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The Export Administration Amendments Act of 1985

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The Export Administration Amendments Act of 1985: A Reassessment and Proposals for Further Reform

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I. INTRODUCTION

On June 27, 1985, following more than two years of debate, the House and Senate passed legislation to reauthorize and revise the Export Administration Act of 1979 (EAA)¹, the fundamental statutory authority for the Department of Commerce in regulating trade of non-military goods and technology.² The Export Administration Amendments Act of

1. Pub. L. No. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. §§ 2401-2420 (1982)).

2. The 1985 Act's Byzantine procedural history attests to the bitterness of the policy disputes that stymied its passage through Congress. The efforts to revive and revise the 1979 Act spanned two Congressional terms. The 98th Congress began its abortive efforts to reenact the EAA in 1983 by introducing various proposals to revive and revise the EAA. *See* H.R. 381, H.R. 483, H.R. 1197, H.R. 1564, 1565 and 1566, H.R. 2278, H.R. 2281, H.R. 2500, S. 397, S. 407, S. 434, and S. 979, 98th Cong., 1st Sess. (1983).

Following extensive hearings in the first half of 1983, the House Committee on Foreign Affairs wrote a new, "clean" bill containing proposals from the various House bills. *See* H.R. 3231, 98th Cong., 1st Sess. (1983). The House favorably received this bill and passed it on Oct. 19, 1983.

Likewise, the Senate Committee on Banking, Housing and Urban Affairs incorporated major provisions of several Senate proposals into a new version of S. 979 with amendments on March 1, 1983.

Wide differences in the reauthorization bills produced a seven-month conference seeking to reconcile their divergent components. By October 1984, a compromise proposal that tightened national security controls, strengthened enforcement of such controls, and reduced license delays emerged, only to founder on the closing days of the session. Two hotly-contested issues led to the collapse: the Defense Department's role in the export license process and sanctions on the Republic of South Africa.

Section 10(g) of S. 939 empowered the Defense Department to review any proposed exports, including "West-West" shipments to friendly nations that might be illegally diverted to the Soviet bloc. The less hawkish House bill included no similar provision. The Reagan Administration opposed the Senate proposal because its provisions would provide insufficient latitude to allocate administrative resources. *See* 130 CONG. REC. H12147 (daily ed. Oct. 11, 1984).

Although the Senate bill did not specifically address South Africa sanctions, the House bill included a proposal that would have systematically restricted transactions with that nation. Title III of the House measure required that: (1) compulsory fair employment standards known as the Sullivan principles be enforced by all United States companies operating in South Africa; (2) no United States bank loan directly or indirectly to the South African apartheid regime or any corporation, partnership or other entity controlled by the Government; and (3) no United States person could make any investment, sign a

1985 (EAAA)³ is not a complete structural overhaul of United States export policy.⁴ Rather, it maintains the tripartite structure of export administration — National Security Controls, Foreign Policy Controls and Short Supply Controls⁵ — created when Congress passed the EAA. Within this structure the new act seeks to achieve two goals: first, to reduce the burden of export regulation and thereby improve the competitive position of United States goods and services in the world market, and second, to end the hemorrhage of restricted, high technology products and data to the Soviet bloc and other unfriendly nations.

Although the dual goals of the EAAA appear contradictory, the policies behind each are compelling. For more than a decade the United States has accumulated increasingly large trade deficits with its trading

loan or extend credit in South Africa.

The new 99th Congress placed the renewal legislation high on its docket, with both the Senate and House passing the bill in April 1985. Following conference resolution of disputes in June 1985, Congress enacted the final legislation, which President Reagan signed July 12, 1985. For a summary of the procedural background, see 131 CONG. REC. S8924 (daily ed. June 27, 1985) (statement of Senator Proxmire) and Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, LEGAL TIMES OF WASHINGTON, Aug. 5, 1985, at 17; see also Harris & Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT'L L. 71, 73 fn.5 (1985).

The lengthy hearings and debate attending the bill's enactment provide abundant, albeit ambiguous, interpretations of its provisions for courts seeking to puzzle out the EAAA's meaning. Given the extensive discussions in Congress in 1983 and 1984, the 1985 Conference Report and discussion only touch on the remaining unresolved problems left from the 98th Congress. See CONFERENCE REPORT ON S. 883, 99th Cong., 1st Sess. (daily ed. June 25, 1985); 131 CONG. REC. S8921-27 (floor statement of Senate Conferees); 131 CONG. REC. H5059-63 (daily ed. June 27, 1985) (floor statement of House Conferees); see also PROPOSED CONFERENCE REPORT OF THE 98TH CONGRESS, 130 CONG. REC. H12150-62 (daily ed. Oct. 11, 1984) and earlier reports; HOUSE FLOOR DEBATE, 130 CONG. REC. H12146-50, 12162-70 (daily ed. Oct. 11, 1984). For further legislative history, see THE EXPORT ADMINISTRATION ACT AMENDMENTS OF 1983, S. REP. NO. 170, 98th Cong., 1st Sess. (1983); THE EXPORT ADMINISTRATION ACT OF 1983, H. R. REP. NO. 257, pts. I-III, 98th Cong., 1st Sess. (1983).

3. Pub. L. No. 99-64, 99 Stat. 120 (1985). This Note is limited to Title I of the act (non-military export controls), and does not address Title II (export promotion programs) or Title III (congressional oversight of nuclear cooperation agreements).

4. Although Senator Jake Garn (R-Utah), one of the managers of S.979 said the legislation "represents the most comprehensive and detailed revisions of our export control laws since they were first enacted over 30 years ago," 131 CONG. REC. S8922 (daily ed. June 27, 1985), the EAAA, as passed, leaves intact the export administration structure enacted in 1979.

5. 50 U.S.C. app. §§ 2404, 2405, 2406 (1980).

partners.⁶ As imports mounted, policymakers reasoned that a serious effort to boost exports could balance United States trade figures while avoiding protectionist measures that invite retaliation by the targeted countries.⁷ Meanwhile, reports of widespread diversion of United States technology, particularly electronics and computers, to Soviet military production facilities alarmed members of Congress.⁸ Defense analysts pointed out that such thefts erode the West's technological leads, resulting in accelerated United States defense spending and higher government budget deficits.⁹

This Note analyzes the EAAA and the administrative regulations it subsequently engendered; it also evaluates their success as of February 1987 in easing the burden of export controls and improving security over United States technological assets. In addition, it considers several complex issues at the heart of export control that Congress fails to address in the EAAA and the consequences of legislative silence in the national security area. Finally, it proposes changes in export control administration and policy that Congress should consider before the EAA comes up for reauthorization in September 1989.

Section II examines the development of United States export regulation since World War II and the growing awareness during the past decade of the significance of exports for the United States economy. Section III explains the framework of United States export regulations established by the EAA of 1979. Section IV discusses how the EAAA eliminates controls on low technology items sold to allied nations, speeds administration of export licenses, and upgrades the effectiveness of the Coordinating Committee on Export Controls (COCOM) which coordi-

6. The 1986 trade deficit totaled a record \$169.78 billion compared to \$139.69 in 1985. *Wall St. J.*, Feb. 2, 1987, at 2, col. 2.

7. See Transcript of A U.S. CHAMBER [OF COMMERCE] CONFERENCE ON THE EXPORT ADMINISTRATION AMENDMENTS ACT OF 1985, at 8 (July 18, 1985) (statement of Roger Majak, Staff Director, House Subcommittee on International Economic Policy and Trade) (copy on file at Vanderbilt Journal of Transnational Law) [hereinafter Chamber of Commerce Transcript].

8. See *Extension and Revision of the Export Administration Act of 1979: Hearings and Markup Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 197 (1983) (statement of Richard Perle, Assistant Secretary for International Security Policy, Defense Department) [hereinafter *Extension and Revision of EAA of 1979*].

9. *Reauthorization of the Export Administration Act: Hearings Before the Subcomm. on International Finance and Monetary Policy of the Sen. Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. 173 (1983) (statement of William Schneider, Undersecretary of State for Security Assistance) [hereinafter *Hearings on Reauthorization of the Export Administration Act*].

nates multilateral export controls. Section IV also examines congressional efforts to limit the President's use of export controls for foreign policy purposes. Section V concerns Congressional efforts to strengthen enforcement of United States export controls by enhancing COCOM, defining new crimes, imposing tougher sanctions and increasing enforcement authority. Section VI addresses four volatile issues that Congress either deliberately ignored or only partially addressed in its efforts to pass the EAAA: the extraterritorial impact of United States export controls, the sanctity of existing contracts when Congress imposes embargoes, the role of the Department of Defense in export policy, and the imposition of sanctions against South Africa. In leaving these issues unresolved, Congress ceded effective control of United States exports to the executive branch and undermined the structures that ostensibly regulate United States commerce abroad. Finally, this Note recommends four modifications to the export administration structure in order to reduce impediments to United States exporters not remedied by the EAAA.

II. HISTORICAL BACKGROUND

Throughout the early part of the twentieth century, the United States imposed export controls only in times of war or during emergency situations.¹⁰ In response to the Cold War following World War II, Congress

10. Berman & Garson, *United States Export Controls—Past Present and Future*, 67 COLUM. L. REV. 791 (1967). Recent writing on export control is extensive. See, e.g., Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970's and 1980's*, 65 MINN. L. REV. 739 (1981); Alexander, *Preserving High Technology Secrets: National Security Controls on University Research and Teaching*, 15 LAW & POL'Y INT'L BUS. 173 (1983); Blair, *Export Controls on Nonmilitary Goods and Technology: Are We Penalizing the Soviets or Ourselves?*, 21 TEX. INT'L L.J. 363 (1986); Boyd & Whisman, *The U.S. Law of Export Controls: A Selected Bibliography*, 18 INT'L LAW. 483 (1984); Evrard, *The Export Administration Act of 1979: Analysis of Its Major Provisions and Potential Impact on United States Exporters*, 12 CAL. W. INT'L L. J. 1 (1982); deKieffer, *Foreign Policy Export Controls: A Proposal for Reform*, 11 N.C.J. INT'L L. & COM. REG. 39 (1986); Feldman, *The Restructuring of National Security Controls Under the 1985 Amendments to the Export Administration Act: Multilateral Diplomacy and the Extraterritorial Application of United States Law*, 21 STAN. J. INT'L L. 235 (1985); Kalivoda, *The Export Administration Act's Technical Data Regulations: Do They Violate the First Amendment?*, 11 GA. J. INT'L & COMP. L. 563 (1981); Levine, *Technology Transfer: Export Controls Versus Free Trade*, 21 TEX. INT'L L.J. 373 (1986); Marcuss & Mathias, *U.S. Foreign Policy Export Controls: Do They Pass Muster Under International Law?* 2 INT'L TAX & BUS. L. 1 (1984); Monahan, *The Regulation of Technical Data Under the Arms Export Control Act of 1976 and the Export Administration Act of 1979: A Matter of Executive Discretion*, 6 B.C. INT'L & COMP. L. REV. 169 (1983); Overly, *Regulation of Critical Technologies*

retained wartime export restrictions. By 1949, however, two of the original reasons for stringent controls — preventing shortages of goods vitally needed at home and channeling specific, critically needed items abroad on a priority basis¹¹ — had disappeared. Denying communist nations access to products that might enhance their economic or military potential then became the predominant *raison d'être* for United States export controls.¹²

In 1949, Congress passed the Export Control Act (ECA),¹³ “the first comprehensive system of export controls ever adopted by the United States in peacetime.”¹⁴ Although it was designed to expire two years later, Congress successively reenacted the measure seven times as tensions between the United States and the communist world mounted during the Korean War and the Indochina conflict.¹⁵ The ECA provided the President with expansive authority to regulate exports. Specifically, it allowed him to forbid or curtail the export of any articles, materials or supplies, including technical data, to safeguard domestic supplies, to pro-

Under the Export Administration Act of 1979 and the Proposed Export Administration Amendments of 1983: American Business Versus National Security, 10 N.C.J. INT'L L. & COM. REG. 423 (1985); Overman, *Reauthorization of the Export Administration Act: Balancing Trade Policy with National Security*, 17 LAW & POL'Y INT'L BUS. 325 (1985); Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255 (1981); Comment, *The Export Administration Act of 1979: Refining United States Export Control Machinery*, 4 B.C. INT'L & COMP. L. REV. 77 (1981); Note, *Accountability and the Foreign Commerce Power: A Case Study of the Regulation of Exports*, 9 GA. J. INT'L & COMP. L. 577 (1979); Note, *High Technology Warfare: The Export Administration Act Amendments of 1985 and the Problem of Foreign Reexport*, 18 N.Y.U. J. INT'L L. & POL. 663 (1986); Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983); Note, *United States Human Rights Policy: Effect on Exports*, 9 GA. J. INT'L & COMP. L. 287 (1979); Note, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355 (1984).

11. Berman & Garson, *supra* note 10, at 794-95.

12. Overly, *Regulation of Critical Technologies Under the Export Administration Act of 1979 and the Proposed Export Administration Amendments of 1983: American Business Versus National Security*, 10 N.C.J. INT'L L. & COM. REG. 423, 427 (1985).

13. Act of Feb. 28, 1949, ch. 11, 63 Stat. 7, as amended 50 U.S.C. App. §§ 2021-32 (1964) (terminated 1969).

14. Berman & Garson, *supra* note 10, at 792.

15. Joint Resolution of May 16, 1951, ch. 83, 65 Stat. 43; Act of June 16, 1953, ch. 116; 67 Stat. 62; Act of June 29, 1956, ch. 473, 1, 70 Stat. 407; Act of June 25, 1958, Pub. L. No. 85-466, 72 Stat. 220; Act of May 13, 1960, Pub. L. No. 86-464, 74 Stat. 130; Act of July 1, 1962, Pub. L. No. 87-515, 76 Stat. 127; Act of June 30, 1965, Pub. L. No. 89-63, 79 Stat. 209.

mote foreign policy and to protect national security.¹⁶ The President delegated this executive power to the Commerce Department's Office of Export Control,¹⁷ and the executive branch aggressively applied its new regulatory authority. The most important consequence of the new export controls was the "virtual embargo" on all United States industrial and military technologies to communist nations.¹⁸

In furtherance of its goal of limiting the availability of economic and military exports to communist countries, the United States and six of its European allies in 1949 formed the Coordinating Committee on Export Controls (COCOM).¹⁹ COCOM coordinates the efforts of its member countries to block the export of any strategic commodities to communist countries.²⁰ The Mutual Defense Assistance Act of 1951,²¹ commonly called the Battle Act, both codified United States participation in COCOM and authorized restrictions on United States foreign assistance to countries exporting commodities²² "designated by the State Department as strategic commodities."²³

16. U.S. DEPT. OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION OFFICE OF EXPORT ADMINISTRATION, OVERVIEW OF THE EXPORT ADMINISTRATION PROGRAM 1 (1985); Export Control Act, *supra* note 13. Section 2023(a) of the EAA of 1979 delegates to the President almost unlimited power to control exports:

To effectuate the policies [of protecting short supplies, furthering foreign policy, and protecting national security] set forth in section 2 hereof, the President may prohibit or curtail the exportation from the United States, its Territories, and possessions, of any articles, materials, or supplies, including technical data, except under such rules and regulations as he shall prescribe.

50 U.S.C. app. § 2023(a) (terminated 1969).

In a widely-cited 1967 study of export regulations, Berman & Garson concluded: Probably no single piece of legislation gives more power to the President to control American commerce. Subject to only the vaguest standards of "foreign policy" and "national security and welfare," he has authority to cut off the entire export trade of the United States, or any part of it, or to deny "export privileges" to any or all persons.

Berman & Garson, *supra* note 10, at 792.

17. Overly, *supra* note 12, at 426-27.

18. *Id.* at 427.

19. *Id.* at 427 n.19. Headquartered in Paris, COCOM now includes Belgium, Canada, Denmark, France, West Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom and the United States. *Hearings on Reauthorization of the Export Administration Act*, *supra* note 9, at 177.

20. *Hearings on Reauthorization of the Export Administration Act*, *supra* note 9, at 177.

21. Pub. L. No. 82-213, 65 Stat. 644 (1951) (codified at 22 U.S.C. §§ 1611-1613(d) (1976) (superceded 1979)).

22. Overly, *supra* note 12, at 428.

23. *Id.* COCOM now regulates Western exports through three embargo lists: (1) the

Although the embargo-style tactics proved effective during the 1950s, the relative decline in United States industrial superiority in later years began to weaken the impermeable seal around Western industrial technology.²⁴ As European economies recovered from wartime devastation, their dependence on the United States abated.²⁵ Moreover, as the threat of an impending Soviet invasion appeared less credible and revolts in East Berlin, Poland and Hungary undermined the image of a communist monolith, traditional trading patterns with Eastern Europe reemerged.²⁶ The United States was reluctant to expand commercial exchanges, but its economic and technological edge permitted toleration of the Western European interest in lifting commercial export restrictions.²⁷ Moreover, the United States retained significant leverage over the flow of goods and research data to communist countries by means of unilateral controls.²⁸

During the following years, three factors undermined COCOM's efforts to regulate exports to the East. First, the United States' vast technological lead over its allies eroded. As a consequence, United States exporters first raised the now familiar argument that commercial restraints are ineffective as a foreign policy tool. They emphasized that European manufacturers facing less extensive export restrictions could supply comparable products²⁹ and thereby profit from the market vacuum. Second, in the late 1960s the USSR achieved approximate strategic parity with the United States. Analysts concluded that export restrictions could at best impede, but not prevent, the inevitable economic development of the Soviet Union.³⁰ Finally, the USSR actively turned to the West for the technology it needed for modernization, offering in return commodities badly needed in Europe.³¹ As a result of these gradual shifts, a trend emerged favoring wider East-West trade. At the same time United States proponents of broader commercial contacts argued for: (1) narrower uni-

International Atomic Energy List, (2) the International Munitions List and (3) the International List. While the first two regulate the export of commodities and technologies of direct military application, the latter regulates the export of dual-use commodities and technologies which could aid both the civilian and military sectors of Soviet bloc economies. *Id.*

24. See Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255, 262-64 (1981).

25. *Id.* at 262.

26. *Id.* at 262-63.

27. *Id.* at 263.

28. *Id.*

29. *Id.* at 264.

30. *Id.*

31. *Id.*

lateral controls; (2) a stronger voice in formulating policy; (3) greater emphasis on foreign availability and balance of payment issues; (4) an expanded role for Congress; and (5) greater accountability of the controls in general.³² The Export Administration Act of 1969³³ (EAA of 1969) adopted these positions. The EAA of 1969 reflected the view that trade should be encouraged with communist nations as well as with the market economies of Western Europe, Canada, Latin America and Asia. For the first time, Congress actively monitored the executive branch's cold war-motivated and often erratic enforcement of the Export Control Act, which had hampered United States business expansion while failing to effectively block Soviet access to strategic commodities.³⁴

During the decade following passage of the EAA of 1969, the total volume of United States exports to the USSR increased significantly.³⁵ This increase also reflected growth in exports of high technology products.³⁶ Congress recognized the particular sensitivity of high technology exports, and the 1977 amendments to the EAA of 1969 emphasized regulation of specific items and technologies whose export could undermine United States security.³⁷ Prior to the 1977 amendments, the EAA restricted the Department of Commerce to regulate those exports directly under United States territorial jurisdiction.³⁸ The 1977 amendments, however, markedly extended the extraterritorial reach of Department of Commerce authority to prohibit or curtail exports 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."³⁹

The 1977 amendments also signified increasing flexibility in national export policy. The government could no longer grant or deny export licenses based on whether the ultimate destination of the products was

32. *Id.* at 264-65.

33. 50 U.S.C. app. §§ 2401-2413 (1976) (original version of 83 Stat. 841 (1969)) (superseded by the Export Administration Act of 1979).

34. *See* Overly, *supra* note 12, at 429.

35. *Id.* at 431.

36. *Id.*

37. Export Administration Amendments Act of 1977, Pub. L. No. 95-223, Title III, 91 Stat. 1625 (expired 1979).

38. *See* Overly, *supra* note 12, at 430.

39. Export Administration Amendments Act of 1977, § 301(a), 91 Stat. 1629 (amending § 4(b)(1) of the Export Administration Act of 1969). This provision, embedded in succeeding legislation, proved to be a source of tremendous irritation in Western Europe when United States officials invoked it to block the export to the USSR of goods and technology produced by U.S. corporate subsidiaries abroad for use in constructing the Soviet gas pipeline.

communist or noncommunist.⁴⁰ Although one licensing criterion was the destination country's current and potential relationship with the United States, the amendments required a balancing of several other factors.⁴¹

One significant trend which countered the liberalization of export controls during the 1970s developed as a consequence of President Carter's human rights policy. Despite periodic objections to their application and scope, the exporting community has supported national security controls. Export controls for foreign policy purposes, however, have faced a more hostile reception.⁴² National security restrictions usually target strategic technologies whose acquisition by Soviet bloc countries would undermine a strong Western defense. Foreign policy-oriented export controls, however, have antagonized allies, each of whom maintains its own view on achieving common foreign policy goals. Conservative critics of export restrictions also contend that the United States can more effectively mold human rights policies within a nation when the United States has developed strong commercial links with that nation. This "constructive engagement" view animated Reagan Administration policy toward authoritarian regimes, most notably that of South Africa, during the first half of the 1980s.

III. ANATOMY OF UNITED STATES EXPORT CONTROLS UNDER THE 1979 EAA

Following the pattern of its 1949 and 1969 predecessors, the 1979 EAA "authorizes export controls to protect the national security of the United States, to promote foreign policy interests, and to conserve resources and materials."⁴³ The Act can be analyzed most succinctly in terms of its (a) substantive provisions, (b) procedural provisions and (c) export control provisions.

A. *Substantive Provisions*

Congress enumerated nine policy findings underlying the Act's provisions. These findings reflect a "high priority" for exports generally, but also a specific concern about foreign policy and national security.⁴⁴ Con-

40. See Overly, *supra* note 12, at 430.

41. *Id.* at 430-31.

42. See Comment, *supra* note 24, at 265.

43. See Evrard, *The Export Administration Act of 1979: Analysis of its Major Provisions and Potential Impact on United States Exporters*, 12 CAL. W. INT'L L.J. 1, 12 (1982).

44. In summary, these findings are:

1. Concern that United States citizens be able to engage in international com-

gress did not award priority to any one finding over another, suggesting that full consideration of each one and a balancing of interests is required by the EAA provisions.⁴⁵ Recognizing the substantial impact that export controls have on the exporting community, Congress implied that the interests of exporters would be considered and that controls would not be imposed unreasonably.⁴⁶ Yet by failing to explicitly prescribe executive discretion in imposing export controls, Congress emphasized flexibility and sacrificed consistency.⁴⁷

In addition to these findings, Congress included a list of eleven policy declarations in section 2402, indicating a more solicitous attitude toward exporters than previous enactments.⁴⁸ Nowhere is it stated, however, that

merce is a basic government policy.

2. Exports benefit the United States and the world by increasing employment and production domestically and by reducing inflation by bolstering the balance of trade and the value of the dollar.

3. It is in the national interest for the government and the private sector to give high priority to exports.

4. The United States' economic and foreign policy goals may be affected by the availability of certain materials that the U.S. exports.

5. National security may be threatened by failure to consider whether exports of goods or technology will contribute significantly to the military potential of other countries singly or in concert.

6. Uncertainties in export policy can cause domestic business to reduce efforts and thereby adversely affect the United States' balance of trade.

7. Unreasonable controls on access to world supplies can have widespread political and economic effects.

8. Export controls for national security purposes should especially consider the export of technology and of goods which contribute to the transfer of technology that could aid the military potential of other countries and threaten the security of the United States.

9. Minimal controls on agricultural commodities and products are needed in order to keep domestic agriculture strong and free of government supports, to achieve a positive balance of payments and to eliminate hunger worldwide.

See 50 U.S.C. app. § 2401 (1980).

45. See Evrard, *supra* note 43, at 13.

46. *Id.* at 14.

47. *Id.*

48. *Id.* at 15 n.52. Policy considerations in summary are:

1. Uncertainty in export control policy should be minimized, and trade with all countries encouraged, except those the President determines to have interests incompatible to our own.

2. Export controls are to be used only after full consideration of economic impact and only if necessary to

—control the export of goods and technology that would significantly contribute to the military potential of other countries in a manner detrimental to U.S. national security;

any person or corporation has a "right" to export or that the executive branch must accord any particular weight to the views of exporters in the granting of licenses.⁴⁹ Thus, adequate safeguards against excessively burdensome policies are absent in the EAA, and efforts to promote greater participation by the exporting community have no statutory support.⁵⁰

B. *Procedural Provisions*

Section 2403 of the EAA defines the three types of export licenses that the Department of Commerce may require exporters to obtain.⁵¹ The

-
- control exports to further U.S. foreign policy objectives; and
 - control exports to protect the United States' economy from the drain of scarce resources and to reduce inflation caused by foreign demand.
3. Export controls should be imposed in full cooperation with other nations and to achieve uniformity of export control policy with countries with which the United States has defense treaties.
 4. Economic resources and trade potential should be utilized to further the growth of the United States' economy and to further national security and foreign policy objectives.
 5. The United States' policy is
 - to oppose boycotts and other restrictive trade practices directed against nations friendly to the U.S. or against United States persons;
 - to encourage or require U.S. citizens engaged in foreign trade to refrain from participating in such boycotts;
 - to develop international cooperation and international rules to ensure free access to world supplies.
 6. Private industry and government should review the desirability of subjecting products to export controls.
 7. Export controls, including license fees, can be used to secure removal by foreign countries of restrictions on access to supplies, which increase domestic inflation, create shortages or attempt to influence U.S. foreign policy, but the President should first use diplomatic means to effectuate this policy.
 8. Export controls can be imposed to prevent and suppress international terrorism.
 9. Export controls can be imposed in cooperation with countries with whom the United States has defense treaties in order to restrict the flow of certain goods and technology to countries that could increase their military potential against the United States.
 10. It is United States policy to give high priority to trade by U.S. citizens except if in conflict with national security, foreign policy and short supply objectives, but such controls must be consistent with basic standards of due process.
 11. Restrictions on the export of agricultural commodities and products are to be minimized.

49. *Id.* at 17.

50. *Id.* at 18-19.

51. 50 U.S.C. § 2403 (1980). Section 2403(b) also makes the Secretary of Commerce

first type, the general license, is a broad authorization published in the Export Administration Regulations.⁵² It covers groups of items that do not require a specific license application or any license document in order to be exported.⁵³

The second type, the validated license, authorizes the export of a specific item which the Department of Commerce determines to be non-strategic.⁵⁴ The Department of Commerce awards a validated license upon acceptance of an exporter's application. "Nonstrategic" means the item may not improve the scientific, technological or industrial capabilities of the nation to which it will be exported, or reexported and used by such nation in a manner harmful to United States security.⁵⁵ The Secretary of Commerce (Secretary) also weighs the destination country's access to the good or technology from other sources, its military posture, and the status of relations between the United States and that country.⁵⁶ A validated license is mandatory if: (1) the goods or technology to be exported are restricted by a multilateral agreement to which the United States is a signatory and which requires the parties to approve the export;⁵⁷ (2) other countries are less advanced than the United States in the development of the product or technology; or (3) the United States is

responsible for maintaining a commodity control list, cataloging controlled goods and technologies for national security and foreign policy purposes.

52. See 15 C.F.R. 371.1-22 (1986).

53. 15 C.F.R. 371.1 (1986); see also Comment, *supra* note 24, at 268.

54. See Evrard, *supra* note 43, at 19.

55. *Id.*

56. *Id.*

57. References in statutes and regulations to "multilateral review procedures to which the United States is a party" usually means the Coordinating Committee. Because it is not based on any treaty or executive agreement, COCOM members are not bound to abide by COCOM decisions. On the other hand, there have been only a few instances since COCOM's founding in 1950 when any member exercised its sovereign right to deviate from COCOM decisions.

COCOM has three major functions. First, it establishes and updates lists of embargoed products and technologies. Although the COCOM lists are not published, they provide the basis for the national control lists administered by each of the member governments. Second, it acts as the clearinghouse for individual requests submitted by member states to permit the shipment of embargoed items to the proscribed countries when the risk of diversion to military use is sufficiently small. The proscribed countries for COCOM purposes include the USSR, other Warsaw Pact countries, Albania and the communist regimes of Asia. Each year COCOM reviews between 1200 and 1500 of these possible transactions, rejecting those exports which are too risky. Finally, COCOM serves as a means of coordinating the administration and enforcement activities of the member governments. See *Hearings on Reauthorization of the Export Administration Act*, *supra* note 9, at 177-79.

seeking comparable controls on the goods or technology from other suppliers and the Secretary concludes a validated license is necessary pending completion of such agreement.⁵⁸

The third type of license, the Qualified General License (QGL), authorizes multiple exports under a single license to a particular consignee or for a specified end use, thereby cutting down on paperwork and expense.⁵⁹ Created for the first time in the 1979 EAA, the QGL category reduced the number of license applications, which had threatened to overwhelm licensing agencies.⁶⁰ The Department of Commerce may require a QGL for export of goods or technology restricted by a multilateral treaty to which the United States is a party if the treaty does not require the signatories to approve the export.⁶¹ Thus, the QGL has brought substantial improvement in licensing procedures in cases in which an exporter makes multiple shipments of nonstrategic items to a controlled country.⁶²

The Commerce Department's Commodity Control List (CCL) specifies the type of export license required for a specific export to a given destination.⁶³ The CCL divides goods and technologies into export categories and indicates the country group level of control.⁶⁴ Today, there are seven country control groups into which all nations except Canada have been categorized.⁶⁵ The CCL organizes nations into two larger groups: "communist countries and countries to which exports are restricted by virtue of foreign policy controls."⁶⁶ Under the EAA of 1979, Congress directed the Secretary of Commerce to maintain an ongoing review of the foreign availability of commodities and technologies in-

58. *Id.*

59. See 50 U.S.C. § 2403(a)(3); see also Comment, *supra* note 24, at 268.

60. See Evrard, *supra* note 43, at 20.

61. *Id.* at 21; see also 50 U.S.C. § 2404(e)(3).

62. See Evrard, *supra* note 43, at 21.

63. 50 U.S.C. app. §§ 2403(b), 2404(c)(1) (1982).

64. See Overly, *Regulation of Critical Technologies*, *supra* note 12, at 435.

65. *Id.* "The Hyde Park Declaration of 1941, negotiated by President Franklin D. Roosevelt and Prime Minister Mackenzie King along with an Exchange of Notes in 1945, began a course of collaboration between the two countries relating to hemispheric defense. As a result, Canada and the United States have eliminated licensing in either direction for all exports except a few nuclear-related, communications countermeasures, and short-supply items. This unique relationship does not apply to any other U.S. ally." NATIONAL ACADEMY OF SCIENCES, *BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION* 82 (1987).

66. *Id.*

cluded on the CCL.⁶⁷ In addition, to facilitate the license review process the 1979 Act introduced the concept of indexing, a procedure whereby the Department of Commerce removes "particular commodities or technologies from the CCL [when] their export no longer represents a possible threat to United States national security."⁶⁸

C. *Export Controls*

In the 1979 EAA, Congress established four primary forms of export regulation: (1) national security controls; (2) foreign policy controls; (3) short supply controls; and (4) foreign boycott controls.

1. National Security Controls. Section 2404 of the EAA empowers the President to forbid "the export of any goods or technology in the interest of national security."⁶⁹ The 1979 EAA retains the approach of the 1969 EAA by providing that the destination country's communist or non-communist status is only one factor in determining whether a validated license should be granted.⁷⁰ Other considerations include: "(1) a country's present and potential relationship with the United States, (2) its present and potential relationship with countries friendly or hostile to the United States, and (3) its ability to control re-export of United States goods and technology consistent with United States foreign policy."⁷¹

The Act also establishes guidelines for the Executive when implementing the national security provisions. Most significantly, section 2403(c) requires that the President not impose export controls for foreign policy or national security purposes if he finds that there are no restrictions on the import of items of similar quality and quantity from foreign sources.⁷² If, based upon "adequate evidence", he concludes "that the absence of export control would prove detrimental to United States foreign policy or national security interests, he may impose controls."⁷³ The elasticity of the phrase "adequate evidence" and the enormous de facto authority it places in the hands of the Executive prompted significant limitations to this subsection in the 1985 amendments.

2. Foreign Policy Controls. Foreign Policy Controls serve three purposes. They (1) influence a nation to change behavior that the United States finds objectionable by imposing economic costs on the target of the

67. *Id.* at 436.

68. 50 U.S.C. app. § 2404(g) (1982); *see also* Overly, *supra* note 12, at 437.

69. 50 U.S.C. app. § 2404(a)(1); *see* Evrard, *supra* note 43, at 28.

70. *See* Evrard, *supra* note 43, at 28.

71. 50 U.S.C. app. § 2404(b); *see also* Evrard, *supra* note 43, at 28.

72. *See* Evrard, *supra* note 43, at 29.

73. *Id.*

controls; (2) punish a nation for such behavior by imposing costs; and (3) symbolically demonstrate displeasure with, or distance the United States from, a specific country or behavior by restricting United States exports.⁷⁴ The EAA of 1979 signaled the first legislative attempt to curtail the President's authority to control exports for foreign policy purposes.⁷⁵ Some leading commentators argue that the change was symbolic, rather than substantive.⁷⁶ Moreover, they argue that the President has imposed broad foreign policy controls since 1979 under the guise of national security controls, contradicting the apparent intent of the EAA.⁷⁷ The Act sets forth six criteria that the President must consider before imposing export restrictions on foreign policy grounds. These factors include: "(1) the probability that such controls will be effective. . .; (2) the compatibility with foreign policy objectives, such as control of terrorism. . .; (3) the reaction of other countries to the imposition or expansion of such controls; (4) the effect on exports, employment, production, and the reputation of the United States as a world supplier; (5) the ability of the United States to enforce such controls; and (6) the foreign policy consequences of not imposing such controls."⁷⁸

The Act requires only that the President consider these factors in implementing export controls. The Act does not require that the President draw a specific conclusion about any one of them. Moreover, the Act does not indicate that any one criterion should receive greater weight than any other. The executive, therefore, retains considerable discretion in making export policy. Failure to consider these six factors is a violation of the 1979 Act as an abuse of Presidential discretion, and Congress may direct the Executive to show that the six factors were considered.⁷⁹ The President, however, could satisfactorily answer the request while

74. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS ON EXPORT CONTROLS, ASSESSMENT OF COMMERCE DEPARTMENT'S FOREIGN POLICY REPORT TO CONGRESS 5 (Aug. 1986) [hereinafter GAO REPORT].

75. See Abbott, *Linking Trade to Political Goals: Foreign Export Controls in the 1970's and 1980's*, 65 MINN. L. REV. 739, 857 (1981).

76. See Berman, *The Export Administration Act: International Aspects*, in PROC. OF THE AM. SOC. OF INT'L L. 82, 84 (1980); see also Abbott, *supra* note 75, at 873. "By attempting simultaneously to restrain executive discretion and protect executive flexibility, the Act creates little more than hortatory restrictions and an additional administrative burden." *Id.*

77. See Overly, *supra* note 12, at 453. "This joinder of the President's authority to impose export controls for national security and foreign policy reasons blantly defeats the congressional intention behind the statutory separation of these bases of authority." *Id.*

78. See Evrard, *supra* note 43, at 33-34.

79. *Id.* at 35.

clearly evading the will of Congress to curb his discretion.⁸⁰

3. Short Supply Controls. To avoid "excessive drain" of domestic goods and to reduce inflation caused by foreign demand,⁸¹ section 2406 of the EAA empowers the President to impose export restrictions.⁸² The President may allocate a percentage of export licenses based on the equitable trade treatment given the United States by other countries and by their treatment of the United States in periods of short supply.⁸³

4. Foreign Boycotts. Section 2407 of the EAA of 1979 authorizes the Executive to draft regulations barring any United States person who engages in domestic or foreign commerce from joining boycotts imposed against a nation friendly to the United States and which is not the object of a boycott by the United States.⁸⁴ For example, this provision prevents Arab nations from requiring that United States companies forgo any business with Israel as a precondition to signing contracts with Arab governments.⁸⁵

80. The 1969 Act had virtually no language on foreign policy controls; Executive discretion was total. Perhaps partly because of this, the incidence of foreign policy controls has proliferated at an alarming rate. Some such controls are necessary, but it is not always clear that they are well thought through and effective. We thought it would be a good idea to make the President accountable for his use of such controls.

Bingham, *The Export Administration Act of 1979: A Congressional Perspective*, PROC. OF THE AM. SOC. OF INT'L L. 88, 91 (1980) (statement of Rep. Jonathan Bingham, Chairman, Subcommittee on International Economic Policy). However, Bingham foresaw how congressional intent could be easily subverted:

The problem is that we cannot tell the President, in the law, whether to call a given control a national security control or a foreign policy control. We can only tell him that he has to call it one or the other (or both), and that his exercise of that control then becomes subject to the legislative provisions governing that type of control. Thus the temptation is still there to call a control whatever it is convenient to call it, rather than what it is.

Id. at 93.

81. 50 U.S.C. app. § 2402(2)(c).

82. *Id.*, § 2406(a)(1).

83. *Id.* In addition, section 2406(c)(1) provides for a system of monitoring recyclable metallic items in short supply. Further, section 2406(d) of the Act prohibits the export of domestically-produced crude oil transported over the Trans-Alaskan pipeline. *See also* Evvard, *supra* note 42, at 35-38.

84. 50 U.S.C. app. § 2407(a)(1); *see also* Note, *Through the Antiboycott Morass to an Export Priority*, 9 GA. J. INT'L & COMP. L. 357 (1979).

85. *See* Note, *supra* note 84.

IV. THE 1985 EAAA: CUTTING RED TAPE FOR UNITED STATES EXPORTERS

The 1979 EAA promised to remove impediments to exports, yet, during the 1980s, business groups continued to attack the legislation and press for more narrowly defined and more consistently applied controls. Proponents of reform argued that lengthy turnaround times for license applications at the Department of Commerce deterred sales abroad and that many of these license applications were unnecessary.⁸⁶ Moreover, they pointed out that foreign policy controls had the perverse effect of devastating the balance sheets of United States businesses,⁸⁷ giving United States exporters a reputation for unreliability⁸⁸ and weakening their long term ability to compete in the world market.⁸⁹

Two trends converged during the mid-1980s that provided trade groups with the political leverage needed to force liberalization of some areas of export policy. First, as the trade deficit mounted each year, particularly in areas of traditional United States strength such as manufacturing,⁹⁰ Congress felt pressure to promote exports.⁹¹ Although studies

86. During fiscal year 1982, 98.8% of all export license applications were approved, prompting Sen. Jake Garn (R-Utah) to question how many of them were really necessary. See *Oversight on the Commerce Department's Fulfillment of its Responsibilities Under the Export Administration Act, Hearing on the Export Administration Act Before the Sen. Comm. on Banking, Housing and Urban Affairs, 98th Cong., 1st Sess. 2 (1983)* [hereinafter *Senate Banking Committee Hearings*].

87. The 1980 grain embargo against the USSR cost U.S. businesses more than \$40 billion and was a major catalyst in the decline of International Harvester Corp. It affected planting, rail transportation, grain storage facilities, agricultural equipment purchases, farm belt banking and insurance. See *Extension and Revision of EAA of 1979, supra* note 8, at 99 (statement of Kempton Jenkins, ARMCO, Inc. vice president).

For an especially vociferous attack on U.S. foreign policy controls, see the statement of Dresser Industries executive Ardon Judd contained in Chamber of Commerce Transcript, *supra* note 7, at 59. Judd commented that the irrationality of recent foreign policy controls brought to mind the Talking Heads' film "Start Making Sense."

88. See *Hearings on the Reauthorization of the Export Administration Act, supra* note 9, at 472 (statement of Lawrence McQuade, Emergency Committee for American Trade).

89. *Id.* at 280 (statement of James Gray of the National Machine Tool Builders Assn.) Specifically, Gray said that ". . .our own critical industrial base is imperiled because the economies of scale utilized by our COCOM-violating competitors allow them to not only capitalize on the export market, but also to flood our domestic markets with imports." *Id.*

90. See 3 Int'l Trade Rep. (BNA) 178 (Feb. 5, 1986).

91. See Chamber of Commerce Transcript, *supra* note 7, at 8 (statement of Roger Majak, Staff Director, House Subcommittee on International Economic Policy and

indicated that export controls accounted for only \$10-\$12 billion of lost business annually, legislators sought a means of increasing exports to prevent projected growing trade deficits.⁹² Indeed, some legislators saw export development as the sole means of achieving a merchandise trade balance without resorting to protectionist measures.⁹³ Second, policymakers argued that foreign policy controls aimed at human rights violators only assuaged American consciences, and did not effectively pressure unpalatable regimes to adopt more humane policies. For example, in December 1981, the Reagan Administration imposed export controls on pipeline equipment destined for the Soviet gas pipeline in reaction to martial law in Poland. In effect, however, the controls arguably damaged Caterpillar Corporation more than they effected changes for the Polish people.⁹⁴

A. *Streamlining the Export Licensing Process*

To answer exporters' concerns about excessive paperwork and lengthy delays, Congress in the 1985 EAAA addressed three key issues critical to expediting the export licensing process.

1. **Deadlines.** First, Congress enacted new and tighter deadlines for the Secretary of Commerce in processing license applications. Section 10(d) gives the Secretary ten days to respond to firms which have requested immediate and proper classification of an item or technology.⁹⁵ Section 10(c) of the EAAA reduces from ninety to sixty days the time in which the Commerce Department must issue or deny licenses, assuming it is not necessary to refer an application to any other agency for examination.⁹⁶ Should the Secretary need to refer an application to another agency, he must do so within twenty days instead of thirty, as previously

Trade).

92. *Id.*

93. *See id.* at 30 (statement of Congressman Don Bonker (D-Wash.))

The fact is that if we do not do something to bring down the trade deficit, we have no choice but to move down the path of protectionism. I happen to feel that we are in a trade crisis, but we are not yet at the end of the rope. We can still approach this problem in a positive way, through export promotion, through facilitating new marketing opportunities in the world, through removing some of the remaining impediments that make it difficult for us to compete effectively.

Id.

94. *See Extension and Revision of EAA of 1979, supra* note 8, at 77.

95. EAAA § 111(a)(3), *amending* EAA § 10(d) (codified, as amended at 50 U.S.C. app. § 2409(b) (1985)).

96. EAAA § 111(a)(2) *amending* EAA § 10(c) (codified as amended at 50 U.S.C. app. § 2409(f)(h) (1985)).

required.⁹⁷ That referral agency must issue its recommendations within twenty days after receipt of the application,⁹⁸ although it may request a twenty-day extension from the Secretary.⁹⁹ Once the Secretary receives those recommendations, he must issue or deny the license within sixty days, rather than ninety, as previously required.¹⁰⁰

In the event the Secretary does not meet the prescribed deadlines, an exporter may file a petition with the Secretary requesting compliance.¹⁰¹ If the Secretary does not begin processing the application within twenty days (formerly thirty) the applicant may seek injunctive relief in a United States district court.¹⁰² Whether the Commerce Department has sufficient personnel and resources to meet these deadlines remains to be seen. The major reorganization of the Department's Office of Export Administration (OEA), announced in August 1985, may, however, prove beneficial.¹⁰³ These changes, coupled with funding increases and greater accountability by the Department of Commerce, should expedite license processing.¹⁰⁴

2. Applicant's Rights. Section 10(f) provides that applicants may respond in writing to any Department of Commerce objections to proposed

97. EAAA § 111(b)(3), *amending* EAA § 10(e) (codified as amended at 50 U.S.C. app. § 2409(e)(1) (1985)).

98. EAAA § 111(b)(3)(B), *amending* EAA § 10(e)(3)(A) (codified as amended at 50 U.S.C. app. § 2409(e)(2) (1985)).

99. EAAA § 111(a)(2), *amending* EAA § 10(f)(1) (codified at 50 U.S.C. app. § 2409 (1985)). When the Secretary of Defense reviews applications concurrently under section 10(g), he has twenty days, as opposed to thirty previously, to notify the President that he disapproves of the issuance of a license. The President, in turn, has twenty days, to notify the Secretary of Commerce that the license should be denied. In cases where an item or technology requires COCOM review, the Secretary of Commerce may issue a license subject to that review and if COCOM does not reach a decision within forty days, instead of sixty as previously required, the Secretary's approval becomes final. *See* EAAA § 111(a)(1), (3), *amending* EAA § 10(g)(2)(c), 10(h) (codified as amended at 50 U.S.C. app. § 2409 (1985)); *see also* EAA § 10(j)(2) (codified at 50 U.S.C. app. § 2409 (1985)).

100. EAAA § 111(a)(3), *amending* EAA § 10(j)(2) (codified as amended at 50 U.S.C. app. § 2409 (1985)).

101. EAAA § 111(a)(3), *amending* EAA § 10(j)(3) (codified as amended at 50 U.S.C. app. § 2409 (1985)).

102. *See Major Reorganization of Controls Structure at Commerce Department Outlined by Archey*, 2 Int'l Trade Rep. (BNA) 1025 (Aug. 14, 1985).

103. *See Harris & Bialos, Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19. For details of the OEA reorganization, see 2 Int'l Trade Rep. (BNA) 1295-96 (Oct. 16, 1985). For regulations implementing the new deadlines, see 50 Fed. Reg. 48745 (1985).

104. EAAA § 111(c)(2)(A), *amending* EAA § 10(f)(2) (codified as amended at 50 U.S.C. app. § 2409 (1985)).

exports within thirty days after the Secretary informs them of the objections.¹⁰⁵ Alternatively, they may answer the objections in person by filing a written request to do so within fifteen days after receipt of the objections.¹⁰⁶ Under section 13(e), an applicant whose license has been denied may appeal within ninety days to an administrative law judge who will conduct proceedings to determine whether the export item is on the control list.¹⁰⁷ The Secretary then has thirty days after receiving the judge's determination to either affirm or vacate the ruling.¹⁰⁸ The Secretary's decision is final and is not subject to judicial review.¹⁰⁹ Although these provisions create a more efficient and structured OEA licensing process, the continued absence of judicial review of the Secretary's ultimate decision under the Administrative Procedure Act denies the applicant the benefits of appeal.

3. Small Business Needs. Section 10(m) directs the Secretary to develop plans to aid small businesses in wading through the export licensing quagmire.¹¹⁰ These plans include but are not limited to counseling and seminars on filing applications and identifying goods or technology on the control list.¹¹¹ Department of Commerce regulations attempt to reduce the burden of controls on small companies with limited resources and little experience as exporters.

B. *Decontrolling Less Sensitive Exports*

Section 5(b)(2) eliminates United States licensing requirements for exports of comparatively low technology items and processes to the fifteen COCOM member countries.¹¹² With one bold stroke, Congress elimi-

105. EAAA § 111(c)(2)(B), *amending* EAA § 10(f)(2) (codified as amended at 50 U.S.C. app. § 2409 (1985)).

106. EAAA § 114, *amending* EAA § 13(e) (codified as amended at 50 U.S.C. app. § 2412 (1985)).

107. *Id.*

108. *Id.*

109. EAAA § 111(e), *amending* EAA § 10(m) (codified as amended at 50 U.S.C. app. § 2409 (1985)).

110. *Id.*

111. One Defense Department official has suggested that the export control function should develop a public rule-making mechanism similar to that in the public securities area. A regular publication written in ordinary English should identify interpretive findings and rulings without identifying parties, he said. *See Defense Official Calls for Consolidated List of Controlled 'War Material' During Hearings*, 2 Int'l Trade Rep. (BNA) 1437-8 (Nov. 13, 1985).

112. EAAA § 105(b)(2), *amending* EAA § 5(b) (codified as amended at 50 U.S.C. app. § 2404 (1985)).

nated forty percent of the OEA's workload, reducing its annual rate of 125,000 license applications for review by 40,000-50,000.¹¹³ By deregulating export of less sensitive items to COCOM countries, Congress intended to enable the Commerce Department to "scrutinize more effectively high-technology [trading and] surreptitious transactions."¹¹⁴

C. *The Comprehensive Operations License*

The EAAA establishes a Comprehensive Operations License to benefit multinational corporations.¹¹⁵ The new license permits "exports and reexports of technology and related goods, . . . from a domestic concern to and among its foreign subsidiaries, affiliates, joint venturers, and licensees that have long-term, contractually defined relations with the exporter. . . ."¹¹⁶

This broad license, which supplants the need to obtain validated licenses for day-to-day transactions between related companies or offices of the same company, is aimed at reducing the degree to which United States export controls complicate common business operations or research and development activities of eligible multinational firms.¹¹⁷ The new license, therefore, encourages "cooperative innovation" and technology transfer within international companies doing business in the United States.¹¹⁸ The Comprehensive Operations License will not, however, be granted to all multinationals. In particular, it is not available for exports to the Soviet bloc and is available only when the Department of Commerce finds the applicant eligible following a detailed investigation.¹¹⁹ In a significant departure from past export policy, the EAAA requires the Department of Commerce to determine eligibility and to "grant the license to manufacturing, laboratory, or related operations on the basis of approval of the exporter's systems of control, including internal proprie-

113. 131 CONG. REC. H5060 (daily ed. June 27, 1985).

114. *Id.* See 2 Int'l Trade Rep. (BNA) 952, 953 (July 24, 1985).

115. EAAA § 104(a), amending EAA § 4(a)(2) (codified as amended at 50 U.S.C. app. § 2403 (1985)).

116. *Id.* One example of a low technology item is a personal computer. 131 CONG. REC. H5062 (daily ed. June 17, 1985). The change will also affect transmission equipment, radio relay equipment, machinery for aircraft manufacture, numerical control equipment, pumps, valves, wind tunnels and acoustic wave devices. See 2 Int'l Trade Rep. (BNA) 952, 953 (July 24, 1985).

117. See Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19.

118. See S. REP. NO. 170, 98th Cong., 1st Sess. 4 (1983).

119. See Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19.

tary controls, applicable to the technology and related goods to be exported rather than approval of individual export transactions."¹²⁰ This new requirement thereby allows the OEA to focus on the reliability of the licensee's internal control system instead of on the particularities of individual transactions.¹²¹

The EAAA provides a second new license to applicants who are ineligible for the Comprehensive Operations License or who determine the amount of goods they export does not warrant the burden of full procedures. Section 104 of the EAAA creates a Distribution License (DL) procedure allowing multiple export of goods to approved distributors abroad.¹²² The Secretary may grant a DL after determining the applicant's reliability and the likelihood that the foreign distributor will prevent the item or technology from falling into unfriendly hands.¹²³ As with the Comprehensive Operations License, the EAAA demands stringent eligibility requirements. Failure of a license holder or its consignees to meet required internal controls is grounds for suspension, limitation or revocation of the license.¹²⁴ If these controls are followed, however, the DL affords significant flexibility in making shipments without obtaining individual validated licenses.¹²⁵

D. Foreign Availability

Business interests persistently complain that the imposition of unilateral United States controls against an unfriendly nation is ineffective when the item or a technologically equivalent substitute is freely available on the world market. Certain provisions of the EAAA attempt to force the executive branch to consider foreign availability of items considered for embargo before an embargo is imposed. First, the EAAA amends section 4(c) of the EAA and directs the President to "give strong emphasis to bilateral or multilateral negotiations to eliminate foreign

120. EAAA § 104(a), amending EAA § 4(a)(2) (codified as amended at 50 U.S.C. app. § 2403 (1985)).

121. See S. REP. NO. 170, 98th Cong., 1st Sess. 4 (1983); see also Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 5.

122. EAAA § 104(a), amending EAA § 4(a)(2) (codified as amended at 50 U.S.C. app. § 2403 (1985)).

123. *Id.*

124. See generally Revision of Distribution License Procedure, 50 Fed. Reg. 21562, 21562 (1985) (to be codified at 15 C.F.R. 373).

125. *Id.* For an analysis of the new DL procedure, see Greenwald & Bialos, *Coping with the U.S. Export Controls: The Merits of the New Distribution License Procedure and the Mechanics of Corporate Compliance Programs*, 1 EXPORT TODAY (Fall 1985).

availability."¹²⁶ Further, it requires the Secretary of Commerce and the Secretary of Defense to cooperate in gathering information relating to foreign availability including, for example, establishing and maintaining a jointly-operated computer system.¹²⁷

Second, the EAAA amends the 1979 language on national security controls to require the Secretary to accept applicants' statements regarding foreign availability of controlled goods and technology unless contradicted by reliable evidence.¹²⁸ It directs the President to negotiate with nations which make their goods available to controlled destinations that are detrimental to United States national security to encourage them to prohibit such exports.¹²⁹ If after six months of negotiations foreign availability continues, the Secretary must allow export of the item unless the President, at his discretion, extends the negotiating period by twelve months.¹³⁰ After eighteen months, if foreign availability continues, the Secretary must eliminate the controls.¹³¹ Additionally, this provision requires the Department of Commerce to establish an Office of Foreign Availability and to report to Congress semiannually on that office's operation.¹³²

Third, the 1985 Act amends EAA section six language on foreign policy controls to require the President to evaluate foreign availability within six months of imposing restrictions.¹³³ In the EAAA, Congress also directed the Secretary to approve licenses for exports of goods or technology if those goods or technologies are available abroad in sufficient quantity so that denial of licenses would be ineffective in achieving the purposes of the controls.¹³⁴ The Act empowers the Secretary to re-

126. EAAA § 104(c), *amending* EAA § 4(c) (codified as amended at 50 U.S.C. app. § 2403(c) (1985)).

127. *Id.*

128. EAAA § 107(b), *amending* EAA § 5(f)(3) (codified as amended at 50 U.S.C. app. § 2404 (1985)). In making determinations of foreign availability, the Secretary may consider such factors as cost, reliability, the availability of spare parts, durability and scale of production. *Id.* "Evidence" for these purposes includes "foreign manufacturers' catalogues, brochures, operation or maintenance manuals, articles from reputable trade publications, photographs and depositions based on eyewitness accounts." *Id.*

129. EAAA § 107(c), *amending* EAA § 5(f)(4) (codified as amended at 50 U.S.C. app. § 2404 (1985)).

130. *Id.*

131. *Id.*

132. EAAA § 107(d), *amending* EAA § 5(f)(5) (codified as amended at 50 U.S.C. app. § 2404 (1985)).

133. EAAA § 108(g), *amending* EAA § 6(h) (codified as amended at 50 U.S.C. app. § 2405 (1985)).

134. *Id.*

move items or technology from the control list.¹³⁵ It further exempts from the foreign availability analysis export controls that are imposed to fulfill United States international obligations¹³⁶ and to further United States policy on terrorism.¹³⁷ Finally, the Act exempts crime control and detection equipment in order to further United States policy on human rights.¹³⁸

E. *Curbs on Presidential Discretion*

In response to criticism that the executive invokes foreign policy controls in a manner that circumvents regulations and imposes unfair costs on suppliers, Congress in the EAAA attempted to narrow the executive's authority to impose such restrictions. Accordingly, the EAAA states certain requirements that must be met before the President may impose foreign policy controls. The President must: (1) consult with and seek advice from affected United States industries "in every possible instance";¹³⁹ (2) consult with nations with which the United States cooperates in export control matters;¹⁴⁰ and (3) consult with and report to Congress regularly.¹⁴¹

In his deliberations, the President must consider several factors. In particular, he must consider whether controls will achieve their intended purposes; whether controls will be compatible with United States foreign policy goals; whether the reaction of other nations to the controls will be positive; whether the controls on United States exports will enhance performance; and whether the United States is capable of enforcing the controls.¹⁴² If the President imposes foreign policy controls without meeting these requirements, those controls will be ineffective unless Congress au-

135. *Id.*

136. EAAA § 108(h), *amending* EAA § 6(i) (codified as amended at 50 U.S.C. app. § 2405 (1985)).

137. EAAA § 108(i), *amending* EAA § 6(j) (codified as amended at 50 U.S.C. app. § 2405 (1985)).

138. EAAA § 108(j), *amending* EAA § 6(k) (codified as amended at 50 U.S.C. app. § 2405 (1985)).

139. EAAA § 108(c), *amending* EAA § 6(c) (codified as amended at 50 U.S.C. app. § 2405 (1985)).

140. EAAA § 108(d), *amending* EAA § 6(d) (codified as amended at 50 U.S.C. app. § 2405 (1985)).

141. EAAA § 108(e), (f), *amending* EAA § 6(f) (codified as amended at 50 U.S.C. app. § 2405 (1985)).

142. EAAA § 108(b), *amending* EAA § 6(b) (codified as amended at 50 U.S.C. app. § 2405 (1985)).

thorizes them by joint resolution.¹⁴³ Reacting specifically to the Carter Administration's controversial 1980 Soviet grain embargo, Congress singled out agricultural commodities for special protection from presidential export control authority. By amending section seven of the EAA, Congress prohibited the President from imposing an embargo of farm exports lasting longer than sixty days unless Congress enacts a joint resolution of approval.¹⁴⁴

F. *Scientific Communications*

Faced with congressional efforts to limit the studies of visiting Eastern European scholars doing research in the United States¹⁴⁵ and Reagan Administration attempts to "limit or otherwise chill normal and essential scientific communication,"¹⁴⁶ Congress inserted language in the 1985 Act to prevent further erosion of academic exchanges between East and West. As amended, section 3(12) states that it is United States policy to sustain vigorous scientific enterprise by promoting free circulation of research findings by publication, teaching and conferences.¹⁴⁷ More concretely, under the 1985 amendments, colleges, universities and other educational institutions, unlike domestic corporations, need not report to the Department of Commerce any agreements they sign with a government agency of a controlled nation intended to result in the export of unpublished technical information of United States origin.¹⁴⁸

G. *Analysis*

The specific methods by which EAAA attempts to reduce the burden of export controls may be usefully divided for purposes of analysis into two categories: (1) mechanical changes in export license procedure, and

143. EAAA § 108(O)(1), *amending* EAA § 6(o) (codified as amended at 50 U.S.C. app. § 2405 (1985)). The Constitution invested Congress rather than the President with the plenary authority to regulate foreign commerce. *See* U.S. CONST., art. 1, § 8. Thus, the executive's only power to control exports derives from acts of Congress such as the EAA.

144. EAAA § 110(d), *amending* EAA § 7(g)(3) (codified as amended at 50 U.S.C. app. § 2406 (1985)).

145. *See Hearings on the Export Administration Act before the Sen. Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. 6-15 (1983) (statement of Sen. Cohen).

146. H.R. REP. NO. 257, pt. I, *supra* note 2, at 15.

147. EAAA § 103(5), *amending* EAA § 3(12) (codified as amended at 50 U.S.C. app. § 2402 (1985)).

148. EAAA § 105(g), *amending* EAA § 5(j) (codified as amended at 50 U.S.C. app. § 2404 (1985)).

(2) limitations on executive latitude in imposing foreign policy and national security controls. The mechanical changes such as tightening deadlines, eliminating controls on low-technology exports to COCOM countries, and adopting the comprehensive operations license significantly aid United States exporters. Tightly crafted and therefore difficult to recharacterize, these measures, if accompanied by additional Department of Commerce funding, might provide the relief for which trade groups have been calling.

The new congressional limitations on presidential power, such as the applicants' rights provisions, the foreign availability language, and the 1985 language on consultation before imposing foreign policy controls, do not provide similar benefits. By requiring the President to run a gauntlet of nettlesome procedures and lengthy discussions with business leaders, allies, and legislators in order to impose export controls, Congress invites him to circumvent the entire process by recharacterizing his actions as national security controls.¹⁴⁹ Under normal circumstances Congress could challenge this recharacterization. Given that issues of foreign policy and national security invariably overlap and that in a crisis following an international incident Congress and the public have traditionally deferred to the acts of a decisive President, there seems to be little likelihood that Congress would challenge the President's characterization in that instance.¹⁵⁰ In an emergency, the President holds the trump card — the argument that continued trade with an unfriendly power will undermine the national defense.

149. *Accord* Bingham, *supra* note 80, at 93. A key cost of controls stems from their impact on technological advances. To the extent that a nation's technological preeminence is the result of continuing innovation prodded by market forces, controls aimed at protecting that technology will also isolate it and inhibit further innovation. This is particularly true in the case of controls on scientific communications. Thus, extraordinary protection of technology for national security purposes may achieve exactly the opposite long term result from that intended. BUSINESS HIGHER EDUCATION FORUM, EXPORT CONTROLS: THE NEED TO BALANCE NATIONAL OBJECTIVES 15 (1986) [hereinafter EXPORT CONTROLS].

Given the large number of foreign graduate students studying in the U.S., controls on scientific communications would fundamentally alter the behavior of the nation's scientific community. Approximately 23% of the graduate students in U.S. universities are foreign, and the figures are even higher in scientific and technical fields. For example, 43% of the graduate students in engineering are foreign nationals. *Id.* at 34.

150. *See Emergency Controls on International Economic Transactions: Hearings Before House Comm. on Int'l Rel. Subcomm. on Int'l Econ. Pol'y & Trade*, 95th Cong., 1st Sess. 21-26 (1977) (statement of Prof. Harold G. Maier); *id.* at 16-19 (statement of Prof. Andreas F. Lowenfeld); *see also* *Regan v. Wald*, 468 U.S. 222, 244 (1984) (Blackmun, J., dissenting).

V. THE 1985 EAAA: STRENGTHENED ENFORCEMENT OF UNITED STATES EXPORT CONTROLS

At the same time that Congress heard testimony from business leaders claiming that Department of Commerce export procedures were crippling domestic industry, it received alarming reports that erratic enforcement of these same procedures was allowing the Soviet bloc to obtain United States high technology secrets for military use. According to United States intelligence, Soviet acquisition of technology secrets during the 1970s and early 1980s, either legally or through evasion of controls, narrowed the technology gap with the West in some areas from ten years to within two years.¹⁵¹

Soviet intercontinental ballistic missiles, for example, are far more accurate today because of advanced Western machinery that permitted the Soviets to manufacture precision ball bearings for gyroscopic guidance mechanisms.¹⁵² The Kama River truck plant, built with Western technology and United States export licenses, supplies transport vehicles for Soviet troops in occupied Afghanistan.¹⁵³ The Soviet RYAD computer series is in large part copied, even down to its repair manuals, from IBM 360 and 370 mainframe computers stolen from the West in 1972.¹⁵⁴ Exact copies of the Texas Instruments 54 74 microchip serve as

151. See *Extension and Revision of EAA of 1979*, *supra* note 8, at 197 (statement of Richard Perle, Assistant Secretary for International Security Policy, Defense Department).

152. *Id.* at 201 (statement of William Schneider, Jr., Under Secretary for Security Assistance, Science and Technology, State Department). According to Perle, the United States will have to spend between \$30 and \$50 million on the MX missile as a result of improved Soviet missile accuracy. See Cokerell, *How the Soviets Are Acquiring Western High Technology*, *Wall St. J.*, May 3, 1983, reported in *Extension and Revision of EAA of 1979*, *supra* note 8, at 1358-59. Assertions that the sale of U.S. precision grinding machines to the Soviet Union allowed the production of miniature ball bearings used in missile guidance systems, with the result that the Soviet Union substantially improved its missile accuracy, have been challenged. It was later acknowledged that precision grinding machines adequate to meet the needs of Soviet missile designers were available in several foreign countries, including Switzerland, which does not generally impose any restriction on the export of such items to the Soviet Union. Moreover, the CIA has stated that even Soviet grinding machines could have produced the required bearings. For the view that Pentagon fears have been overblown, see EXPORT CONTROLS, *supra* note 149, at 11. For recent evidence that large scale diversion of high technology to the Eastern Bloc is continuing, see *U.S. Investigating Loss of Computers*, *N.Y. Times*, Oct. 10, 1986, at A1, col. 1. See also *Swedish Firm Agrees to a \$440,000 Penalty for Participating in Computer Re-Exports*, 3 *Int'l Trade Rep. (BNA)* 615 (May 7, 1986).

153. See *Extension and Revision of EAA of 1979*, *supra* note 8, at 201.

154. *Id.*

command and control equipment for the Soviet Strategic Rocket Forces.¹⁵⁵ In sum, the USSR has been able to significantly enhance more than 150 of its weapons systems with Western, and primarily United States, high technology.¹⁵⁶

This conclusion disturbed Congress, especially because the United States has long relied on the technological superiority of its weapons to counterbalance the quantitative superiority of Warsaw Pact forces.¹⁵⁷ Confronted with these findings, Congress attempted to shore up enforcement of export controls in the 1985 amendments by: (1) reanimating the moribund Coordinating Committee; (2) creating a series of new crimes; (3) imposing tougher sanctions on violators; and (4) augmenting enforcement authority.

A. *Enhancing COCOM*

The EAAA amends section 5(i) and requires the Executive to negotiate with COCOM member states to strengthen COCOM's controls and seek full compliance by all members.¹⁵⁸ The Executive must also seek agreement to improve COCOM's Control List; upgrade COCOM's facilities, translation services, communications network and Paris staff; adopt uniform penalties; and increase on-site inspections by national enforcement authorities of COCOM members to ensure that the ultimate purchasers of shipments approved by COCOM are complying with its requirements.¹⁵⁹

155. *Id.* at 1359.

156. *Id.*

157. 131 CONG. REC. S.8924 (daily ed. June 27, 1985) (statement of Sen. William Proxmire). The USSR's systematic effort to acquire Western technology has saved it the equivalent of 100,000 man years in research. More than 300 firms in over 30 countries have been involved in Soviet-sponsored diversions, with most of the benefit going to the Soviet microelectronics industry, where the Western lead narrowed from more than ten years in the mid 1970s to about five years in 1985. *See* Soviet Acquisition of Militarily Significant Western Technology: An Update (Defense Department Intelligence Report) (copy on file at the Vanderbilt Journal of Transnational Law). For an account of the attempted transshipment of highly advanced VAX 11-782 computers through Sweden to the USSR in 1982, see Overly, *supra* note 12, at 447. *See generally* CORSON & CROWLEY, *THE NEW KGB* (1985).

158. EAAA § 105(f), *amending* EAA § 5(i) (codified as amended at 50 U.S.C. app. § 2404 (1985)).

159. *Id.* The congressional support shown for COCOM in the EAAA ratifies earlier Presidential initiatives, including a ministerial-level COCOM meeting in January 1982, the first since the late 1950s. *See Hearings on the Reauthorization of the Export Administration Act, supra* note 9, at 178. (statement of William Schneider, Undersecretary of State for Security Assistance, Science and Technology). Section 5(k) of the EAA, as

B. *New Crimes*

To permit United States officials to crack down on complex subterfuge, the EAAA lists several new offenses. Under EAAA it is a crime to possess goods or technology with the intent to export them in violation of United States national security or foreign policy export controls or to possess them with knowledge or reason to believe that such articles will be illegally exported.¹⁶⁰ The EAAA also provides that any person who "takes any action with the intent to evade [the EAA] or any regulation, order, or license issued" thereunder may be criminally liable.¹⁶¹ The 1985 measure plugs a prior loophole in the law by making it a crime to transfer sensitive items to embassies and affiliates of controlled countries, and to any companies, organizations or entities owned or controlled by those regimes.¹⁶² Finally, the new Act makes any person convicted of violating sections 793, 794 and 798 of the EAA (Title 18),¹⁶³ section 783(b) of the Internal Security Act of 1950¹⁶⁴ or section 38 of the Arms Control Export Act¹⁶⁵ ineligible for any export license for ten years.¹⁶⁶

amended in 1985, provides that if non-COCOM countries agree to COCOM-like controls they can receive COCOM-like controls treatment. In February 1986 Switzerland enacted a new export control law empowering officials to inspect products moving through the country in transit and to require proof that the foreign products' licenses allow further export; Sweden created similar controls four months later, and Austria has a new export control law as well, although court action is needed there to inspect items in transit. U.S. officials trace the "dramatic" improvements in European export control to fear among European nations that they will be discriminated against in international high technology trade. U.S. officials are encouraging Pacific Rim countries to take similar action. 3 Int'l Trade Rep. (BNA) 892-3 (July 9, 1986); *see also* 51 Fed. Reg. 22,503 (1986).

160. EAAA § 112(b), *amending* EAA § 11(b) (codified as amended at 50 U.S.C. app. § 2410(b)(3) (1985)).

161. *Id.* at § 2410(b)(4).

162. EAAA § 105(a), *amending* EAA § 5(a)(1) (codified as amended at 50 U.S.C. app. 2404(a)(1)). *See also* 131 CONG. REC. S.8923 (daily ed. June 27, 1985) (statement of Senator Jake Garn).

163. 18 U.S.C. §§ 793, 794, 798.

164. 50 U.S.C. § 783(b).

165. 22 U.S.C. § 2778.

166. EAAA § 112(e), *amending* EAA § 11 (codified as amended at 50 U.S.C. app. § 2410 (1985)). The acting Director of the Office of Export Enforcement, Anstruther Davidson, commented that the previous inability to deny export privileges to someone who has been convicted of crimes other than the Export Administration Act

was noted as [a] gaping hole in the previous act, when the firm of Polampco, a firm . . . in Chicago — I think it was a trading company for Poland — was alleged to have a bunch of Polish spies in it and had been involved in a basic garden variety spy case out in California. It did not have its export privileges

Section 112(a) of the EAAA is of key importance for prosecutors. It lists general provisions for violations, adds a conspiracy provision, and avoids any requirement of specific intent.¹⁶⁷ In addition, the EAAA amends EAA section 11(b); the EAA required a knowing involvement in an export transaction in violation of the law or regulations.¹⁶⁸ Section 112(b) of the EAAA removes all specific reference to exports in the EAA.¹⁶⁹ Prosecutors can, therefore, reach violations of the regulations that have a significant impact on enforcement but do not relate to an individual export.¹⁷⁰ Congress left intact section 11(b)(1) which imposes severe civil and criminal penalties on violators, including fines of up to five times the value of the goods or one million dollars for a corporate violation.¹⁷¹ In addition, the section provides for penalties of up to ten years in prison and fines of up to \$250,000 for individuals.¹⁷²

C. Tougher Sanctions

To complement the list of new crimes, Congress added two important sanctions that courts or the Department of Commerce may levy against export control violators. First, any individual criminally convicted of violating national security export controls must, in addition to any other remedy, forfeit to the United States all of his interest in: (1) the tangible items or goods that were the subject of the violation; (2) any other tangible property used in the illegal export transaction; and (3) any proceeds received either directly or indirectly from the violation.¹⁷³

denied because it had not violated the Export Administration Act.

See Chamber of Commerce Transcript, *supra* note 7, at 36.

167. EAAA § 112(a), *amending* EAA § 11(a) (codified as amended at 50 U.S.C. app. § 2410(a) (1985)); see also Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19.

168. EAAA § 11(b) (codified at 50 U.S.C. app. § 2410 (1985)).

169. EAA § 112(b), *amending* EAA § 11(b) (codified as amended at 50 U.S.C. app. § 2410 (1985)).

170. See Chamber of Commerce Transcript, *supra* note 7, at 39. (statement of Cecil Hunt, Asst. Gen. Counsel for Export Administration, Commerce Dep't).

171. EAA § 11(b)(1)(A) (codified at 50 U.S.C. app. § 2410(b) (1985)).

172. EAA § 11(b)(1)(B) (codified at 50 U.S.C. app. § 2410(b) (1985)). Hunt commented that:

the reason we wanted to get such crimes [conspiracy, attempts or evasion] defined in the statute is because we've found U.S. attorneys around the country timid or unwilling to bring counts based on attempts and conspiracy charges, which have been defined in the regulations as offenses for some time. They feel more comfortable if you have statutorily defined crime.

See Chamber of Commerce Transcript, *supra* note 7, at 39.

173. EAAA § 112(d), *amending* EAA § 11(e) (codified as amended at 50 U.S.C.

Second, and far more important, any individual who violates any national security export controls may be barred by a presidential order from importing goods into the United States.¹⁷⁴ The EAAA further empowers the President to deny entry into the United States market to any person who violates a multinational agreement to which the United States is a party if: (1) negotiations with the nation having jurisdiction over the violator are unsuccessful; (2) the President notifies other parties to the agreement of his plans to impose sanctions within sixty days; and (3) a majority of those parties concur with the proposed controls.¹⁷⁵ The severity of these new provisions may curtail their implementation by the Department of Commerce, which will use them for only the most grave violations of the export laws such as the diversion of militarily important technology to the Soviet bloc.¹⁷⁶

D. Increased Enforcement Authority

Finally, the EAAA provides the Department of Commerce with greater authority and resources to enforce United States export controls. In EAAA, Congress amended EAA section 18 to increase appropriations for export control and to require the Department of Commerce to earmark specific funds for enforcement and foreign availability assessments.¹⁷⁷ Moreover, the 1985 Amendments authorize the Department of

app. § 2410 (1985)); see also Harris & Bialos, *Congressional Balancing Act Benefits Exports*, *supra* note 2, at 17-19. According to Sen. Garn, the forfeiture provision was modeled on that contained in the RICO statute. See 131 CONG. REC. S.8923 (daily ed. June 27, 1985). Roger Urbanski, Director of Strategic Investigations in the United States Customs Service, observed that the new provision "allows us to seize the assets that are obtained by violators as they engage in violations of the law. That includes their boats, houses or whatever they might purchase. . . ." See Chamber of Commerce Transcript, *supra* note 7, at 54.

174. EAA § 121, *amending* the Trade Expansion Act of 1962 (TEA) (codified as amended at 19 U.S.C. § 1861 et seq. (1985)).

175. *Id.* Sen. Garn said on the Senate floor:

In effect, we will be telling [violators], choose your market, the American or the Soviet. When you think what a ruble will buy you these days, I do not think that the choice will be a hard one. Without this provision . . . we have the ridiculous situation where companies are profiting from the enormous American market while at the same time undermining our security by selling sensitive goods and technology to our adversaries.

See 131 CONG. REC. S.8923 (daily ed. June 27, 1985). For the extraterritorial significance of this new provision, see discussion in section IV.A, *infra*.

176. See Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19.

177. EAAA § 119, *amending* EAA § 18 (codified as amended at 50 U.S.C. app. §

Commerce to search, detain and seize goods and technology at points of entry or exit from the United States in enforcing export controls.¹⁷⁸ To facilitate this role, Congress empowers the Department of Commerce officials, for the first time, to execute judicial search warrants, make warrantless arrests when there is "probable cause" of a violation, and carry firearms.¹⁷⁹ To emphasize the increasing importance of effective export control, Congress created the new position of Undersecretary of Commerce for Export Administration to direct the Department of Commerce's export activities.¹⁸⁰

E. *Analysis*

Of the four general measures that Congress passed to restrict Soviet access to United States know-how, the most potentially effective are the conspiracy provision and the forfeiture provision modeled after RICO. With its tentacular reach and weak evidentiary requirements compared to other offenses, the conspiracy charge should afford prosecutors greater leverage in their efforts to convict smugglers and other violators. The forfeiture language will permit Customs and Department of Commerce officials to fine violators and prevent the recurrence of their illegal activities.¹⁸¹ Denial of licenses to violators of export control and espionage laws should also aid enforcement authorities.

The other provisions — enhanced COCOM activity and a wider Department of Commerce enforcement rule — may ultimately prove less effective. Although European governments expelled unprecedented numbers of Soviet espionage agents acting as diplomats in recent years, those governments remain skeptical of United States motives following the 1982 Siberian Oil Pipeline fiasco.¹⁸² The wider Department of Com-

2417 (1985)).

178. EAAA § 113(a), *amending* EAA § 12(a) (codified as amended at 50 U.S.C. app. § 2411(a) (1985)).

179. *Id.*; see also Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19.

180. EAAA § 116(a), *amending* EAA § 15 (codified as amended at 50 U.S.C. app. § 2414 (1985)). The new undersecretary will assume responsibilities formerly delegated to the lower ranking Assistant Secretary of Commerce for Trade Administration. *Id.*

181. The conspiracy and forfeiture provisions may prove to be well crafted weapons against smugglers' use of large numbers of shell corporations, each of which would have to be shut down in order to halt a smuggling operation. For an account on how one West German made more than \$18 million on profits using shell corporations to smuggle high tech equipment from Silicon Valley to Zelenograd, the Soviet microelectronics center outside Moscow, see Cockerell, *supra* note 152, at 1358.

182. See generally, Moyer & Mabry, *Export Controls as Instruments of Foreign*

merce enforcement powers may create even greater friction with the Customs Service than in the past because the Act does not clearly demarcate the duties accorded each agency. Ultimately, as one former Russian microelectronics engineer commented, all controls will fail when confronted with large numbers of citizens whose greed exceeds their sense of national loyalty.¹⁸³

VI. UNRESOLVED CONTROVERSIES

The EAAA is as notable for the critical issues Congress sidestepped or ignored as for those it faced squarely. The issues that stymied its passage during two years of bitter dispute are the ones in which the dual goals of improving poor United States export performance and halting Soviet technology theft most openly clashed. In each area of dispute — contract sanctity, the extraterritorial impact of controls, the Department of Defense's role in export control and South Africa sanctions — Congress' indecision cedes authority to resolve each controversy to the President.

A. *Contract Sanctity*

A major controversy growing out of the 1982 Soviet pipeline incident concerned the extent to which United States export controls may be retroactively imposed so as to abrogate existing contracts.¹⁸⁴ Under the pipeline regulations the Department of Commerce barred "re-exports of goods manufactured from U.S. technology for use on the pipeline even though such technology was not subject to export controls when it initially left the United States."¹⁸⁵ The Department of Commerce consequently forced foreign companies to choose between: (1) breaking existing agreement to re-export such goods to the USSR for use on the pipeline; or (2) adhering to the agreements and thereby violating United States export controls.¹⁸⁶ Under enormous pressure from the business community, the Senate and House bitterly debated proposed limitations on the President's authority to place exporters in this dilemma.¹⁸⁷ The Senate favored guaranteed contract sanctity, but the House supported

Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases, 15 LAW & POL'Y INT'L BUS. 1 (1983).

183. "What must be done is to change the human nature of the businessmen in the West. That's impossible, I believe." See Cockerell, *supra* note 152, at 1361.

184. See Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19.

185. *Id.*

186. *Id.*

187. *Id.*

broader presidential power to order retroactive controls in certain circumstances.¹⁸⁸

Worn down by argument, Congress reached a compromise forbidding imposition of foreign policy controls on exports already under contract unless the President certifies to Congress that "(a) 'a breach of the peace poses a serious and direct threat to the strategic interest of the [U.S.]; (b) the 'prohibition or curtailment of such contracts . . . will be instrumental in remedying the situation posing the direct threat'; and (c) 'the export controls will continue only so long as the direct threat persists'."¹⁸⁹ But what does the critical phrase "breach of the peace" mean? The Conference Report did not attempt to define the term and the legislative history is inconsistent.

The legislative history of EAAA, while ambiguous, does indicate that two general views emerged. Senator John Heinz, who claims to have written the "breach of the peace" compromise language, argued that the term must be narrowly construed to forbid sanctions "except in the most extreme circumstances."¹⁹⁰ Later the same day, Senator William Proxmire challenged Heinz's characterization of the phrase, saying he preferred a broader definition supported by legal history, Supreme Court decisions and international law.¹⁹¹ Representative Howard Berman, who also adopted the broader interpretation, stated that the courts refer to threats of danger as well as to actual violence. They would therefore apply "breach of the peace" to acts of terrorism, gross violations of human rights and nuclear weapons tests.¹⁹²

Regardless of the correct definition, the contract sanctity provision has no application to new export controls that are justified on grounds of

188. *Id.*; see also S. REP. NO. 170, *supra* note 120, at 13; H.R. 3231, 98th Cong., 2d Sess. § 111(a) (1985).

189. *Id.*; see also EAAA § 108(1), *amending* EAA § 6 (codified as amended at 50 U.S.C. app. § 2405 (1985)).

190. 131 CONG. REC. S.8922 (daily ed. June 27, 1985). Heinz later discussed his views in greater detail at a U.S. Chamber of Commerce conference: "[I]n my view, what breach of the peace is, or is not, is less important than establishing that it is, above all and manifestly, an *event*, an action — not a threat, not a worry, not a vague fear — an event." Chamber of Commerce Transcript, *supra* note 7, at 3. He added, "When the President signed the bill, in addition to using the word 'compromise' three times in the first twelve lines . . . he acknowledged the contract sanctity provisions' significance when he said . . . 'This provision will allow U.S. exporters to be perceived as more reliable suppliers.'" *Id.* at 4.

191. 131 CONG. REC. S.8926 (daily ed. June 27, 1985) (statement of Sen. Proxmire); see also 130 CONG. REC. H.12167 (daily ed. Oct. 11, 1984).

192. 130 CONG. REC. H.12167 (daily ed. Oct. 11, 1984).

national security.¹⁹³ Furthermore, the President is not constrained by the terms of prior contracts if he imposes export sanctions under the International Economic Emergency Powers Act, as he did with respect to Nicaragua in May 1985 and to Libya in January 1986.¹⁹⁴ Because the majority of United States exports are controlled on national security grounds, the foreign policy language fades in significance.¹⁹⁵ In essence, Congress presented the business community with a pyrrhic victory.¹⁹⁶

B. *The Extraterritoriality Quandary*

The 1979 EAA authorizes the President to "prohibit or curtail the exportation of any goods, technology or other information subject to the jurisdiction of the United States. . . ."¹⁹⁷ The statute does not define the term "person subject to the jurisdiction of the United States," but regulations issued under the EAA have defined it to include among others non-United States citizens located outside the United States.¹⁹⁸

Almost every United States attempt to assert extraterritorial jurisdiction, whether under the 1979 Act or under its predecessors, has generated significant international friction. Early jurisdictional disputes arose in connection with United States embargoes of the People's Republic of China and Cuba, which applied to foreign subsidiaries of United States companies under the Trading with the Enemy Act. In 1965 a French court of appeals approved the appointment of a temporary administrator for the French subsidiary of Fruehauf Corporation, a United States corporation, so that the French firm could fulfill its agreements to build trucks for delivery to China. Likewise in 1973, the Canadian Government pushed United States directors of MLW-Worthington, Ltd., a Montreal-based United States subsidiary, to resign so the firm would no longer be subject to United States jurisdiction and could ship locomotives to Cuba.¹⁹⁹

193. Ellicott, *The Export Administration Amendments Act of 1985*, 1 INT'L BUS. & TRADE REP. 4, 10 (Sept. 1985).

194. *Id.*

195. *Id.*

196. See Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19.

197. EAA § 5(a)(1) (codified at 50 U.S.C. app. § 2405(a) (1985)).

198. For example, the regulations governing the 1980 embargo of grain sales to the USSR applied to the export and re-export of United States origin grain by foreign companies. 15 C.F.R. 376.5 (repealed 1981); see also *Extension and Revision of EAA of 1979*, *supra* note 8, at 43 (statement of Richard Kahler, Emergency Committee for American Trade).

199. See *Extension and Revision of EAA of 1979*, *supra* note 8, at 131-2 (statement

Although the United States did not press its assertion of extraterritorial jurisdiction in these early conflicts, recent disputes have been more acrimonious. In June 1982, the Department of Commerce issued regulations under the 1979 EAA banning the sale of oil and gas industry equipment to the USSR by foreign companies owned or controlled by United States firms.²⁰⁰ Although the Reagan Administration ultimately dropped the restrictions, this broad assertion of United States jurisdiction provoked outrage among European governments and business groups. A European Community memorandum characterized the regulations as "an unacceptable interference in the affairs of the European Community" and a violation of international law.²⁰¹ A number of governments invoked measures to compel United States foreign operations to honor existing contracts. Ultimately the District Court of the Hague held that, under international law, the United States could not regulate such agreements.²⁰²

Despite serious opposition by foreign governments to the language in EAA section 5(a) permitting extension of United States jurisdiction abroad,²⁰³ Congress took no actions in the 1985 Amendments to restrict

of Richard W. Roberts, President, National Foreign Trade Council).

200. *Id.* at 132; *see also* 47 Fed. Reg. 27,250-52 (daily ed. June 24, 1982). *See generally*, Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL. INT'L BUS. 1 (1983).

201. *See Extension and Revision of EAA of 1979, supra* note 8, at 132.

202. *Id.* Section 27, RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, states that a "corporation or other private legal entity has the nationality of the state which creates it." Section 40 of the Restatement states "[w]here two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction. . . ." Factors that should be considered include "the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, the extent to which the required conduct is to take place in the territory of the other state, and the nationality of the person. . . ." *Id.*

The legality of the controls faced judicial challenge, but no court reached a decision on the merits. *See Dresser v. Baldrige*, No. 82-2385, slip op. (D.D.C. Nov. 10, 1983) (denying request for a preliminary injunction against the imposition of sanctions); *Dresser Industries, Inc. v. Baldrige*, 549 F. Supp. 108 (D.D.C. 1982) (denying temporary restraining order against the imposition of sanctions for violations of the pipeline regulations). *See generally* Note, *High Technology Warfare: The Export Administration Act Amendments of 1985 and the Problem of Foreign Exports*, 18 N.Y.U. J. INT'L L. & POL. 663 (1986).

203. *See* Letter from French Ambassador Bernard Vernier-Palliez to Rep. Don Bonker (March 16, 1984), *reprinted in Revision and Extension of EAA of 1979, supra*

the reach of United States jurisdiction overseas. Furthermore, some provisions of the EAAA further extend United States jurisdiction abroad. These include both the President's authority to impose import restrictions on foreign companies that contravene United States export policy and the Department of Commerce's requirement that license applicants create internal security control systems subject to periodic government audits and investigations.²⁰⁴

C. *The Department of Defense's Role in Export Control*

The EAAA is silent on another ambiguity in export regulation: whether the Department of Defense is authorized to review export license applications for United States shipments to Western nations, referred to as "West-West" trade. Trade industry critics have long charged that the Department of Commerce inefficiency slows down the license review process and costs exporters business.²⁰⁵ Yet as evidence of massive diversion of United States technology to the USSR mounted during the 1980s, Department of Defense analysts also argued that the Department of Commerce was failing to enforce national security controls. Some

note 8, at 1872; *see also id.* at 1895; Diplomatic Note from Embassy of Australia to the State Department (May 20, 1983).

204. One proposal which has drawn complaints from the European Community is the "gold card" concept, which would make available a general license for certified end-users allowing selected entities to receive items without a validated license. In a protest filed with the Reagan Administration Aug. 18, 1986, the EC called the proposal a "relevant step" toward improving the transfers of goods and technology under the Export Administration Regulations but stated it would impose extraterritorial United States controls that are "unacceptable." 3 Int'l Trade Rep. (BNA) 1054 (Aug. 20, 1986). The EC particularly objected to the requirement that gold card holders obtain United States authorizations for sales of United States goods to non-gold card firms because this would mean on some occasions a resale license would be needed for sales between firms in a European Community member state. In addition, the note said that the Community could not see the justification for the proposals not authorizing gold cardholders to incorporate United States parts or components into foreign made products for resale or re-export and said the proposal "maintains an unjustifiable discrimination against" Ireland, not a member of COCOM "but which applies a rigorous policy of export controls." *Id.* Industry groups in the United States have also attacked the gold card proposal, arguing that the list of eligible countries is too short, that it does not help firms which cannot use distribution licenses and still need a way to sell products to agents for resale, and that its record keeping requirements and U.S. government monitoring will provoke resistance abroad. 3 Int'l Trade Rep. (BNA) 1102 (Sept. 10, 1986). The gold card proposed regulations are published at 51 Fed. Reg. 22,826-29 (June 23, 1986). Some nations have acceded to U.S. requests to tighten their export control laws. *See Neutral Nations Guard American Technology To Gain Import Rights*, Wall St. J., Jan. 15, 1987, at 1, col. 6.

205. 2 Int'l Trade Rep. (BNA) 1438 (Nov. 13, 1985).

members of Congress complained that effective enforcement of controls is impossible when that responsibility is entrusted to a bureaucracy closely allied with the business it regulates.²⁰⁶ To remedy the problem they proposed expanding Department of Defense authority to review West-West trade licensing under EAA section 10(g).²⁰⁷ Although section 10(g) authorizes the Secretary of Defense to "review any proposed export of any goods or technology to any country to which exports are controlled for national security purposes,"²⁰⁸ the Department of Commerce has interpreted the language to preclude Department of Defense review of West-West licensing. The business community has opposed Department of Defense review on grounds that it could lead to longer processing delays and unjustified denial of license applications.²⁰⁹ To break the logjam, President Reagan in January 1985 issued an executive order permitting Department of Defense review of certain kinds of West-West licensing.²¹⁰ Congress, in enacting the EAAA, failed to pass any amendments authorizing an enhanced Department of Defense role, leaving the President without clear authority to order such a change.²¹¹ As a practical matter, the Senate view favoring increased Department of Defense review prevailed in the Executive Order.²¹² Yet some members of the

206. See *Hearings on the Export Administration Act Before the Senate Banking, Housing and Urban Affairs Committee*, 98th Cong., 1st Sess. at 18 (Feb. 3, 1983) (statement of Sen. Cohen).

207. 2 Int'l Trade Rep. (BNA) 856 (July 3, 1985). To counter what he called the "pro-trade bias inherent at the Commerce Department," Sen. Garn has proposed the creation of a new cabinet-level office of Strategic Trade to administer export controls. See 131 CONG. REC. S.89223 (daily ed. June 27, 1985); see also *Hearings on the Export Administration Act Before the Senate Committee on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. 1 (1983).

208. EAA § 10(g)(1) (codified at 50 U.S.C. app. § 2409(g) (1985)).

209. 131 CONG. REC. S.8922 (June 27, 1985) (statement of Sen. Heinz).

210. 2 Int'l Trade Rep (BNA) 90 (Jan. 16, 1985).

211. Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, *supra* note 2, at 17-19.

212. See 131 CONG. REC. S.8924-25 (daily ed. June 27, 1985) (statement of Sen. Proxmire).

[I]n last year's Senate bill we adopted an amendment to section 10(g) to clarify the law and re-emphasize that the Defense Department does have a legitimate role in reviewing West-West export license applications. This amendment is not in the legislation before us today because it is no longer necessary. The President resolved the interagency dispute and set up procedures for the Defense Department to review certain types of exports to certain Western countries from which diversions to the Soviets are taking place. Managers of this bill from both Houses took note of the President's decision in the joint statement of managers and agreed 'the need for the (Senate) amendment was removed by the decision of the President' on

House continue to contend that the President's directive, unsupported by statutory authorization, is illegal.²¹³ The validity of the provision will likely be determined in the courts, but in the interim, exporters may expect continuing delays in export licensing for high technology items.²¹⁴

D. *South Africa Sanctions*

Despite an emotional argument over imposing export sanctions against South Africa, the 99th Congress ultimately sidetracked the issue in order to prevent further delays in the passage of EAAA.²¹⁵ By executive order, President Reagan on October 11, 1985 imposed export controls on the sale of, inter alia, computers, aircraft and helicopters for use by the South African military, paramilitary or police forces.²¹⁶ The restrictions were aimed at preventing the supply of equipment for use in administering the apartheid regime's race laws.²¹⁷

VII. CONCLUSION: A CALL FOR FOUR REFORMS

By enacting the EAAA in 1985, Congress papered over important disputes in order to terminate the general economic emergency which Presi-

this issue.

Id.

213. 131 CONG. REC. H.5061 (daily ed. June 27, 1985) (statement of Rep. Zschau). Defense Department review of West-West licensing today encompasses fifteen countries and eight generic technologies. See Chamber of Commerce Transcript, *supra* note 7, at 47. Representative Don Bonker has suggested that industry should file suit in federal court to challenge the validity of the 1985 Presidential directive. 2 Int'l Trade Rep. (BNA) 952 (July 24, 1985).

214. Automation of license processing should reduce Commerce Department processing time from 18 days to 3-6 days. 3 Int'l Trade Rep. (BNA) 53 (Jan. 8, 1986). Defense Department review will add an additional 7-15 days. 2 Int'l Trade Rep. (BNA) 1438 (Nov. 13, 1985).

215. 130 CONG. REC. H.12147, 12149 (daily ed. Oct. 11, 1984). Title III of H.R. 3231, 98th Cong., 1st Sess. (1983) would have established: (1) compulsory fair employment standards under the so-called Sullivan principles for United States companies operating in South Africa; (2) that no bank operating under United States law may make any loan directly, or through a foreign subsidiary, to the South African government, or any corporation, partnership or other organization owned or controlled by that government; and (3) subject to certain exceptions, that no United States person could make an investment, including establishing or making a loan or other extension of credit in South Africa. The Senate bill had no comparable language. *Id.* at 12163-64.

216. See 50 Fed. Reg. 47,363 (Nov. 18, 1985); 50 Fed. Reg. 36,861-64 (Sept. 10, 1985). The Senate overrode President Reagan's veto of South Africa sanctions by a 78-21 vote on Oct. 2, 1986. 3 Int'l Trade Rep. (BNA) 1214 (Oct. 8, 1986).

217. U.S. DEPT. OF COMMERCE, FOREIGN POLICY REPORT TO CONGRESS 11 (Jan. 17, 1986).

dent Reagan declared when the EAA of 1979 lapsed. Although continued anxiety over the foreign trade deficit has intensified pressure on Congress to see that EAAA provisions facilitating exports are enforced,²¹⁸ critical weaknesses in the EAAA, such as the lame attempt to narrow the President's authority to impose foreign policy controls, may undermine the will of Congress. Further reforms are needed.

The EAA expires in September 1989; at that time Congress should enact four essential reforms that will significantly ease the burden of controls on United States exporters without jeopardizing national security. First, it should revoke the broad delegation of authority to the President to impose unilateral foreign policy controls. The Soviet pipeline case demonstrates that hastily considered attempts to apply economic pressure produce high costs to United States industry without yielding significant human rights benefits. Moreover, that situation illustrates the ease with which the President could evade any statutory requirement that he consult with Congress and industry before imposing sanctions. Withdrawing presidential authority to impose sanctions on his own initiative would, for example, eliminate gaps in the current law which permit the executive to impose controls on an item despite its widespread foreign availability merely by labeling these controls "symbolic" rather than "punitive," an often-used tactic that has been criticized in a recent General Accounting Office report.²¹⁹

If Congress revoked the Executive's authority to impose unilateral foreign policy controls, he would still retain the power to impose national security and short supply controls. Further, if Congress determined that specific circumstances necessitated the imposition of foreign policy controls, it could delegate to the President narrowly defined authority to

218. For proposed legislation aimed at easing the burden of export controls, see 3 Int'l Trade Rep. (BNA) 364 (Mar. 19, 1986), and 3 Int'l Trade Rep. (BNA) 429 (Apr. 2, 1986).

219. GAO REPORT, *supra* note 74, at 6. Under the EAA of 1979, the President was required only "to take all feasible steps to secure the cooperation of foreign governments in controlling exports of controlled items." However, section 6(h) of the EAA, as amended in 1985, provides "that (1) if the President is not successful in securing this cooperation and (2) if the Secretary determines that there is sufficient foreign availability of the controlled item so that denial of an export license would be *ineffective in achieving the purposes of the controls*, then the Secretary shall approve any required export license and remove the commodity from the export control list." *Id.* (emphasis added). The Secretary of Commerce's January 1986 Report to Congress discloses that there is widespread foreign availability of virtually all controlled items. Yet, by defining the foreign policy purpose of the controls as "symbolic," the Secretary is not required to investigate foreign availability because this provision is triggered only when the controls are defined as "punitive" rather than "symbolic." *Id.*

impose them. This authority could be limited to a specific country or region, permitting the executive to define the precise nature of the controls. Controls could also be limited to a specific period of time or to certain types of equipment, with the details of implementation left to the President. Withdrawal of broad powers to impose export controls, therefore, need not mean that the Chief Executive would be left devoid of all effectiveness in this policy area. A narrowing of presidential power would also encourage the use of non-military sanctions other than export controls to demonstrate United States displeasure, such as expulsion of diplomats, a slowdown in the visa application process, denial of fishing or airport landing rights, restriction of aid to and a withdrawal of credit or loans to the target country.

Second, in order to prevent the President from circumventing the foreign policy controls provisions of the EAA by searching for authority beyond the bounds of the Act, Congress should restrict the President's powers under the International Emergency Economic Powers Act of 1977 (IEEPA).²²⁰ IEEPA not only allows the Executive to restrict exports when the EAA has lapsed, it also allows the President to regulate exports when the EAA is in effect. Through this residual authority under IEEPA, the President can declare an emergency and regulate exports in a manner inconsistent with the requirements or provisions of the EAA. President Reagan's imposition of controls against Libya in January 1986 under IEEPA rather than under the newly reauthorized EAA²²¹ suggests that this remains an open avenue for the President to subvert the will of Congress and risk unnecessary friction with allies.

Third, Congress should direct the Department of Commerce to ease re-export controls and controls on parts and components in order to minimize pressure on foreign companies to use non-United States part and component sources. Strict controls on United States suppliers provide only a minimal security benefit while discouraging industrial cooperation between United States and other Western manufacturers. This change need not take the form of complete decontrol. The Department of Commerce could reduce the percentage of United States components within a

220. 50 U.S.C. §§ 1701-1706 (1982).

221. See 51 Fed. Reg. 875-76 (Jan. 9, 1986), 51 Fed. Reg. 1235, 1354-59 (Jan. 10, 1986); see also 3 Int'l Trade Rep. (BNA) 85 (Jan. 15, 1986), 3 Int'l Trade Rep. (BNA) 183 (Feb. 5, 1986), 3 Int'l Trade Rep. (BNA) 213 (Feb. 12, 1986). See generally Harris & Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT'L L. 71 (1985). The Administration used IEEPA to take action against Libya in January 1986, against South Africa in September 1985 and against Nicaragua in May 1985. 3 Int'l Trade Rep. (BNA) 399 (Mar. 26, 1986).

foreign product that would trigger review. Trade with COCOM nations would particularly benefit from decontrol given the difficulty of policing these controls and the safety of the destination countries.²²²

Fourth, Congress should push for the complete implementation of the existing Act, especially for reductions of controlled items through the annual review of control lists, which is required to include at least one-third of the COCOM list. Although Congress has increased spending levels for export administration activities to \$35.9 million in fiscal year 1987 from \$29.4 million during the prior year,²²³ review of the lists has been slow and uneven.²²⁴ Indeed, the Department of Commerce's decision in July 1986 to lift restrictions on automatic silicon wafering saws represents only the first time under the EAA that controls have been relaxed for reasons of foreign availability.²²⁵ There is every indication that the intent of Congress to reduce the number of controlled items has been frustrated.²²⁶

An increase in exports is crucial if the United States is to prevent a further deterioration of its trade balance with other nations. This effort, however, is inhibited by excessive, albeit well-intentioned, international controls. Although the EAAA signaled a mild relaxation of export control, it has failed to bring about the significant reforms, consistent with national security interests, that are necessary to allow United States exporters to compete fairly in world markets.

Donald H. Caldwell, Jr.

222. U.S. Government export controls on high technology goods have largely failed, at a cost of more than \$9 billion each year to the nation's economy, according to a National Academy of Sciences report, issued in February 1987. This, in turn, translates into an annual reduction in domestic employment of nearly 200,000 jobs. Written by a panel of former Defense and intelligence officials, the study called for a limit on the number of items controlled for national security reasons and for an elimination of high technology items more than four years old from the lists of controlled items. NATIONAL ACADEMY OF SCIENCES, *BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION* 121 (1987).

223. 3 Int'l Trade Rep. (BNA) 941 (July 23, 1986).

224. 3 Int'l Trade Rep. (BNA) 504 (Apr. 16, 1986) (statement of David Minnery, Scientific Apparatus Makers Assn.).

225. 3 Int'l Trade Rep. (BNA) 942 (July 23, 1986); *see also* 3 Int'l Trade Rep. (BNA) (Oct. 22, 1986), 3 Int'l Trade Rep. (BNA) (Dec. 24, 1986).

226. Assistant Secretary of Commerce for Trade Administration Paul Freedenberg testified before a congressional subcommittee, "The system does not appear to be providing as much decontrol as Congress intended, and we, too, are disappointed that more decontrol has not taken place." 3 Int'l Trade Rep. (BNA) 1247 (Oct. 15, 1986). Absent, he said, "is an interagency consensus that the letter and spirit of the law be carried out." *Id.*

