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United States Import Controls

In 1966, and again in the President's State of the Union message in January 1967, the Administration announced that it would ask Congress to pass an "East-West Trade Relations Act." The immediate effect of such legislation would be to permit the President to abolish existing discriminatory restrictions upon imports from the Soviet Union or other Communist countries of Eastern Europe (excluding East Germany), in the context of bilateral commercial agreements designed to "provide a framework helpful to private United States firms conducting business relations with Communist state trading agencies."[1] Such agreements, it is contemplated, would be reached "by instituting regular goverment-to-government negotiations with individual Communist countries concerning commercial and other matters of mutual interest."[2] The agreements would have a maximum duration of three years and would be subject to suspension or termination at any time upon reasonable notice.[3]

The Administration's proposed act, if adopted, would permit the President—insofar as the Soviet Union and Eastern Europe are concerned—to overcome the effect of section 231 of the Trade Expansion Aet of 1962, as amended, which requires the application of the 1930 tariff rates to all imports from "any country or area dominated

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1. Sec. 2(b). The proposed act, called "The East-West Trade Relations Act of 1966," [hereinafter referred to as Proposed Act] is published in 54 Dep't State Bull. No. 1405, 838 (May 30, 1966), and in Dep't of State, *The Battle Act Report 1966*, 19th Rep. to Congress 36.

2. Other purposes of the proposed legislation are "to promote constructive relations with Communist countries," and "to contribute to international stability," Proposed Act § 2(b); "to use peaceful trade and related contracts with Communist countries as a means of advancing the long-range interest of the United States in peace and freedom," Proposed Act § 2(a); "to increase peaceful trade and related contracts between the United States and Communist countries, and to expand markets for products of the United States in these countries by creating similar opportunities for the products of Communist countries to compete in United States markets on a non-discriminatory basis," Proposed Act § 2(c).

3. Proposed Act § 5(d). The section provides that the commercial agreements shall be renewable for additional periods, each not to exceed three years.

or controlled by Communism," except Yugoslavia and Poland.[4] Since the general level of American tariffs has declined from about 50 per cent ad valorem in 1930 to about 15 per cent in 1966, the application of the 1930 duties is a substantial trade barrier. Also, the proposed act would authorize the President to terminate, with respect to the Soviet Union, the effect of section 11 of the 1951 Trade Agreements Extension Act, which directed the President to "take such measures as may be necessary to prevent the importation of ermine, fox, kolinsky, marten, mink, muskrat and weasel furs and skins . . . which are the product of the Union of Soviet Socialist Republics or of Communist China."[5]

The new legislation would not, however, result in the automatic restoration of most-favored-nation treatment; the President would retain the power to maintain or relax restrictions on imports from Communist countries, depending upon his success in negotiating commercial agreements with them individually.

The conception that most-favored-nation treatment should be extended to Communist countries not merely in exchange for a reciprocal grant of most-favored-nation treatment, as is the general practice in international relations, but in exchange for additional

4. 76 Stat. 882 (1962), as amended, 19 U.S.C. § 1861 (1965). This restriction was first introduced by § 5 of the Trade Agreements Extension Act of 1951, which required the withdrawal of all trade agreements concessions granted under the Reciprocal Trade Agreements Act of 1934 from the Soviet Union and "any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement." 65 Stat. 73 (1951). The effect of the replacement of the quoted words of the 1951 Act by the words of § 231 of the 1962 Act, and the special treatment of Yugoslavia and Poland, are discussed below.

5. 65 Stat. 75 (1951), 19 U.S.C. § 1367 (1965). See § 10(c) ("Relation to Other Laws") of the proposed legislation. Other United States import restrictions that would be affected by the proposed act are discussed in Berman, *The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example*, 24 LAW & CONTEMP. PROB. 482, 506-08 (1959). They include the provision of the 1930 Tariff Act that imports whose cost of production is lower than that prevailing in the United States are to be subjected to an increased duty in order to "equalize" the costs of production in the two countries. 46 Stat. 687 (1930), 19 U.S.C. § 1303 (1965). This provision does not apply to goods imported from countries with which the United States has a reciprocal trade agreement. 48 Stat. 944 (1934), 19 U.S.C. § 1352 (1965). When the United States in 1951 denounced its trade agreements with Communist countries, they became exposed to the liability that such equalization duties would be applied. Although this hazard has never materialized, the application of most-favored-nation treatment to an individual Communist country would remove it entirely. In addition, several other tariff barriers—namely, anti-dumping duties, countervailing duties designed to neutralize foreign governmental subsidies, and the prohibition of imports of goods produced by convicts or forced labor—though not specifically directed against Communist countries, present a special danger to them. Indeed, the prohibition against imports of goods produced by forced labor was applied in 1951 to Soviet crabmeat, 16 Fed. Reg. 776 (1951), and was only removed by President Kennedy in 1961. 26 Fed. Reg. 2552 (1961). Passage of the proposed East-West Trade Relations Act would help to create a political climate less favorable to the application of these restrictions to Communist countries.

commitments as well, is not a new one.[6] It is generally recognized that the reciprocal reduction of customs duties by a country whose entire trade is conducted by state agencies does not necessarily assure foreign exporters of a greater opportunity to sell their goods; customs duties would not affect decisions to import because they are paid by one state agency (the importer) to another (the Treasury). Therefore, when most-favored-nation treatment was first accorded to the Soviet Union by the United States, under an executive agreement of August 4, 1937, it was granted in return for Soviet commitments to purchase at least 40 million dollars worth of American goods.[7] Britain had previously negotiated a somewhat similar Soviet commitment.[8] Today it is better understood, however, that imports are no sacrifice for centrally planned economies of the Soviet type; they would prefer *only* to import, if they could. Moreover, they are happy to commit themselves to import goods up to a specified value, for this leaves them free to make their own selection and to retain their own built-in governmental restrictions.

Wisely, then, the proposed East-West Trade Relations Act does not speak in terms of negotiation of most-favored-nation treatment in exchange for commitments to import goods up to a specified value. Section 4 of the proposed act lists, as "matters of mutual interest" that may be covered in the commercial agreements, various types of problems that have created, or may create, obstacles for Americans seeking to do business with Communist state trading agencies. These include (but "need not be restricted to"):

> (a) satisfactory arrangements for the protection of industrial rights and processes; (b) satisfactory arrangements for the settlement of commercial differences and disputes; (c) arrangements for establishment or expansion of United States trade and tourist promotion offices, for facilities of such

6. *Cf.* Domke & Hazard, *State Trading and the Most-Favored-Nation Clause*, 52 AM. J. INT'L L. 55 (1958); Berman, *Rapport Final*, in ASPECTS JURIDIQUES DU COMMERCE AVEC LES PAYS D'ECONOMIE PLANIFIÉE (International Association of Legal Scienee, Paris 1961). It should not be assured, however, that the granting of most-favored-nation treatnent to a Communist country would involve an economic loss to the United States, for whieh some specific compensating benefit must be obtained. On the contrary, equal tariff treatnent for imports from Communist countries would presumably constitute an economic benefit to Ameriean importers and to American consumers of the imported products. Nevertheless, the removal of tariff discriminations can serve not only as a benefit to American importers and consumers but also as an inducement to another country to reduce its restrictions upon Ameriean exports.

7. Commercial Agreement with U.S.S.R., Aug. 4, 1937, 50 Stat. 1619, E.A.S. No. 105. This agreement was subsequently extended for one-year periods: Aug. 5, 1938, 53 Stat. 1947, E.A.S. No. 132; Aug. 2, 1939, 53 Stat. 2404, E.A.S. No. 151; Aug. 6, 1940, 54 Stat. 2366, E.A.S. No. 179; Aug. 2, 1941, 55 Stat. 1316, E.A.S. No. 215; July 31, 1942, 56 Stat. 1575, E.A.S. No. 265.

8. The Soviet Union agreed to make purchases from Britain proportional to its exports to Britain, with different ratios fixed for different years. 149 L.N.T.S. 446 Treaty Series 446 (1934).

> efforts as the trade promotion activities of United States commercial officers, participation in trade fairs and exhibits, the sending of trade missions, and for facilitation of entry and travel of commercial representatives as necessary; (d) most-favored-nation with respect to duties or other restrictions on the imports of the products of the United States, *and other arrangements that may secure market access and assure fair treatment for products of the United States;* or (e) satisfactory arrangements covering other matters affecting relations between the United States and the country concerned, such as the settlement of financial and property claims and the improvement of consular relations.[9] [Emphasis added.]

The act thus implicitly accepts the idea that reciprocal most-favored-nation treatment in trade agreements with Communist countries should take the form of a series of particularized non-discriminatory, or "fair treatment," provisions relating to specific areas of trade relations, and in addition, it recognizes the possibility of obtaining special commitments of a concrete nature.[10]

Viewed in these terms, as a framework primarily for the reduction of import restrictions on both sides, the proposed legislation could hardly be termed radical. It offers the possibility of extending to some other Communist countries—chiefly Rumania, Hungary, Czechoslovakia, Bulgaria, and the Soviet Union—the treatment now accorded to imports from Yugoslavia and Poland. The denial to Communist countries of tariff concessions, that is, of reductions in customs duties made under the Reciprocal Trade Agreements Act of 1934 and generalized to all countries to which we extend most-favored-nation treatment, dates from 1951. It was in that year that the Congress, in section 5 of the Trade Agreements Extension Act, required for the first time that the President withdraw trade agreement concessions from the Soviet Union and "any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement."[11] Yugoslavia, which had broken with the Soviet Union in 1948, was not considered a Communist nation within this definition. In 1960, President Eisenhower determined that Poland was also independent of such domination or control for purposes of customs treatment.[12] (In 1956, a similar determination had been made with respect to Poland for

9. Very little has been published in the United States concerning the problems that would arise in negotiating the matters listed. A short discussion of various kinds of restrictions against trade that exist in the Soviet Union, and of various ways in which such restrictions may be reduced, may be found in Berman, *supra* note 5, at 482-504, 521-28. For an excellent recent study of problems of reaching accommodations concerning protection of industrial rights and processes, see Clesner, *Proprietary Rights and East-West Trade* (pts 1-2), 9 IDEA 75, 183 (1965).

10. See Berman, *supra* note 5, at 525.

11. *Supra* note 4.

12. Agreement Relating to Settlement of Claims of Nationals of the United States Against Poland and Exchange of Notes, July 16, 1960, T.I.A.S. No. 4545.

purposes of local currency sales of surplus agricultural commodities under Public Law 480).[13] Then in 1962 Congress substituted for the above-quoted language of section 5 of the Trade Agreements Extension Act of 1951 the words "any country or area dominated or controlled by Communism,"[14] thereby requiring the President, "as soon as practicable," to add Yugoslavia and Poland to the list of proscribed countries. In 1963, however, before the President had found it "practicable" to make the change, Congress, in response to strenuous Administration efforts, permitted Yugoslavia and Poland to be exempted from the proscription, provided that the President "determines that such treatment would be important to the national interest and would promote the independence of such country or area from domination or control by international communism, and reports this determination and the reasons therefor to the Congress;"[15] and on March 26, 1964, the President made and reported such a determination. If Congress had not in 1962 adopted the words "dominated or controlled by Communism," it would have been possible for the Administration to remove discriminatory tariff restrictions with respect to Rumania, Hungary, Czechoslovakia, and Bulgaria simply by declaring, as it did in 1960 with respect to Poland, that one or more of these countries were not "dominated or controlled by the foreign government or foreign organization controlling the world Communist movement." It would be extremely difficult, of course, for the President to say that they are not "controlled by Communism," although technically they call themselves socialist and deny that they have reached the stage of Communism.

Even with the existing restrictions, the President is free to enter into executive agreements with any of the countries concerned. Such agreements would be hampered, however, by the congressional mandate to maintain the 1930 tariff rates. The granting of the benefit of our current tariff schedules to Poland in 1960 was part of an executive agreement under which Poland consented to make a deferred-payment lump-sum compensation agreement on account of Polish nationalization of American-owned property.[16] In 1964, when

13. See text accompanying notes 16 & 59 *infra*.

14. *Supra* note 4.

15. Foreign Assistance Act § 402, 77 Stat. 390 (1963), 19 U.S.C. § 1861(b) (1965). This provision authorized the President to extend the benefits of trade agreements concessions to Communist countries which were receiving such benefits on December 16, 1963, subject to the provisos quoted in the text. Yugoslavia and Poland were the only such Communist countries.

16. *Supra* note 12. The first agreement between the United States and Communist Poland, concluded on June 7, 1957, provided for the sale and shipment of $18,900,000 of surplus agricultural commodities, with payment in Polish zlotys, pursuant to Title I of the Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454 (1954), as amended, 7 U.S.C. § 1691 (1965). The zlotys were to be deposited

representatives of the United States and Rumanian governments met in Washington to discuss trade, they reached agreement on various matters. However, the Joint Communiqué stated that "The Rumanian delegation emphasized that Rumanian products cannot compete on an equal basis in the United States market under the tariff treatment accorded such products," and that "this factor could limit the expansion of trade between the two countries." The United States delegation "took note of this concern, and explained the applicable provisions of United States law."[17] Rumania might well become the next Communist country to receive most-favored-nation treatment if the proposed East-West Trade Relations Act becomes law.

UNITED STATES EXPORT CONTROLS

There are, however, larger political and economic implications in the proposed act. Politically, its enactment would signify the acceptance by Congress of the Administration's view that trade in nonstrategic goods with selected Eastern European countries can be used as a flexible foreign policy weapon to weaken ties with the Soviet Union and with each other.[18] At various times since 1957,

to the account of the United States, and on the same date of such deposit were to be converted and transferred to a special dollar denominated account to the credit of the United States in the National Bank of Poland. Poland agreed to purchase for dollars the balance of zlotys unexpended in 1962, to the extent of $726,000 annually. Surplus Agricultural Commodities Agreement With the Polish People's Republic, June 7, 1957 [1957] 8 U.S.T. & O.L.A. 799, T.I.A.S. No. 3839 (effective June 7, 1957).

In addition, the United States loaned Poland $30,000,000, administered through the Export-Import Bank, for the purchase of surplus products and mining machinery. This line of credit is repayable at 4½% interest in dollars over a 20-year period, beginning in 1962. N.Y. Times, June 8, 1957, p. 1, col. 5.

On Aug. 14, 1957, the June 7th agreement was supplemented by the additional financing by the United States of wheat and cotton sales totalling $46,100,000, in return for zlotys under the same arrangement. Agreement Amending the Surplus Agricultural Commodities Agreement With the Polish People's Republic, June 7, 1957 [1957] 8 U.S.T. & O.I.A. 1289 T.I.A.S. No. 3878 (effective Aug. 14, 1957).

17. 50 DEP'T STATE BULL. 924 (1964).

18. In 1965, a Special Committee on U.S. Trade Relations with East European Countries and the Soviet Union stated that "the case for expanding peaceful trade [with Communist countries] comes down to the proposition that we can use trade to influence the internal evolution and external behavior of Communist countries. Trade provides us with a policy instrument to encourage the movement toward greater national independence in Eastern Europe and the trend toward greater concern for consumer needs in all the European Communist countries. . . ." The Committee was created by the President on February 16, 1965, "to explore all aspects of expanding peaceful trade in support of the President's policy of widening constructive relations with the countries of Eastern Europe and the U.S.S.R." Its report was the immediate stimulus to the proposed East-West Trade Relations Act. For the text of the "Miller Report" (so named for the Chairman of the Committee, J. Irwin Miller), see Dep't of State, *The Battle Act Report 1965*, 18th Rep. to Congress 50.

Also in a 1962 amendment to the Export Control Act of 1949 Congress declared that "it is the policy of the United States to use its economic resources and ad-

the Administration has granted, or has sought to grant, special treatment of one form or another to Poland, Rumania, Hungary, Czechoslovakia, and Bulgaria.[19] In the last few years, it has even accorded the Soviet Union certain advantages over East Germany and Albania.[20] Congress, however, as already indicated, has sought to thwart, or to impose special conditions upon, concessions made by the Executive Branch to particular Communist countries. Also, since 1951 Congress has enacted a labyrinth of restraints of one kind or another on trade with "unfriendly countries," with "any nation or combination of nations threatening the security of the United States," with the "Sino-Soviet bloc," with countries "controlled by the foreign government or foreign organization controlling the world Communist movement," and with countries "controlled by Communism."[21] Certainly, one of the main purposes of the Administration in proposing the East-West Trade Relations Act is to secure congressional acceptance of the more flexible policies followed by four successive Presidents.

In addition to this political purpose the proposed act has further, perhaps even more critical, significance. It would not only permit the relaxation of import restrictions on goods from individual Communist countries in return for concessions, but would also authorize the creation of a framework for the promotion of trade with individual Communist countries, to the mutual advantage of both sides. In this respect it would, for the first time, supplement our existing system of negative controls by a new system of positive controls. For although the proposed act does not alter the existing structure of United States export and credit restrictions, the commercial agreements which it contemplates would provide an opportunity to adapt

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vantage in trade with Communist-dominated nations to further the national security and foreign policy objectives of the United States." 76 Stat. 127 (1962), 50 U.S.C.A. App. § 2022(3) (Supp. 1966). This amendment was not sponsored by the Administration. It can be read to mean that Congress recognizes that trade with Communist nations can have positive value as an instrument of foreign policy.

The 1963 amendment to § 231 of the Trade Expansion Act, *supra* note 15, can also be read as a limited acceptance by Congress of the pluralism of the Communist world.

19. Concerning special treatment for Poland, see text accompanying notes 13-16 *supra* and notes 48, 59 & 63 *infra;* for Rumania, see text accompanying note 48 *infra;* for Hungary, Czechoslovakia, and Bulgaria, see text accompanying note 63 *infra.*

20. See text accompanying note 35 *infra.*

21. *Background Documents on East-West Trade,* SEN. COMM. ON FOREIGN REL., 89th Cong., 1st Sess. (Feb. 1965). This report is the most complete summary to date of United States restrictions on trade with Communist countries. For a very good analysis of these restrictions, see Metzger, *Federal Regulation and Prohibition of Trade With Iron Curtain Countries,* 29 LAW & CONTEMP. PROB. 843, 1000-18 (1964). See also Berman, *supra* note 5 at 504-20. For restraints on the granting of commercial credits in connection with exports to Communist countries, see text accompanying notes 33-35 *infra.*

those restrictions in such a way as to expand, and not prevent, trade.

From an economic point of view, perhaps the most important provision of the proposed act is the statement in section 4 that the benefits to be obtained from the commercial agreements "need not be restricted" to the items listed. Given the nature of the foreign-trade systems of the Communist countries to which the act would be applicable, and given their economic interest not only in increasing their exports to us but also, and especially, in increasing their imports from us, one may easily forecast the approach which their representatives would take in negotiating. In particular, one may assume that they will want to obtain assurances from the United States that export licenses will be granted for definite quantities of particular American products. Moreover, one may assume that the United States negotiators will also be interested in obtaining Soviet and East European commitments to import definite quantities of particular American products—though not necessarily the same quantities or products as those proposed by the other side. Indeed, the principal economic impetus to the East-West Trade Relations Act is not the desire to increase Soviet and East European exports to us, but rather the desire to increase our exports to them. This is due to a belated realization that our export and credit controls have forced the Communist countries to purchase goods in Western Europe and Japan which we have made it difficult or impossible for them to buy in the United States.[22] "Free world" exports to Communist countries amounted to 7.5 billion dollars in 1965; in the same year United States exports to Communist countries amounted to less than 140 million dollars.

An evaluation of the proposed act thus requires an analysis not only of existing American restrictions upon imports from Communist countries, but also of existing American export and credit restrictions,

22. *Cf.* the Miller Report, *supra* note 18. A 1962 amendment to the Export Control Act of 1949 which states that "it is the policy of the United States . . . to formulate a unified commercial and trading policy to be observed by the non-Communist-dominated nations or areas in their dealings with the Communist-dominated nations" (the "Javits amendment") was grounded in a recognition of the diversionary effect of United States export controls. 76 Stat. 127 (1962), 50 U.S.C.A. App. § 2022 (2) (Supp. 1966). See also Javits, *The Political Stakes in East-West Trade*, submitted to the Subcommittee on Foreign Economic Policy of the Joint Economic Committee, 87th Cong., 2d Sess. (1962). *Cf.* "The Control of Exports—A Comparison of the Laws of the United States, Canada, Japan, and the Federal Republic of Germany," prepared by Russell Baker and Robert M. Bohlig, Baker, McKenzie & Hightower, Chicago; Professor Detlev Vagts, Harvard Law School; and Walter H. Glass, Chairman, Committee on Export Control and Promotion, A.B.A. Section of International and Comparative Law, in discharge of an assignment given the Committee on Export Control and Promotion of the Section of International and Comparative Law of the American Bar Association; Hay, *Some Aspects of the East-West Trade in Britain, Germany, and the Common Market* (unpublished).

and of the potentialities for expanding American exports through "regular government-to-government negotiations."

The ultimate success of the proposed East-West Trade Relations Act in providing a framework for expansion of American exports to Communist countries depends, in large part, upon the extent to which the commercial agreements to be negotiated will reduce the restrictive effect of our present system of export controls. It is the Export Control Act of 1949, under which the President may prohibit or curtail any or all exports from the United States, which in the past has been the principal obstacle to the expansion of East-West trade.[23] A brief analysis of the actual operation of that act will disclose that, although the basic structure of the controls under it would not be affected by the proposed East-West Trade Relations Act,[24] nevertheless, there is a considerable leeway within which the parties to a commercial agreement—the United States and an individual Communist country—could bargain for the relaxation of certain restrictions which are not essential to the national security.

The President has delegated his powers under the Export Control Act to the Department of Commerce,[25] which administers the act through the Office of Export Control of the Bureau of International Commerce.[26] The Office of Export Control has created a veritable labyrinth of regulations concerning what may be exported, to what countries, under what conditions, and by what procedures.[27]

All exports from the United States are subject to either a validated license, for which application must be made (in most cases) to the Office of Export Control,[28] or a general license, that is, a general

23. 63 Stat. 7 (1949), 50 U.S.C.A. App. §§ 2021-32 (Supp. 1966). The act has been extended seven times. 65 Stat. 43 (1951); 67 Stat. 62 (1953); 70 Stat. 407 (1956); 72 Stat. 220 (1958); 74 Stat. 130 (1960); 76 Stat. 122 (1962); 79 Stat. 209 (1965). It was amended in 1962 and again in 1965. The authority granted in the act will terminate on June 30, 1969, unless renewed. See Berman & Garson, *U.S. Export Control—Past, Present and Future,* to be published in a fortheoming issue of the *Columbia Law Review.*

24. Sec. 10(b) of the proposed act states that "Nothing in this Act shall be deemed to modify or amend the Export Control Act of 1949. . . ."

25. Exec. Order No. 9630, 10 Fed. Reg. 12245 (1945).

26. Commerce Dep't Order No. 182, 28 Fed. Reg. 1073-77 (1963).

27. The Export Regulations are published in the Federal Register, as issued. They are also published in their entirety as of December 31 of each year in 15 C.F.R. § 368. The regulations are also contained in a loose-leaf publication, entitled *Comprehensive Export Schedule,* which, as amended by *Current Export Bulletins,* may be obtained by subscription from the Superintendent of Documents. Under § 8 of the act, the Department of Commerce submits quarterly reports to the Congress covering its administration of the act. These reports are obtainable from the Superintendent of Documents.

28. For exports which are controlled by agencies other than the Office of Export Control, see 15 C.F.R. § 370.5 (1966). In particular, exports of arms, ammunition, and implements of war, and technical data relating thereto, are controlled by the Office

authorization to export certain types of commodities to certain destinations without the necessity of filing an application.[29] Whether a validated license is required depends upon the nature of the goods and their intended destination.

More specifically, the Export Regulations divide the world (except for Canada) into seven country groups—S, T, V, W, X, Y, and Z.[30] Group T includes the Western Hemisphere except for Canada and Cuba; Group V includes all the non-Communist countries outside the Western Hemisphere, plus Yugoslavia; Group W comprises Poland and Rumania; Group X encompasses Hong Kong and Macao; Group Y is the "Soviet bloc" exclusive of Poland and Rumania (that is, Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, and the Soviet Union); Group Z includes Communist China, Communist-controlled areas of Vietnam, North Korea, and Cuba. In November of 1966 Country Group S was created, consisting of Southern Rhodesia.[31]

Exports which require validated licenses for shipment to Country Groups T and V (the "free world") also require validated licenses for all other destinations. On the other hand, there are a large number of exports which require validated licenses for shipment to Communist destinations but not for shipment to so-called free world destinations;[32] and within the Communist sphere, (1) virtually no commodities may be shipped to Group Z countries without a validated license[33] (and in fact licenses to export to Group Z countries are

of Munitions Control and the Department of State, under regulations promulgated by the Secretary of State under the authority of § 414 of the Mutual Security Act, 68 Stat. 848 (1954), 22 U.S.C. § 1934 (1965). See 31 Fed. Reg. 15174 (1966) (International Traffic in Arms).

29. For general licenses, see 15 C.F.R. § 371 (1966). For validated licenses, see 15 C.F.R. § 372 (1966). Other special licenses are contained in §§ 374 (Project License), 375 (Blanket License), 376 (Periodic Requirements License), 377 (Time Limit License). The major restraint on general license shipments is that goods so shipped cannot be re-exported or diverted to a country for which a validated license is required for a direct exportation from the United States. A validated license, on the other hand, authorizes the exportation of a particular commodity (or technical data) to a particular consignee in a particular country for a particular use. Exports made under validated license can rarely be re-exported or diverted without the express authorization of the Office of Export Control. Applications for validated licenses must be accompanied by an "order" for the goods sought to be exported as well as a statement by the ultimate purchaser or consignee concerning the end-use of the item sought to be exported.

30. 15 C.F.R. § 370.1(g)(2) (1966).

31. CURRENT EXPORT BULL. 943, Nov. 14, 1966.

32. In 1965 the so-called Positive List of restricted exports was replaced by a Commodity Control List. 15 C.F.R. § 399 (1966). It lists virtually every item in the Commerce Department's census classification of goods exported from the United States, and indicates with respect to each item whether or not a validated license is required for export to each of the various country groups.

33. Newspapers and periodicals can be shipped to Group Z countries under general license. In addition to controls imposed under the Export Control Act, the

practically never granted),[34] (2) certain goods which require validated licenses for export to Group Y countries can be shipped under general license to Group W (Poland and Rumania), and (3) applications for licenses to export to certain Group Y countries—for example, Albania and East Germany—will be judged by the Office of Export Control according to different standards from those applied to applications for licenses to export to other Group Y countries such as Hungary and Czechoslovakia.

The distinction between Country Groups W and Y was largely extinguished by President Johnson's decision of October 7, 1966, to remove the validated license requirement with respect to some 400 items which required such licenses for export to Group Y but not to Group W.[35] Since these benefits were not extended to East Germany, however, one principal effect of the President's decision was to create, in effect, a new country group for licensing purposes, that is, "Group Z and East Germany."

The President's action did not affect the authority of the Office of Export Control to decide whether to grant or reject license applications for export of commodities which still require licenses for shipment to Communist countries. The distinctions between different country groups for purposes of the validated license requirement are not in themselves a reliable guide to the probable licensing action

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Foreign Assets Control Regulations and the Cuban Assets Control Regulations, issued under authority of § 5(b) of the Trading with the Enemy Act of 1917, prohibit any "person" (including corporations) subject to the jurisdiction of the United States whether situated in the United States or (with respect to Asian Communist countries) abroad, from exporting anything to, or importing anything from, Communist China, Communist-controlled areas of Vietnam, North Korea, and Cuba without a Treasury Department license or a Commerce Department license. 31 C.F.R. §§ 500 (1959), 515 (Supp. 1964).

34. Exports to friendly foreign embassies in Peking are occasionally approved, *e.g.*, "a household refrigerator, valued at $150." EXPORT CONTROL, 76TH Q. REP. 16 (U.S. Office of Export Control, 2d Q. 1966).

35. N. Y. Times, Oct. 8, 1966, p. 12, col. 2; CURRENT EXPORT BULL. 941 (Oct. 12, 1966). An amusing editorial comment on the licensing changes appeared in the Wall St. J., Oct. 14, 1966, p. 14, under the title "Spy Store for the Government." The author states that "to let enemy operatives buy our arsenic may only be quaint. But it seems scarcely short of treason to sell them 'prepared culture medias,' those readymade breeding grounds of germ warfare. The sugar cane knives and woodworking punches newly made available will be lethal. And no longer will our potential enemies (except, wisely, the wily East Germans) even be denied 'caps for cap pistols.'"

In fact, however, most of the items "freed for export" were always available under validated license, *i.e.*, licenses were always granted. Indeed, from an administrative point of view, the largest benefit of the President's decision may accrue to the Office of Export Control, which is now relieved of a measure of unnecessary paperwork. And, as the *Wall Street Journal* noted, "one wonders only why the Russians haven't been allowed all along to buy as many windmills, water softeners and sets of woolen underwear as they wish," *i.e.*, under general license procedures.

of the Office of Export Control; indeed, that Office will sometimes allow the shipment to a Communist country of goods or articles which require validated licenses for export to the so-called free world.

The only restraint on the authority of the Office of Export Control to issue licenses for export to Communist destinations lies in a multilateral trade control scheme under which all of the NATO nations (excluding Iceland) and Japan have agreed to embargo the shipment to all Communist countries—except Yugoslavia and Cuba—of an internationally agreed-upon list of strategic commodities.[36] This list represents a minimum consensus of what should be considered strategic for export control purposes. Before shipping goods appearing on the list to Communist countries (other than Yugoslavia and Cuba), the United States would have to seek an "exception" from the other NATO countries.[37] All of the listed goods are subject to an import certification and delivery verification system (IC/DV), under which license applications to export from one participating country to another must be accompanied by an import certificate from the importing country. The import certificate represents a commitment by the importer to his government, under sanction of penalties, that he will abide by its terms. In some cases, the importer must also furnish the government of the exporting country with a delivery verification, that is, a document furnished by the government of the importing country certifying that the goods have in fact arrived.[38]

Approximately one-half of all the commodities which require vali-

36. This international embargo list or the "COCOM" list (Coordinating Committee) is secret but is said to conform to the "Battle Act Title I List" (Categories A and B), that is, the list of goods drawn up under the Mutual Defense Assistance Control Act of 1951 (the "Battle Act"), under which act all United States economic or financial assistance must be cut off to any nation which does not apply "an embargo" on the shipment of any goods on this list to "any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination." 65 Stat. 645 (1951), as amended, 22 U.S.C. § 1611 (1965). Changes in the COCOM embargo list are reflected in changes in the Battle Act Title I List. The major difference between the two lists is that the international agreement does not extend to exports to Cuba. The "Administrator" of the Battle Act (the body responsible for drawing up these different lists and representing the United States in the Coordinating Committee forum) is lodged within the Office of East-West Trade of the Department of State.

37. An "exception procedure" is necessary to and an important part of the international embargo system, and it has been availed of by most of the member countries of COCOM. *Cf.* Dep't of State, *The Battle Act Report 1966*, 19th Rep. to Congress 68-71.

38. The Transaction Control Regulations, issued under authority of § 5(b) of the Trading with the Enemy Act of 1917, prohibit foreign-based subsidiaries of United States firms from exporting IC/DV items, as well as commodities on the United States Munitions List, to any Communist country except Yugoslavia and Cuba. 31 C.F.R. § 505 (1959). Some NATO nations have imposed similar controls on their own nationals.

dated licenses for export to Country Groups T and V (the "free world") are subject to the IC/DV requirement and are therefore contained on the international embargo list. Except for such commodities—approximately 600, or, based on the five-digit Standard International Trade Classification, about 120—the Office of Export Control has complete discretion in granting or refusing license applications to export to particular countries.

In addition to restricting the exportation of goods, the Office of Export Control also restricts the exportation of technical data, defined in the Export Regulations as "any professional, scientific or technical information, including any model, design, photograph, photographic file, document or other article or material, containing a plan, specification, or descriptive or technical information of any kind which can be used or adapted for use in connection with any process, synthesis, or operation in the production, manufacture, utilization or reconstruction of article or materials."[39] The Office of Export Control has construed technical data to include information contained in the mind, and not manifested in any written or other tangible form, that is, "know-how and experience"; and it has construed an exportation of technical data to include release or application of such "know-how and experience" by American persons while abroad.[40]

The Office of Export Control has established a series of three general licenses which permit exports of certain technical data. In substance, they allow *published* data to go to *all* destinations, and unpublished data to go to *all non-Communist* destinations and Yugoslavia, without a validated license.[41] Exports of unpublished data to Communist countries (except Yugoslavia) require validated licenses, except for certain types of unpublished scientific and educacational data which may be exported under general license.[42] Exports of unpublished data to non-Communist destinations are subject to the requirement of written assurance from the foreign consignee or licensee (in the form of a letter or as part of a licensing agreement) that neither the technical data nor the direct product thereof will be re-exported or provided to Communist countries.[43]

Technical data exportations that do not fall within the provisions of a general license can be made only under a validated license. The general license provisions are such that most validated license applications will involve exports of unpublished technical data to

39. 15 C.F.R. § 385.1(a) (1966).
40. Hydrocarbon Research Inc., 27 Fed. Reg. 12487 (1962).
41. 15 C.F.R. § 385.2(b) (1966) (Published Technical Data—General Licenses GTDP); § 385.2(c) (Unpublished Technical Data—General License GTDU); § 385.2(d) (Scientific and Educational Data—General License GTDS).
42. For validated license procedure, see 15 C.F.R. § 385.4 (1966).
43. 15 C.F.R. § 385.2(c)(4), (5) (1966).

Communist countries. Exports of unpublished data to friendly foreign countries will require validated licenses, however, whenever foreign buyers refuse to comply with the written assurance requirements.[44] The Office of Export Control will then consider whether the proposed export, absent written assurances, would be inimical to the national security.

Principally as a result of controls imposed on exports of commodities and technical data by the Department of Commerce, annual United States exports to Communist countries have hovered close to the low figures of the Korean War.[45] On the one hand, relatively few commodities can be shipped to Communist countries under general license, and most of those which can are not items they wish to buy. On the other hand, the American business community has become resigned to the stringent licensing standards of the Office of Export Control and, for the most part, no longer bothers to submit license applications for exports other than those sufficiently innocuous to meet with routine approval.[46] A validated license application must be accompanied by a "firm order" for the commodity sought to be exported, and the Office of Export Control will not give advance opinions as to the propriety of a proposed shipment.[47] Many businessmen, however, are not prepared to risk the time and money required to negotiate binding contracts without some assurance that their contracts will not be frustrated by a "no go" decision on the part of the Office of Export Control.

A Communist government interested in entering into a commercial agreement with the United States will inevitably desire to import particular goods from the United States, that is, it will want its import agencies to be able to approach American businessmen and seek contracts for the sale of particular commodities and technical data. It will want to know, therefore, whether the validated license requirement can be replaced by a general license, and, if not, whether assurances can be obtained that the Office of Export Control will approve particular license applications.

The mechanics of both alternatives were clearly illustrated by the changes in export licensing which resulted from intergovernmental

44. 15 C.F.R. § 385.2(c)(4) (1966).

45. In calendar year 1965, United States exports to all Communist countries (excluding Yugoslavia) amounted to $139 million, out of total exports of $26.5 billion. EXPORT CONTROL, 75TH Q. REP. 42 (U.S. Office of Export Control, 1st Q. 1966).

46. In calendar year 1965, the Office of Export Control approved over 95% of applications to export to Communist countries, EXPORT CONTROL, 74TH Q. REP. 5 (U.S. Office of Export Control, 4th Q. 1965).

47. The firm order requirement will be relaxed in unusual circumstances, *e.g.*, where an unusual expenditure of time, money, or technical skill, in excess of ordinary sales expenses, is necessary before a bid can be submitted and an order obtained. 15 C.F.R. § 372.4(f)(3) (1966).

negotiations with Rumania in 1964.[48] By transferring Rumania from Country Group Y to Country Group W, that is, by extending to Rumania the same treatment accorded to Poland, the Office of Export Control in effect removed the validated license requirement for approximately 500 commodities. This is particularly significant in the light of Rumania's interest in complete plants and factories, necessitating the export of many hundreds of commodities and technical data.

In addition, the Rumanian trade delegation which negotiated the agreement, headed by the Chairman of the Rumanian State Planning Commission and the Minister of Foreign Trade, brought with it a "shopping list" of some fifteen categories of items, of which approximately ten categories were accepted by the United States Government as appropriate. After the Joint Communiqué was signed and the trade delegation departed, a Rumanian purchasing committee stayed in the United States to negotiate contracts with American firms and to obtain assurances of credits from the Export-Import Bank. The United States Government did not, of course, enter into the negotiation of contracts; it could, however, and did, give tentative assurances that export licenses would be granted for the agreed-upon categories of goods, and it gave the Rumanian delegation the names of American producers of such goods, with a "to whom it may concern" letter indicating the inter-governmental context in which approaches by Rumanian purchasers to American exporters were being made.

From the viewpoint of the Office of Export Control, such advance assurance that licenses will probably be granted for the export of particular types of goods has much more to commend it than a change in licensing requirements, *i.e.*, a shift of the desired commodities from validated to general license, since such a change in licensing requirements would redound to the benefit of all the countries in the same Country Group, including those with which commercial agreements have not been negotiated. From the viewpoint of the affected Communist country, such advance assurance is also highly desirable, since it serves as a channel for negotiating the purchase of products whose export the United States Government might not be willing to place under general license. Indeed, as we have seen, present licensing requirements for exports to Country Group W (Poland and Rumania) are not substantially more lenient than licensing requirements for exports to Country Group Y, so that Hungary or Czechoslovakia, for example, would not have very much to gain from a reclassification.

48. *Supra* note 17.

CREDIT CONTROLS

The Johnson Act.—One of the more severe American restrictions upon trade with the Soviet Union and Eastern Europe is the Johnson Act of 1934, as amended, which makes it a crime for any individual, partnership, or private corporation or association to extend any loan to, or purchase or sell securities of, a foreign government which is in default in the payment of its obligations to the United States.[49] The act specifically exempts public corporations created pursuant to special congressional legislation, such as the Commodity Credit Corporation, as well as corporations in which the Government of the United States exercises a controlling interest. Special legislation was enacted to exempt the Export-Import Bank from the Johnson Act.[50]

The Johnson Act was amended in 1945 to exclude from the prohibitions contained therein countries which are members of the International Bank for Reconstruction and Development (the "World Bank") and the International Monetary Fund.[51] The practical effect of the amendment was to restrict the application of the Johnson Act to Communist countries—except Yugoslavia, which is a member both of the World Bank and the International Monetary Fund. The Soviet Union and all east European countries, with the exception of Bulgaria, are considered to be in default in the payment of their obligations to the United States within the meaning of the Johnson Act.[52]

The Johnson Act, by its terms, prohibits merely the making of "loans" to certain foreign governments. Shortly after it became law in 1934, Attorney General Cummings confirmed that it was not the purpose of Congress to discontinue all commercial relations with the defaulting countries, and stated that the act did not relate to obligations issued in the ordinary course of business such as drafts, checks, and other ordinary aids to banking and commercial transactions "which are 'obligations' in a broad sense but not in the sense intended."[53] Nevertheless, given the tensions of the "cold war" and the natural conservatism of the banking community, there developed the view, both within and without the Government, that deferred payment arrangements for exports to countries subject to the Johnson Act, with or without bank financing, might be encompassed by the term "loan" as it appears in the act. Although short-term obli-

49. 48 Stat. 574 (1934), as amended, 18 U.S.C. § 955 (1965).
50. 59 Stat. 529 (1945), as amended, 12 U.S.C. § 635(2) (1965).
51. 18 U.S.C. 955(b) (1965).
52. In response to inquiries concerning foreign governments to which loans may not be extended under the Johnson Act, the State Department sends a letter citing Treasury Department rulings to the effect that all the countries of Eastern Europe except Bulgaria are in default in their payments to the United States.
53. 38 OPS. ATT'Y GEN. 505 (1934).

gations (up to 180 days) clearly fell within the term "ordinary aids to banking and commercial transactions," the term "loan" was considered to apply to credits beyond six months. Use of the six-month dividing line was suggested in an informal opinion of the Attorney General's Office, in response to inquiries by American businessmen. The point was never tested in court.

The Attorney General's interpretation of the term "loan," as it appears in the Johnson Act, underwent sudden re-examination in 1963 when the opportunity arose to sell large quantities of surplus United States wheat to the Soviet Union.[54] The Secretary of State asked the Attorney General for a formal opinion on the propriety of sales by private American firms to the Soviet Union on a deferred-payment basis.[55] Attorney General Kennedy replied that the right to defer payment for goods sold is a credit and not a loan:

> [N]either sales transactions by American exporters on a deferred-payment basis, nor payments made to such exporters by third parties in return for an assignment of the right to payment in connection with such sales, are 'loans' to the purchaser of the exported goods in the ordinary sense of that term in legal and commercial usage.[56]

The Attorney General stated, however, that "extensions of credit for an inordinately long period" could not be used "as a device to circumvent the prohibition against loans" and that certain types of transactions "would violate the Act, regardless of their purely formal characteristics, if used as a subterfuge to evade it." Nevertheless, he ruled that the Johnson Act does not prohibit extensions of credit "within the range of those commonly encountered in commercial sales of a comparable character."

The State Department has subsequently taken the view that "deferred payment arrangements for exports from the United States to countries subject to the Johnson Act, with or without bank financing, are permitted, so long as the credit terms are comparable to those commonly given for export of the same commodities to other countries."[57] Neither the State Department nor the Office of the Attorney General has given any support for the widely held view that the

54. See *Communication From the President of the United States Transmitting a Report to the Congress Giving the Reasons for This Government's Decision Not to Prohibit the Sale of Surplus American Wheat, Wheat Flour, Feed Grains, and Other Agricultural Commodities for Shipment to the Soviet Union and Other Eastern European Countries During the Next Several Months,* H.R. Doc. No. 163, 88th Cong., 1st Sess. (1963).

55. Credit was never requested by the Soviet Union nor granted by the companies making the sales. The particular conditions of the sale had not, however, been resolved at the time of the formal request, aud it was anticipated that the Soviet Union might seek some kind of credit arrangement.

56. 49 DEP'T STATE BULL. 661 (1963).

57. Dep't of State, *The Battle Act Report 1965*, 18th Rep. to Congress 44.

Attorney General's letter replaced the six-month rule with a five-year rule.[58] Instead, the Office of the Attorney General together with the State Department has replaced an unofficial fixed standard with a fairly elastic one. It is unlikely, however, that any businessman or any bank will want to test the boundaries of the act without a more definitive statement by the Attorney General.

As in the case of export controls, the proposed East-West Trade Relations Act does not expressly affect credit restrictions under the Johnson Act. It does, however, state that one purpose of the commercial agreements to be negotiated under it is "the settlement of financial and property claims." Presumably, such a settlement would result in a finding by the United States that the partner to the agreement is no longer in default of its obligations for purposes of the Johnson Act.

Credit Controls Under Public Law 480.—The Agricultural Trade Development and Assistance Act of 1954, commonly referred to as Public Law 480, as amended, prohibits sales of agricultural commodities on credit terms to "any country or area dominated or controlled by a foreign government or organization controlling the world Communist movement." Yugoslavia has never been included in this definition, and in 1956 Poland also was determined to have the necessary degree of independence to be excluded, although in the case of Poland payment terms for credit sales cannot exceed five years (as contrasted with the maximum payment period of 20 years applicable to "friendly" countries).[59] Although credit restrictions under Public Law 480 would not be directly affected by the East-West Trade Relations Act, commercial agreements negotiated under the Act could conceivably lead to a situation in which various Eastern European countries (in particular, Rumania, Hungary, Czechoslovakia, and possibly eventually Bulgaria) could, like Poland and Yugoslavia, be considered as no longer "dominated or controlled by a foreign government or organization controlling the world Communist movement." This might leave the Soviet Union in the peculiar situation of controlling a "world Communist movement" located chiefly in those parts of the world "dominated or controlled by Communist China."[60]

58. *Cf.* Haight, *U.S. Regulation of East-West Trade*, 19 BUS. LAW. 875 (1964).

59. 7 U.S.C. § 1691 (1965). The act as amended in 1964 also prohibits the United States from making sales of agricultural commodities for local foreign currencies to "any country or area dominated by a Communist government"—that is, including Yugoslavia and Poland. Public Law 88-638, § 11. With respect to pre-1964 local currency sales to Poland, see note 16 *supra* and Dep't of State, *The Battle Act Report* 1965, 18th Rep. to Congress 41.

60. Under Public Law 480, *barter* transactions can be made with all Communist countries except the Soviet Union or any country dominated or controlled by Communist China.

In addition, the Food for Peace Act of 1966, 80 Stat. 1527, amended Public Law

The Export-Import Bank.—The Export-Import Bank of Washington, owned by the United States Government, is expressly exempted from the operation of the Johnson Act. Also the Attorney General has stated that the Johnson Act would not apply to private insurance companies, acting through the Foreign Credit Insurance Association (FCIA), which might participate with the Bank in the issuance of credit guarantees.[61] However, Title III of the 1964 Foreign Aid and Related Appropriations Act provided that:

> None of the funds made available because of the provisions of this Title shall be used by the Export-Import Bank to either guarantee the payment of any obligation hereafter incurred by any Communist country . . . or in any other way to participate in the extension of credit to any such country . . . except when the President determines that such guarantees would be in the national interest and reports each such determination to the House of Representatives and the Senate. . . .[62]

Since 1964 the President has signed successive determinations which, taken together, permit the Export-Import Bank to issue medium-term export guarantees (180 days to five years) in connection with the sale of all United States products to Poland, Hungary, Bulgaria, Czechoslovakia, and Rumania;[63] to issue long-term guarantees (in excess of five years) in connection with the sale of all United States products to Yugoslavia;[64] and to issue medium-term

480 by prohibiting the President from making foreign currency sales or credit sales to "any nation which sells or furnishes or permits ships or aircraft under its registry to transport to or from Cuba or North Vietnam . . . any equipment, materials, or commodities so long as they are governed by a Communist regime: *Provided*, That with respect to furnishing, selling, or selling and transporting to Cuba medical supplies, non-strategic raw materials for agriculture, and non-strategic agricultural or food commodities, sales agreements may be entered into if the President finds . . . that the making of such agreement would be in the national interest of the United States. . . ." On December 30, 1966, the Administration suspended the sale of surplus foods to Yugoslavia because various Yugoslav groups donated medical supplies and blood plasma to North Vietnam. See N.Y. Times, Dec. 31, 1966, p. 1, col. 5.

61. 59 Stat. 526 (1945), as amended, 12 U.S.C. § 635 (1965).

62. 77 Stat. 863 (1964). The Senate bill was proposed soon after the President's statement on October 9, 1963, that he had authorized the issuance of export licenses for the sale of wheat to the Soviet Union and other Communist countries. See note 54 *supra*. The bill was opposed by the State Department. 49 DEP'T STATE BULL. 935 (1963).

63. On February 4, 1964, President Johnson informed the Congress that he had determined that it is in the national interest for the Export-Import Bank to issue guarantees in counection with the sale of United States agricultural products to these five countries and to the U.S.S.R. On June 15, 1964, the President extended the Bank's authority to issue guarantees in connection with the sale of all United States products and services to Rumania. On October 7, 1966, the President extended similar authority for sales to Hungary, Poland, Bulgaria, and Czechoslovakia, but not to the U.S.S.R.

64. On February 4, 1964, the President determined that it would be in the national interest for the Export-Import Bank to issue guarantees in connection with the sale of United States products and services to Yugoslavia. On May 21, 1964, he approved guarantees of long-term loans to finance exports to Yugoslavia.

guarantees in connection with the sale of United States agricultural products to the Soviet Union.[65]

The President's authority to allow the Export-Import Bank to extend commercial credits to Communist countries may be restricted by the prohibition contained in the Mutual Defense Assistance Control Act of 1951 (popularly known as the Battle Act) against the granting of United States economic or financial assistance to any nation which knowingly permits the shipment of arms, ammunition, implements of war, or certain other strategic materials "to any nation or combination of nations threatening the security of the United States including the Union of Soviet Socialist Republics and all countries under its domination."[66] The State Department has taken the view that since the U.S.S.R. "does knowingly permit such shipments to other Communist countries in the Sino-Soviet bloc, and vice versa . . . the United States therefore may not engage in any transaction with the U.S.S.R. or other Communist bloc countries which constitutes military, economic, or financial assistance."[67]

The Acting General Counsel of the International Cooperation Administration has stated that extension by the Commodity Credit Corporation of credit for a period not exceeding three years in connection with the export of agricultural commodities from its stock would not constitute "financial assistance," and that the Battle Act was not intended to apply to transactions purely of a commercial character initiated and carried out primarily for the benefit of the United States Government.[68] Similarly, medium-term commercial credits by the Export-Import Bank would not be considered "assistance" for the purposes of the Battle Act. However, "inordinately long" guarantees by the Export-Import Bank, that is, credit terms in excess of those encountered in other commercial export transactions, might be construed as "assistance" under the terms of the Battle Act.[69]

65. See note 63 *supra.*

66. Mutual Defense Assistance Control Act, *supra* note 36.

67. Dep't of State, *The Battle Act Report 1965,* 18th Rep. to Congress 40. This view does not seem to be entirely shared by the Attorney General's Office. In his letter to the Department of State concerning the application of certain statutes to wheat sales to the Soviet Union and East European countries, Attorney General Kennedy stated that "the Battle Act did not purport to regulate private U.S. shipments to Soviet bloc countries, which were already subject to regulation under the Export Control Act. The Battle Act relates, rather, to trade with the Soviet bloc by countries receiving aid or assistance from the United States." See note 56 *supra.*

68. Letter of March 14, 1957, to Department of Agriculture from Peter K. Morse, Acting General Counsel, International Cooperation Administration, concerning the Mutual Defense Assistance Control Act of 1951, in *Background Documents on East-West Trade,* SEN. COMM. ON FOREIGN REL., 89th Cong., 1st Sess. 161 (1965).

69. We reached this conclusion with the help of Andreas F. Lowenfeld, Fellow of the Institute of Politics, Harvard University, formerly Deputy Legal Adviser to the Department of State.

Intergovernmental negotiations under the proposed East-West Trade Relations Act would provide the United States Government with an opportunity to bargain with respect to the range of commercial credits which can be offered by the Export-Import Bank. Although the text of the Joint Communiqué describing the agreements reached by Rumania and the United States in 1964 does not refer to export credits, two weeks after the negotiations were concluded President Johnson authorized the Export-Import Bank to extend commercial credits in connection with the sale of all United States products to Rumania.[70] Since the Bank's authority to extend credits to the Soviet Union is restricted to the sale of United States agricultural products, one incident of a commercial agreement between the United States and the Soviet Union could be an authorization to the Bank to extend commercial credits for sales of United States industrial products as well. In addition, since virtually all of the major Western countries have granted export credits in excess of five years to Communist countries,[71] it is possible that the Administration may wish to reconsider the propriety of the five-year credit line in connection with commercial agreements reached with particular Communist countries.[72]

CONCLUSION

It should be stressed again that the proposed East-West Trade Relations Act does not expressly purport to alter the structure of American export and credit controls. Instead, it speaks only in terms of bargaining with respect to most-favored-nation treatment, that is, the removal of discriminatory restrictions upon imports in return for a variety of concessions which would considerably ease the position of American firms doing business with Communist state trading agencies. If intergovernmental commercial agreements can be negotiated for the realization of these objectives, a long step forward will have been taken toward normalizing trade relations between the United States and the "less unfriendly"—if we may suggest a phrase that might have appeal for some Congressmen—Com-

70. See note 63 *supra.*

71. *Cf.* Clesner, *supra* note 9, at 184.

72. In 1958, the United States managed to persuade most of its allies to limit commercial credits to Communist countries to five years. This informal agreement was achieved in the Berne Union (Union D'Assureurs des Credits Internationaux), an international association of government-owned or supported export credit insurers. The so-called five-year credit line was maintained by most of the members until 1964. In that year, England and most of the Common Market countries extended credits in excess of five years for various projects in different Communist countries. In 1965 the Export-Import Bank granted what was in effect a 7½ year credit (30 months deferred and 6% interest for the next 5 years) for construction of a petroleum cracking plant in Rumania.

munist countries. Not only the affected Communist countries but also the United States would benefit economically both by the withdrawal of special American tariff barriers—which would enable American importers and consumers to obtain products of Communist countries on favorable terms—and by the reduction of existing Communist barriers to American traders. In fact, we are probably hurting ourselves much more than anyone else by levying a 35 per cent higher duty upon Soviet vodka than upon liquor from Western Europe, a 400 per cent higher duty on Soviet manganese than on manganese from South America, Asia, and Africa, and a 50 per cent higher duty on Soviet watches than on Swiss watches.

The proposed act has additional implications, not apparent on its face. "Regular government-to-government negotiations," leading to intergovernmental commercial agreements, may well result in a modification of American export and credit controls in return for a variety of commitments, possibly including the commitment to purchase particular American products. If past experience is any guide, the Office of Export Control can be fully trusted not to permit any shipments which would be inimical to the national security. In the past, the United States has been wary of entering into intergovernmental commercial agreements of the kind indicated, although our agreements with Poland and Rumania contain some of their features. When Soviet Premier Khrushchev, in June 1958, proposed a comprehensive Soviet-American trade agreement, listing many types of peaceful goods which the Soviet Union would like either to purchase or offer for sale in the United States, President Eisenhower rejected the bid.[73] "As you know," the President wrote:

> United States export and import trade is carried on by individual firms and not under governmental auspices. There is no need, therefore, to formalize relations between United States firms and Soviet trade organizations. Soviet trade organizations are free right now, without any need for special action by the United States Government, to develop a larger volume of trade with firms in this country. . . .[74]

Less than a year later, in May 1959, the Soviet Union negotiated a five-year trade agreement with the United Kingdom very similar to that proposed to President Eisenhower. In fact, if we study the

73. For a detailed discussion of the Khrushchev proposal and the response of President Eisenhower and the State Department, see Berman, *supra* note 5, at 525-27. See also Berman, *The Relationship Between U.S.S.R.-U.S. Trade and the Further Growth of an International Climate Favorable to Peace*, in THE LAW OF U.S.-U.S.S.R. TRADE 3, 14-16 (1965) (papers prepared for Conference of American and Soviet Legal Scholars, Ass'n of Am. Law Schools). The Soviet offer of a trade agreement was renewed informally in 1964 by Khrushchev's successor as Chairman of the Council of Ministers, A. N. Kosygin.

74. 39 DEP'T STATE BULL. 200 (1958).

way in which England, France, Germany, Italy, Belgium, Sweden, Argentina, Brazil, Nigeria, and a host of other non-Communist countries conduct trade with the Soviet Union, Poland, Czechoslovakia, and the other Communist countries, we find that such trade is generally carried out on the basis of bilateral trade agreements containing programs for the exchange of particular goods in particular quantities over a period of years.

There is nothing sinister in such programmed trade agreements, if they are properly negotiated and implemented. From the viewpoint of a planned economy, the lists of goods ("contingents") contained in the agreements can help form the basis for plans concerning domestic production and consumption. From the viewpoint of Western countries, the negotiating of the contingents is a means of preventing, even in advance of applications for licenses, exports which have strategic value or which for any other reason are undesirable. The Western government agrees only that it will issue export licenses to its private exporters, upon their application, for the listed quantities of the listed goods. No governmental commitment is made that sales will actually be made, and no system of import licensing is required on the Western side. The agreed-upon contingents of exports and imports are merely targets. Yet through the governmental negotiation of these targets it is possible to exert pressure for expanding trade in particular directions. In such an agreement with the Soviet Union, for example, it could be stipulated that a certain proportion of Soviet imports from the United States should consist of consumer goods and agricultural products. Thus not only the individual interests of particular American business firms, but also the national economic interests of the United States, could be protected.

Whether or not the commercial agreements to be negotiated by the United States under the proposed East-West Trade Relations Act take the prevalent form of intergovernmental trade agreements between Communist and other non-Communist countries, they would surely help to overcome the widespread American myth that our exports to Communist countries constitute a kind of foreign aid program. If we were to repeat Great Britain's experience with the Soviet Union, we would find that the Communist countries are not in a position to take as many of our exports as we would like them to take and that they are fully aware that a sale is not a gift, that imports must eventually be paid out of the proceeds of exports, and that trade in general is a matter of mutual advantage and not a "zero-sum game" in which one side's gain is another side's loss.

Above all, commercial agreements with Communist countries—negotiated on the basis of mutual advantage—can help to prove to

them that their own long-range interests are linked with the stability and integrity of the international economic order. If we may take the liberty of quoting what one of us has written elsewhere,

> In the 1920's and 1930's one of the principal charges levied against the Soviet leaders was that they had withdrawn from the world economy, that their foreign trade system was inherently restrictive and discriminatory, and that their goal was self-sufficiency. In the 1950's and 1960's the Soviet leaders have come out of their shell, have abandoned their earlier tendency toward economic isolationism, and have sought to establish firmer economic ties with the West. It is strange indeed that they should now be able to charge the United States with subverting economics to politics, with refusal to trade, and with discriminatory trade practices.[75]

This argument applies, of course, with added force to the other Communist countries of Europe, which are, in fact, Western countries, and which are openly striving to lessen their economic dependence upon the Soviet Union and upon each other.[76] The Communist countries can no longer afford to view trade as a political weapon for isolating themselves from the "capitalist camp," and by the same token we can no longer afford to view trade as a political weapon for containing Communism. The proposed East-West Trade Relations Act may be a belated recognition of these historic facts. At least it provides an opportunity to create legal institutions that reflect their significance.

75. Berman, *A Reappraisal of U.S.-U.S.S.R. Trade Policy*, 42 Harv. Bus. Rev. No. 4, 139, 151 (1964).

76. *Cf. Berman, We Can Trade With the Communists*, 202 The Nation, No. 26, 766 (June 27, 1966).