Part I, supra note 21, at 623 (statement of Frank Weil); id. at 935 (statement of Stanley Marcuss).

370. See Senate EAA Hearings Part III, supra note 116, at 41 (statement of Frank Weil); cf. text accompanying note 315 supra (petroleum equipment controls).

371. Cf. Senate EAA Hearings Part II, supra note 250, at 258 (statement of Machinery and Allied Products Institute) (commenting that no action had been taken by the Executive "to reduce the array of existing restrictions on U.S. exports"). The Administration seemed almost casually able to reconcile existing controls with the new policy. See, e.g., House EAA Hearings Part I, supra note 21, at 142, 144, 146, 147 (statement of William Root). Foreign availability may, however, have been one of the reasons why licenses were not denied under the petroleum equipment controls until the change in policy of January 1980. See, e.g., Senate EAA Hearings Part I, supra note 106, at 66 (statement of Juanita Kreps) (indicating that "no firm Administration conclusions were reached about whether the items made subject to control were available from foreign sources").


373. See notes 735-51 infra and accompanying text.

374. The President, under EAA '79, extended current foreign policy controls on Dec. 29, 1979, 45 Fed. Reg. 1595 (1980), having first determined that the absence of each of the controls would be detrimental to American foreign policy notwithstanding foreign availability. Id. at 1596.
goods and technologies to the Communist nations simply because it was the only source from which they were available, at least at reasonable prices. Now, however, the United States maintains a monopoly or even a substantial technological lead in only a very small number of goods and technologies.\(^{375}\) The vast majority of goods, even goods involving relatively sophisticated technology, are available from a number of other suppliers in Western, Eastern, and neutral countries.\(^{376}\) Moreover, most items of which the United States is the sole supplier are already controlled to all destinations for national security reasons.\(^{377}\) It is thus very unlikely that the United States could impose new controls for foreign policy purposes without encountering a substantial degree of foreign availability.\(^{378}\)

There are admitted difficulties in determining precisely the existence of foreign availability. Availability of the types of petroleum equipment controlled for export to the U.S.S.R. in 1978, for example, was hotly disputed.\(^{379}\) Professor Huntington wrote that the United States was "virtually . . . the . . . sole supplier" of much of that equipment and that the Soviet Union was "dependent" on American supplies;\(^{380}\) industry representatives countered that "all geophysical equipment currently in use by American oil companies [was] available overseas with

\(^{375}\) See, e.g., Senate EAA Hearings Part I, supra note 106, at 5 (statement of Sen. Stevenson); House EAA Hearings Part II, supra note 119, at 5 (statement of Juanita Kreps); House EAA Hearings Part I, supra note 21, at 40 (statement of Dimitri Simes); id. at 45-46 (statement of Marshall Goldman); Adler-Karlsson, International Economic Power: the U.S. Strategic Embargo, 6 J. WORLD TRADE L. 501, 508 (1972). The industry position is well represented in Senate Foreign Policy Hearings, supra note 119, at 310 (statement of National Foreign Trade Council, Inc.); id. at 318 (statement of John James).

\(^{376}\) Some primary products (particularly grain in the case of the United States) may not be fully available abroad because of inadequate and inelastic supplies, even when there are other suppliers. There may also be limited foreign availability of specially designed spare parts.

\(^{377}\) Of the 73 unilaterally controlled entries on the Commodity Control List compiled by the Commerce Department in June 1979, see note 363 supra, the majority were "B" entries controlled for export to all destinations. Most entries controlled for export only to certain destinations were either foreign policy controls or basket entries. A few entries were controlled only for export to the Communist countries.

\(^{378}\) This may in part explain the popularity of changes in licensing policy and individual license denials, affecting items already controlled for national security reasons, as tools of foreign policy. See notes 321-43 supra and accompanying text.

\(^{379}\) The debate is concisely summarized in CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, POLICY CONSIDERATIONS ON EXPORT LICENSING 1979, reprinted in House EAA Hearings Part I, supra note 21, at 914, 926-29.

\(^{380}\) Huntington, supra note 317, at 76.
no reduction in quality." Such a disparity of views is possible primarily because of a lack of reliable information. Target nations such as the Soviet Union and South Africa are naturally secretive regarding the technologies they have been able to obtain. Often the only sources of such information are the American intelligence agencies, and they are frequently unable to obtain satisfactory data. Friendly nations may also be unwilling to share commercially important information. The Commerce Department itself has been criticized for lacking adequate resources to investigate foreign availability.

Disagreement is also possible because there is no accepted definition of "availability." Executive branch officials have argued that American controls should not be discarded when foreign substitutes appear to be of lesser quality, available in smaller quantities, or the like, although there is no agreement even within the executive branch on the proper standard of comparability. Exporters argue that foreign availability exists whenever a target nation can satisfy its needs with a foreign substitute at an acceptable price. A sophisticated analy-

381. *House EAA Hearings Part I*, supra note 21, at 68 (statement of James Giffen).

382. For an interesting example of the difficulties involved in determining whether a particular item has been obtained by the target and whether it is available from another supplier nation, see generally *Export Licensing: Foreign Availability of Stretch Forming Presses, Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations* (Pt. I), 96th Cong., 1st Sess. (Comm. Print 1977) [hereinafter cited as *Export Licensing Hearings*].


388. *Comptroller General Report 1979*, supra note 363, at 5. The Defense Department has a clear and quite conservative definition, *see House EAA Hearings Part II*, supra note 119, at 16 (statement of Ellen Frost). Such a definition is more appropriate for national security controls: the products and technologies controlled have military applications, and whatever damage they might do to American security is done if they are exported. In the case of foreign policy controls, the United States will normally have other opportunities to influence a target nation if a questionable export is allowed.

389. *See Senate Foreign Policy Hearings*, supra note 119, at 57 (statement of C. William Verity); *House EAA Hearings Part I*, supra note 21, at 971 (letter
sis of foreign availability under the instrumental rationale might reject these extreme positions, attempting first to calculate the costs to the target nation of shifting to the available foreign substitutes and then to estimate the likelihood that imposing costs of that magnitude would lead to the desired political results. Such precision, however, is probably unattainable.

With many foreign policy controls, it is hardly necessary to engage in this detailed analysis. With an embargo like that of Uganda or of the South African military and police, for example, foreign availability unquestionably exists for all but the most sophisticated items. Virtually all crime detection equipment is freely available elsewhere. In 1980, the United States embargoed all exports for use at the Moscow Olympics, but again foreign substitutes were readily available for most of the prohibited exports. The instrumental rationale simply cannot justify controls imposed in the face of such unquestioned foreign availability.

Even given the decline of the United States' position as a

from John Chambers). See also id. at 43 (statement of Dimitri Simes). In the case of the petroleum equipment controls, it has been suggested that the Soviets could not only "make do" with less advanced foreign substitutes, but might actually be able to use them more effectively for most purposes than American equipment. CONGRESSIONAL RESEARCH SERVICE, supra note 379, reprinted in House EAA Hearings Part I, supra note 21, at 928.

See CONGRESSIONAL RESEARCH SERVICE, supra note 379, reprinted in House EAA Hearings Part I, supra note 21, at 914, 926-29.

See note 802 infra and accompanying text.

One commentator argues that a presumption of effectiveness should apply in evaluating controls intended to further human rights; a "burden of proof" should be placed on those who would argue ineffectiveness due to foreign availability. Brown, "... in the National Interest," in HUMAN RIGHTS AND U.S. FOREIGN POLICY 161, 167-68 (P. Brown & D. MacLean eds. 1979).

A burden of proof scheme would be difficult to administer under the present system, in part because EAA '79 exempts new controls from the Administrative Procedure Act; controls may thus be implemented without prior notice or opportunity for comment. EAA '79, § 13(a), 50 U.S.C. app. § 2412(a) (Supp. III 1979). The recent practice of the Commerce Department has been to issue regulations with immediate effectiveness but in interim form, allowing an opportunity for post-imposition public comment, see, e.g., 45 Fed. Reg. 1895 (1980) (to be codified in scattered sections of 15 C.F.R.). This practice still does not permit anyone outside the executive branch to make a case for foreign availability before new controls are imposed. Even an opportunity for prior comment would not give a fair opportunity to carry a burden of proof, since there would be no impartial decisionmaker; comments are addressed to those who proposed the control. At the licensing stage, exporters rarely play any greater part in the decision process. See COMPTROLLER GENERAL REPORT 1978, supra note 32, at 9-12.

More importantly, foreign availability is the prevailing condition in the markets for most products. If a burden of proof is to have any factual justifica-
supplier in world markets, instrumental controls could be effective if foreign supplier nations were to cooperate in enforcing them. Since the late 1940s, the United States has sought the cooperation of foreign nations in enforcing national security controls through the informal organization known as COCOM.\textsuperscript{393} The members of COCOM—Japan and the NATO nations (except Iceland)—first agree on broad categories of strategic goods and technologies to be kept from the U.S.S.R. and other Communist nations and then prepare lists of specific items within these categories.\textsuperscript{394} Members agree to control the export of items on the lists; a nation wishing to permit the export of a controlled item must request a COCOM exception.\textsuperscript{395}

In recent years, however, COCOM has been viewed as ineffective.\textsuperscript{396} Europe and Japan have long advocated reductions in product coverage,\textsuperscript{397} and the United States has lost the power to enforce cooperation.\textsuperscript{398} Further, COCOM has its own foreign

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\textsuperscript{393} "COCOM" is a military-style acronym for "Coordinating Committee." See Berman & Garson, supra note 2, at 834-42; Special Report of the President on Multilateral Export Controls, reprinted in Export Administration Act: Agenda for Reform, Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Relations, 95th Cong., 2d Sess. 52 (1978) [hereinafter cited as COCOM REPORT].

\textsuperscript{394} COCOM REPORT, supra note 393, at 52.

\textsuperscript{395} Id. at 52-54. See Comptroller General Report 1979, supra note 363, at 10-13.

\textsuperscript{396} See, e.g., H.R. Rep. No. 95-190, supra note 37, at 20; Export Licensing Hearings, supra note 382, at 31 (statement of Rep. Bingham).

\textsuperscript{397} See Comptroller General Report 1979, supra note 363, at 8; Berman & Garson, supra note 2, at 949-41.

\textsuperscript{398} When COCOM was formed, the main American tool for inducing cooperation within the organization was the Mutual Defense Assistance Control Act of 1951 (Battle Act), Pub. L. No. 213, §§ 101-105, 202-203, 301-335, 65 Stat. 646 (repealed 1979), which authorized an Administrator in the State Department to terminate all military and economic assistance to any nation that did not agree to cooperate with the American strategic embargo. See Comptroller General Report 1979, supra note 363, at 7-8; G. Adler-Karlsson, supra note 92, at 27-28; Berman & Garson, supra note 2, at 836-38. Leverage over the COCOM nations based on American aid has long since disappeared. Id. In 1979, the Battle Act was repealed, EAA '79, § 17(e), 50 U.S.C. app. § 2416(e) (Supp. III 1979), on the ground that it was obsolete. See S. Rep. No. 96-169, supra note 31, at 15-16. In the early days of COCOM, informal pressures based on American technological
availability problem: nonmember nations are now able to offer products and technologies previously available only through COCOM.399 Finally, United States officials charge that Europe and Japan have been more lenient in interpreting agreed standards and more lax in enforcing them,400 in spite of a relatively high degree of consensus on the importance of COCOM to national security.401

Foreign policy controls enjoy no equivalent consensus—indeed, most other Western industrial nations tend to avoid politically motivated controls on trade.402 Virtually no Western industrial nation has joined the United States in any of the foreign policy controls discussed in Part III of this Article;403 indeed, other Western nations have usually moved to fill the commercial void resulting from American controls.404 Lack of

superiority were also used to obtain cooperation. G. ADLER-KARLSSON, supra note 92, at 51. Such influence, too, is now largely unavailable. Thus, there are no effective sanctions that the United States can impose against a nation that refuses to abide by the COCOM embargo lists. COCOM REPORT, supra note 393, at 54.

399. See H.R. REP. No. 95-190, supra note 37, at 20; Senate Foreign Policy Hearings, supra note 119, at 265 (statement of Machinery and Allied Products Institute) (non-COCOM competitors include Sweden, Austria, and Switzerland).

400. COCOM REPORT, supra note 393, at 54-55; H.R. REP. No. 95-190, supra note 37, at 20. See also Senate EAA Hearings Part III, supra note 116, at 27-28 (statement of Frank Weil). On the other hand, the United States has in recent years submitted almost half of all COCOM exceptions requests, leading to similar complaints by the other members. COCOM REPORT, supra note 393, at 53-54.

401. See COCOM REPORT, supra note 393, at 55.

402. See Senate EAA Hearings Part I, supra note 106, at 56 (statement of Juanita Kreps); id. at 208-10 (statement of Richard Cooper); House EAA Hearings Part I, supra note 21, at 191 (statement of William Root). Even with consensus at a general ethical or political level, as in the case of South Africa, Rhodesia, or Cuba, there may be little agreement on precise goals or the appropriate course of action. See M. DOXEY, ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT 94-96 (2d ed. 1980); L. KAPUNGU, THE U.N. AND ECONOMIC SANCTIONS AGAINST RHODESIA 40 (1973); H. STRACK, SANCTIONS: THE CASE OF RHODESIA 30 (1978).

403. See House EAA Hearings Part I, supra note 21, at 142, 146-47 (statement of William Root) (summarizing American foreign policy controls with reference to lack of foreign cooperation in each). Although American controls aimed at Iran and at the U.S.S.R. after the invasion of Afghanistan have received greater cooperation (in part due to intense United States pressure), cooperation has hardly been total, and effectiveness remains at best an open question.

international cooperation has similarly plagued programs of multilateral economic sanctions.405

Studies of the United Nations embargo of Rhodesia reveal an additional dimension of the foreign availability problem: illicit trade. Even with nearly universal participation in the embargo, Rhodesia was able to “prosper” under sanctions for some ten years406 and was able to purchase virtually anything it desired during the entire period of sanctions.407 Much of its trade was with (or through) Portugal, its colonies, and South Africa, countries that did not join in the sanctions,408 but “unacknowledged” or clandestine trade came to account for over half of Rhodesia’s exports and imports.409

Some governments seemed unable to stop illicit trade despite the best of intentions due to a lack of bureaucratic resources,410 insufficient legal authority, or similar problems.411 Some breaches of sanctions, however, resulted from deliberate governmental decisions such as the Byrd Amendment, which permitted the United States to import Rhodesian chrome “in


407. D. Losman, supra note 355, at 98-99. Strack concludes that the economic sanctions against Rhodesia were less successful than the political and other types of sanctions employed, H. Strack, supra note 402, at 247, while Losman finds that the controls on exports to Rhodesia were the least effective of the economic sanctions. D. Losman, supra note 355, at 98-99. The major limit on Rhodesia’s imports under sanctions was a shortage of foreign exchange. Id. at 241-43. Indeed, Strack concludes that the independence of Mozambique in 1975 was the most important development in finally settling the Rhodesian crisis, in that after independence Mozambique joined in the sanctions and began to act as a base for guerilla warfare. Id. at 31, 237-38, 252.

408. South Africa is Rhodesia’s neighbor to the south, and Mozambique, a colony of Portugal when sanctions began, lies to the north and east. Since Rhodesia is landlocked, the assistance of these two states was crucial to its survival. See H. Strack, supra note 402, at 241-43. Indeed, Strack concludes that the independence of Mozambique in 1975 was the most important development in finally settling the Rhodesian crisis, in that after independence Mozambique joined in the sanctions and began to act as a base for guerilla warfare. Id. at 31, 237-38, 252.


411. See P. Kuyper, supra note 409, at 99-121. Kuyper’s work is a detailed case study of the implementation of the Rhodesian sanctions by the Netherlands, a strong supporter of sanctions in the United States.
blatant disregard of [its] treaty undertakings."\textsuperscript{412} Still other governments were actively involved in clandestine trade,\textsuperscript{413} the now classic example being the complex machinations used to deliver petroleum to Rhodesia in violation of the embargo and in the face of a naval blockade.\textsuperscript{414}

In short, international precedents confirm the American experience: efforts to achieve international cooperation in trade controls are unlikely to eliminate foreign availability. If foreign availability cannot be eliminated, instrumental trade controls are likely to fail.

b. Import Substitution

Just as export controls will be ineffective if the target nation can obtain comparable items from other suppliers, they will also be ineffective if the target can develop comparable items itself.\textsuperscript{415} Large, economically diverse and sophisticated nations, such as the U.S.S.R.,\textsuperscript{416} are most adept at import substitution,\textsuperscript{417} but even less sophisticated nations like Rhodesia can successfully develop substitutes. It is therefore rarely accurate to say that export controls "deny" essential goods or technology to a target nation. Even if alternative supplies are unavailable, controls can normally only postpone the time

\textsuperscript{412} Diggs v. Schultz, 470 F.2d 461, 466 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973). The Byrd Amendment to the Strategic and Critical Materials Stock Piling Act, Pub. L. No. 92-156, § 503(2), 85 Stat. 427 (1971), forbade the President to regulate or prohibit the importation from a non-Communist nation of any product determined to be strategic and critical under that Act so long as it was not illegal to import the same product from a Communist nation. Although the amendment is still in effect, it ceased to apply to Rhodesia in 1977 by reason of an amendment, adopted with the strong support of the President, to the United Nations Participation Act, Pub. L. No. 95-12, 91 Stat. 22 (1977) (amending 22 U.S.C. § 287c (1979)). For a case study of the amendment, see H. STRACK, supra note 402, at 146-64.

\textsuperscript{413} See R. LILICH & F. NEWMAN, supra note 171, at 439-43.

\textsuperscript{414} Id. at 449-50. See Political Developments in Southern Rhodesia: Hearing Before the Subcomm. on Africa of the House Comm. on International Relations, 95th Cong., 1st Sess. 12-63 (1977). The involvement of British officials in these transactions (Britain was the sponsor of the sanctions) created a scandal in the United Kingdom. R. LILICH & F. NEWMAN, supra note 171, at 449-50.

\textsuperscript{415} See M. DOXEY, supra note 402, at 110; D. LOSMAN, supra note 355, at 126; Taubenfeld & Taubenfeld, supra note 405, at 191.


\textsuperscript{417} The U.S.S.R. could in time probably develop any product the West sought to deny it, if the product were important enough, and the U.S.S.R. has done precisely that with many forms of technology. See Senate Foreign Policy Hearings, supra note 119, at 15 (statement of George Ball); id. at 57 (statement of C. William Verity, Jr.); id. at 243 (statement of George Helland); Holzman & Portes, The Limits of Pressure, 32 FOREIGN POL’Y 80, 87-89 (1978).
when the target nation obtains the controlled items,\(^\text{418}\) while imposing the costs of developing substitutes.\(^\text{419}\) These costs may in time\(^\text{420}\) or in special situations\(^\text{421}\) be sufficiently burdensome to lead to political concessions by the target nation, but judging from experience, such cases will be rare.

Forcing a target nation to develop import substitutes may actually confer a benefit. American export controls have forced the U.S.S.R. to develop certain technologies for which it had been dependent on the United States;\(^\text{422}\) the 1980 grain embargo, similarly, is said to have had "an important stimulative effect on Soviet agricultural policy . . . ."\(^\text{423}\) Rhodesia developed industries under sanctions that might not otherwise have become established for decades.\(^\text{424}\) In such cases, sanctions result in a threefold loss for the countries imposing sanctions: the desired political concession is not made, the opportunity for future sales of the controlled item is lost, and whatever influence might have flowed from the target nation's dependence on the item disappears.\(^\text{425}\)

\(^{418}\) House EAA Hearings Part I, supra note 21, at 84 (remarks of Rep. Bingham); Holzman & Fortes, supra note 416, at 87-89. The preservation of "lead times" in the development of technologies with military applications is the acknowledged aim of American national security controls. See House EAA Hearings Part I, supra note 21, at 161 (statement of Ellen Frost).

\(^{419}\) See D. Losman, supra note 355, at 18, 118-19, 127; H. Strack, supra note 402, at 86-97. Among the possible costs are the following: gains from trade on the basis of comparative advantage may be lost, forced diversification may lead to reductions in economies of scale, resources may have to be diverted from other projects, and inefficiencies may develop from the lack of foreign competition. The greatest costs will result from controls on items for which demand in the target nation is relatively inelastic—spare parts, certain raw materials—and for which substitution is difficult—petroleum being the prime example. D. Losman, supra note 355, at 14-16, 133.

\(^{420}\) The toll taken by the sanctions on Rhodesia, for example, did not become serious for some years. See H. Strack, supra note 402, at 96-97.

\(^{421}\) Professor Huntington argues that the 1978 controls on petroleum equipment exports were designed to take advantage of such a situation. Huntington, supra note 317, at 76.

\(^{422}\) See note 416 supra; Senate Foreign Policy Hearings, supra note 119, at 10 (statement of George Ball); id. at 291 (statement of National Machine Tool Builders Association). See also Senate EAA Hearings Part I, supra note 106, at 104-05 (statement of Sen. Stevenson).


\(^{424}\) H. Strack, supra note 402, at 15; D. Losman, supra note 355, at 111-12, 126-27.

\(^{425}\) See Bingham & Johnson, supra note 117, at 917.
3. The Likelihood of Instrumental Success

Even if export controls can be designed to impose significant economic costs on a target nation, the likelihood that they will be politically successful remains small. The extensive economic sanctions brought to bear on Cuba, Rhodesia, and other nations, for example, have imposed enormous costs without achieving the desired results.\footnote{See L. Kapungu, supra note 402, at 127-28; D. Losman, supra note 355, at 43-44, 125; H. Strack, supra note 402, at 237.} Studies of these sanctions contradict an assumption basic to the instrumental rationale—that target governments respond rationally to economic pressure. These studies demonstrate that resistance to sanctions is also compelled by less rational forces like personal and national pride, and that a target nation will often endure substantial sacrifice rather than accede to external demands.\footnote{See House EAA Hearings Part I, supra note 21, at 20 (statement of George Ball) (“no political leader of a major country can ever admit, either by word or action, that he is taking instructions from the U.S. Government”).} They also demonstrate that a target nation may have a startling ability to resist economic deprivation.\footnote{Galtung finds that “hidden forces” are released in the target. Galtung, supra note 344, at 409.} These findings are discussed below. For the sake of clarity, the discussion is divided somewhat artificially into political and economic categories.

a. Political Factors

Two factors that influence the target’s decision to resist are particularly relevant to United States export controls. First, the value to the target government of the policy or conduct under attack fundamentally affects both its logical and emotional responses.\footnote{Cf. M. McDougal & P. Feliciano, supra note 1, at 33 (quoting Clausewitz: “The smaller the sacrifice we demand from an adversary, the slighter we may expect his efforts to be to refuse it to us.” Id. at n.92.)} When the target believes strongly in its course of conduct, sanctions may lead to a strengthening of the will to resist rather than the capitulation predicted by the instrumental rationale.\footnote{Galtung, supra note 344, at 389; cf. Doxey, The Rhodesian Sanctions Experiment, 1971 Y.B. World Aff. 142, 157-59. Wallensteen’s study of twentieth century economic sanctions found that most sanctions programs sought changes in policies that were fundamentally important to the target nation, and that target governments bolstered their internal support by stressing the challenge to fundamental values. Wallensteen, supra note 357, at 256-57, 262.} The importance of this factor casts doubt on the efficacy of many American export controls—such as those intended to promote regional stability in the Middle East and to oppose Middle East terrorism—which seek to influence deeply
held values. Some commentators believe that changes within a
target nation's society may be perceived as more fundamental
than changes in external relations.\textsuperscript{431} To the extent this is true,
it also casts doubt on controls aimed at changing human rights
practices in the Soviet Union, South Africa, and elsewhere.

Second, sanctions imposed in public view may force the
target's government to resist in order to avoid public embar-
rassment and to demonstrate its independence.\textsuperscript{432} Although
even Professor Huntington acknowledges the dangers of pub-
licity and urges a policy of "quiet leverage" applied "subtly and
discreetly rather than openly and arrogantly,"\textsuperscript{433} such advice is
difficult to follow.\textsuperscript{434} New validated license controls are highly
visible, whether imposed by the executive branch and an-
nounced in the Export Administration Bulletin and the Federal
Register or imposed by Congress. Huntington urges the exten-
sion of validated license control over a larger number of prod-
ucts, even with no present intention of prohibiting their export,
so that the Executive can in the future prohibit exports more
easily, and presumably more discreetly, through license deni-
als.\textsuperscript{435} Even individual licensing decisions, however, tend to be-
come public knowledge through the complaints of exporters
and the efforts of the trade and general press. More impor-
tantly, any significant extension of validated license controls
would place a greater burden on the already strained resources
of the export control bureaucracy; would increase the expense,
delay, and uncertainty with which the exporting community
must contend, even if all licenses were granted; and would run
counter to the efforts of Congress to increase the amount of in-
formation flowing to the public about control policy.\textsuperscript{436} These
costs greatly outweigh any benefit that might be gained from
reducing the publicity given to export controls.

\textsuperscript{431} See Wallenstein, supra note 357, at 256-57, 262.
\textsuperscript{432} House EAA Hearings Part I, supra note 21, at 20 (statement of George
Ball); M. Doxey, supra note 402, at 121-22; Sirkin, Can a Human Rights Policy
Be Consistent?, in Human Rights and U.S. Foreign Policy 199, 202 (P. Brown
& D. MacLean eds. 1979).
\textsuperscript{433} Huntington, supra note 317, at 72.
\textsuperscript{434} Some of the controls discussed in Part III of this Article seem to have
been announced as publicly as possible—in a presidential statement, for exam-
ple—in pursuit of various secondary goals. More recent sanctions aimed at the
U.S.S.R. and Iran were, if anything, announced with even greater fanfare than
any controls discussed in Part III. See notes 802-10 infra and accompanying
text.
\textsuperscript{435} Huntington, supra note 317, at 76. Again, the petroleum equipment
controls embody Huntington's recommendations. See note 351 supra and ac-
companying text.
\textsuperscript{436} See note 765 infra and accompanying text.
Economic sanctions may also strengthen a target government's ability to mobilize effective resistance to external pressure once a decision to resist has been made. Popular support for the regime may increase, giving it a stronger hand in resisting the sanctioners' demands. The very economic sacrifices the target society must endure may boost morale and political cohesion. Target leadership has in some cases increased political unity by skillful internal propaganda that paints the government as the unyielding defender of national interests, using the sanctions as a political rallying point. Such political measures, as well as the economic mobilization needed to resist sanctions, may incidentally tend to strengthen the conservative forces in a society and make its government more authoritarian, to the possible detriment of the target nation's population.

b. Economic Factors

Although some nations are more vulnerable than others to the economic effects of sanctions, any target nation can take

437. Strack, for example, notes a "consensus among scholars" that economic sanctions are not only ineffective instrumentally "but may well be dysfunctional or counterproductive . . . in the sense that they tend to increase the internal political cohesion of the target-state and increase its will to resist." H. STRACK, supra note 402, at xi-xii.

438. Galtung, supra note 344, at 389, 394; Taubenfeld & Taubenfeld, supra note 405, at 191 (finding that the effort to influence a target by expressing disapproval of its conduct through sanctions "seems uniformly to have boomeranged" by increasing morale). Cf. M. Doxey, supra note 402, at 120-23 (external threat may induce heightened sense of solidarity).

439. Galtung, supra note 344, at 395. In the early years of the Rhodesian sanctions the Smith government rallied support by casting itself as the defender of national interests against outside pressure, unyielding to foreign demands. See Doxey, supra note 430, at 157-59. Externally, manipulation of the target's image can weaken the resolve of sanctioning states. See H. Strack, supra note 402, at 249-50.

440. The phrase is from Schreiber, supra note 404, at 404, describing Fidel Castro's use of American sanctions to make himself "look like a hero" to his people and to divert attention from pressing internal problems.

441. House EAA Hearings Part I, supra note 21, at 54 (statement of Thomas Wolfe). Wallensteen found that target governments became both more authoritarian and more stable during sanctions. Wallensteen, supra note 357, at 255-58, 264. In the case of Rhodesia, Kapungu finds that the sanctions welded together the conservative elements of the society into a strong alliance, L. KAPUNGU, supra note 402, at 128, while Strack finds that in 1975 the Rhodesian Front Party was "never stronger" in spite of ten years of sanctions. H. Strack, supra note 402, at 237. Some of the methods used by the government to consolidate its political position are described in L. Kapungu, supra note 402, at 103-08. Cf. D. Losman, supra note 355, at 128-30 (detailing potential adaptive adjustments within target states).

442. The most important factors in determining the vulnerability of a target
steps to minimize and absorb the economic costs imposed by sanctions without acceding to the demands of the sanctioners.  

A target nation can also impose costs upon the sanctioners as part of its defense. A major reason for the failure of past sanctions programs has been advance preparation by the target on all of these fronts. The methods of preparing for economic warfare have become so widely known in the twentieth century that they can be referred to as “standard.” They include stockpiling, rationing, developing domestic substitutes, stimulating diversification, and developing both overt and illicit alternative supply sources. Countries that expect to be the targets of new or expanded American foreign policy controls can institute such measures in anticipation.

Once sanctions are imposed, the target can minimize its costs through trade reorientation, import substitution, and similar measures. When sanctions are not complete and universal, their impact will often decrease over time as new economic patterns become established. The target may receive substantial economic assistance from allies or other nations opposed to the program of sanctions, leading to new, supportive political relationships.

A particularly pernicious variant of cost minimization is economy to export controls are generally thought to be the importance to the target nation's economy of the following factors: imports from the sanctioning states, imports of the items controlled (especially the elasticity of demand for imported products) and the economic sectors that depend on imports. See L. Kapungu, supra note 402, at 44-47; D. Losman, supra note 355, at 14-16, 133; Galtung, supra note 344, at 385-86.

443. The only strategies available to a target nation are (1) to take advantage of foreign availability by restructuring its trade patterns away from the sanctioning states, or by developing illicit trade; (2) to restructure its own economy to develop substitutes for controlled imports; and (3) to absorb the costs imposed by the sanctions. See D. Losman, supra note 355, at 126-28; Galtung, supra note 344, at 387-88; MacDonald, Economic Sanctions in the International System, 1969 CAN. Y.B. INT'L L. 61, 85-86.

444. See L. Kapungu, supra note 402, at 130; H. Strack, supra note 402, at 22-23.

445. M. McDougal & P. Feliciano, supra note 1, at 328.

446. Id.; M. Doxey, supra note 402, at 119-22; Taubenfeld & Taubenfeld, supra note 405, at 191. Rhodesia's preparations are described in L. Kapungu, supra note 402, at 108-21.

447. D. Losman, supra note 355, at 14-16, 45; Taubenfeld & Taubenfeld, supra note 405, at 195. Cf. Galtung, supra note 344, at 410-11 (whether lack of universality accounts for failure of multilateral sanctions programs can only be assessed by reference to individual cases).

448. See, e.g., Schreiber, supra note 404, at 394-405 (describing assistance rendered to Cuba by Soviet Union). But cf. H. Strack, supra note 402, at 252-53 (target's maintenance and development of international relationships does not necessarily lead to the acquisition of legitimacy from other countries).
the allocation of costs to powerless sectors of the target nation's society. Rhodesia, for example, had a dual economy during the sanctions period: most Africans lived near subsistence while most Europeans lived at a more prosperous level. The Rhodesian government was able to deflect many of the economic burdens resulting from sanctions—especially unemployment—onto the African population, keeping the white population at high levels of employment through subsidies and other measures.

Research has demonstrated that target nations can absorb the irreducible economic costs of sanctions and can even prosper by mobilizing their economies to a degree only possible with the heightened morale and political unity of a crisis. Some sixteen years ago, Taubenfeld perceptively summarized for the American Society of International Law the potential of economic mobilization in this setting, observing that techniques first learned in wartime and since practiced in planned economies may allow a target to refuse the demands of its sanctioners, at least for some time, even in the face of "universal, perfectly applied" economic sanctions. Rationing and voluntary sacrifice can reduce demand. To increase production, the target nation can utilize underemployed capital equipment, land, and labor to full capacity, resulting in nearly costless production increases. In the crisis atmosphere it can often find "slack in the system" that enables it to expand the productivity of land and labor beyond normal capacity. It can extend its capital stock beyond its normal life through deferral of maintenance and similar techniques. Such measures, coupled with the protection from import competition which sanctions incidentally provide, may lead to something of an economic boom.

The populations of target nations have been willing to make the sacrifices necessary for the success of these tactics, reflecting the combined operation of the political factors discussed above and the economic techniques just discussed. The

449. See M. DOXEY, supra note 402, at 76.
451. See Taubenfeld & Taubenfeld, supra note 405, at 188.
452. Id. at 188-92.
453. There often is a second boom following the end of sanctions because built-up demand must be satisfied and extended capital stock must be replaced. Id.; M. DOXEY, supra note 402, at 110-11.
454. D. LOSMAN, supra note 355, at 126; Galtung, supra note 344, at 391-98; MacDonald, supra note 443, at 85-86.
actions taken by the government to mobilize the economy, the psychological response to external pressure, and the sacrifices incurred in resisting sanctions all contribute to a level of morale and political unity that make successful mobilization possible.

Most targets will also be able to retaliate economically by defaulting on government and private debts, freezing the assets of the sanctioners and their citizens, or expropriating property.\footnote{455}{See M. Doxey, supra note 402, at 120; MacDonald, supra note 443, at 84. Losman and Strack both note that Rhodesia's counter-sanctions in the financial area were more effective than the financial sanctions imposed upon Rhodesia, at least initially. D. Losman, supra note 355, at 105; H. Strack, supra note 402, at 97-98. Rhodesia regularly reminded sanctioning states of the counter-sanctions it could impose. H. Strack, supra note 402, at 249-50.} A target that trades actively with the sanctioners—especially if it supplies vital raw materials—can impose substantial economic costs on them through trade controls of its own.\footnote{456}{The United States for example, depends heavily on imports for many essential metals and minerals. See, e.g., Office of Special Trade Representative, Twenty-Third Annual Report of the President on the Trade Agreements Program 140-41 (1978) (Table 33).} Any target can also retaliate by taking action against citizens of the sanctioners within its borders.\footnote{457}{The impact of hostage-taking, albeit not in the context of retaliation for economic sanctions, was demonstrated by the United States-Iranian crisis in 1980.} Even when economic counter-measures are not available, powerful nations can respond with political and military moves,\footnote{458}{Such responses were of concern in relation to the controls on exports of petroleum equipment to the Soviet Union. See note 320 supra and accompanying text.} while weak nations may be able to mobilize international public opinion against the sanctioners by protesting interference in their affairs by stronger powers.\footnote{459}{See Doxey, supra note 430, at 123. A sanctioning state will ordinarily evaluate the possible retaliatory moves of the target before initiating sanctions and will not implement them if the likely cost seems too high. Such considerations produce much of the inconsistency that plagues the American doctrine of promoting respect for human rights abroad. See, e.g., Sirkin, supra note 432, at 205.}

The best example of target resistance is again the case of Rhodesia.\footnote{460}{See R. Lillich & F. Newman, supra note 171, at 450-63.} The Rhodesian embargo is in many ways the most favorable precedent for the use of multilateral economic sanctions: the level of participation and the endurance of the sanctioners were particularly impressive,\footnote{461}{H. Strack, supra note 402, at 252.} and the embargo at least contributed to the final settlement of the crisis.\footnote{462}{Id. at 253.}
fact remains, however, that Rhodesia survived over a decade of nearly universal embargo before beginning to implement any of the social or political changes sought by Britain and the international community. It is true that its survival depended in large part on strategically located nonparticipants and on illicit trade, but much of its success—which may be deplored, but cannot be denied—must be credited to its own ability to restructure its trade, diversify and mobilize its economy, and otherwise adapt to the pressures created by sanctions. Indeed, some analysts feel that sanctions alone would never have led to capitulation by Rhodesia's white government; success came only with the escalating guerrilla war. Cuba likewise illustrates the ability of a target to resist. It has absorbed even greater economic punishment from the American embargo than Rhodesia did from sanctions and its economy has struggled. With substantial help from the Soviet Union, however, it too has survived with its policies unchanged and now poses even greater challenges to American foreign policy.

It bears repeating that the analysis of target nation resistance presented in these sections is based primarily on experience with multilateral sanctions programs involving not only export controls but controls on imports, financial transactions, transportation, and communications—true economic warfare. In that context, it is wholly appropriate to speak of "capitulation" and "economic mobilization." In the context of United States export controls, however, the language of economic warfare is normally out of proportion to the facts. Except in highly unusual circumstances, the type of export controls authorized by the EAA can have nothing like the political or economic effects of full-scale multilateral sanctions. The analysis of effec-

464. See notes 406-09 supra and accompanying text.
465. See L. KAPUNGU, supra note 402, at 103-122; H. STRACK, supra note 402, at 85-97.
466. See H. STRACK, supra note 402, at 237-38; Arnold, White Exodus, not Sanctions, is Draining Rhodesia, 11 NEW AFRICAN DEV. 393, 394 (1977).
467. D. LOSMAN, supra note 355, at 43-45, 125.
468. See Schreiber, supra note 404, at 394-405.
469. The trade controls against Uganda and the Group Z nations do constitute nearly total trade embargoes (with the important exception of food exports to Uganda). These embargoes, however, have rarely been multilateral, and have not been instituted under the EAA. The 1979 House EAA bill would have provided that the Act did not authorize total embargoes. This provision was removed in conference, because no provision was thought necessary.
tiveness presented in these sections thus applies a fortiori to American political export controls.

4. Quasi-Instrumental Motivations

The pure instrumental rationale is concerned with forcing change in target nation behavior. Other theories advanced to justify political trade controls also focus on the potential effect of controls on the target, although they acknowledge that actual change in target conduct is not attainable. These theories might be called quasi-instrumental rationales.

One such theory holds that export and other trade controls are effective ways to punish a target for past behavior. One student of economic sanctions concludes that punishment is often the dominant motive of sanctioning states, even when their expressed goals are instrumental.470 Other scholars have also identified retribution as a motivation for both multilateral471 and unilateral472 sanctions programs. Although retribution is rarely advanced openly in support of United States export controls,473 it often appears as an underlying rationale.474

Another theory holds that controls can function as a deterrent, putting the target nation on notice of the economic hardships the sanctioners can create and leading it to think twice before repeating disfavored conduct. Deterrence, unlike retribution, is openly advanced in justification of American political export controls.475

Export controls are also sometimes urged as a means of communicating to the target nation that the United States disapproves of its conduct.476 The expression of disapproval, not

470. Galtung, supra note 344, at 380-81.
471. E.g., H. Strack, supra note 402, at 238.
472. See Schreiber, supra note 404, at 389.
473. But see text accompanying note 318 supra (petroleum equipment controls first justified as "reprisal").
474. See, e.g., Uganda Hearings, supra note 202, at 82 (“there are certain prescriptive rules of behavior which apply to the rulers of all nations. Those who violate such rules jeopardize their standing in the community of nations. Uganda ... belongs outside of the fellowship of civilized nations and should thus be denied its benefits.”) (statement of Sen. Weicker).
476. For example, President Carter stated of the various actions taken to protest the Shcharansky and Ginzburg trials, “We have expressed our displeasure in a very moderate way.” N.Y. Times, July 21, 1978, at A-6, col. 1. The function of “sending a message” to the target has also motivated certain multilateral sanctions. Wallensteen, for example, concludes that most sanc-
the creation of economic hardship, appears as the primary purpose. The precise object of conveying such a message of disapproval is not always made clear; it may be thought that exerting moral or psychological pressure on the target will lead it to change its policies or will act as punishment or as a deterrent.477

Unfortunately, these justifications for export controls are subject to the same limitations as the instrumental rationale itself. The economic, political, and psychological factors discussed above make export controls generally an unsatisfactory form of retribution, a weak deterrent, and an ineffective vehicle for exerting moral pressure.478

Other potential results claimed for political trade controls do not involve any effect on the target nation itself, but are nevertheless put forward as instrumental in nature. The benefit most often cited in this context is gaining the favor of third countries that oppose the target nation's conduct, "associating the U.S. diplomatically with one group of countries as against another."479 The United States, for example, refused to terminate the embargo of Rhodesia upon the installation of the Muzorewa government primarily for this reason.480 Another benefit claimed is "raising the visibility" of an issue such as human rights,481 even if little can be done to increase respect for human rights within the particular target country. The aim may be to exert subtle pressure on other nations,482 to lay the groundwork for cooperation in future actions, or to mobilize

477. See Galtung, supra note 344, at 399-404. When strong, positive emotional feelings prevail between the target and the sanctioners, the moral pressure of disapproval might achieve results. Ordinarily, however, expressing disapproval will not cause the target to repent and might have the opposite result. C. Brown-John, MULTILATERAL SANCTIONS IN INTERNATIONAL LAW: A COMPARATIVE ANALYSIS 363 (1975).


481. See House EAA Hearings Part I, supra note 21, at 147 (statement of William Root).

482. Pressure applied to third countries through example and the force of public opinion may help make controls instrumentally effective. See, e.g., Uganda Hearings, supra note 202, at 112 (statements of Sen. Church and William Harrup); Senate EAA Hearings Part I, supra note 106, at 56 (statements of Sen. Froxmire and Juanita Kreps); id. at 79 (statement of Juanita Kreps).
public opinion. More generally, some have argued that strong moral stands will increase international respect for the United States, thereby creating new leverage.

These indirect justifications for political trade controls seem intuitively to have merit. Even though they are often phrased in instrumental terms, however, they cannot be analyzed or tested in the same way as the instrumental rationale or its more direct variants. Because the benefits claimed are so subtle and so much a matter of judgment, these arguments are best considered in the context of the symbolic rationale, discussed in the next section.

5. Summary

The literature reveals a "striking consensus . . . that economic sanctions alone have been ineffective in the fulfillment of their primary [that is, instrumental] objectives." Following an exhaustive study of the effectiveness of the United Nations sanctions against Rhodesia, for example, Strack concluded that, in terms of their political achievements, sanctions "must be regarded as marginal instruments of influence best employed in conjunction with other means of influence such as armed force." Kapungu also concluded from his study of the Rhodesian case that sanctions are only likely to be effective as an adjunct to the use of force. The Taubenfelds concluded from their study of collective sanctions that there is a "prima facie case against economic measures used alone."

The concept of a prima facie case against the effectiveness of export controls suggests fundamental changes in the scope of executive authority under the EAA. As demonstrated in this section, the likelihood that political export controls will be successful in modifying (or even in deterring) target nation conduct must ordinarily be regarded as extremely small. With

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484. See, e.g., Farer, United States Foreign Policy and the Protection of Human Rights: Observations and Proposals, 14 VA. J. INT'L L. 623, 625-27 (1974) ("the appearance of virtue can be converted into the currency of power").


487. L. Kapungu, supra note 402, at 129.

488. Taubenfeld & Taubenfeld, supra note 405, at 188.

489. But see Galtung, supra note 344, at 410. The Rhodesian sanctions might
successful instrumental use so exceptional, an unrestricted delegation of authority to the Executive to control American exports for political purposes seems misguided. Executive authority would be more nearly consistent with the actual utility of export controls if the President were required to make a case for the effectiveness of any proposed instrumental control sufficient to overcome the "prima facie case" against it. 490

B. THE SYMBOLIC RATIONALE

The instrumental rationale has been the dominant theoretical justification for multilateral economic sanctions in the twentieth century491 and has been advanced in support of American foreign policy export controls as well.492 Yet the deliberations on EAA '79 suggest that the principal justification for United States political export controls may now be symbolic rather than instrumental: that controls can and should be used to give vent to American disapproval or outrage at the behavior of a target nation, regardless of whether there are any direct or indirect instrumental results.493

Students of multilateral economic sanctions agree that their expressive function has often been a central reason for their use.494 Wallensteen, for example, found that public statements by governments imposing economic sanctions tended to be dominated by expressive, emotional elements, reflecting perceptions that the target had breached norms important to the sanctioners; the instrumental or pragmatic content of the statements was very small.495 He concluded that, although the

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490. In note 392 supra, it is suggested that those who propose instrumental export controls should carry a burden of proof on the issue of foreign availability. The present point expands on that suggestion to take account of other issues discussed in this section. Part VI of this Article considers how the suggestion could be implemented.

491. See Barber, supra note 485, at 370, 373; Galtung, supra note 344, at 379, 388. Some analysts think of economic sanctions only in terms of instrumentality. See, e.g., D. LOSMAN, supra note 355, at 1.

492. See, e.g., Huntington, supra note 317. Various writers have characterized instrumental goals as "primary" and symbolic purposes as "secondary." See, e.g., H. STRACK, supra note 402, at 24-30. Barber also identified—in the context of multilateral controls—the "tertiary" purposes of supporting international law or organizations. Barber, supra note 485, at 370-73.

493. See, e.g., Uganda Hearings, supra note 202, at 5 (statement of Sen. Hatfield) ("We are looking now to this committee to articulate and to bring into focus the essence of indignation represented by these various resolutions.").

494. See, e.g., Galtung, supra note 344, at 411-12.

495. Wallensteen, supra note 357, at 252-54.
language of instrumentality may later be used to rationalize their actions, the motives of sanctioning states are less to modify target nation behavior than to express their own feelings.\textsuperscript{496} The Taubenfelds concluded that some sanctions programs have actually been designed to fail instrumentally: to be strong enough to express disapproval, but not effective enough to truly damage the target or cause it to retaliate.\textsuperscript{497}

In the United States, the importance of the symbolic function is evident from the highly emotional statements in Congress by supporters of the Uganda embargo\textsuperscript{498} and the restrictions on exports of crime detection equipment.\textsuperscript{499} The symbolic rationale is captured in a hypothetical case that is frequently repeated as a shorthand for symbolic controls: should the United States refuse to sell thumbscrews, useful only as instruments of torture, to an agency of a government believed to violate human rights, even though such a refusal would do nothing to prevent that government from torturing its citizens? Among members of Congress, the executive branch, and private interest groups, there is wide agreement that it should.\textsuperscript{500}

On the part of the executive branch, the symbolic rationale has most often been expressed as a desire to use export controls to "demonstrate our opposition" to "abhorrent behavior" (such as apartheid),\textsuperscript{501} to "disassociate" or "distance" the United States from repressive foreign governments or agencies thereof,\textsuperscript{502} or to respond to "extreme acts" of which the United States disapproves.\textsuperscript{503} Even when foreign conduct is not as morally offensive as apartheid, but is merely distasteful or dis-

\begin{itemize}
\item \textsuperscript{496} Id.
\item \textsuperscript{497} Taubenfeld & Taubenfeld, supra note 405, at 201. Galtung agrees that the symbolic function is best served when the "value-deprivation" imposed on the target nation is kept low. Galtung, supra note 344, at 411-12.
\item \textsuperscript{498} See, e.g., House EAA Hearings Part II, supra note 119, at 149 (statement of Rep. Pease); notes 474, 493 supra.
\item \textsuperscript{499} Discussions of the crime detection items, in particular, often assumed a highly emotional character, as speakers drew analogies to the sale of gas chamber equipment to Hitler, concentration camp supplies to Stalin, and handcuffs to the KGB. See, e.g., Senate EAA Hearings Part II, supra note 250, at 140-41, 157 (statement of Jerry Goodman); id. at 147-48 (statement of Robert Gordon); Senate EAA Hearings Part III, supra note 116, at 26 (statement of Frank Weil).
\item \textsuperscript{500} See, e.g., H.R. Rep. No. 96-200, 96th Cong., 1st Sess. 7 (1979); House EAA Hearings Part I, supra note 21, at 80 (statements of Rep. Bingham and James Giffen).
\item \textsuperscript{501} See House EAA Hearings Part I, supra note 21, at 132, 145, 148 (statement of William Root).
\item \textsuperscript{502} Id. at 686 (statement of Stanley Marcuss).
\item \textsuperscript{503} House EAA Hearings Part II, supra note 119, at 9 (statement of William Root).
\end{itemize}
favored, the government has relied on export controls to achieve distance from events or practices it opposes, refusing to continue "business as usual" with the responsible governments. 504 Indeed, the desire to use export controls symbolically became, under the Carter Administration, the principal argument for continued and unrestrained executive discretion to control exports for foreign policy purposes. 505

The belief that the government should restrict or prohibit exports in order to express moral feelings, or simply to disassociate itself from distasteful conduct, regardless of instrumental effects, is predictably controversial. It is derided as a desire to produce a rewarding "moral glow," as a simplistic refusal to "sup with the devil," 506 and as a hypocritical policy; 507 and it is denounced by businessmen. 508 By others, however, it is supported as allowing the nation to express its moral feelings in a satisfying way, preserve its self-respect, 509 and release accumulated moral indignation. 510 Instrumental results, though long-range and indirect, may also be anticipated. 511

This writer is prepared to agree that restrictions on economic intercourse are sometimes appropriate to express American distaste or moral outrage at the policies or conduct of another nation. The thumbscrew case, for example, is appealing. The rationale does, however, have troublesome implications. First, restrictions on trade are a costly means of expressing national opinion on moral or political issues. 512 In-

505. E.g., House EAA Hearings Part I, supra note 21, at 686-87 (statement of Stanley Marcuss), House EAA Hearings Part II, supra note 119, at 9 (statement of William Root); id. at 145 (statement of Stanley Marcuss).
506. House EAA Hearings Part I, supra note 21, at 17 (statement of George Ball).
508. See, e.g., Senate Foreign Policy Hearings, supra note 119, at 322-23 (statement of John James).
510. See Hoffman, The Functions of Economic Sanctions: A Comparative Analysis, 4 J. PEACE RES. 140, 154-55 (1967); Wallenstein, supra note 357, at 252-54. Hoffman finds that sanctions allow governments to act when they experience irresistible pressure to provide such a release, but simultaneously allow them to placate those pressuring the government not to act or not to do too much.
511. See notes 479-84 supra and accompanying text.
512. For a discussion of the costs of imposing export controls, see text accompanying notes 521-706 infra.
indeed, one attraction of the thumbscrew case may be that it involves nearly \textit{de minimis} costs. Second, there has been an increasing number of issues on which the United States has felt compelled to express a position. This Article has traced the growth of foreign policy export controls during the 1970s largely in terms of the emergence of such morally engaging issues. Finally, there appears to be an increasing tendency to turn to export controls as a favored vehicle for symbolic expression, particularly on the part of the executive branch, which has broad authority to invoke controls under the EAA.

The latter two observations underlie the criticism that American export controls have been imposed simply because the responsible officials have concluded that they must "do something" in response to a development abroad that implicates one of a growing number of sensitive issues.\footnote{513} The charge is not baseless—the need to act, regardless of results, has been identified by scholars as a frequent motivation for both unilateral and multilateral economic sanctions.\footnote{514} Galtung finds that the value of "at least doing something," or of creating "the illusion of being instrumental," is of major importance to sanctioning states.\footnote{515} Barber notes that "[i]t is generally important for governments to be seen to be concerned and busy" and concludes that an important objective of economic sanctions is to demonstrate the government's willingness to act, even if little is achieved.\footnote{516} The "do something" tendency visible in United States export control policy\footnote{517} has been of concern not only to the business community,\footnote{518} but also to more objective students of international relations,\footnote{519} and even to some advocates of action to promote the observance of human

\footnotesize{
513. \textit{See Senate Foreign Policy Hearings, supra} note 119, at 266 (statement of Machinery and Allied Products Institute); \textit{House EAA Hearings Part I, supra} note 21, at 79 (statement of James Giffen) (if executive branch has export control authority, it will inevitably use it).

514. \textit{See, e.g.,} Wallensteen, \textit{supra} note 357, at 252-54, 262.

515. Galtung, \textit{supra} note 344, at 411-12; \textit{see} Hoffman, \textit{supra} note 510, at 154-55.

516. Barber, \textit{supra} note 485, at 380. Barber cites a remark of David Lloyd George concerning the British sanctions against Italy, occasioned by the Italian invasion of Ethiopia, under the auspices of the League of Nations: "They came too late to save Abyssinia, but they are just in the nick of time to save the Government." \textit{Id.}

517. The most striking example is in \textit{Uganda Hearings, supra} note 202, at 85 (statement of Sen. Weicker) ("[T]o me what is important ... is that we act ... What I am really for is that we do something.").

518. \textit{See} note 508 \textit{supra} and accompanying text.

519. \textit{See House EAA Hearings Part I, supra} note 21, at 442 (statement of Dimitri Simes); \textit{id.} at 295 (statement of Arthur Downey).}
The challenge of the symbolic rationale is to draft legislation that will permit the symbolic use of export controls in situations of major moral or political importance, but that will restrain the growth of symbolic controls as a reflexive response to the enormous range of foreign acts and policies of which the United States might disapprove. Part V of this Article will examine how EAA '79 attempts to meet that challenge.

C. THE COSTS OF POLITICAL EXPORT CONTROLS

Neither the instrumental nor the symbolic rationale for political export controls can be properly evaluated unless the costs incurred by the nation implementing such controls are balanced against the potential benefits. This section will consider three types of costs: economic, political, and systemic.

1. Economic Costs

a. Lost Transactions

The economic costs of export controls are largely the product of several classes of foregone transactions that extend well beyond the balance sheets of the exporters directly affected.

The first class consists of export sales actually prohibited. According to the Commerce Department, the value of sales for which licenses were denied on foreign policy grounds during 1977 and 1978 was only $112 million. Other transactions might properly be included in this class, however: sales lost because of delay in processing license applications, and sales

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520. Weissbrodt expresses concern that piecemeal responses to human rights violations motivated by a desire to "do something" damage the structure of the United States human rights policy. Weissbrodt, supra note 170, at 262.


522. Delay is a problem of long standing. Despite past congressional efforts to establish deadlines for consideration of license applications, the problem seems to have remained quite serious. See, e.g., Senate EAA Hearings Part I, supra note 106, at 11 (statement of Comptroller General Elmer Staats); id. at 29, 43, 53, 63 (statement of Juanita Kreps); Senate EAA Hearings Part II, supra note 250, at 61 (statement of Scientific Apparatus Makers Association); id. at 63 (statement of American Electronics Association). Congress tried again in 1979. One of the "principal objectives" of the 1979 House bill was to improve the efficiency of the licensing system by establishing a series of "suspense points" at which certain actions would be required. H.R. REP. NO. 96-200, 96th Cong., 1st Sess. 5. The Senate bill had similar objectives. S. REP. NO. 96-169, supra note 31, at 9-11. Section 10 of EAA '79 establishes procedures for processing license applications based on the Senate provision. See H.R. CONF. REP. NO. 96-482, supra note 10, at 49-50.

523. See House EAA Hearings Part I, supra note 21, at 964-66 (statement of
not consummated because the parties expected that the licensing process would be lengthy and expensive or that the needed license would not be issued. For the exporting firm, such lost sales translate into reduced production, profits, and reinvestment; for the workers of the firm they may translate into reduced wages or unemployment. Similar effects are felt among suppliers to the exporting firm, and a negative “ripple effect” passes through affected communities.

The second class of foregone transactions is closely related to the first. Rarely do exports of sophisticated industrial machines, aircraft, or other capital goods involve the sale of only the original item. Such exports ordinarily lead to further sales as well: spare or replacement parts, “add-on” equipment, new generations of equipment to replace obsolete models, and training and maintenance services. The loss of these sales produces comparable adverse effects, though they are less visible.

The third and broadest class of foregone transactions results not from direct interference with specific exports, but from the existence of a practice of interfering with exports. Since major export sales often lead to and grow out of long-term business relationships, the confidence of both buyer and seller is required. To the extent foreign purchasers believe that the United States has adopted a policy of prohibiting or restricting exports for political reasons, they may come to think

James Gray); id. at 285 (statement of Frederick Huszagh). Professor Huszagh, Executive Director of the Dean Rusk Center for International and Comparative Law at the University of Georgia, conducted extensive research on export control procedures as adviser to the Committee on International Trade and Foreign Relations of the National Governors Association. Id. at 282. He notes that empirical studies have shown delay in delivery to be a significant factor in a buyer's decision to purchase capital goods. The Rusk Center is conducting research to estimate the effects of licensing delay on the competitiveness of the product groups most frequently subject to United States validated license procedures, and their “[p]reliminary calculations suggest that for some high technology products delivery delays have a significant effect on competitiveness.” Id. at 285.

See Senate Foreign Policy Hearings, supra note 119, at 33 (statement of David Packard); id. at 302-04 (statement of American Electronics Association). On the effect on employment in particular, see id. at 385 (statement of United Electrical, Radio, and Machine Workers). Cf. C. Bergsten, supra note 131, at 20 (beyond the “obvious effect on jobs and output,” export controls will “weaken the controlling country’s exchange rate over the long run, adding to its inflationary pressures, even if there is no such effect in the short run”).

See Senate Foreign Policy Hearings, supra note 119, at 324 (statement of Dresser Industries, Inc.).

See id. at 306 (statement of American Electronics Association); id. at 311 (statement of National Foreign Trade Council).

See Shultz, Give Us the Rules, and We Will Finish the Job, ACROSS THE BOARD, May 1979, at 78, 80.
of American firms as unreliable suppliers\(^{528}\) and may consequently consider third country or domestic suppliers more favorably. Even if alternative products are more expensive or of poorer quality, concern over American export control policy can render them equivalent in the minds of buyers.\(^{529}\) Although the effect may be more pronounced in nations already subject to some controls and aware of the danger,\(^{530}\) it may be felt in any nation that fears becoming a target of future controls.\(^{531}\) Further, because the United States seeks to regulate reexports of its products and technical information and even of the goods made with the use of controlled information, major American trading partners may begin to seek alternate supply sources for sensitive products and technologies, even for benign products to be exported to sensitive areas, all to avoid the interference of American reexport controls.\(^{532}\) Any permanent diversion of trade brought about by such concerns could profoundly affect the relative economic and political power of the United States.\(^{533}\)

\(^{528}\) This is a concern of both the business community and government officials. See, e.g., Senate Foreign Policy Hearings, supra note 119, at 24-25 (statement of David Packard); id. at 306 (statement of American Electronics Association); Senate EAA Hearings Part II, supra note 250, at 85, 91-92 (statement of Robert McLellan for National Association of Manufacturers); Senate EAA Hearings Part I, supra note 106, at 7 (statement of Elmer Staats); id. at 152 (statement of C. Fred Bergsten).

\(^{529}\) See House EAA Hearings Part I, supra note 21, at 285 (statement of Frederick Huszagh) (buyer awareness of past license denials may create a "learning curve," leading buyers to "consciously discount the attributes of U.S. products by the probability that the license will not be granted.").

\(^{530}\) See Senate EAA Hearings Part II, supra note 250, at 264-67 (statement of Machinery and Allied Products Institute) (examples from the case of South Africa). William Root, of the State Department's East-West Trade Office, states that the U.S.S.R. has made the United States the "supplier of last resort." Rattner,\(^{533}\) Trade Curbs By U.S. Hinge On Its Allies, N.Y. Times, Jan. 6, 1980, at 14, col. 1 (quoting Root). See also Medvedev, supra note 423 ("the leaders clearly plan to end all future substantial grain purchases in America").

\(^{531}\) See C. BERGSTEN, supra note 131, at 20.

\(^{532}\) If alternate supplies are not available, United States controls may provide an incentive for new or expanded production within foreign states. See House EAA Hearings Part I, supra note 21, at 236 (statement of John Chambers). But cf. Huntington, supra note 317, at 73 (foreign manufacturers may hesitate before expanding capacity to meet a demand that could quickly be weakened by a loosening of American controls). Some diversions of trade to producers new to the market have become permanent. See Senate EAA Hearings Part II, supra note 250, at 261 (statement of Machinery and Allied Products Institute); C. BERGSTEN, supra note 131, at 20.

\(^{533}\) See Senate EAA Hearings Part I, supra note 106, at 49 (statement of Sen. Stevenson); id. at 187 (statement of Richard Cooper); Senate Foreign Policy Hearings, supra note 119, at 21-22 (statements of Sen. Stevenson and David Packard); id. at 156 (statement of Dean Rusk); Taubenfeld & Taubenfeld, supra note 405, at 198.
Concern over possible interruption of future transactions influences American exporters as well as foreign purchasers. Entering a new export market is an expensive and lengthy process.\textsuperscript{534} Concern over possible future controls may make the risks attendant upon researching and preparing a market, building customer relationships, and negotiating sales too high, especially for new and smaller exporters.\textsuperscript{535} Exporters' concerns are heightened when licenses appear to be denied because a foreign policy gesture is needed, when controls are issued retroactively or without opportunity for prior public comment, and when licenses are suspended or revoked or consideration is publicly given to doing so.\textsuperscript{536} In the view of many in American business\textsuperscript{537} and government,\textsuperscript{538} such actions have already chilled the efforts of business to increase exports, offsetting governmental efforts to promote them.\textsuperscript{539}

These types of lost transactions, only the first of which comes to the attention of government officials,\textsuperscript{540} directly affect not only the welfare of the export community\textsuperscript{541} but also that of

\textsuperscript{534} See Senate Foreign Policy Hearings, supra note 119, at 305 (statement of American Electronics Association); \textit{id.} at 311 (statement of National Foreign Trade Council).

\textsuperscript{535} Cf. \textit{id.} at 311, ("exporters simply will not bear these huge 'up-front' marketing costs without some degree of certainty about U.S. export controls"); \textit{House EAA Hearings Part I, supra} note 21, at 285 (statement of Frederick Huszagh) (license mechanism creates "sizeable impediment to the entry of small and medium firms into the export market"); \textit{id.} at 295 (statements of Frederick Huszagh and Arthur Downey) ("unanticipated license decisions . . . [deprive] companies of substantial investments").

\textsuperscript{536} See, e.g., notes 275, 321-43, 392 supra and accompanying text. For example, in 1978 the government publicly considered revoking a controversial license permitting Dresser Industries to export to the U.S.S.R. certain equipment and technology for the manufacture of oil well drill bits, see Bingham & Johnson, \textit{supra} note 117, at 915, again considered revocation publicly in 1980, \textit{U.S. Export Weekly} (BNA) No. 333, at A-1 (Nov. 30, 1980), then finally revoked the license. \textit{U.S. Export Weekly} (BNA) No. 336, at A-4 (Dec. 9, 1980).

\textsuperscript{537} See, e.g., \textit{Senate Foreign Policy Hearings, supra} note 119, at 25 (statement of David Packard); \textit{Senate EAA Hearings Part II, supra} note 250, at 63 (statement of American Electronics Association); \textit{House EAA Hearings Part I, supra} note 21, at 69 (statement of William Giffen); Schultz, \textit{supra} note 527, at 78, 81.

\textsuperscript{538} See, e.g., \textit{Senate EAA Hearings Part I, supra} note 106, at 205 (statement of Richard Cooper).

\textsuperscript{539} George Shultz, President of Bechtel Corporation and former Secretary of Labor and of the Treasury and Director of the Office of Management and Budget, points out that American exports are a "wasting asset" from the point of view of their use as political tools. The more political export controls are used, the more exports are discouraged, and thus the less effective controls will be in the future. Schultz, \textit{supra} note 527, at 82.


\textsuperscript{541} It should be noted that the economic burden falls disproportionately
the whole nation. During the years when the controls described in Part III of this Article were being imposed, for example, the United States was running a large and increasing deficit in its balance of merchandise trade (from $9.3 billion in 1976 to $34 billion in 1978). The trade deficits "weakened the value of the dollar, intensified inflationary pressures . . . , and heightened instability in the world economy." Their seriousness was recognized by the leading international economic policy makers in the executive branch and by Congress; in

even among firms engaged in export trade. Even leaving aside the makers of arms, crime control equipment, and similar products, the burden has fallen in the United States principally on the manufacturers of certain goods—such as computers, aircraft, and machinery—for which there is strong foreign demand and at least somewhat limited foreign availability, and on those manufacturers' employees, shareholders, and communities. In effect, because these goods represent the nation's greatest comparative advantage and provide a large share of its export earnings, the United States has elected to impose the maximum economic cost on itself. If political export controls are routinely extended to grain exports, this process will be repeated.

The internal incidence of costs has been recognized as a problem of multilateral economic sanctions. Doxey, supra note 430, at 105; MacDonald, supra note 443, at 197-98. For example, opposition by import-export interests in Britain and France is said to be one reason why League of Nations sanctions against Italy were not more successful. MacDonald, supra note 443, at 73; Taubenfeld & Taubenfeld, supra note 405, at 198.

542. See Bureau of the Census, United States Dep't of Commerce, Statistical Abstract of the United States: 1979 at 847 (1979) (Table No. 1491) (figures adjusted to balance of payments basis). Other components of the balance of payments were in surplus during those years, but an overall current account deficit was incurred for both 1977 and 1978. Id.

Merchandise exports grew by less than 8% in 1976 and by only 6% in 1977, though they increased by over 21% in 1978. Id. at 860 (Table No. 1506). Merchandise imports increased by over 25% in 1976, over 22% in 1977, and over 16% in 1978. Id. Much of the increase in imports was due to petroleum imports, see id. at 867-68 (Table No. 1515), but in dollar value petroleum imports actually declined in 1978. Id.


545. See generally National Policy Hearings, supra note 544; National Export Pro-
testimony on export controls, former Secretary of State Dean Rusk called the deficits "an emergency situation." The tendency of political export controls to contribute to the trade deficits was pointed out explicitly by the American exporting community, and was finally recognized by the President. Although there have been improvements in the merchandise trade balance since 1978, it remains true that export controls distort national trading patterns, sacrifice some gains from trade, and thereby contribute to inflationary pressure and monetary instability.

b. Unpredictability

The third class of costs described above—the indirect costs to the United States flowing from a reputation of unreliability abroad and of arbitrariness at home—is particularly noteworthy. Cumulatively, such costs may far exceed the hardship that controls can impose on any target nation. These larger costs

gram: Hearing Before the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 2d Sess. (1978). Export promotion has in fact become fashionable in Congress, to a degree that appears to reflect the "mercantilist instinct which seems to be inbred in human beings." C. KINDLEBERGER, POWER AND MONEY 117 (1970). While this Article recommends a reduction of certain restraints on exports, it does not endorse every effort to increase exports.

548. See notes 578-80 infra and accompanying text.
549. According to the Commerce Department, the deficit was $42.36 billion in 1978, $40.37 billion in 1979, and $36.36 billion in 1980. Wall St. J., Mar. 2, 1981, at 11, col. 1.
550. A related issue in recent years has been whether trade with the U.S.S.R. should be perceived as a zero-sum game (any gains from trade realized by the U.S.S.R. are losses for the United States), or as a positive-sum game (both parties benefit from trade). See, e.g., House EAA Hearings Part I, supra note 21, at 47 (statement of Marshall Goldman); CONGRESSIONAL RESEARCH SERVICE, supra note 379, at 918-20. According to Thomas Wolfe, Assistant Professor of Economics at Ohio State University, many observers believe that the U.S.S.R.—with a centralized, planned economy—is able to obtain disproportionate benefits from trade transactions with American companies. This belief leads to greater faith in foreign policy export controls, which by hypothesis withhold more benefits from the U.S.S.R. than from the United States. Professor Wolfe contends that observers both overestimate the disproportionate distribution of the gains from East-West trade and overemphasize the importance that the Soviets give to those benefits, and thus hold exaggerated expectations for trade controls. House EAA Hearings Part I, supra note 21, at 52-53.
551. See C. BERGSTEN, supra note 131, at 20.
552. No aspect of foreign policy controls elicits as much scorn from critics as their self-punishing nature. See, e.g., Senate EAA Hearings Part I, supra note 108, at 48-49 (remarks of Sen. Stevenson and Stanley Marcus); Senate Foreign Policy Hearings, supra note 119, at 323 (statement of Dresser Industries, Inc.).
are principally due to the unpredictability that inheres in foreign policy export controls, a quality that becomes apparent when political controls are compared with national security controls in terms of their underlying policies, product coverage, and target nations.

The basic policy thrust of national security controls—to prevent or delay the acquisition of militarily useful technologies by nations perceived as a threat to United States national security—is widely understood and accepted by American business. Disagreement with the policy tends to focus, as it has since the mid-1960s, on product coverage. In contrast, there is no central foreign policy goal around which public understanding and support can readily coalesce. The concept of foreign policy has a "treacherous breadth and homogeneity": its breadth includes every aspect of American international relations, subsuming all the interests of a great power, while its homogeneity, at least as reflected in the EAA, gives all of these interests equal authority as bases for trade controls. Further, although the purpose of national security controls has remained generally stable for some years, the goals of foreign policy are fluid. In the words of a former Secretary of Commerce:

[It is sometimes very difficult to identify foreign policy goals. For one thing, they may shift from one time to another.]

553. The business community is nearly unanimous in holding that "the lack of predictability is the major problem in the current export control system." Senate EAA Hearings Part II, supra note 250, at 91 (statement of Robert McLellan). See Senate Foreign Policy Hearings, supra note 119, at 51 (statement of Donald Morfee).

554. See notes 18-23 supra and accompanying text.

555. See Senate Foreign Policy Hearings, supra note 119, at 321 (statement of John James); Senate EAA Hearings Part II, supra note 250, at 274 (statement of MAPD); Shultz, supra note 527, at 82.

Though not strictly relevant to the issue of predictability, it is important to note that American business strongly supports the policy of keeping militarily useful items from adversaries, but may not share many of the foreign policy goals pursued through the use of trade controls. See, e.g., Senate Foreign Policy Hearings, supra note 119, at 321-22 (statement of John James); Bingham & Johnson, supra note 117, at 911 (with respect to promotion of human rights, "no type of foreign policy control . . . sends businessmen up the wall faster").

556. Brown, supra note 392, at 164.

557. Such interests include access to raw materials, opposition to terrorism, promotion of human rights, regional stability, nuclear nonproliferation, the mix of geopolitical concerns that supports the Group Z embargoes, and more.

558. EAA '69 drew no distinctions among foreign policy goals as bases for export control authority. EAA '79 urges restriction of controls to situations in which they are necessary to further "fundamental" foreign policy objectives. EAA '79, § 3(10), 50 U.S.C. app. § 2405(a)(1) (Supp. III 1979). The provision seems to have little operative force. See note 729-32 infra.
It would help us enormously if we knew precisely what those goals were. Changes in foreign policy come not only from the administration but also from the Congress. . . .

. . . At any point in time, precisely what is a foreign policy goal and how you honor that goal may be quite difficult to determine. In the eyes of American business, the fluidity and diversity of foreign policy make trade contingent on unforeseeable events.

The export community is generally aware of the types of goods and technologies controlled for national security purposes. Although the precise items controlled are revised periodically, the coverage of national security controls has not changed drastically for some time. Further, since security controls are limited to sophisticated products and technologies, a limited number of exporters are affected. There are frequent disagreements over product coverage, but these disagreements are generally at the margin; at the core, there is consensus on the types of products that must be controlled. Although the current move to control "technologies" rather than "products" has to some extent broken the old consensus, a new
one seems to be forming.\textsuperscript{565}

In contrast, there is no natural core product coverage for foreign policy controls. Such controls can and do affect products ranging from high technology items originally controlled for national security purposes to stuffed animals ("Misha" dolls for the Moscow Olympics) or copper buttons for South African police uniforms. Political controls may prohibit the sale of every conceivable product to certain buyers, such as the Group Z nations, the South African military and police, and the concessionaires at the Olympics. The result is unpredictability for all exporters.

American business knows with certainty the countries against which national security export controls are aimed. Although since 1977 the EAA has provided that a nation's Communist or non-Communist status alone should not determine whether controls are imposed,\textsuperscript{566} the longstanding preoccupation of national security controls with exports to Communist destinations has not changed.\textsuperscript{567}

Foreign policy controls, on the other hand, are not by nature directed at any particular nation or group of nations. With the variety of foreign policy goals that can be pursued under the EAA, few nations in the world can be considered safe from the application of controls. The human rights policy, in particular, leads to broad potential country coverage. It is an unpleasant fact that an alarming number of nations show sufficient disregard for human rights to be considered potential targets of nations and thereby permitting expanded exports of high technology products. Highlights of the report are reprinted in \textit{Senate Foreign Policy Hearings}, supra note 119, at 170. \textit{See generally} Comptroller General Report 1979, supra note 363, at 60-64; \textit{House EAA Hearings Part I}, supra note 21, at 537-41 (statement of Reps. Wolff and Miller on H.R. 3216). The "military critical technologies" approach is continued under EAA '79, § 5(d), 50 U.S.C. app. § 2404(d) (Supp. III 1979).

\textsuperscript{565} \textit{See House EAA Hearings Part I, supra} note 21, at 1020 (reprinted speech of J. Fred Bucy).


\textsuperscript{567} The 1979 country policy report of the State Department concluded that only the Communist nations (other than Yugoslavia) should be subject to national security controls because only they pose an immediate threat to American national security. \textit{See House EAA Hearings Part I, supra} note 21, at 646 (statement of William Root). Most categories on the CCL are controlled for export to all destinations, but licenses for exports to "free world" destinations are usually granted if the end use is appropriate and there is adequate protection against diversion. \textit{See} 15 C.F.R. § 385.4(b)(1) (1980) (policy governing licenses to countries in Group V).
American export controls.\textsuperscript{568} Amnesty International, in its 1973 \textit{Report on Torture}, stated that "torture has virtually become a world-wide phenomenon . . . encouraged by some governments and tolerated by others in an increasingly large number of countries."\textsuperscript{569} Shestack and Cohen, urging a more active human rights policy, wrote in 1974 that "one can call the roster of the United Nations and find human rights violations in each case."\textsuperscript{570} The State Department under Secretary Kissinger declined to release its 1975 report on human rights in nations receiving United States military assistance "since all but a relative handful of countries committed human rights violations . . . ."\textsuperscript{571} Sirkin states that "[m]ost developing countries are currently under authoritarian rule; a substantial number might qualify as gross violators [of human rights]."\textsuperscript{572}

The Carter Administration pointed to improvements in the world human rights situation after 1977;\textsuperscript{573} while there is room for optimism, the situation remains "discouraging and alarming."\textsuperscript{574} The State Department's 1979 report on human rights in nations receiving American assistance, for example, includes the Freedom House ratings of civil and political "freedom" prevailing in the nations of the world. Fifty-five nations are rated "not free," while another fifty-three are considered only "partly free." Even the group of "free" nations includes some—such as Greece, Turkey, and Spain—where respect for human rights may not be firmly rooted.\textsuperscript{575} With this pool of potential targets, foreign policy controls affecting transactions of American exporters could be imposed at any time.\textsuperscript{576}

\textsuperscript{568} The vast majority of nations are in fact subject to controls on purchases of crime detection equipment. \textit{See} notes 266-90 \textit{supra} and accompanying text.

\textsuperscript{569} \textit{Amnesty International, Report on Torture} 7 (1973).


\textsuperscript{572} Sirkin, \textit{supra} note 432, at 210.

\textsuperscript{573} \textit{See, e.g., Human Rights Hearings, supra} note 170, at 5-7 (statement of Mark Schneider); \textit{Report on Human Rights Practices, supra} note 200, at 4-7.

\textsuperscript{574} \textit{See Robertson, supra} note 463, at 8.


\textsuperscript{576} \textit{See House EAA Hearings Part I, supra} note 21, at 9 (statement of Dean Rusk). Because of the large number of potential targets, export controls raise the problem of inconsistency which has plagued other aspects of the human rights movement. \textit{See, e.g., Human Rights Hearings, supra} note 170, at 18-19 (statement of Rep. Ryan); \textit{id.} at 33 (question to State Department); \textit{id.} at 47, 49 (Congressional Research Service Issue Brief); Sirkin, \textit{supra} note 432, at 210. The scope of the human rights policy has been limited by confining its application to "gross violators" of "internationally recognized" human rights, to the in-
The broad potential applicability of political export controls is both a product and a cause of what may be called a "control psychology." The use of political export controls on a sufficient number of occasions leads foreign nations, American exporters, and other interested groups to expect that, in the future, the United States will continue to pursue a range of foreign policy goals and to react to a variety of international developments by imposing controls. As these expectations become established, issue-oriented groups in the United States will increasingly call for trade controls, seeing any program of governmental action not including them as insufficient. Government officials will turn ever more readily to trade controls as a policy instrument, assuming that foreign nations and domestic constituencies will perceive any American response not including controls as an indication of less than full disapproval. The more these effects lead to the use of controls, the greater will be the pressure for their use in the future. With the imposition of controls becoming ever more likely, importers and exporters (actual and potential) will seek greater certainty by redirecting

In 1976, the State Department reported on human rights practices in six nations receiving military assistance, concluding in each case that "extraordinary circumstances" and "the national interest" justified continuing aid in spite of human rights violations. See generally DEPARTMENT OF STATE, HUMAN RIGHTS AND U.S. POLICY: ARGENTINA, HAITI, INDONESIA, IRAN, PERU AND THE PHILIPPINES (1976) (Report Submitted to the House Committee on Int'l Relations, 94th Cong., 2d Sess.) [hereinafter cited as HUMAN RIGHTS AND U.S. POLICY]. (The "extraordinary circumstances" and "national interest" standards are contained in § 502(B) of the Foreign Assistance Act, 22 U.S.C. § 2304(c)(1) (1978)). Among the considerations cited as justifying these conclusions were the following: access to raw materials (such as oil); the need to safeguard American investments; the desire to retain influence with powerful nations; the need to safeguard United States military security, military bases, and important allies; and the desire to maintain confidence in American security commitments. HUMAN RIGHTS AND U.S. POLICY, supra, at 6, 11, 16-17, 22, 27, 32; see Weissbrodt, supra note 170, at 271 n.134. While consideration of such factors has been criticized, see, e.g., Weissbrodt, supra note 170, at 271-73; Brown, supra note 392, at 162-63, it seems only realistic to believe that they will continue to be considered. See also Vogelgesang, supra note 170, at 827. To the extent that they are considered, and economic sanctions are employed against some violators of human rights but not against others, the United States leaves itself open to charges of cynical inconsistency, reducing the moral force of its policy. Cf. Hoffman, The Hell of Good Intentions, 29 FOREIGN POL'Y 3, 8-9 (1977) (avid pursuit of all human rights violations is likely to be a highly self-destructive ordeal).

577. The term is suggested by the concept of an "inflationary psychology," which occurs when consumers expect inflation to continue and increase their current spending to "beat" future price increases, thus worsening inflation.
their resources to areas in which the risk of political interference is less. The potential costs of creating a control psychology are staggering and should figure prominently in any decision to impose political export controls.

c. Summary of Economic Costs

At least some economic costs of political export controls were recognized by the Carter Administration. In September 1978, the President announced a series of measures to improve American export performance and to reduce export barriers posed by American law and policy. Among these was a directive to the agencies involved in export licensing "to take export consequences fully into account when considering the use of export controls for foreign policy purposes." Administration representatives later indicated that care was being taken to "insure, in those instances where controls are invoked, that the foreign policy gain will outweigh the commercial loss." New foreign policy controls did appear to slow following the President's statement, a change attributed by the Administration to increased sensitivity to export consequences and foreign availability. Most of the controls in effect at the time of the statement were expressly continued in force, however, and near the end of President Carter's term, significant new controls were imposed. In justifying these actions, executive branch officials on occasion appeared to deal in an almost casual way with the mandate to take export consequences fully into account. The Carter Administration also opposed inclusion in EAA of a requirement that economic costs be considered before imposing foreign policy export controls. It appears, in short, that further legislative steps—even beyond

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578. See, e.g., Senate EAA Hearings Part I, supra note 106, at 151-52, 192 (statement of C. Fred Bergsten).
580. Id. at 1633. This statement also indicated that "[w]eight will be given" to foreign availability when considering controls. Id.
582. See Senate EAA Hearings Part III, supra note 116, at 26 (statement of Frank Weil).
584. See text accompanying notes 799-810 infra.
586. House EAA Hearings Part II, supra note 119, at 9 (statement of William Root); id. at 145-46 (statement of Stanley Marcuss).
those taken in EAA '79—are needed to ensure that the full range of economic costs is considered in any decision on political export controls.

2. Political Costs

The political costs of export controls result from a variety of strains on international political relationships. It is obvious that relations with the target nation and its allies will be strained, perhaps to the point of provoking economic, political, or even military retaliation. It is less obvious, though perhaps more important, that relations with third countries may also suffer when such nations are pressured to reduce foreign availability. The limited success of the United States in obtaining cooperation from other governments has already been examined; the present point is that efforts to force such cooperation have been politically costly.

At least as much animosity has been engendered during

587. Galtung, supra note 344, at 388-89; MacDonald, supra note 443, at 72.
588. See MacDonald, supra note 443, at 72.
589. See notes 393-405 supra and accompanying text. One commentator argues that before the moral duty to use trade controls in furtherance of human rights is avoided because of foreign availability, the United States must exert pressure on other nations for cooperation. See Brown, supra note 392, at 167-68. Some members of Congress have taken a similar position, criticizing the Executive for failure to so negotiate. Selective pressure, however, may be more advantageous in the long run. Brown's formulation, that all bilateral and multilateral efforts to secure leverage must be exhausted in every case, would seriously strain America's relations with her major allies—and, based on past experience, would produce little cooperation.

If pressure is not exerted out of regard for political costs, the impact of foreign availability on any proposed control must be considered. It should also be remembered that in the case of controls like the South African military and police embargo (imposed on a broad range of items, including items widely available), negotiations sufficient to eliminate foreign availability are simply impracticable.

590. See D. Losman, supra note 355, at 138. Recent efforts to obtain cooperation in sanctions against Iran, for example, caused serious strains in relations with the EEC. See, e.g., Apple, Europe Expects Criticism for Retreat on Iran Sanctions, N.Y. Times, May 11, 1980, at 3, col. 1; Gwertzman, Muskie Will Raise Iran Sanctions in Talks With Allies, N.Y. Times, May 12, 1980 at 1, col. 6; Gwertzman, Muskie Reminds Allies of Pledge for Sanctions on Iran, N.Y. Times, May 14, 1980, at 1, col. 1. Another recent illustration of political tension arose in November 1980, when United States Customs held up clearance of a shipment of steel products from the Creusot-Loire Company of France. The ostensible reason was that the steel included Cuban nickel; the "real" reason was said to be retaliation against Creusot-Loire for taking over a Soviet contract which American firms had to give up when the technology embargo was imposed. See U.S. Export Weekly (BNA) No. 333, at A-6 to A-7 (Nov. 18, 1980). Maintaining cooperation among participating states has similarly been a major problem in the use of multilateral economic sanctions. See, e.g., Taubefeld & Taubenfeld, supra note 405, at 185, 195, 197-200.
past political trade control programs by American efforts to regulate two types of third country transactions without the cooperation of the host government: the reexport of United States-origin goods or technology to a target nation, and the export of local-origin goods or technology to a target nation by local subsidiaries of American corporations.

a. Reexport Controls

Besides prohibiting exports from the United States of items that the exporter knows are to be reexported, the Regulations directly prohibit all reexports by foreign purchasers unless specific approval is granted by the OEA or general authorization is given in the Regulations. Because reexport controls extend to parts, components, and other materials used in foreign manufacturing, inclusion of a single American-origin component may prevent the export from a foreign country of an end product manufactured there by a local firm.

Controls on the reexport of technical information have an extra dimension of complexity because the Regulations attempt to control the disposition of some goods produced abroad with the aid of American-origin data. American controls extend, for example, to exports from any country to a country in Groups Q, W, Y, P, or Z of certain "direct products" of American-origin data and certain commodities produced by a plant, or a major component thereof, which was the direct product of United States-origin data. Until recently, reexport controls were primarily based on national security, but they are now a part of many of the foreign policy controls described in Part III of this Article.

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591. Cf. 15 C.F.R. § 374.1(b) (1980) (goods); id. at § 379.8(a)(2) (information).
592. See id. at §§ 374.1(a) (goods); id. at 379.8(a)(1) (information). "Reexport" includes transshipment or diversion of goods or information as well as subsequent export from the purchasing nation. Id. at § 370.2.
593. See id. at § 374.3 (goods); id. at § 379.8(c) (information).
594. See id. at § 374.2 (goods); id. at § 379.8(b) (information).
595. See id. at § 376.12. An example might be the extension of American controls to the export from another country of a machine tool manufactured locally, but containing a United States-origin "numerical control device." See id. at § 376.11.
596. See id. at § 379.8(a)(3).
597. Id. A "direct product" is defined for this purpose as the immediate product, including a process or service, produced by use of the data. See id. at § 379.4(f) n.6.
598. See id. at §§ 379.8(a)(3), 379.4(f), 379.5(e)(1)-(2).
599. See, e.g., id. at § 385.4(a)(1)-(4) (Republic of South Africa and Namibia); id. at § 379.4(f)(1)(i)(p) (petroleum equipment).
Even American national security reexport controls caused friction with both nonaligned nations and members of COCOM. COCOM members especially resented them because they either (1) implemented unilateral United States controls exceeding the level of restraint agreed upon by COCOM, or (2) duplicated the COCOM review process and the national control systems maintained by members in accordance with their COCOM obligations. Implementation of unilateral controls fueled the longstanding dispute over the proper product coverage of COCOM controls, while duplication implied distrust of foreign control systems. COCOM members' complaints were sharp enough to prompt the United States in the late 1970s to seek ways of eliminating at least the duplicative aspect of its reexport controls, and in 1980 a partial step in this direction was taken.

When the United States regulates reexports in support of foreign policy controls, an issue similar to that raised by unilateral national security controls arises: American interference with the trade of a nation that has not agreed to participate in the American controls, that may strongly disapprove of them, and that may even have specifically refused to support them.

Beyond an emotional reaction to American interference

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600. See COCOM Report, supra note 393, at 55.
602. See id. Such distrust does appear to be the principal reason for maintenance of security reexport controls. Id. at 14.
603. President Carter stated that his Administration would "stop issuing a separate U.S. reexport license in cases where [it had] already approved reexport of the same product as part of the COCOM process." President Carter's Recommendations to Congress on Export Disincentives and Commerce Department Summary of Major Findings (Sept. 9, 1980), reprinted in U.S. Export Weekly (BNA) No. 324, at M-1, M-3 (Sept. 16, 1980).
604. Foreign resentment over some of the most recent foreign policy export controls has been mitigated by implementing reexport controls in a much less rigorous manner than has been the case with national security controls and past foreign policy controls.

The April 1980 order prohibiting most exports to Iran under the President's emergency authority, see note 810 infra, covered exports "from the United States, or from any foreign country," but only when made "by any person subject to the jurisdiction of the United States . . . ." Exec. Order No. 12,205, § 1-101(a), 45 Fed. Reg. 24,099 (1980). Further, the order did not apply to foreign subsidiaries of American corporations. See id. at § 1-102. See also 31 C.F.R. § 535.207(b) (1980). Thus, reexports by foreign purchasers, or even by American foreign subsidiaries, were not covered.

The regulations were later tightened, see 31 C.F.R. § 535.430 (1980), prohibiting the export of items to be incorporated in foreign-manufactured goods when the "person subject to the jurisdiction of the United States has reasonable cause to believe that those goods are intended for export to Iran." This section, however, still applies to exports from the United States to third countries, not
and a desire not to lose export sales, foreign resentment of American reexport controls is rooted in theoretical opposition to the extraterritorial application of United States law.\footnote{See e.g., L. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 998-99, 1047-49 (1976); Hacking, The Increasing Extra-Territorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America, 1 Nw. J. INT’L L. & Bus. 1, 1-10 (1979).} American reexport controls, like some aspects of American securities and antitrust law, are seen as improper attempts to subject foreign firms and nationals, residing and doing business abroad, to legal sanctions\footnote{See 15 C.F.R. § 387.1 (1980) (criminal, administrative, and civil sanctions); see also id. at § 388.3 (administrative and civil sanctions).} for violations of American regulations even though their conduct is not prohibited by local law.\footnote{Cf. Berman & Garson, supra note 2, at 866-67, 875-76 (the extraterritorial imposition of penalties may strain international legal principles). The reexport regulations for commodities provide that reexport authorization by the Office of Export Administration does not relieve any foreign person or firm from the burden of complying with foreign laws. See 15 C.F.R. § 374.9 (1980). The rules for technical data are similar, but also provide that no foreign law, rule, or authorization relieves any person of responsibilities under the Export Administration Regulations. See id. at § 379.8(d).} American claims of extraterritorial jurisdiction to prescribe rules of conduct\footnote{See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 6-7 (1965) [hereinafter cited as RESTATEMENT].} have been sharply criticized abroad even when limited by a requirement that the foreign conduct have some effect on United States commerce\footnote{See Schoenbaum v. Firstbrook, 405 F.2d 200, 203-09 (2d Cir., cert. denied, 395 U.S. 906 (1968)); ANTITRUST DIVISION OF THE DEP’T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (1977), reprinted in [1977] 5 TRADE REG. REP. (CCH) ¶ 50,309 [hereinafter cited as ANTITRUST GUIDE].} or that some reexports from those countries. The standard reexport prohibition was not added to the regulations.

The 1980 restrictions on exports related to the Moscow Olympics, 45 Fed. Reg. 21,612 (1980), appeared to cover any reexports, requiring validated licenses or reexport authorization for the export or reexport of any commodity or technical data that the exporter or reexporter had reason to know was for a use in any way related to the Olympics. The application of the provision, however, was again limited to exports or reexports by persons "subject to the jurisdiction of the United States." See id. (amending 15 C.F.R. § 385.5). Further, for the purpose of this regulation only, the phrase "person subject to the jurisdiction of the United States" was defined to include United States citizens or resident individuals, United States corporations, and any permanent establishments of foreign firms in the United States. Id. Thus, again, the reexport of a controlled item by a foreign purchaser, or even by a foreign subsidiary of a United States corporation, was not covered by the regulations.

On the other hand, the embargo on sales of grain to the U.S.S.R., implemented in January 1980, see note 803 infra, applied fully to the reexport by purchasers in other countries of American grain, see 45 Fed. Reg. 1883 (1980) (amending 15 C.F.R. § 376.5; amending and revising 15 C.F.R. §§ 386.7(a), 399.1), as did the related controls on exports of phosphates used for fertilizers. See 45 Fed. Reg. 8293 (1980) (amending 15 C.F.R. § 399.2).
conduct necessary to the violation take place within the United States.610

Reexport controls do not clearly fall within any of the internationally accepted justifications for extraterritorial jurisdiction to prescribe rules of conduct, nor even within those justifications accepted in the United States.611 For example, no conduct relating to a reexport transaction need take place in the United States for the reexport prohibition to attach.612 A reexport ordinarily has no direct effect on American commerce; and the effect of any single transaction on the foreign policy interests of the United States does not seem substantial.613 The United States might assert jurisdiction under the "protective principle," arguing that reexports "threaten its security as a state," but as to foreign policy controls that assertion seems exaggerated at best. In any event, reexports do not appear to constitute conduct "generally recognized as a crime" within the American version of the protective principle.614 Although for-

612. Cf. RESTATEMENT, supra note 608, at § 17 ("Jurisdiction to Prescribe with Respect to Conduct, Thing, Status, or Other Interest within Territory").
613. The RESTATEMENT, supra note 608, at § 18, provides that a state has jurisdiction to prescribe a rule attaching legal consequences to conduct outside its territory which causes an effect within its territory, if either (a) the conduct and the effect are generally recognized as elements of a crime or tort, or (b) the effect is substantial, direct, and foreseeable, and the rule prescribed is not inconsistent with the principles of justice recognized by states having reasonably developed legal systems. Paragraph (b), dealing with acts "malum prohibitum," seems to be the only alternative applicable to foreign policy reexport controls. Jurisdiction is normally based on an effect on commerce. See [1977] 5 TRADE REG. REP. (CCH) ¶ 50,309, at 55,655. The Reporters' Notes to § 18, however, indicate that other effects—such as effects on the prescribing nation as a whole—can also serve as a basis for jurisdiction to prescribe. The Reporters' Notes illustrate this point with cases involving the inciting of sedition, disclosure of military secrets dangerous to armed forces, and the like. RESTATEMENT, supra note 608, Reporters' Notes § 18, at 56. A reexport usually would not have any effect on United States commerce—unless the original American exporter participated in it and therefore could be penalized directly under the Regulations—and would not normally seem to have a "substantial" effect on the foreign policy interests of the United States comparable to the examples given in the Reporters' Notes to § 18.
614. Section 33 of the RESTATEMENT, supra note 608, codifies the "protective principle": a state has jurisdiction to prescribe rules attaching legal consequences to conduct abroad which "threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed
eign importers are often required to make written representa-
tions or assurances regarding reexport—and thus can be said to
be subject to United States regulation as a matter of contract—
the reexport regulations apply regardless of whether the
purchaser has signed a document that refers to or accepts
them. As there is no generally accepted principle of interna-
tional law governing the extent to which a nation has jurisdi-
cion to prescribe legal consequences for the acts of foreign
persons abroad, restrictions on reexports will remain a
source of theoretical disagreement and political tension be-
tween the United States and its trading partners, especially to
the extent such restrictions serve only unilateral foreign policy
interests.

b. Controls on Foreign Entities

Even more severe political tension has been generated by
American efforts to control local-origin exports by foreign firms
owned or controlled by United States persons. Such efforts cre-
ated serious foreign policy problems during the 1960s, when the
United States continued its embargo of the People's Republic
of China after most other Western nations had come to treat

legal systems." This section was intended to provide a basis for jurisdiction to
 prescribe when the effects of foreign conduct are not sufficient to invoke § 18.
See id., Comment c. The principle is restricted to recognized crimes, however,
to prevent untoward extensions of jurisdiction. See id., Comment d.

615. Most validated license applications for the export of goods require a
statement from the "ultimate consignee or purchaser" regarding ultimate desti-
nation and end use. See 15 C.F.R. § 375.2(a) (1980). It is a violation of the Regu-
lations to divert goods outside of these representations. See id. at § 375.2(f)(2).
Many validated license applications for the export of technical data must be
supported by a similar statement from the foreign importer. Id. at
§ 379.5(e)(2). Some technical data may only be exported under General Li-
cense GTDR with written assurances from the importer regarding reexport to
Groups P, Q, W, Y, and Z. See id. at § 379.4(f).

616. The ultimate consignee/purchaser statement is not required for vali-
dated license exports to Group T, see id. at § 375.2(a), nor is any representation
from the importer required for any general license export of goods. Importer
statements and written assurances are only required for exports of technical
data of the types specified in the relevant regulation. See id. at §§ 379.5(e)(2),
379.4(f). Destination control statements, warning that diversion contrary to
American law is prohibited, must be used in connection with all exports under
a validated license and under certain general licenses, id. at § 386.6(a), and the
Regulations purport to make it illegal for any person to divert the exported
goods once that person has received notice of the prohibition against diversion
to any country not authorized in that notice. See id. at § 386.6(i). The destina-
tion control statements, however, do not cover all the destinations subject to
foreign policy export controls, and they do not in any case constitute the agree-
ment of the importer to the application of the American regulations.

617. RESTATEMENT, supra note 608, § 37, Comment a.
that country no more restrictively than the U.S.S.R.\textsuperscript{618}

The embargo of the People's Republic of China was implemented under the United States Foreign Assets Control Regulations (FACR), promulgated under the extraordinary national emergency powers granted to the President by the Trading with the Enemy Act (TWEA).\textsuperscript{619} Substantially all the prohibitions of the FACR apply to "any person subject to the jurisdiction of the United States,"\textsuperscript{620} a phrase defined to include any "partnership, association, corporation, or other organization, wheresoever organized or doing business, which is owned, or controlled by" United States citizens, residents, or corporations.\textsuperscript{621} The FACR purported directly to prohibit these controlled foreign firms from trading with the People's Republic of China, although, in both theory and practice, such a prohibition could only be enforced against the American parents.\textsuperscript{622} The most celebrated attempt to interrupt a transaction by a foreign subsidiary is undoubtedly the Fruehauf case, in which the United States directed the Fruehauf Corporation of Detroit to instruct its French subsidiary to cancel a sale of truck bodies for export to the People's Republic of China, over the strong protest of the French government. The diplomatic impasse was only broken when the French courts intervened.\textsuperscript{623}

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\begin{itemize}
  \item \textsuperscript{618} See Berman & Garson, supra note 2, at 867-69, 872-76. See generally Corcoran, The Trading with the Enemy Act and the Controlled Canadian Corporation, 14 McGill L.J. 174 (1968); Craig, Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy, 83 Harv. L. Rev. 579 (1970); Sommerfield, Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba, 19 Bus. Law. 861 (1964).
  \item \textsuperscript{619} See 50 U.S.C. app. \textsection 1-43 (Supp. III 1979); note 2 supra.
  \item \textsuperscript{620} See, e.g., 31 C.F.R. \textsection 500.201 (1980).
  \item \textsuperscript{621} Id. at \textsection 500.329. The word "controlled" is not defined in the regulations, but see Sommerfield, supra note 618, at 866-67.
  \item \textsuperscript{622} The United States considers a corporation to be a national of the country under whose laws it is created. The theory on which controls over foreign subsidiaries are based is that the United States has jurisdiction to prescribe rules governing the conduct of its own nationals—in this case the foreign corporation's shareholders—and jurisdiction to enforce those rules within its territory. By regulating the owners of the foreign corporation, then, it can indirectly control its activities. See Restatement, supra note 608, \textsection 27, Comment d, illustration 1, Reporters' Notes. In practice, enforcement of such controls has been directed at the American owners—the Treasury Department has directed them to cause their subsidiaries to act as desired. See Berman & Garson, supra note 2, at 868; Corcoran, supra note 618, at 177. The regulations, however, are still written to apply directly to the foreign corporation.
  \item \textsuperscript{623} See generally Fruehauf Corp. v. Massardy, [1965] La Semaine
Since 1977, Presidential authority to impose emergency trade controls has derived from the International Emergency Economic Powers Act (IEEPA), which reaches jurisdictionally as far as the FACR. The IEEPA has thus far been invoked only twice. In 1979, President Carter declared a national emergency with respect to the "situation in Iran" and ordered all official Iranian assets blocked. The President's order and the Treasury Department's implementing regulations extended the freeze to all property of the designated official Iranian entities that was "subject to the jurisdiction of the United States or which [was] in the possession of or control of persons subject to the jurisdiction of the United States . . . ." The phrase "person subject to the jurisdiction of the United States" was defined exactly as in the FACR. The blocking of assets was clearly intended to apply extraterritorially, because an announcement of Iran's intention to withdraw from American banks all its official deposits, many of which were held in foreign branches and subsidiaries, was the immediate provocation for the American action. Subsequent trade sanctions against Iran, however, did not have the same territorial reach. The order banning exports to Iran, for example, applied generally to exports "by any person subject to the jurisdiction of the United States" regardless of the country of origin, but exempted from the ban any nonbanking corporations or other organizations organized and doing business under the laws of a foreign country. The first use of IEEPA trade control authority thus showed restraint in terms of extraterritorial application. A sec-


625. The President is authorized to regulate transactions "by any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1) (Supp. III 1979).
627. See 31 C.F.R. Pt. 535 (1980). Exec. Order No. 12,170, supra note 626, delegated to the Treasury Department all powers available to the President under the IEEPA.
629. See 31 C.F.R. § 535.329 (1980); note 621 supra.
631. See note 604 supra.
632. See 31 C.F.R. § 535.207(a) (1980).
633. See id. at § 535.207(b). Later amendments extended the embargo to all technical data, including that which is already published, and to exports to third countries when the exporter has reasonable cause to believe that the
ond national emergency was declared in 1980, in response to “subsequent events in Iran” (the seizure of American hostages) and the Soviet invasion of Afghanistan. This declaration was used to support an import embargo and other sanctions against Iran, but not any sanctions against the Soviet Union or Afghanistan.

Prior to December 1977, the export control statutes, unlike the emergency statutes, did not authorize this form of extraterritorial control at all, empowering the President only to “prohibit or curtail . . . exportation from the United States, its territories and possessions.” In 1977, however, as part of the legislation limiting TWEA to times of war and enacting IEEPA, Congress amended EAA '69 to permit the President to control all exports of property “subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States.”

The legislative history of this amendment seems to reveal confusion among the responsible members of Congress. It appears that the amendment was intended simply to supplement the newly restricted TWEA by allowing the President to continue exercising the authority over foreign subsidiaries he had previously exercised under that Act. The controls on exports

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items sold are intended for resale to Iran. See id. at §§ 535.429, .430. Export controls, however, were not extended to foreign subsidiaries.


635. Id. at §§ 1-101 to -103, 1-106. Other political export controls relating to the Afghanistan invasion—including the Olympics embargo and the controls on exports of grain and phosphates, see notes 802-04 infra,—preceded the April 1980 declaration of emergency. Later controls on certain exports to the Kama River truck plant and on exports to Afghanistan, see notes 808-09 infra, were based only on EAA authority.

636. EAA '69, Pub. L. No. 91-134, § 4(b), 83 Stat. 841 (codified at 50 U.S.C. app. § 2403(b) (1976)) (expired 1979). It should be noted that EAA '69 was supplemented in the national security area by the Transaction Control Regulations, imposed under TWEA, which regulated exports by foreign subsidiaries of strategic items. See note 2 supra.


639. The principal House sponsor, Representative Bingham, stated that the amendment was needed so that the President could continue to exercise the power that he had been exercising under TWEA to control transactions by foreign subsidiaries. Revision of Trading with the Enemy Act: Markup Before the House Comm. on International Relations, 95th Cong., 1st Sess. 7-10 (1977) (statement of Rep. Bingham). The Senate Banking Committee similarly stated that the amendment would authorize the President to control foreign subsidiary exports as previously had been done under the emergency provisions of TWEA. S. Rep. No. 95-466, 95th Cong., 1st Sess. 6 (1977).
by foreign subsidiaries that had been implemented under TWEA, however, covered only exports to embargoed nations and exports of strategic goods to Communist nations. Furthermore, these controls, including the FACR, were grandfathered by the very same 1977 statute and are still in effect. Thus, the 1977 amendment of EEA '69 went much further than was necessary simply to allow the President to continue doing what he had been doing. In fact, its effect has been to broaden the potential reach of peacetime, non-emergency foreign policy controls to exports by foreign subsidiaries of all products and data (not merely strategic) to all destinations (not merely the embargoed nations and other Communist countries).

Admitting that the implications of the 1977 amendment "may not have been considered adequately by the Congress at the time the provision was adopted," the Senate Banking Committee later reported that it had considered deleting this provision. The Committee noted that the Executive had not yet utilized the new authority, so that no controls would be undone if the provision were repealed, and observed that any controls imposed under it would probably be challenged by foreign nations. Yet the Committee did not recommend repeal, "pending further study," principally to leave the executive branch the flexibility to impose extraterritorial controls in cases in which "the United States would wish to distance itself from especially abhorrent acts of other Governments." As of this writing, the Executive's authority to impose extraterritorial controls under the EAA remains unused.

640. See note 2 supra.
642. Id. at 5.
643. Id.
644. None of the controls discussed in Part III applied to foreign subsidiaries, and neither have the foreign policy controls implemented more recently against the U.S.S.R.

The regulations imposing an embargo on the Olympics, 45 Fed. Reg. 21,612 (1980) (to be codified at 15 C.F.R. § 385.2(d)), applied to exports by "persons subject to the jurisdiction of the United States," but the phrase was defined for that purpose to "include" United States citizens and residents, American corporations, and permanent American establishments of foreign corporations. Id. The release accompanying the regulations in the Federal Register stated that the term "meant" these three categories, and did not merely include them among others. Id. Remarks by government officials confirmed that foreign subsidiaries would only be covered if they were acting jointly with their American parents. See U.S. Export Weekly (BNA) No. 301, at A-1 (April 1, 1980).

When the grain embargo was imposed, the Agriculture Department requested American grain companies not to sell grain from third countries to the Soviets until those countries could develop their own restrictive policies. See
Extraterritorial controls were imposed by Congress as part of the Uganda embargo, however, and a related move was made by the Executive to expand the reach of other controls under the EAA. The provision added to EAA '69 to implement the embargo forbade the export to Uganda of most goods subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States.\(^\text{645}\) Although the temporary regulations went no further,\(^\text{646}\) the more detailed proposed regulations\(^\text{647}\) would have placed Uganda in Country Group Z and would have prohibited not only exports and reexports of American-origin items, but also exports of non-American-origin goods and information by any "person subject to the jurisdiction of the United States,"\(^\text{648}\) as defined in an expansive and detailed way.\(^\text{649}\) To this extent, the proposed regulations reflected congressional intent. Beyond this, however, the proposal would have added the same broad definition of "person subject to the jurisdiction of the United States" to the general definitions in the Regulations and would have included a general policy statement describing the potential extraterritorial effect of all export control regulations.\(^\text{650}\) This proposed language appeared to be a tentative first step by the executive branch toward greater extraterritorial export controls, and it was strongly criticized as such at the time.\(^\text{651}\)

U.S. EXPORT WEEKLY (BNA) No. 314, at A-5 (July 1, 1980). Foreign sales by the companies themselves or by foreign subsidiaries, however, were not prohibited.

The controls imposed on high technology exports to the U.S.S.R. in January 1980 involved merely a tightening of licensing policy, the suspension and cancellation of certain licenses, and the addition of certain new categories to the CCL; no change in the territorial coverage of the Regulations was made. In fact, the Commerce Department issued a clarifying statement to the effect that foreign subsidiaries would not be affected by the new controls unless they were trading in American-origin products or data. See U.S. EXPORT WEEKLY (BNA) No. 302, at N-1, N-3 (April 8, 1980).

Use of the authority has been advocated to strengthen the South African embargo. See Mehlman, Milch & Toumanoff, supra note 241, at 596-97, 600.

648. Id. at 58,573 (proposed 15 C.F.R. § 385.1(c)).
650. 43 Fed. Reg. 58,571-72 (1978). The statement of policy would have been inserted after 15 C.F.R. § 370.3(a), the general prohibition of exports without a general or validated license.
651. See Statement of Covington and Burling before the Industry and Trade Administration of the Department of Commerce, U.S. EXPORT WEEKLY (BNA)
The Carter Administration stated its intention to impose extraterritorial controls sparingly and only after weighing their "foreign relations costs." Indeed, the foreign policy controls imposed near the end of President Carter's term of office—even given the emotional atmosphere of the Iranian crisis and the Soviet invasion of Afghanistan—did not extend to foreign subsidiaries and other controlled foreign entities. Yet the existence of broad authority for extraterritorial controls still causes concern. The realities of the multinational corporation and the lack of foreign government cooperation in American controls seem almost to ensure that the authority will be used as American policy makers search for instrumental effectiveness or symbolic power. In addition, the conflict of the 1960s over exports to the People's Republic of China has not been forgotten abroad. Any significant use of extraterritorial foreign policy trade controls would almost surely lead to serious political tensions.

3. Systemic Costs

Systemic costs include those resulting from the effect of extensive foreign policy export controls on the system of rules governing international trade. The cornerstone of that system—and of its major constitutive document, the General Agreement on Tariffs and Trade (GATT)—is the principle of nondiscrimination among nations in trade matters. Political ex-

No. 241, at M-1 (Jan. 23, 1979). The proposed regulation apparently would not have imposed any new validated license requirements, however, because the operative licensing provision of the Export Administration Regulations, applying only to exports from the United States, would have been left unchanged. 15 C.F.R. § 370.3(a) (1980).


654. See Hacking, supra note 605, at 5-6.

655. See Nash, supra note 611, at 180-83.


port controls blatantly discriminate among nations in terms of their right to purchase American goods and technology. They may technically violate the terms of GATT and are certainly contrary to its underlying principles, although serious legal consequences are unlikely. Of more importance, serious economic and political consequences may result if political export controls create precedents for and expectations of broad deviations from the principle of nondiscrimination in trade.

Consider first the legal obligations of the United States under GATT. Although the best-known manifestation of the nondiscrimination principle is without doubt the Article I requirement of unconditional most-favored-nation (MFN) treatment for tariffs,\(^{658}\) Article I also applies to all "duties and charges" and all "rules and formalities" applied to exports.\(^{659}\) Further, Article XI prohibits any restrictions on exports other than duties and charges, and specifically prohibits export licenses.\(^{660}\) One might argue that Article XI is subordinate to the EAA under the Protocol of Provisional Application by which the United States has adhered to GATT, but the law appears to the contrary.\(^{661}\)

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658. GATT, supra note 657, art. I, ¶ 1. Unconditional MFN calls for nondiscriminatory treatment of imports from a given nation whether or not that nation makes related tariff concessions to the United States. Conditional MFN, by contrast, calls for nondiscriminatory treatment only upon receipt of adequate compensation. See GATT Studies, supra note 656, at 133-35.

659. GATT, supra note 657, art. I, ¶ 1; see J. JACKSON, supra note 657, at 499. The MFN obligation of Article I applies only to trade with GATT signatories. Not all of the Communist nations are signatories; the United States has either not consented to or has suspended the application of GATT to its trade with Communist signatories. The United States does have bilateral trade agreements that call for MFN treatment with several Communist countries.

660. GATT, supra note 657, art. XI, ¶ 1. Article XIII, which prescribes rules for the administration of permissible quantitative restraints, establishes a nondiscrimination rule applicable to any "prohibition or restriction" on exports to GATT signatories. GATT, supra note 657, art. XIII, ¶ 1.

661. GATT has itself never come into force, since the minimum number of states required by Article XXVI has never accepted it "definitively." J. JACKSON, supra note 657, at 60-61. All nations which apply GATT do so provisionally, either through the original Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 308 (1948), signed by the United States and 22 other nations, or through later protocols with similar language (former colonies becoming independent are deemed to apply the GATT through the protocols of the sponsoring parent nation). The Protocol of Provisional Application provides that signatory states will apply Part II of GATT "to the fullest extent not inconsistent with existing legislation." Id. at ¶ 1(b).

The Export Control Act was not enacted until 1949, Act of Feb. 26, 1949, ch. 11, 63 Stat. 7 (expired 1969), and so was not "existing legislation" on its face. Prior wartime export control authorities had been extended until that date. See Berman & Garson, supra note 2, at 792 n.2. The Second Decontrol Act of
as to Article I.\textsuperscript{662} The exception provisions of GATT must therefore be considered.\textsuperscript{663}

The "Security Exceptions" in Article XXI\textsuperscript{664} are most closely applicable. Nothing in GATT is to be construed to prevent any signatory from taking any action that it considers necessary for the protection of its "essential security interests" if such action (1) relates to "fissionable materials," (2) relates to traffic in arms, ammunition and implements of war, or to trade in other goods when carried on, directly or indirectly, "for the purpose of supplying a military establishment," or (3) is taken in time of war or other international emergency.\textsuperscript{665} These exceptions appear to permit virtually all current American national security controls.\textsuperscript{666}

Political controls on exports to 1947 authorized export controls to aid in carrying out American foreign policy, \textit{see} \text{SECRETARY OF COMMERCE, FIRST QUARTERLY REPORT UNDER THE SECOND DECONTROL ACT OF 1947} at 1 (1947), and other wartime legislation gave even broader power. Act of July 2, 1940, ch. 508, 54 Stat. 712, \textit{as amended by Act of June 30, 1942}, ch. 461, 56 Stat. 463. One might argue that all subsequent export control legislation relates back to these statutes and is thus "existing legislation." The prevailing interpretation of the Protocol, however, is that only "mandatory" legislation (not mere "authorizing" legislation) can be saved by the "existing legislation" clause. \textit{R. HUDEC, WORLD TRADE AND THE LAW OF GATT} 121-37 (1975); \textit{J. JACKSON, supra} note 657, at 108-10.

\textsuperscript{662} Article I is in Part I of the General Agreement and thus the "existing legislation" clause of the Protocol of Provisional Application, \textit{see} note 661 supra, does not limit its application. \textit{See J. JACKSON, supra} note 657, at 256.

\textsuperscript{663} Article XI permits temporary export restrictions to deal with critical shortages of food or other essential products and restrictions necessary for the application of standards, grading, and the like. \textit{GATT, supra} note 657, art. XI, \textsection 2. Article XX permits restrictions on imports and exports that are necessary to protect life, health, and public morals; that relate to gold or silver or products of convict labor, artistic or archaeological treasures, and the like; and that are essential to assure adequate supplies of various materials, among other exceptions. All of the exceptions of Article XX are subject to the requirement that restrictions not be applied in a manner constituting either "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail or disguised restrictions on international trade. \textit{Id.} at art. XX. Other exceptions to the nondiscrimination principle deal with particular balance of payments situations. \textit{Id.} at art. XIV.

In the context of restrictions on access to supplies, the total of these exceptions has been said to make Article XI's ban on export licenses "virtually useless." \textit{C. BERGSTEN, supra} note 131, at 25.

\textsuperscript{664} \textit{GATT, supra} note 657, art. XXI. Article XXI(c) permits a Contracting Party to act in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. \textit{See} note 2 supra.

\textsuperscript{665} \textit{GATT, supra} note 657, art. XXI(b). Article XXI(a) permits a Contracting Party to withhold information if it considers disclosure contrary to its essential security interests.

\textsuperscript{666} Controls on the export of arms and nuclear material, as well as dual-use items "relating" to arms and nuclear material, seem clearly covered by the first and second clauses; no one would argue that essential security interests are not involved. Indeed, controls on dual-use items seem to have been contemplated by the drafters of GATT. \textit{See J. JACKSON, supra} note 657, at 748.
military entities (in South Africa, for example) might fall within the language of the second clause if the quoted phrase is taken to refer to foreign as well as domestic military establishments. Here, however, the matter of "essential security interests" is much less clear. The embargoes and other trade controls instituted under the TWEA and the IEEPA might fit under the "emergency" language of the third clause, though again it is not clear that "essential security interests" are involved.

None of the Article XXI security interest exceptions, however, appears to cover the American restrictions on exports to civilian purchasers in Uganda, the embargo of police forces in South Africa, the controls on petroleum equipment sales to nonmilitary entities in the U.S.S.R., the embargo on sales to consignees associated with the Olympics, or similar political controls. Although these actions are probably violations of GATT, no action has been taken against similar political trade controls in the past. In one of the very few instances in which GATT has even considered political trade controls, Czechoslovakia argued in 1949 that the American export licensing program was a breach of the MFN obligation of Article I; the United States defended on the basis of Article XXI, among other grounds. The "infant GATT had neither the capacity nor the prestige to undertake a serious examination of U.S. cold war measures," and the United States was found to have breached no GATT obligation. Discussion among the GATT signatories in that case and in subsequent cases turned on the point that "every country must have the last resort on questions relating to its own security."

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667. See note 2 supra.
668. Article XXI is enormously flexible, however, because it allows each nation to judge what is necessary to its own security interests. GATT, supra note 657, art. XXI(b) (introductory clause). See also J. Jackson, supra note 657, at 748-52.
669. The cases in which Article XXI has or might have figured are described in J. Jackson, supra note 657, at 749-51. No decisions referring to Article XXI appear in the periodic supplements to BISD since the date of Professor Jackson's treatise.
671. R. HuDEC, supra note 661, at 68. See also J. Jackson, supra note 657, at 749.
672. J. Jackson, supra note 657, at 749. This statement was balanced with the admonition that contracting parties should not take any step that might undermine the General Agreement. Id. Ghana's objections to the accession of Portugal to GATT were partly based on this argument. Ghana saw the situation in Angola, then a Portuguese colony, as a threat to its security. Id. at 750-51.
Indeed, if history is instructive, it is unlikely that the question whether United States political trade controls comply with Article XXI will ever be squarely faced in GATT. In 1951, the American suspension of MFN treatment for European Communist nations again came before GATT, once more on a complaint by Czechoslovakia; the signatories simply “declared,” without citing any provision of the agreement, that both nations were “free” to suspend their obligations toward each other.673 The best interpretation of this declaration seems to be that the signatories recognized a fait accompli they were powerless to influence. As one national representative put it: “The General Agreement [is] a technical instrument to deal with technical trade problems”; the political issue before the signatories “was of a different order altogether.”674

Even if American controls can almost certainly withstand or escape scrutiny under GATT,675 the harm they may cause to the international trading system should be considered as a cost of their utilization. The framers of GATT, particularly the United States delegation,676 believed that an open and nondiscriminatory world trading system677 would allocate resources in the most efficient manner and contribute to increased world prosperity: “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.”678 Some also believed that open and nondiscriminatory trade was the best path to political cooperation and world peace.679 Today, both goals remain as important as ever;680 and

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673. Id. at 749-50.
674. Id. at 750 (quoting GATT Doc. C.P.6/S.R. 13, at 4 (1951)).
675. In the context of American controls, as in that of developing nations’ restrictions on access to raw materials, “no effective framework of rules and institutional arrangements to deal with the trade policy problems arising from export controls has ever existed, and none exists today.” C. BERGSTEN, supra note 131, at 4. Bergsten points out that GATT has taken no action against participants in the 1973 OPEC oil embargo, which he sees as a clear violation of Article I. Id. at 26.
677. The two related goals can be seen in the Preamble to GATT, which recites the intention of the Contracting Parties to reach their stated goals through arrangements “directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.” GATT, supra note 657, Preamble, ¶ 3.
678. Id. at ¶ 2.
679. See K. DAM, supra note 676, at 12 n.5.
680. The importance of peace is obvious. On the continued importance of economic efficiency, see id. at 6. Professor Dam quotes Ragnar Nurske’s apho-
while some of the earlier hopes for the results of free international trade now seem naive, many continue to believe that free trade can make valuable contributions to both peace and prosperity. The United States has at least formally continued to adhere to its belief in the principle of nondiscrimination.

It is true that the principle of nondiscrimination is riddled with exceptions, in GATT itself, in United States practice, and in the practice of other states. Indeed, the principle often seems to be under attack from all sides, as developing nations call for preferential treatment, as OPEC inspires nationalism: "The world is not rich enough to be able to despise efficiency." (quoting Nurske, International Trade Theory and Development Policy, in Economic Development for Latin America 234 (H. Ellis ed. 1961)).

See, e.g., George Ball's dismissal of the idea that trade leads to peace, in Senate Foreign Policy Hearings, supra note 119, at 12, and Professor Dam's statement that modern economic research has shown some of the premises of GATT to be economically simplistic. K. DAM, supra note 676, at 5-7.


Examples in GATT, supra note 657, include art. I, ¶ 1-2 (historical preferences); art. XXIV (customs unions and free trade areas); art. XXV, § 5 (waivers). See note 663 supra. In addition, the nontariff trade barrier codes emerging from the Tokyo Round also provide for non-MFN treatment of nonsignatories. See Hufbauer, Erb & Starr, The GATT Codes and the Unconditional Most-Favored-Nation Principle, 12 L. & Pol'y in Int'l Bus. 59, 68 (1980).

For example, the Trade Act of 1974 requires the President to continue to deny nondiscriminatory tariff treatment to most Communist nations, Trade Act of 1974, § 401, 19 U.S.C. § 2432 (1976) (amended 1979); provides a special form of import relief for imports from Communist countries, id. at § 406, 19 U.S.C. § 2437, and provides for discriminatory treatment of nations that do not observe reciprocity. Id. at § 126, 19 U.S.C. § 2136.


tions controlling raw materials to pursue their political ends through the use of economic power, and as calls for protectionist policies are regularly made.

Yet there is hope—and this may be the most that can be hoped for—that an open, nondiscriminatory trading system carries with it sufficient economic and political benefits that it will continue to be accepted as the framework for the bulk of world trade even while various specialized areas of divergence are established. National security trade controls, for example, are universally recognized in theory and practice; nondiscrimination can easily coexist with the kind of controls permitted by a moderate interpretation of Article XXI. Similarly, the nondiscriminatory trading system can accommodate such relatively minor exceptions as those for public health measures and the protection of artistic treasures. It can surely survive the occasional use of multilateral sanctions. It now appears that the system can accept, with some strain, significant discrimination in favor of developing nations. A significant degree of regionalism is also being digested.

These particularized developments are significant, but more worrisome is the apparent growth of a belief among developed and developing nations alike that the open, nondiscriminatory trading system has, over its thirty-plus years, produced an unacceptable level of economic interdependence—a state of affairs in which nations are so strongly af-


688. See C. Bergsten, supra note 131, at 10-14.

689. Cf. Baldwin & Kay, supra note 682, at 117 (economic and political benefits of a minimum set of rules covering state conduct and responsibilities).

690. See, e.g., C. Bergsten, supra note 131, at 27; P. Samuelson, Economics 652 (11th ed. 1980).

691. See notes 664-68 supra and accompanying text. See also Berman & Garson, supra note 2, at 890.

692. See GATT, supra note 657, art. XX, ¶ (a)-(f). This statement assumes that the proviso in Article XX is enforced.


695. See, e.g., K. Dam, supra note 676, at 274-95; J. Jackson, supra note 657, at 575-623; Baldwin & Kay, supra note 682, at 113-16.

696. Economic interdependence is a necessary product of an open trading system. See, e.g., J. Jackson, Legal Problems of International Economic Relations § 1.1, at 1-4 (1977); The Outlook for International Trade and the Management of Interdependence, Speech of Mr. Olivier Long, Director General of GATT, Foreign Trade Day of the Wholesale and Foreign Trade Association in
fected by external events that national governments can no longer control their own economies. The growth of this belief threatens the foundations of the system, and no other deviation from the nondiscrimination principle seems more likely to accelerate its growth than the peacetime use of political export controls. Political trade controls affecting the entire range of commercial products and a growing number of target nations highlight the risks of economic interdependence, even for trade in peaceful goods, and equate economic interdependence with political weakness. They tend to create a "control psychology" on a world scale.

Contributing to such a development would be shortsighted and self-defeating. The natural reaction of trading nations would be to increase their economic self-sufficiency and to reorient their trade to the nations least likely to interrupt it for political motives. The result would almost certainly be a reduction in economic efficiency and world standards of living, especially to the extent that policies of economic self-sufficiency were pursued. Political communication would be reduced and international conflict would be nurtured. The possibility that multilateral economic sanctions could become an effective tool of international law enforcement would all but disappear. To be sure, these catastrophic results will not occur merely because one more computer sale is prohibited. A widespread perception, however, that the foremost defender of the nondiscrimination principle has abandoned it in the hope of reaping short-term foreign policy benefits would prompt others to follow suit, impairing the future vitality of the trading system.

At the very least and quite ironically, an expanded commit-
ment to foreign policy export controls would weaken the ability of the United States to attain one of its principal foreign policy goals: international access to supplies, a goal that depends on international control of discrimination in trade. 703 During the Tokyo Round, the developed nations pressed for negotiations on this issue, but discussions foundered on the developing nations' concern over the control of natural resources as an attribute of sovereignty. 704 The participants did agree on an Understanding Regarding Export Restrictions and Charges, 705 calling for GATT to "reassess" the provisions on export controls "as one of the priority issues" following the conclusion of the negotiating round. Negotiations on this issue will be difficult, and the adoption of firm rules in the near future is doubtful. 706 The issue is of extraordinary importance to the developed world, however, and the American negotiating position would be significantly strengthened by a record of diligent support for the principle of nondiscrimination.

V. THE EXPORT ADMINISTRATION ACT OF 1979

With the passage of EAA '79, Congress has attempted for the first time to limit presidential authority to control exports for foreign policy purposes. Bills introduced in both the House and Senate would have imposed even stricter limits than the Act, 707 but the Carter Administration opposed the most restrictive proposals as undue interference with its conduct of foreign policy. 708 The final legislation thus represents an effort to reconcile the desire of many in Congress to restrain the use of

703. Negotiation of agreements providing assured access to supplies was a "principal United States negotiating objective" during the Tokyo Round. Trade Act of 1974, § 108(a), 19 U.S.C. § 2118(a) (1976).
706. See C. BERGSTEN, supra note 131, at 25-32.
707. This is particularly true of the bills offered by the principal sponsors, Senator Adlai Stevenson and Representative Jonathon Bingham. See note 10 supra.
708. See, e.g., House EAA Hearings Part I, supra note 21, at 685-87 (statement of Stanley J. Marcuss).
controls with the desire of the executive branch to maintain its flexibility.

Three dimensions of the Act's approach to foreign policy controls are important: first, foreign policy controls are treated separately from national security controls; second, a statutory tone skeptical of foreign policy controls is established; and third, various substantive provisions attempt to restrict executive discretion. Analysis demonstrates, however, that, for all of its innovation, EAA '79 ultimately fails to impose any effective restraint on the Executive.

A. SEPARATION OF NATIONAL SECURITY AND FOREIGN POLICY CONTROLS

Separate treatment of the two principal types of controls can be traced to Representative Bingham's original House bill.709 The House Committee on Foreign Affairs found that "the distinction between these two types of control has not been adequately made in the past," even by the executive branch, and felt that the two types "have different purposes and should be governed by different criteria and procedures."710 Accordingly, national security and foreign policy controls are treated in distinct provisions of EAA '79—sections five and six, respectively. Each section authorizes the President to prohibit or curtail exports of goods, technology, and other information in order to carry out specified policies. For example, section six approves three policies in terms virtually identical to prior law: the use of export controls to further significantly the foreign policy of the United States,711 the access to supplies policy,712 and the anti-terrorism policy.713 Sections five and six then establish separate substantive and procedural rules tailored to each type of control. The Act also requires the Commerce Department to maintain, as part of the CCL, a separate listing of foreign policy controls that shows the items controlled and the countries to which controls apply.714 A unified


712. Id. at § 3(7), 50 U.S.C. app. § 2402(7).

713. Id. at § 3(8), 50 U.S.C. app. § 2402(8).

714. Id. at § 6(k), 50 U.S.C. app. § 2405(k). The items controlled are to be
CCL may be maintained so long as foreign policy controls are clearly identified, enabling exporters to distinguish them from national security controls.\textsuperscript{715}

Public identification of foreign policy export controls is an essential first step in any attempt to circumscribe their use. Before EAA '79, merely to determine what foreign policy controls were in force required careful study of the CCL, the Regulations, the periodic reports of the Commerce Department, and any public statements by the State and Commerce Departments,\textsuperscript{716} as well as a certain amount of guesswork. Now foreign policy-based validated license requirements can be identified as such, although there remains an element of mystery about certain licensing policies that involve foreign policy considerations.

Despite this welcome change, it will not always be easy to distinguish foreign policy controls from national security controls, because some controls imposed under the Act combine characteristics of each. The best examples are anti-terrorism and regional stability controls (particularly those aimed at a strategic area like the Middle East), and nuclear nonproliferation controls.\textsuperscript{717} In these and other cases, the statutory scheme invites the Executive to choose one or the other characterization, either to avoid or to take advantage of particular statutory provisions. For example, by characterizing a control as national security-based, the Executive can avoid certain consultation, negotiation, and reporting requirements. Some members of Congress charged that the Carter Administration did just this in characterizing certain controls imposed on exports to the Soviet Union, in response to the invasion of Afghanistan, as national security-based.\textsuperscript{718}
Alternatively, some controls can be characterized as based on both foreign policy and national security considerations.\textsuperscript{719} Every item appearing on the CCL for reasons of national security, for example, has also been made subject to parallel validated license requirements in certain circumstances for two foreign policy purposes: nonproliferation and opposition to terrorism.\textsuperscript{720} To the extent that the Act permits such overlaps,\textsuperscript{721} much of the clarity it seeks will be lost.\textsuperscript{722} Indeed, a new layer of confusion will be added, because the Act does not indicate whether the substantive and procedural rules of section five, section six, or both, apply to dual-purpose controls.\textsuperscript{723}

B. \textbf{STATUTORY TONE}

EAA '79 contains a number of congressional findings, statements of policy, and other hortatory provisions that do not actually limit the authority delegated under the Act, but that do express Congress' desire to "emphasiz[e] the importance of exports to the United States economy and confin[e] the use of export control authority to instances where controls are essential."\textsuperscript{724}

The congressional findings show most clearly how these provisions change the tone of prior law. In EAA '69, a single finding expressed concern that "unwarranted" controls could have damaging effects on the United States economy.\textsuperscript{725} EAA '79 elaborates similar concerns in three paragraphs at the outset of the findings and specifically notes the economic costs of uncertainty in control policy.\textsuperscript{726} The congressional declarations of policy set the same tone, providing that controls should be

\textsuperscript{719} Before EAA '79, some items on the Commodity Control List were said to be controlled for more than one reason. \textit{See House EAA Hearings Part I, supra} note 21, at 687-91 (statement of Stanley Marcuss). Some were said to be controlled for export to Libya for several reasons. \textit{Id.} at 646 (statement of William Root).

\textsuperscript{720} \textit{See} notes 115, 168 \textit{supra}.

\textsuperscript{721} \textit{See House EAA Hearings Part I, supra} note 21, at 727 (statement of Victor Johnson).

\textsuperscript{722} \textit{See} \textit{U.S. Export Weekly (BNA)} No. 291, at A-4 to A-5 (Jan. 22, 1980) (describing confusion over whether the grain embargo of the U.S.S.R. was a foreign policy or national security control; Administration officials had claimed both foreign policy and national security justifications for the President's embargo order).

\textsuperscript{723} \textit{See House EAA Hearings Part I, supra} note 21, at 687-91.

\textsuperscript{724} \textit{S. Rep. No. 96-169, supra} note 282, at 3.


used "only to the extent necessary" to carry out the policies of the Act and then "only after full consideration of the impact on the economy of the United States," stating that uncertainty in control policy should be minimized.

Potentially the most far-reaching of the hortatory provisions is the declaration of policy in section 3(10). This provision declares that exports should not be controlled except when necessary to further "fundamental" national security, foreign policy, or short supply objectives and then only when controls will "clearly" further such objectives. Section 3(10) represents the first attempt in American export control law to address the homogeneity of the term "foreign policy." Most of the controls of the 1970s could probably have been imposed even if this section had been operative. Nonetheless, the provision suggests that future export controls should be confined to situations in which the foreign conduct addressed (a human rights violation or act of terrorism, for example) is in some way of fundamental concern to United States policy. Section 3(10) also appears to require the Executive to establish that a proposed foreign policy control will "clearly" further its intended objective. Together, the two prongs of section 3(10) imply that, before a control is implemented, the Executive must (1) define the objective of the control, (2) find the objective to be fundamental, and (3) determine that the proposed control will clearly further the objective. Rigorous application of this analytic process would go far to prevent the development of the control psychology alluded to earlier. Unfortunately, an expansive reading of section 3(10) is undermined by statements in its legislative history indicating that the subsection was not intended as a substantial change from prior law.

In any case, hortatory provisions like the findings and policies of EAA '79 are easily disregarded by an Executive not sympathetic to the principles expressed. "Disregard" is not even

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727. Id. at § 3(2), 50 U.S.C. app. § 2402(2). The word "only" in the first phrase quoted was added by the Act.
728. Id. at § 3(1), 50 U.S.C. app. § 2402(1).
729. Id. at § 3(10), 50 U.S.C. app. § 2402(10).
730. For example, EAA '69 specifically approved anti-terrorism and access to supplies controls, while § 502B of the Foreign Assistance Act made the promotion of human rights abroad a "principal goal" of American foreign policy.
731. See text accompanying note 577 supra.
732. See House EAA Hearings Part II, supra note 119, at 117-18 (statement of Rep. Fascell) (§ 3(10) was proposed by its drafter, Representative Fascell, as a "reassurance amendment" that "does not change the substantive or basic objective of the bill.").
necessary; the language of these provisions is sufficiently vague to be rendered ineffective through interpretation. As Professor Huszagh of the University of Georgia School of Law stated in testimony before the House, provisions like section 3(10) may bring about a "substantial philosophical reform," but are unlikely to create a successful "administrative reform."733 The policies implicit in section 3(10) and other such provisions are not integrated into the substantive provisions of the Act; the identity and attitudes of the controllers are not affected by the Act; and there is no provision for review of export control decisions by any institution outside the executive branch.734 There is thus little reason to expect any significant results from the hortatory provisions of EAA '79, reform-minded as they may be.

C. SUBSTANTIVE PROVISIONS

The substantive limitations on executive authority, found principally in sections four and six of EAA '79, fall into six categories: (1) a general limitation based on foreign availability; (2) a list of factors that must be considered in any decision to impose, expand, or extend controls; (3) a requirement that reasonable efforts be made, before imposing controls, to achieve a desired foreign policy goal through negotiation or other means; (4) various consultation and reporting requirements; (5) automatic annual expiration of controls unless extended by the President; and (6) certain miscellaneous provisions.

1. Foreign Availability

Section 4(c) of the Act extends the foreign availability provision that formerly applied only to national security controls to foreign policy controls.735 The President thus may not impose controls for foreign policy purposes on exports of items that he determines to be available "without restriction," in "significant" quantities, and of "comparable" quality, from foreign

733. House EAA Hearings Part I, supra note 21, at 294.
734. The original Bingham bill, H.R. 2539, 96th Cong., 1st Sess. § 6(e) (1979), would have permitted a congressional veto of new foreign policy controls by concurrent resolution. This provision was opposed by the Administration, see House EAA Hearings Part I, supra note 21, at 685 (statement of Stanley Marcus), and was withdrawn by Representative Bingham himself. See id. (statement of Rep. Bingham). The provision was later restored by the subcommittee, id. at 770-73, and adopted by the House. See H.R. 4034, 96th Cong., 1st Sess., § 6(e) (1979). The measure was dropped in conference, H.R. REP. No. 96-482, supra note 10, at 46, except for certain controls on agricultural commodities. EAA '79, § 7(g)(3), 50 U.S.C. app. § 2406(g)(3) (Supp. III 1979).
735. See text accompanying notes 359-66 supra.
sources, unless he finds that adequate evidence has been presented demonstrating that the absence of controls would prove detrimental to American foreign policy. The foreign availability provision governing national security controls, however, is tightened by the Act, as discussed below.

Both the House and Senate reports on EAA '79 recognized that some foreign policy purposes can be served by export controls in spite of foreign availability—generally, those justified by the symbolic rationale. Both reports indicated, however, that national security controls, the only purpose of which is to deny access to controlled items, are substantially vitiated if the items are available from other sources. Congress' differing perception accounts for the continuing difference between the two types of controls in the treatment of foreign availability. Yet neither the Act nor the reports distinguish between instrumentally motivated foreign policy controls and those with symbolic purposes, despite the fact that instrumental foreign-policy controls are impaired by foreign availability in virtually the same degree as national security controls. As a result, the Act fails to require that adequate weight be given to foreign availability in the context of instrumental foreign policy controls.

The failure to distinguish the two forms of political control also affects other foreign availability provisions in the Act. When a foreign policy control is imposed, for example, the President must take "all feasible steps" to initiate and conclude negotiations for foreign cooperation. Yet the provision fails

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737. See note 745 infra and accompanying text.
739. The House report mentions the "thumbscrew" hypothetical, H.R. Rep. No. 96-200, 96th Cong., 1st Sess. 7 (1979); the Senate report cites State Department testimony to the effect that the United States might wish to "distance" itself from acts of a foreign nation even in the face of foreign availability. S. Rep. No. 96-169, supra note 31, at 8.
741. EEA '79, § 6(g), 50 U.S.C. app. § 2405(g) (Supp. III 1979). Congressional concern on this point stems in part from testimony by the Administration that other industrial nations had not been asked to cooperate with controls like the Uganda embargo and the restrictions on sales of petroleum equipment to the U.S.S.R. See Senate EAA Hearings Part I, supra note 106, at 208-11 (statement of Richard Cooper).

As mentioned previously, it might be counterproductive to require the Executive to negotiate over foreign availability in every case. Although the language "take all feasible steps" comes perilously close to just such a requirement, there is sufficient flexibility in the phrase to allow the Executive to avoid negotiations when they would have adverse foreign relations consequences.
to distinguish instrumental from symbolic controls, even though only the former may require successful negotiations over foreign availability to be effective. Negotiation may thus be required, with its possible political costs, when it is unnecessary.\textsuperscript{42} On the other hand, even when negotiations do not eliminate foreign availability or are not pursued for reasons of foreign relations, the Act permits instrumental controls to be implemented.

Additionally, although the basic foreign availability standard in section 4(c) of the Act applies to both foreign policy and national security controls,\textsuperscript{43} the national security provisions of section 5 more precisely define the degree of foreign availability that should inhibit controls.\textsuperscript{44} Section 5(f) provides that a validated license requirement should be terminated (or a license granted), subject to the possibility of a presidential override, if the target nation can obtain items in sufficient quantity and quality that the control (or license denial) would be "ineffective in achieving [its] purpose."\textsuperscript{45} The same test would be useful for instrumental foreign policy controls and might lead to more sophisticated foreign availability analysis. The "effectiveness" criterion, however, is not used in the foreign policy context, because no distinction between instrumental and symbolic controls is drawn.

The legislative history of EAA '79 demonstrates that the

\textsuperscript{42} Negotiations might be pursued to prevent other nations from reaping the benefits of trade that the United States decides to forego, but this will normally be a futile effort.

\textsuperscript{43} EAA '79, § 4(c), 50 U.S.C. app. § 2405(c) (Supp. III 1979); see text accompanying note 735 supra.

\textsuperscript{44} EAA '79, § 5, 50 U.S.C. app. § 2404 (Supp. III 1979).

\textsuperscript{45} Id. at § 5(f), 50 U.S.C. app. § 2404(f). Section 5(f) requires the Secretary of Commerce to review on a continuing basis the foreign availability of all items subject to validated license controls for national security purposes and to suspend or terminate such controls if the controlled items are found to be available "in fact" in sufficient quantity and quality to make the controls "ineffective in achieving their purpose." EAA '79, § 5(f)(1), 50 U.S.C. app. § 2404(f)(1) (Supp. III 1979). This provision was designed to remove American controls before foreign competitors have captured a market. H.R. REP. No. 96-200, 96th Cong., 1st Sess. 10 (1979). Similarly, the Commerce Department must issue a validated license required for national security purposes if it determines that the items to be exported are in fact available to the purchasing country from outside the United States, and must then consider whether to terminate the validated license requirement completely. EEA '79, § 5(f)(2), 50 U.S.C. app. § 2404(f)(2) (Supp. III 1979).

Even these provisions, however, continue to permit validated license requirements and license denials in the face of foreign availability if the President determines that the absence of controls would be detrimental to national security. Id. at § 5(f)(1)-(2), 50 U.S.C. app. § 2404(f)(1)-(2).
drafters were extremely sensitive to the Carter Administration's arguments that an emphasis on foreign availability might unduly restrain executive flexibility in implementing foreign policy. The State Department, for example, voiced concern that a foreign availability provision applicable to foreign policy controls would limit its flexibility to respond to "extreme acts" of other nations.746 The Senate Banking Committee report concluded that the Department's concern was "unwarranted," noting that members of the committee agreed that foreign availability should not necessarily be given as much weight in foreign policy cases as in national security cases (even though the foreign availability provision, section 4(c), makes no distinction between them).747 The report also stressed that section 4(c) would require the Executive only to determine whether foreign availability exists, and in appropriate cases to attempt to eliminate it through negotiations; it would not prevent the President from using foreign policy controls in spite of foreign availability.748 The Committee's intention was only to require the President to learn whether controlled items were available elsewhere, not to limit his actions once that information has been gathered.749 It is essential that the President determine the extent of foreign availability; and under the Act foreign availability must be "considered" in deciding whether to impose foreign policy controls.750 Even so, the Act does little to reflect the impact of foreign availability on the effectiveness of instrumental controls.751

2. Decision Factors

Central to the reforms under EAA '79752 is a list of factors that must be considered before the President can impose any foreign policy export control: (1) the probability that the proposed control will achieve the intended foreign policy goal in light of such factors as the foreign availability of the items pro-

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746. S. REP. No. 96-169, supra note 31, at 8.
747. Id. at 9.
748. Id.
749. Id. at 8-9.
750. See text accompanying notes 752-56 infra.
751. On the positive side, the Act requires the OEA to establish the capability to investigate and monitor foreign availability, and requires other agencies involved in the control process to share information with the OEA. EAA '79, § 5(f)(5)-(6), 50 U.S.C. app. § 2405(f)(5)-(6) (Supp. III 1979).
752. Similar provisions were included in the bills passed by both houses. S. 737, 96th Cong., 1st Sess. § 4(a)(2)(C) (1979); H.R. 4034, 96th Cong., 1st Sess. § 6(b) (1979).
posed for control; (2) the compatibility of the proposed control with other foreign policy objectives of the United States and with overall United States policy toward the proposed target nation; (3) the reactions of third countries to the proposed control; (4) the likely effects of the proposed control on the export performance of the United States, on its competitive position in the international economy, on its international reputation as a supplier of goods and technology, and on individual American companies and their employees and communities, including the effects of the controls on existing contracts; (5) the ability of the United States to enforce the proposed control effectively; and (6) the foreign policy consequences of not imposing the control. 753

This list is thoughtful, and it includes most of the considerations of effectiveness and cost discussed in Part IV of this Article. Two aspects of effectiveness are addressed in factors one and five. The enforceability of controls (factor five) is in most respects a mechanical matter, but sympathetic consideration of this issue should lead to continued restraint in efforts to control reexports, exports by foreign subsidiaries, and transactions between persons within a target nation. Consideration of the probability that a proposed control will achieve its intended foreign policy purpose (factor one) is essential. The Act, however, does not require the Executive to spell out its objective, or even to state whether it is essentially instrumental or symbolic. 754 Without any requirement that the goal of a proposed control be stated, it is virtually meaningless to require the Executive to assess whether the control will be effective in reaching its goal.

The focus of factors one and five on foreign availability and enforceability indicates that the drafters were contemplating instrumental controls. The Administration had argued, however, that considerations of effectiveness were less important in the case of symbolic controls; if Congress required such factors to be considered in all cases, flexibility in the use of symbolic controls might be lost. 755 Here again, Congress attempted to accommodate the use of symbolic controls by permitting the Executive to disregard considerations of effectiveness, but al-

753. EAA '79, § 6(b), 50 U.S.C. app. § 2405(b) (Supp. III 1979).
754. This is true even though Congress noted that the goals of foreign policy controls had often been questioned as unclear. See H.R. Rep. No. 96-200, supra note 479, at 5.
owed it to disregard them when considering instrumental controls as well. The Senate report, for example, carefully notes that the "decision factors" listed in the Act are not criteria that must be met by any proposed control, but are only factors to be considered; having once considered them, the President is free in all cases to disregard any of them. Further, no attempt is made in the Act to require the Executive to consider whether symbolic controls will be effective on their own terms as expressions of American disapproval or moral outrage over foreign actions.

The Act requires consideration of the costs of controls to the United States in both economic terms (elements of which are summarized in factor four) and political terms (included in factors two and three). Political costs, however, are not fully recognized; in particular, the larger issue of impairing the open, nondiscriminatory trading system is disregarded entirely.

The Act also fails to require the Executive to weigh the economic and political costs of a proposed control against the importance of its objective and the ability of the control to achieve that objective. Such a comparison would be difficult in any event because the Act does not require a clear statement of objective; even in the report that must be submitted after imposing a foreign policy control, the President does not have to state the purpose of the control or balance its anticipated results against its costs.

The House bill would have been a substantial improvement in this regard. While the decision factors in that bill were similar to those ultimately included in the Act, the information to be reported to Congress after imposition of a control would have been more extensive and better organized. The President would have been required, first, to give reasons why he had imposed the control, the purposes sought to be achieved, and the conditions under which the control would be removed, and second, to specify how consideration of the factors set out in the

756. The President may deem certain factors irrelevant, but even if he admits their relevance § 6(b) "would not preclude the President . . . from imposing or maintaining export controls regardless of his conclusions with respect to the factors listed." S. REP. NO. 96-169, supra note 31, at 8-9. See also House EAA Hearings Part I, supra note 21, at 727-28 (statement of Rep. Bingham) ("We want to make perfectly clear that, while we want the administration to consider these points, the administration then can impose the control anyway.").

757. A sympathetic administrator could consider the issue under the rubric of "foreign policy" in factor two, but the issue was rarely discussed in Congress, and it is fair to say that it was not intended to be covered in the Act.

bill, including cost factors, had led the Executive to determine that "on balance" the control would further the foreign policy interests of the United States.\textsuperscript{759} One may quarrel with specific language in the bill, but it was superior to the Act in requiring the Executive to state its objective and balance the costs of a control against the value of that objective.\textsuperscript{760}

3. \textit{Exhaustion of Other Means}

EAA '79 requires the President to determine, before "resorting to" the use of controls, that "reasonable efforts" have been made to achieve the relevant policy goal through negotiations or other means.\textsuperscript{761} The use of the phrase "resort to" connotes a view of export controls as a foreign policy tool of last resort, to be used only when other methods are not available or have proven ineffective.

As with the access to supplies and anti-terrorism policies, this provision is laudable. Certainly when an instrumental export control is proposed, the Executive should be required to attempt negotiation with the target state before turning to as hostile and coercive a tool as trade sanctions. Given the political and economic costs and long term disruption resulting from export controls, it also seems reasonable to require that less costly coercive steps, such as disqualification from military or economic assistance, be implemented before exports are controlled. This is not to say that export controls should never be used, but rather that less coercive and less costly methods should be attempted, or at least fully considered, first.

When a symbolic purpose is advanced for a proposed control, it seems all the more reasonable to require the exhaustion or full consideration of less hostile and less costly means of expression before private economic transactions are interrupted to signal national displeasure. At times, the government of the United States may well determine—for the sake of its reputation in the world community or its own self-esteem, or simply because it believes it right—to prohibit some forms of economic intercourse with another nation or certain of its institutions. These may well be morally sound and politically defensible decisions. The question is one of degree and frequency. Because

\textsuperscript{759} H.R. 4034, 96th Cong., 1st Sess. § 6(e)(1)-(2) (1979).
\textsuperscript{760} This provision was modified in conference. H.R. Conf. Rep. No. 96-482, \textit{supra} note 10, at 46.
\textsuperscript{761} EAA '79, § 6(d), 50 U.S.C. app. § 2405(d) (Supp. III 1979). The Senate bill would have required the President only to "consider" other means. S. 737, 96th Cong., 1st Sess. § 4(a)(2)(C)(I) (1979).
of the sheer number of regimes, practices, and events with which some influential element within the United States might wish to express displeasure, it is simply wise and prudent policy to avoid overly rapid or excessive use of controls on private transactions as the instruments of expression—particularly given the economic and political costs not only of individual trade controls but of the practice of restricting trade. Moreover, treating trade controls as the last or a later resort, reserved for egregious cases, would render them more effective symbols when they are called upon in that capacity.

Finally, it should at least be noted that many export controls—total export embargoes and controls on food exports, for example—impose hardship on the populations of target nations, often the very people who are the victims of the conduct the United States seeks to protest. This fact also counsels restraint in the use of trade controls.

The "reasonable efforts" language of the Act stops far short of actually making export controls the measure of last resort. To underscore the President's flexibility, the Act allows him, in the report submitted after a control is imposed, to give reasons for not having attempted negotiation or other alternate methods rather than describing their results.

4. Consultation and Reports

The Act mandates that, before any foreign policy control is imposed, the Secretary of Commerce must consult with "appropriate" American industries with respect to foreign availability,

762. See note 450 supra.

763. The Administration opposed even the flexible requirement of prior negotiation in § 6(d) on the ground that it did not take account of situations in which fast action would be necessary to prevent an export harmful to United States policy. Spokesmen for both the State and Commerce Departments invoked the same example: an item useful in nuclear processes which, if exported, could violate the United States nonproliferation policy. See House EAA Hearings Part I, supra note 21, at 648 (statement of William Root); id. at 687 (statement of Stanley Marcuss). This example appears to confuse the imposition of new validated license requirements with licensing policy. Most sophisticated products and technology with nuclear applications are already subject to validated license requirements, and nothing in the Act purports to require negotiation before a license is denied. Negotiation is only required before new controls are imposed—to take a hypothetical case, before anti-terrorism controls are extended to Chile. Such a policy decision would rarely have the same urgency as a last-minute effort to prevent a particular export of dangerous goods. If it did (for example, when foreign policy controls applicable to the U.S.S.R. were quickly extended to Afghanistan), § 6(d) clearly allows the President to act swiftly.

the economic effects of controls, and other matters. There seems to be nothing in the Act that prevents the Secretary from determining that no industry is appropriate, in circumstances, for example, when prompt action is perceived to be required, although the legislative history tends to indicate that a total failure to consult would be improper.

The Act also requires the President to consult with Congress "in every possible instance" before imposing controls. It was largely this provision that persuaded the conference committee to drop a concurrent resolution veto procedure that had been adopted by the House. The Act, however, does not define "consultation" or impose any immediate sanction for failure to consult; nor do the reasons for such a failure have to be stated.

Under the Act, whenever new controls are imposed or existing controls are extended or expanded, the President must immediately notify Congress and submit a report. The report must specify the President's conclusions on the decision factors enumerated in the statute; state the results of negotiations or other alternate measures, or the reasons for not attempting them; and indicate how the controls will further significantly the foreign policy of the United States. Several shortcomings of this report have been analyzed above.

Finally, the Act requires an annual report on the export control program. Along with general information and various data on other types of export controls, the report must include "detailed information" on the effectiveness of any export controls imposed under section six "in furthering the foreign policy of the United States." Past Commerce Department export control reports were criticized by the General Account-

765. Id. at § 6(c), 50 U.S.C. app. § 2405(c).
766. The Commerce Department opposed the consultation requirement on the same basis as it opposed the requirement of prior negotiation. House EAA Hearings Part I, supra note 21, at 687 (statement of Stanley Marcuss); see note 763 supra. The same analysis is applicable here.
767. See House EAA Hearings Part I, supra note 21, at 728 (statement of Victor Johnson).
768. EAA '79, § 6(e), 50 U.S.C. app. § 2405(e) (Supp. III 1979).
769. H.R. CONF. REP. No. 96-482, supra note 10, at 46.
770. See EAA '79, § 6(e), 50 U.S.C. app. § 2405(e) (Supp. III 1979). The House Conference Report, H.R. CONF. REP. No. 96-482, supra note 10, at 46, states that if consultation is not satisfactory Congress will reconsider the veto provision.
773. Id. at § 14(a)(11), 50 U.S.C. app. § 2413(a)(11).
ing Office for not specifying the goals of foreign policy controls or assessing their effectiveness. Although EAA '79 requires an assessment of effectiveness, the assessment can be made in general terms, without reference to a stated objective for each control, so that it may be of little value.

5. Automatic Expiration

The Act provides that all foreign policy export controls automatically expire one year after imposition unless the President extends them. Each extension is limited to a one-year period, but a control can be extended an unlimited number of times. To extend any control, the President must again consider the decision factors spelled out in section six. The requirements of prior negotiation and prior consultation with industry and Congress are not applicable to extensions, but a subsequent report must be filed with Congress.

President Carter extended most controls then in force on December 29, 1979, making a blanket determination that the absence of all controls extended would be detrimental to United States foreign policy notwithstanding foreign availability. All of these controls, and all new controls imposed during 1980, have since been extended through 1981.

The automatic expiration provision was intended to force

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774. See COMPTROLLER GENERAL REPORT 1979, supra note 363, at 18, 31; cf. House EAA Hearings Part I, supra note 21, at 259 (statement of J. Kenneth Fasick) (“However, the discussion on controls for foreign policy purposes in this report is brief and we believe inadequate because it does not discuss: one, the specific foreign policy goals that trade controls are supposedly designed to serve, nor two, whether they are serving these goals well or poorly.”).

775. EAA '79, § 14(b), 50 U.S.C. app. § 2413(b) (Supp. III 1979), requires certain information on controls other than or more stringent than “multilateral controls.” This provision appears to have been aimed at national security controls exceeding COCOM levels, but as drafted it seems to apply to foreign policy controls, most of which are unilateral.

776. Id. at § 6(a)(2), 50 U.S.C. app. § 2405(a)(2). Controls in effect on the adoption date of the Act were to expire on December 31, 1979, or one year after implementation, whichever was later.

777. Section 6(a)(2) permits extensions “in accordance with subsections (b) and (e).” Id.

778. See 45 Fed. Reg. 1595-96 (1980) (to be codified at 15 C.F.R. § 368). The following controls were extended: (1) crime control and detection devices, (2) the South African military and police embargo and certain other controls on exports to South Africa, (3) certain anti-terrorism controls on exports to Libya and other Middle East nations, (4) one regional stability control on exports to Libya, (5) controls on exports of petroleum equipment to the U.S.S.R., (6) all IEEPA embargoes (North Korea, Vietnam, Cambodia, and Cuba), and (7) all nonproliferation controls. Id. at 1596-97.

the Executive regularly to review all continuing controls under the same criteria applicable to new controls.\textsuperscript{780} The intent is laudable, but the criteria continue to suffer from the same weaknesses described above.\textsuperscript{781} As President Carter's blanket determination on foreign availability demonstrates, presidential extensions are likely to be little more than formalities.

6. \textit{Miscellaneous Provisions}

The President is not authorized under the Act to control exports of medicine or medical supplies for foreign policy purposes.\textsuperscript{782} In addition, two provisions restrict controls on the export of food: a policy statement favors minimizing such restrictions\textsuperscript{783} and, more importantly, a provision buried in the "short supply controls" section of the Act allows Congress to overrule by concurrent resolution any control imposed on agricultural exports for either foreign policy or short supply purposes.\textsuperscript{784} The Act further declares the intent of Congress that the Executive branch should not impose foreign policy controls on any export the principal effect of which would be to meet basic human needs,\textsuperscript{785} this language appears to cover virtually all food exports. Yet despite its expressed concern with basic human needs, Congress was unable to terminate the grain embargo of the U.S.S.R. imposed early in 1980.\textsuperscript{786}

The Act specifically authorizes continued controls on the export of crime detection equipment but authorizes the President to exempt nations whose conduct is consistent with the United States human rights policy.\textsuperscript{787} Also included in the Act

\textsuperscript{780} S. REP. No. 96-169, \textit{supra} note 31, at 8.
\textsuperscript{781} See text accompanying notes 752-60 (decision factors), 771 (report) \textit{supra}.

\textsuperscript{782} EAA '79, § 6(f), 50 U.S.C. app. § 2405(f) (Supp. III 1979). The House bill would have withheld authority to control food as well, stating that export controls should not be applied to exports which would meet "basic human needs." H.R. 2539, 96th Cong., 1st Sess. § 6(g) (1979). In conference, authority to control food exports was restored. H.R. CONF. REP. 96-482, \textit{supra} note 10, at 14, 46.

\textsuperscript{783} Id. at § 3(11), 50 U.S.C. app. § 2402(11).

\textsuperscript{784} Id. at § 7(g)(3), 50 U.S.C. app. § 2406(g)(3).

\textsuperscript{785} EAA '79, § 6(f), 50 U.S.C. app. § 2405(f) (Supp. III 1979).

\textsuperscript{786} See U.S. EXPORT WEEKLY (BNA) No. 317, at A-7 (July 29, 1980). A move to cut funding for the grain embargo was defeated in the House by a vote of 279 to 135. \textit{Id}. Those opposed to the funding cut stated "that it would have had little practical effect, but would have been embarrassing to the Administration in its stance against the Soviet Union." \textit{Id}. The congressional veto power under EAA '79, § 7(g)(3) was unavailable, since the grain embargo was imposed by the President as both a national security and a foreign policy measure. \textit{See} U.S. EXPORT WEEKLY (BNA). No. 292, at M-1 to M-3 (Jan. 29, 1980) (presidential report to Congress on Soviet grain embargo).

\textsuperscript{787} EAA '79, § 6(j), 50 U.S.C. app. § 2405(j).
is a special anti-terrorism provision that arose out of concern with certain prior sales of aircraft and other vehicles to Libya and Syria. The Commerce and State Departments are required to notify a named committee in each house before approving any license for certain major exports to any nation that the Secretary of State determines to have repeatedly supported terrorism. Because of the Secretary's power over such determinations, the executive branch can in essence decide whether to notify the appropriate committees in advance; not surprisingly, controversy has already arisen over executive branch conduct under this provision.

EAA '79 attempts to remove the National Security Council from any major role in export controls and to involve more directly the Secretaries of Commerce, State, and Defense, along with other relevant agencies, in the decision-making process. The Act exempts from the restrictions on foreign policy controls all controls imposed to fulfill "obligations of the United States pursuant to treaties ... or ... other international agreements." Finally, the Act continues the President's authority to control exports of all items "subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States ... ." The problem of extraterritorial application is thus destined to continue.

VI. APPROACHES TO REFORM

Congress must not be content with the foreign policy provisions of EAA '79. By attempting simultaneously to restrain executive discretion and protect executive flexibility, the Act creates little more than hortatory restrictions and an additional administrative burden. The Act's requirements of negotiation, consultation and reporting, its "sunset" feature, and its other

789. EAA '79, § 6(i), 50 U.S.C. app. § 2405(i) (Supp. III 1979) as amended by International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 111, 94 Stat. 3131; see note 169 supra. This is the only case where consultations regarding individual licenses are required.
790. U.S. Export Weekly (BNA) No. 322, at A-6, A-7 (July 29, 1980) (proposed sale of Boeing aircraft to Iraq); id. at No. 313, at A-3 to A-5 (June 24, 1980) (proposed sale of engines to Iraq); id. at No. 306, at A-1 to A-3 (May 6, 1980).
791. EAA '79, § 4(e), 50 U.S.C. app. § 2403(e) (Supp. III 1979); see note 31 supra.
793. Id. at § 6(h), 50 U.S.C. app. § 2405(h).
794. Id. at § 6(a)(1), 50 U.S.C. app. § 2405(a)(1).
Substantive provisions, however, create the illusion that boundaries on executive discretion have been erected. This illusion may be gaining time for a control psychology to become more firmly rooted.\textsuperscript{795}

Although the Carter Administration began to recognize some of the economic and political costs of export controls and some of the constraints on their effectiveness,\textsuperscript{796} it continued generally to believe that the Executive should be allowed flexibility in the use of export controls as tools of foreign policy,\textsuperscript{797} free of legislative interference.\textsuperscript{798}

Developments since the passage of EAA '79 confirm that a determined Executive can continue to curtail exports extensively in spite of the restraints now incorporated in the Act. The major developments, some of which have been referred to previously, have been:

1. Most controls in effect when EAA '79 was adopted, and all controls imposed subsequently, have been extended beyond the dates on which they would have expired under the Act.\textsuperscript{799}

2. Anti-terrorism and nonproliferation controls were extended to all items requiring a validated license for national security purposes.\textsuperscript{800}

3. The partial embargo of South Africa was extended by requiring a validated license for all computer exports to most South African government agencies.\textsuperscript{801}

4. A number of controls were instituted in response to the Soviet invasion of Afghanistan. They included (a) a prohibition of most exports in any way related to the Moscow Olympics,\textsuperscript{802} (b) an embargo on sales of grain, meat, and certain other agricultural products to the U.S.S.R.,\textsuperscript{803} (c) a related em-
bargo on exports of phosphates (used for fertilizer) to the U.S.S.R.;\textsuperscript{804} (d) some new national security-based validated license requirements,\textsuperscript{805} a tightening of licensing policy on many existing controls,\textsuperscript{806} and the suspension and revocation of certain outstanding validated licenses;\textsuperscript{807} (e) the extension of national security and foreign policy controls applicable to the U.S.S.R. to Afghanistan;\textsuperscript{808} and (f) controls on certain exports to the Soviet Kama River truck plant.\textsuperscript{809}

(5) Finally, a range of economic sanctions, including an export embargo, were applied against Iran. These controls were instituted under the emergency provisions of the IEEPA rather than under EAA '79.\textsuperscript{810}

The Reagan Administration may change the direction of American foreign policy in important ways, but it would be a mistake to conclude that these changes will mean the end of the problems identified in this Article. There are strong indications that the new administration will not pursue the human rights policy with the enthusiasm of its predecessor, and trade corn; licenses for exports of wheat and corn would be issued to an aggregate limit of 8 million metric tons for the period of October 1, 1979 to September 30, 1980. \textit{Id.} at 1883 (to be codified at 15 C.F.R. 376.5). Subsequently, a three-tier licensing system was established: (1) certain commodities that could contribute to the Soviet Union's grain and livestock capacity remained subject to validated license requirements, 45 Fed. Reg. 8292 (1980) (to be codified at 15 C.F.R. Part 376, Supp. No. 2), and the general policy was to deny all licenses except those for wheat and corn exports not to exceed 8 million metric tons; (2) other commodities remained subject to validated license requirements, but licenses would be considered on a case-by-case basis in light of several specified criteria, including whether the export could be used as animal feed or diverted to other uses that would undermine the grain and livestock controls, 45 Fed. Reg. 8292 (1980) (to be codified at 15 C.F.R. Part 376, Supp. No. 3); (3) all remaining agricultural commodities were returned to general license status, but with an additional reporting requirement to permit monitoring by the OEA. 45 Fed. Reg. 8291 (1980) (to be codified at 15 C.F.R. Part 376, Supp. No. 1). President Reagan terminated the embargo on April 24, 1981. \textit{See} Weisman, Reagan Ends Curbs on Export of Grain to the Soviet Union, \textit{N.Y. Times}, April 25, 1981, at 1, col. 7.


\textsuperscript{805}. \textit{Id.} at 29,568.


\textsuperscript{807}. \textit{U.S. EXPORT WEEKLY} (BNA) No. 290, at A-1, M-1 (Jan. 15, 1980) (suspension); note 536 \textit{supra} (revocation).

\textsuperscript{808}. 45 Fed. Reg. 37,415 (1980).

\textsuperscript{809}. \textit{Id.} at 30,617.

controls implementing the policy will surely decline.\textsuperscript{811} On the other hand, the Reagan Administration appears committed to linking trade with political and military issues in the East-West arena, apparently on an instrumental basis.\textsuperscript{812} Most dramatically, the President initially refused to terminate the Soviet grain embargo despite campaign rhetoric to the contrary. Further predictions are more uncertain. Secretary of State Haig has said opposition to international terrorism may take the place of human rights in American foreign policy;\textsuperscript{813} broadly interpreted, the anti-terrorism policy could support extensive controls. Issues of access to supplies may well arise in the coming years. The relevant policy in EAA '79 is a broad and untested source of executive export control authority. Geopolitical concerns may lead to an expansion of regional stability controls. Promotion of human rights abroad is still by statute a principal goal of United States policy; domestic and international pressure will not permit the Reagan Administration to abandon the policy. New foreign policy issues, as revolutionary as human rights, may in time emerge. Changes of administration and substantive foreign policy, in short, do not necessarily lead to restraint in the use of trade controls as tools of national policy, and there remain numerous policy areas where an active Executive may wish to draw upon its authority under EAA '79.

The longer export controls remain a significant instrument of American foreign policy, the more difficult it will be to reverse the prevailing psychology. Congress must act soon to install a legislative mechanism that will permit the use of export controls in the relatively few situations in which they are appropriate, but will block their growth into an all-purpose, ultimately self-defeating response to the range of foreign developments of which the United States, or powerful factions within it, might disapprove.

Three approaches are realistically available. They are, in order of diminishing degree of executive discretion: (1) revising EAA '79 to tighten its restraints on the exercise of delegated authority; (2) requiring Congress to approve, or permitting it to disapprove, new foreign policy controls; and (3)

\textsuperscript{813} See N.Y. Times, Jan. 29, 1981, at A10, col. 6 (transcript of news conference of Secretary Alexander M. Haig).
repealing the delegation of executive authority to control exports for foreign policy purposes. Since no single approach appears capable of solving all of the problems analyzed in this Article, the discussion that follows will focus on the strengths and weaknesses of each, and will explain why the author has come to favor repeal.

A. Tighter Statutory Restraints

Perhaps the most easily attainable alternative is the amendment of EAA '79 to strengthen its restrictive provisions. Amendment might take place upon the expiration of the Act in 1983 or even sooner if Congress were to conclude that the Act in its present form is unable to restrain the growth of foreign policy export controls.

Although some provisions of the Act could be usefully tightened—several possible revisions are suggested below—this approach has serious flaws. First, both the theoretical analysis in Part IV of this Article and the discussion of EAA '79 in Part V demonstrate that, in theory at least, an effective restraining statute would necessarily require the President to characterize any proposed political control as either predominantly instrumental or predominantly symbolic. Characterization of the control is necessary so that appropriate patterns of decision-making can be prescribed by the statute. Without such characterization, a statute must regulate all political controls under the same criteria, by either (1) imposing criteria lenient enough to permit symbolic controls, and thus failing to require adequate attention to considerations of effectiveness when instrumental controls are proposed (the weakness of EAA '79), or (2) requiring rigorous effectiveness analysis for all controls, in essence making symbolic controls impossible. At the same time, a requirement that a control be characterized as symbolic or instrumental would force the President to formulate the objective of the control; this would make effectiveness analysis more meaningful.

Under a statute that required characterization, the President might state, for example, that the objective of a proposed control was to convince the Soviet Union to withdraw its troops from Afghanistan or to deter further Soviet aggression.814 Such a control would be instrumentally motivated, and the statute would accordingly require the Executive to analyze the likely

effectiveness of the control and make a determination of effectiveness. The factors to be considered might include: (1) whether, or to what degree, the control is likely to be effective in denying the controlled items to the target, in light of such matters as foreign availability, import substitution, and enforceability; and (2) whether the control is likely to produce the desired change in the target nation's behavior, in light of the anticipated impact on its economy, its political situation, its ability to absorb costs, its capacity for retaliation, and the like.

Alternatively, the Executive might state that the purpose of a proposed control was, for example, to disassociate the United States from the forcibly repressive elements of South African society, or to demonstrate American opposition to torture. Such a control would be symbolic, and much of the foregoing effectiveness analysis would be unnecessary. Instead, the Executive might be required to assess the importance of a symbolic gesture on the issue at hand and to estimate the effectiveness of the proposed control as a symbol of the American position.

Although the separation of instrumental and symbolic controls is crucial to analysis and to the structure of an ideal statute, it may be too pure a dichotomy to serve as a practical framework for legislation. The instrumental and symbolic rationales are essentially forms of motivation for the use of controls; they do not necessarily correspond to particular controls. Most controls probably partake of both rationales: for example, the purposes of the controls imposed in response to the Afghanistan invasion surely include (1) the primary objectives of imposing economic costs on the U.S.S.R. for instrumental, punitive, and deterrent reasons; (2) the secondary, symbolic objective of demonstrating American opposition to aggression; and (3) the tertiary, symbolic objective of demonstrating strength and resolve to the American electorate. A statute drafted to deal with such a complex of purposes would almost certainly be forced to err on the side of leniency in the same way as EAA '79. A requirement that all the purposes of a proposed control be spelled out might also be unwise: a statement of instrumental intent could stiffen resistance in the target nation, while a statement of mere symbolic intent could weaken the control in the eyes of its domestic advocates, the target nation, and other nations.

A second problem with simply revising the EAA format relates to the treatment of costs. A strengthened statute would
necessarily require the President first to make a complete assessment of the costs of any proposed control—whether instrumental, symbolic, or some combination of the two—and then to determine that the anticipated value of the control to American foreign policy outweighed those costs. This change would in theory lead to a more rigorous weighing of costs against anticipated benefits than is required by EAA '79. In fact, however, even such a provision would necessarily permit such a wide range of judgment on the part of the Executive that it might be simply an exercise in futility. If no outside review of executive branch decisions were possible, the Executive could basically continue to do as it pleased.

If effective provisions for characterization of controls and weighing of costs were not feasible, the other improvements that might be suggested would be trivial. Among the possible changes are the following:

(1) The restrictive aspects of sections 3(2)(B) and 3(10) might be incorporated into the substantive portion of the statute, which would thereby provide that no foreign policy control could be imposed unless the President had determined that the control was necessary to further "significantly" a "fundamental" objective of American foreign policy and that it would have a reasonable likelihood of doing so effectively.

(2) The Executive might be required to determine, before imposing any political export controls, that all less restrictive or less costly methods of achieving its objective had either been found inappropriate in the circumstances or been tried and found insufficient. This would strengthen the "reasonable efforts" language of EAA '79.

(3) An abbreviated form of the original decision process might be required prior to a decision to extend a control about to expire under the Act's sunset provision.

(4) The Executive might be required to publish a statement of licensing policy for every new control—indeed for all current controls as well—and to revise the statements as necessary. Licensing policy is an issue almost totally neglected by EAA '79. Most statements of licensing policy issued under such a provision would probably contemplate case-by-case determinations, but the statements could nonetheless spell out

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815. But cf. EAA '79, § 6(a)(3), 50 U.S.C. app. § 2405(a)(3) (Supp. III, 1979) (Secretary of Commerce must notify applicant whose license is denied of reasons for denial and how export could be modified to be compatible with controls).
the criteria that would be applied in licensing decisions as well as the foreign policy developments that would permit the control to be terminated. This would provide as much predictability as is realistically possible within the present framework.

In sum, while revision of the Act might be the approach to reform most appealing to Congress, it is wishful thinking to expect that tinkering with the format of EAA '79 will effectively restrain the Executive. Statutory prescription of a decision-making process is simply too mechanistic an approach to a complex political decision.

B. PARTICIPATION BY CONGRESS

One political mechanism for restraining executive action was enacted as part of EAA '79: if the President restricts any agricultural exports under the foreign policy authority of the Act, Congress may, within thirty legislative days, disapprove the President's action by concurrent resolution; upon the adoption of such a resolution the control ceases to be effective.816 The House bill would have permitted congressional disapproval of all new foreign policy controls.817 It would have established an expedited parliamentary procedure allowing consideration of the disapproval resolution by the appropriate committees and by both houses within sixty days. In conference, the congressional veto power was limited to foreign policy and short supply controls on agricultural products, but the conference report on EAA '79 indicated that if consultation by the Executive under the Act proved to be inadequate, Congress would "give further consideration to a congressional veto mechanism in subsequent legislation."818

A congressional review and veto procedure for all foreign policy controls would have several advantages as a method of restricting executive discretion. With the courts immobilized by the terms of EAA '79819 and by the political questions doctrine and similar policies of judicial restraint,820 at least some

816. Id. at § 7(g)(3), 50 U.S.C. app. § 2406(g)(3). A concurrent resolution does not require the signature of the President and is not subject to veto.
818. H.R. CONF. REP. No. 96-482, supra note 10, at 46.
819. EAA '79 exempts virtually all functions under the Act from the Administrative Procedure Act, including the APA's judicial review requirements. EAA '79, § 13(a), 50 U.S.C. app. § 2412(a) (Supp. III 1979).
independent institution would review decisions of the executive branch against the criteria specified in the statute. Further, congressional review would allow the very body that has established those criteria to determine compliance with them and to invalidate action that exceeded their boundaries. It would permit an essentially political decision to be reviewed by a political body—one able to hear the views of affected interests and to weigh the complex factors involved in a control decision.\footnote{See H.R. REP. NO. 96-200, 96th Cong., 1st Sess. 7 (1979).} Finally, a congressional veto procedure would simplify the drafting of statutory criteria, because more general guidelines could be written into the EAA than might be acceptable absent review.

A congressional veto provision in the EAA, however, might create more problems than it would solve. Most importantly, the constitutionality of such a provision is subject to serious question.\footnote{See L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 120-23 (1972). For a current review and analysis of the arguments and authorities on the constitutionality of the various congressional veto mechanisms, see Nathanson, Separation of Powers and Administrative Law—An Intellectual Odyssey, 75 NW. U. L. REV. 000 (1981) (forthcoming).} Although a number of congressional veto provisions are currently in effect,\footnote{Professor Jackson notes 19 provisions of various types in effect as of 1977. J. JACKSON, supra note 696, at 147 n.15 (1977).} building such a controversial and constitutionally dubious device into the EAA would run counter to one of the main objectives of revising the Act in the first place: to provide greater certainty to those engaged in export trade.\footnote{EAA '79, § 3(1), 50 U.S.C. app. § 2402(1) (Supp. III 1979).}

A congressional veto would also add an unwarranted element of complexity to the control process. Even business groups opposed to the use of foreign policy controls have decried the additional delay and confusion the procedure might produce.\footnote{See House EAA Hearings Part I, supra note 21, at 206 (statement of Joseph Karth).} The negative form of veto incorporated in the House bill and most other current statutes\footnote{See J. JACKSON, supra note 696, at 147 n.15.} would be the most disruptive of all. A negative veto procedure would permit a new control to be promulgated and enforced for many weeks while the American foreign policy apparatus, American exporters, and foreign buyers remained unsure whether it would be overturned by Congress. If it were overturned, two changes of policy, not merely one, would take place within thirty or...
Moreover, the legislative veto might not be a realistic limitation on the Executive. Congress would be likely to exercise the veto only infrequently, because of the difficulty of assembling a congressional majority to overturn a control that directly affected only a limited segment of the economy. Congress might also be reluctant to overturn an executive judgment on foreign policy that was already communicated to foreign governments, because of the resulting disruption of diplomacy.

Even if Congress did exercise its veto, considerable damage might already have been done. It is widely believed, for example, that the short supply controls imposed on soybean exports in 1973 led to considerable loss of faith in the United States as a reliable supplier of agricultural products even though the controls were quickly terminated. Such shock effects cannot be totally abated by subsequent reversal of a control.

In sum, despite the advantages of having a second branch of government participate in export control decisions as a check on the Executive, the legislative veto, even if constitutional, seems to be an unworkable response to the problems identified in this Article.

C. REPEAL OF DELEGATED AUTHORITY

If the EAA's delegation of authority to control exports for foreign policy purposes were repealed, the President's authority under the EAA would be limited to national security and short supply controls. National security authority might be redefined—in the statute or by executive interpretation—to encompass certain regional stability, nonproliferation, and similar controls. Political export control authority would remain avail-

827. A positive veto procedure—requiring, for example, congressional approval within 60 days before a new control can be effective—could ameliorate some of these problems. If Congress disapproved of a control, it would avoid actual changes in control policy. It could assuage some of the uncertainties of dealing with a control already in effect but still subject to reversal by Congress. So long as the normal requirements for enactment of legislation were not followed, however, the constitutional problems would likely remain. See L. Henkin, supra note 822, at 121-22. It is proposed below that actual legislation be required to implement a new control.


829. See L. Henkin, supra note 822, at 122-23.

able to the Executive in two situations: (1) when the Security Council mandates economic sanctions (under the United Nations Participation Act);831 and (2) when the President declares a national emergency (under the IEEPA and the National Emergencies Act).832 In other situations, the Executive would be required to request statutory authority for political controls. This approach is at the same time the most thorough and the most sensible.833

The nondelegation approach has several advantages. First, its allocation of roles to the Executive and Congress fits neatly into the constitutional framework, unlike the legislative veto. Foreign policy would in the first instance be made primarily by the President. If the executive branch wished to further its policies through the regulation of exports—that is, of foreign commerce—it would have to seek permission from Congress. Once the requested authority had been granted, controls would be communicated to foreign nations and administered by the President, "the sole organ of the federal government in the field of international relations,"834 without congressional interference.

Second, unlike the other approaches mentioned, the nondelegation approach would be relatively simple to effectuate and its procedures are familiar and workable.

Third, this approach recognizes that Congress is a more effective forum than the executive branch for assembling and exposing all the interests that would be affected by a proposed export control. Those interests that are affected economically—business, labor, and their representatives in state and local government—have advanced strong views in past congressional

831. See note 2 supra.
832. See note 2 supra.
833. Repeal of foreign policy export control authority has been suggested by others. It was recommended in 1967 by Harold Berman and John Garson in their leading article on export controls. Berman & Garson, supra note 2, at 882-83. The variety of foreign policy controls described here had not yet developed. The authors' recommendation was made in the context of the controls on East-West trade that then dominated the control program. More recently, repeal was recommended during House hearings on EAA '79 by Arthur Downey, a former Deputy Assistant Secretary of Commerce for East-West Trade and staff member of the NSC and the State Department. See House EAA Hearings Part I, supra note 21, at 252, 254, 250-91, 294-96. Mr. Downey's recommendation was not incorporated in any of the bills submitted to Congress, however, and did not receive extensive consideration.
835. The National Governors Association has testified on export legislation and prepared a bill, H.R. 3154, 96th Cong., 1st Sess. (1979), submitted by Representatives Gibbons and Conable, containing a complete proposed Export Ad-
hearings. Under the nondelegation approach, they would have a more timely opportunity to provide Congress with information on economic costs, foreign availability, and similar matters and to present their views on a control's importance to United States foreign policy. Interests favoring a particular political control would also participate, as they have in recent hearings, arguing for the importance of controls on crime detection devices and on exports to South Africa and Uganda. Congress would continue to benefit as well from testimony and written submissions from former government officials, academicians, and other concerned independent parties. Under the statutory approach, these views would be received before controls are implemented. The voluminous hearings held in recent years on EAA '79, on export policy, and on particular foreign policy controls leave a clear impression that all implications of a proposed control would be thoroughly aired before Congress reached a decision.

Fourth, controls enacted by Congress upon the President's recommendation might be more effective than those imposed by the Executive alone. Within the United States, broader popular support might result, especially among those adversely affected, if the whole machinery of government had been mobilized to implement a control after all interested views had been heard. Symbolic controls, in particular, might carry more force abroad and create greater moral and emotional satisfaction when implemented by joint action of Congress and the President.

Fifth, with judicial review unavailable, the representative branch of government seems the most appropriate locus for a political decision that will impose direct, adverse economic consequences on a particular group of persons in the hope of obtaining less definable benefits for the whole of society. In Congress, the affected interests can state their positions and their representatives can participate in debate and vote.⁸³⁶ The representative character of the decisionmaking institution is particularly important because the United States generally does not compensate persons adversely affected by export con-

⁸³⁶ Legislative representatives are currently involved primarily through sporadic intervention in particular control and licensing decisions. See Note, supra note 820, at 605; note 119 supra. But see note 855 infra.
trols for their losses. Compensation only takes place ad hoc, a cynic might say, when the affected interests are unusually powerful, well-organized and vocal. With little chance of ex post compensation, it is essential that affected interests have a voice \textit{ex ante} in decisions on new controls, even though their position will not always prevail.

Sixth, because the President currently has greater peacetime, nonemergency power to restrict exports than to control imports or other private economic activities, the costs of conducting foreign policy fall disproportionately on United States exporters. Perhaps the broadest delegation of authority over imports, for example, permits the executive branch to "adjust" imports of any article which it determines to be imported in such quantities or under such circumstances as to threaten the national security. Because this provision requires a finding of a threat to the national security, it cannot support as wide a range of import controls as that effected against exports under the foreign policy section of the EAA—to date it has been used only to restrict petroleum imports. As the law now stands, the Executive is tempted to look first to export controls when seeking a foreign policy action simply because authority is readily available.

It should also be noted that Congress has refused to dele-


838. An obvious example is the government's willingness to assume, through the Commodity Credit Corporation, the contracts of United States grain exporting companies affected by the grain embargo of the Soviet Union in order to maintain grain prices. See U.S. EXPORT WEEKLY (BNA) No. 293, at A-14 (Feb. 5, 1980). The estimated cost to the government of the contract assumption program was $2.5 billion. Id.


gate under EAA '79 authority to impose a trade embargo on the ground that an embargo is an act "of the gravest importance," an act of "economic warfare." Trade controls short of an embargo, however, also carry serious foreign policy implications. Who can doubt the consequences for American relations with South Africa, for example, of the prohibition on exports to its military and police forces? Yet the Executive is authorized to impose such a prohibition on exports but does not have authority to institute an embargo of a small country with which the United States has little trade. In short, repealing the foreign policy authority of EAA '79 would rationalize American trade policy by requiring congressional authorization for most major political trade controls imposed in nonemergency situations.

A number of objections to the repeal of foreign policy export control authority can be voiced. First, Professor Huntington and those sharing his views on executive power might argue that repeal would deprive the President of an important tool of foreign policy. In response, however, it should be noted that a wide range of measures would still be available. In the context of the human rights policy, for example, the State Department has spoken of the "rich mix of diplomatic tools" available to it and of the numerous tangible steps it has been able to take in support of the policy. Many of these measures do not interfere directly with private activity and do not carry the economic and political costs of export controls; even under the current legislative scheme they should ordinarily be used before resort to trade controls. Further, the President would retain authority to impose political export controls and other economic sanctions under the IEEPA in times of emergency.

845. See note 761 supra and accompanying text.
846. One might in fact criticize the approach to export control authority recommended here for providing an incentive to the President to utilize his emergency powers. One would hope that the formal limitations in the emergency statutes, see note 2 supra, and the political forces which a declaration of emergency would set in motion would restrain any impulse to declare emergencies too freely.
and could obtain authority for export controls in nonemergency situations by convincing Congress of their importance.

Second, it might be objected that this approach would deprive the Executive of flexibility in the conduct of foreign policy. To some extent, this is the same objection as the first. To the extent that it concerns the ability of the Executive to administer controls flexibly once they are imposed, the answer lies in proper drafting of the legislation that implements particular controls. In mandating controls on crime detection devices, for example, Congress has left it to the Executive to define the products covered—this is an appropriate executive function. Moreover, EAA '79 granted the Executive greater flexibility to impose and terminate such controls as to particular nations in line with their human rights practices—this too seems appropriate. Total flexibility in administering controls, however, would be undesirable. At the minimum, the Executive should be given policy guidelines, in line with standard delegation doctrine, and should be required to publish a statement of licensing policy for every control in effect.

Third, some might object that Congress acts too slowly to utilize political trade controls effectively. It is undoubtedly true that Congress often acts slowly, but it has acted with some dispatch on matters of this sort, an example being the Ugandan embargo. With well-informed oversight committees familiar with the workings of export controls and well-informed foreign relations committees familiar with the proposed target and other nations potentially involved, Congress should be able to act with sufficient speed on executive proposals. Special legislative procedures, if necessary, could also be provided. The 1979 House bill, for example, borrowed from the Atomic Energy Act a procedure by which Congress takes up disapproval (by concurrent resolution) of certain licenses for the export of nuclear material. That procedure permits full congressional deliberation within sixty days; a similar procedure could be followed for action on executive requests for control authority.

847. For a discussion of the objections to rigid, nondiscretionary export controls, see Note, supra note 200, at 324-25.
849. See Note, supra note 820, at 596-60.
851. But see Note, supra note 820, at 603-08 (Congress does not effectively oversee the EAA).
Congress’ relative lack of speed, moreover, can be seen as a virtue. A major reason why Congress would not act as swiftly as some might wish is the time required to perform those information-gathering and deliberative functions that are among the greatest advantages of legislative action: hearing the views of affected interests, considering alternative measures, weighing costs and benefits. Political trade controls should be imposed with caution, after adequate consideration of their short- and long-term economic and political consequences and a complete airing of views. The legislative approach promises to produce this kind of action more frequently.854

On the other hand, Congress has sometimes acted as hastily as the Executive. In the case of Uganda, for example, Congress overrode executive objections based on considerations of effectiveness to impose broad political trade controls. Further, such congressional actions have been and would continue to be unrestrained by any of the limits now imposed on the Executive by EAA '79. Yet the fact that Congress is already deeply involved in export controls855—from imposing an embargo on Uganda and requiring validated licenses for crime detection devices to exerting influence on particular licensing decisions—points to an additional virtue of the recommended approach: it would eliminate much of the duplication of authority between President and Congress that presently exists and that seems destined to grow as Congress plays a more active role in the area. Lodging political export control authority solely in Congress seems likely to result in more restrained use of export controls overall.

Fourth, members of Congress might object that the congressional workload is already excessive.856 One would hope, however, that requests for authority to impose foreign policy export controls would be infrequent. Further, as noted above, Congress could establish committees and parliamentary procedures to deal with such requests expeditiously. Congress has in the past devoted a great deal of time to oversight of the Executive’s use of political export controls, particularly in years

856. See House EAA Hearings Part I, supra note 21, at 290 (statement of Rep. Bingham) (“the load on the legislative branch . . . is already intolerable.”)
when the EAA had to be renewed, 857 this demand on legislative
time would at least in part be relieved. In any case, Congress
already devotes a substantial amount of time to consideration
of similar measures. Every year’s foreign assistance appropria-
tions legislation, for example, disqualifies several nations from
various forms of aid or sets conditions on their eligibility, often
after lengthy hearings. The frequency of these measures sug-
gests that, if a presidential request for export control authority
is truly important to the nation, time for its consideration can
be found.

Finally, beyond these largely institutional considerations, it
might be objected that repeal of foreign policy export control
authority would deprive the United States of a powerful instru-
ment for doing good—promoting human rights, opposing terror-
ism, and the like—in the interest of mere economic gain. Yet
this Article proposes repeal not as a position of retreat on these
important issues but rather as a position of prudence on the
use of a dangerous policy instrument. It proposes repeal be-
cause no other scheme yet advanced seems capable of re-
straining the Executive from using political export controls
instrumentally when they cannot be effective; use of political
export controls in those circumstances is economically waste-
ful, perhaps profoundly so, and may be politically destructive
as well. It proposes repeal because no other scheme yet ad-
vanced seems capable of curbing the use of controls as sym-
bolic expressions; and beyond some unascertainable point, the
symbolic use of controls may be even more wasteful and
equally destructive. It is true that this Article proposes repeal
in large part because of economic considerations, but no other
scheme yet advanced seems capable of forcing the Executive to
give sufficient weight to the costs it asks the American people,
and those of other nations, to bear when it embarks on a pro-
gram of controls. To paraphrase a quotation cited earlier, the
world is not yet rich enough to be able to despise the economic
implications of political export controls. 858

857. See Note, supra note 820, at 604. In 1979, for example, Representative
Bingham’s Subcommittee on International Economic Policy and Trade of the
House Committee on Foreign Affairs devoted all or part of 16 days to hearings
on EAA ’79; the full committee met on seven additional days.
858. See note 680 supra.