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UNITED STATES EXPORT CONTROLS—PAST, PRESENT, AND FUTURE

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INTRODUCTION

Traditionally, the United States Government has restricted exports only in time of war or in special emergency situations.¹ With the end of World War II, however, drastic wartime controls over exports were continued from

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The authors would like to express their gratitude to Theodore Thau, Executive Secretary, Advisory Committee on Export Policy of the United States Department of Commerce, and Andreas Lowenfeld, Fellow of the Kennedy Institute of Politics at Harvard University, for reading a draft of this article and for making a great many valuable criticisms and suggestions. Mr. Thau's comments were not made by him in an official capacity and it should perhaps be added, since the article criticizes some aspects of our export control system quite severely, that not all of his suggestions were accepted. Of course, neither he nor the Department of Commerce, nor Mr. Lowenfeld, is responsible for any errors of fact or of judgment the article may contain.

1. In both World Wars the President was empowered to control all exports to all destinations. Otherwise, with rare exceptions—indeed, the only one our researches have disclosed is a 1936 congressional prohibition of unlicensed exports of tin-plate scrap, enacted because of short supply (Act of February 15, 1936, ch. 74, 49 Stat. 1140)—controls upon exports prior to 1945 were limited to war materials or to articles exported to countries with which we were at war or which were at war with others or in which a state of civil strife existed. Thus in 1898, three days prior to declaration of war against Spain, a joint resolution of Congress authorized the President "to prohibit the export of coal or other material used in war from any seaport of the United States until otherwise ordered by the President or by Congress" (Joint Resolution of April 22, 1898, No. 25, 30 Stat. 739). This joint resolution was amended in 1912 to prohibit, except as the President shall prescribe, the export of "arms or munitions of war" to "any American country [in which there exist] conditions of domestic violence [promoted by the availability of U.S. arms]." (S.J. Res. 89, 37 Stat. 630 (1912)). After American entry into World War I, Congress authorized the President to restrict "during the present war" the export of any articles to any country to be named in a Presidential proclamation (Act of June 15, 1917, ch. 30, tit. VII, § 1, 40 Stat. 225); and the Trading With the Enemy Act of October 6, 1917 (ch. 106, 40 Stat. 411) made it unlawful for any person in the United States, except with the license of the President, to trade with designated enemies or with nationals, agents, or allies of such enemies. The joint resolutions of April 22, 1898, and March 14, 1912, were repealed and replaced by a joint resolution of January 31, 1922 (S.J. Res. 124, ch. 44, 42 Stat. 361 (1922)), which extended the scope of the President's authority to license exports of arms or munitions to include "any country in which the United States exercises extraterritorial jurisdiction." A joint resolution of May 28, 1934 (H.J. Res. 347, ch. 365, 48 Stat. 811) authorized the President to prohibit the sale of arms and munitions to countries engaged in armed conflict in the Chaco (Bolivia and Paraguay).

The Neutrality Act of August 31, 1935 (ch. 837, 49 Stat. 1081) authorized the President to control the export of arms, ammunition, or implements of war to any belligerent country during the progress of war between, or among, two or more foreign

year to year until February 28, 1949,² when the Export Control Act³ was enacted, the first comprehensive system of export controls ever adopted by the Congress in peace time. Even that Act was initially conceived as a temporary measure, and might well have been allowed to lapse in 1951 but for the Korean War. The Export Control Act was renewed in 1951, and again in 1953, 1956, 1958, 1960, 1962, and 1965. It is due to come before the Congress again in 1969.⁴

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. Moreover, the procedures for implementing this power are left almost entirely to his discretion, and at the same time heavy administrative and criminal sanctions may be imposed for violation of any export regulations he may introduce.

Under the Export Control Act, the Executive regulates all exports from the United States regardless of destination. In addition, he may invoke the Trading With the Enemy Act of 1917 against designated countries.⁵ That Act was employed by the President in December 1950, following the entrance of

states. A 1937 amendment to the Neutrality Act authorized the President to place restrictions on "the shipment of certain articles or materials in addition to arms, ammunition, and implements of war from the United States to belligerent states, or to a state where civil strife exists . . ." if such restrictions are "necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States." S.J. Res. 51, ch. 146, § 2(a), 50 Stat. 122 (1937). These powers were continued in the Neutrality Act of November 4, 1939 (ch. 2, 54 Stat. 4), which in addition provided that the President, pursuant to a declaration that there exists a state of war between foreign countries, could restrict the export of any articles or materials to any such countries.

On July 2, 1940, after the German conquest of France, Congress passed "An Act to Expedite the Strengthening of the National Defense" (ch. 508, 54 Stat. 712), section 6 of which authorized the President to prohibit or curtail the exportation from the United States "of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing or operation thereof. . . ." An expiration date of June 30, 1942, was provided. In 1941, section 6 of the 1940 act was extended to cover exports from all territories, dependencies, and possessions of the United States. S.J. Res. 76, ch. 134, 55 Stat. 206 (1941). By Act of June 30, 1942 (ch. 461, 56 Stat. 463) the 1940 Act (as amended) was extended to June 30, 1944, and section 6 was broadened to include "any articles, technical data, materials, or supplies." On July 1, 1944, the expiration date was once again extended to June 30, 1945. Ch. 360, 58 Stat. 671.

2. § 6 of the Act of July 2, 1940, as amended on June 30, 1942, *see note 1 supra*, was successively extended to June 30, 1946 (Act of June 30, 1945, ch. 205, 59 Stat. 270), June 30, 1947 (Act of May 23, 1946, ch. 269, 60 Stat. 215), July 15, 1947 (S.J. Res. 139, ch. 184, 61 Stat. 214 (1947)), February 29, 1948 (Act of July 15, 1947, ch. 248, 61 Stat. 321), and February 28, 1949 (S.J. Res. 167, ch. 526, 61 Stat. 945 (1947)).

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

4. 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. 80-464, 74 Stat. 130; Act of July 1, 1962, Pub. L. No. 87-515, § 1, 76 Stat. 172; Act of June 30, 1965, Pub. L. No. 89-63, 79 Stat. 209.

5. Ch. 106, 40 Stat. 411 (1917), *as amended*, 50 U.S.C. App. §§ 1-44 (1964).

Communist Chinese forces into Korea, as the basis for the issuance of regulations designed to prevent virtually all economic dealings (including imports and financial transactions, as well as exports) with Communist China and North Korea.⁶ In 1953, another set of regulations was also issued under the Trading With the Enemy Act, controlling exports to Communist countries by persons subject to the jurisdiction of the United States, of goods produced outside the United States.⁷ In 1961, the Trading With the Enemy Act also provided the foundation for the imposition of controls on economic dealings with Cuba similar to (though not quite as severe as) those previously made applicable to China.⁸

The Export Control Act is administered by the Commerce Department. The three sets of regulations issued under the Trading With the Enemy Act are administered by the Treasury Department. In addition, the State Department administers a licensing system regulating the export of arms, ammunition, and other implements of war, and technical data relating thereto, under the Mutual Security Act of 1954.⁹ These are the most important—although by no means the only¹⁰—governmental controls over exports.

The time has come to re-examine seriously both the Export Control Act and the Treasury Regulations issued under the Trading With the Enemy Act.

6. The Foreign Assets Control Regulations (31 C.F.R. §§ 500.101-808 (1967)) were issued on December 17, 1950, as an incident of the emergency declared by the President on December 16, 1950 (Pres. Proc. No. 2914, 3 C.F.R. 99 (Comp. 1949-53)). North Vietnam was added as a "designated foreign country" by an amendment published in 29 Fed. Reg. 6010 (1964). On June 17, 1966, the "National Liberation Front of South Viet-nam," the "Viet Cong," and the "Liberation Red Cross" were determined to be "specially designated nationals" of North Vietnam. *See* 31 Fed. Reg. 8586 (1966).

7. The Transaction Control Regulations, 31 C.F.R. §§ 505.01-60 (1967), were issued on June 29, 1953, to supplement the export controls exercised by the Department of Commerce over direct exports from the United States to the USSR and Eastern Europe.

8. The Cuban Import Regulations of February 7, 1962, were replaced by the Cuban Assets Control Regulations on July 8, 1963. *See* 31 C.F.R. §§ 515.101-808 (1967).

9. 22 U.S.C. § 1934 (1964); *see* 31 Fed. Reg. 15174-84 (1966) for a detailed definition of "arms, ammunition and implements of war."

10. The exportation of gold, narcotic drugs, and marijuana is regulated by the Treasury Department under the Gold Reserve Act of 1934, the Narcotic Drugs Import and Export Act, and the Marijuana Tax Act of 1937, respectively. The exportation of nuclear materials and equipment is regulated by the Atomic Energy Commission under the Atomic Energy Act of 1954. The exportation of natural gas and electric energy is regulated by the Federal Power Commission under the Natural Gas Act of 1938 and the Federal Power Act respectively. The exportation of tobacco seed and live tobacco plants is regulated by the Department of Agriculture under the Tobacco Seed and Plant Exportation Act of 1954.

The sale to a foreign purchaser and/or the transfer to foreign registry of vessels which are owned by citizens of the United States is subject to the approval of the U.S. Maritime Administration under authority of the United States Shipping Act of 1916. Vessels of war, as defined in the United States Munitions List, require export authorization from both the Department of State and the Maritime Administration. Vessels exported for the purpose of scrapping, dismantling, dismembering, or destroying the hulls or hulks thereof, require export authorization from both the Office of Export Control and the Maritime Administration for any Communist country (except Yugoslavia), Hong Kong, or Macao. For exportation to other destinations, export authorization is required from the Maritime Administration only.

See 15 C.F.R. § 370.5 (1966) ("Exportations authorized by Government agencies other than the Office of Export Control").

The question must be asked: Can methods of export control which were adopted initially as a temporary wartime expedient serve adequately for the indefinite future? We must also ask whether, if export licensing has in fact become a permanent part of our economic and legal order, it is wise to divide the main burden of administering it between three different departments of the Government. Closely related to the question of methods of control is the question of criteria for granting or denying license applications; these criteria must be analyzed in order to determine whether they in fact promote the aims of national security and foreign policy which the Export Control Act affirms. Finally, we must ask to what extent the United States, by "going it alone" in many of its export control policies, is adversely affecting the competitive interests of American exporters and of the American economy, and is also risking American leadership in the international community.

While we mean to answer these questions as impartially as possible, we do not wish to conceal our conviction—which is perhaps apparent from the questions themselves—that our system of export controls needs a drastic revision. We believe that the methods of administering export controls are in many respects arbitrary; that the existing division of controls among three different departments is unwise, and at times bureaucratic and oppressive; and that some of the criteria for granting or denying license applications are specious. Moreover, we are convinced that the United States, by refusing to adapt its export controls to those of the countries of Western Europe, is doing a disservice to American exporters, who are thus deprived of markets; to the American economy, whose balance of payments thereby suffers; and to American leadership in the world, which incurs the charge that it lacks both realism and idealism—the realism to recognize that one can trade even with one's enemies on the basis of mutual advantage, and the idealism that places the long-range development of an international economic and legal order ahead of short-range national political interests.

I. THE LEGISLATIVE HISTORY OF THE EXPORT CONTROL ACT OF 1949

Although most other special wartime controls withered away in the period from 1945 to 1947 with the transition to a peacetime economy,¹¹ it was necessary to continue to restrict exports for two main reasons: first, our domestic economy was faced with world-wide shortages of critical items such as steel, chemicals, drugs, and building supplies, and thus, in the absence of controls, exports could have drained away—or bid up the price of—many goods vitally needed at home; and second, our policy of aiding the post-war recovery of the

11. The First Decontrol Act of 1947 (ch. 29, 61 Stat. 34) and the Second Decontrol Act of 1947 (ch. 248, 61 Stat. 321) eliminated many wartime controls over domestic distribution, production, price, transportation, and shipping. The preamble to the Second Decontrol Act stated that "It is the general policy of the United States to eliminate wartime control of materials except to the extent necessary. . . ."

European economies—symbolized in the Marshall Plan—required the channelling of particular goods to particular countries on a priority basis. In addition, there was a third reason—which ultimately became the main reason for continuing the controls, but which in the period of 1945-1947 was considered only a subsidiary reason: the need for close scrutiny over shipments to the USSR and other Communist countries of industrial materials which might have military significance. In this connection it should be noted that in 1947 it was still open to the Soviet Union to join the Marshall Plan; that the Communist victory in China was secured only in 1948 and 1949; and that the phrase "Cold War" was only beginning to penetrate our national consciousness.

In 1948 it was apparent that the repeated annual extensions of the 1940 law authorizing export controls were meeting congressional opposition, and that new legislation was required which would more adequately reflect the post-war situation. A Senate investigation in 1948 disclosed substantial weaknesses in the administrative system of export controls, and made several recommendations, some of which were of a restrictive character (a greater degree of consultation by the Commerce Department's Office of International Trade, which was administering the controls, with other executive departments and with private traders) and some of which involved an expansion of administrative rule-making power (the authority to promulgate regulations applicable to financing, transporting, and other servicing of exports).¹² In addition, the officials of the Office of International Trade wished to be expressly relieved by statute from the requirements of the Administrative Procedure Act, especially section 4 thereof requiring hearings on proposed regulations.¹³

A. *The Congressional Hearings*

The major reason advanced by the Administration for the extension of export controls was that certain goods continued to be in short supply throughout the world and that, in the absence of controls, exports of these scarce commodities would be greatly increased to the detriment both of our national economy and of our obligations to aid European recovery. Given existing scarcities, Secretary of Commerce Sawyer stated, exports must be channelled to countries "where our foreign-policy interest would be served best," namely to Western Europe.¹⁴ By the end of 1948, however, high levels of United States production had overcome most shortages, even in the light of European

12. See S. REP. No. 1775, pt. 2, 80th Cong., 2d Sess. (1948).

13. See *Hearings on S. 548 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 81st Cong., 1st Sess. 199 (1949) [hereinafter cited as *Hearings on S. 548*].

14. *Id.* at 6 (Secretary Sawyer). § 112(g) of the Economic Cooperation Act of 1948 provided that no shipment of material to a European country not participating in the Marshall Plan was to be licensed until the requirements of the participating countries were being adequately met. 62 Stat. 148.

demand.¹⁵ Indeed, at the time that the Export Control Act was passed, shortages of supply accounted for only about one-third of the export licensing activities of the Office of International Trade.¹⁶

It seems clear that the Administration exaggerated the dimensions of the short supply situation and that, notwithstanding State Department controls over exports of military goods, the Administration was most concerned to exercise, in the words of the statute, "the necessary vigilance over exports from the standpoint of their significance to the national security." As early as March 1, 1948—shortly after the Communist coup in Czechoslovakia—the Department of Commerce had placed under licensing control most exports to the Soviet Union and the countries of Eastern Europe. And in the same month, Congress enacted an amendment to the pending Marshall Plan bill which directed the President "to refuse delivery insofar as practicable to [Marshall Plan participants] of commodities which go into the production of any commodity for delivery to any nonparticipating European country which commodity would be refused export licenses to those countries by the United States in the interest of national security."¹⁷ In December 1948 a Senate committee investigating the administration of export controls reported that "The national security aspects of our export control program are of transcendent importance, particularly in view of the present activities of the Soviet Union and its satellites."¹⁸ Thus, in the period March 1948 to February 1949 (when the Export Control Act was passed), so-called security controls replaced short supply controls as the principal regulator of the American export trade. At the same time, however, the Administration was hopeful that export controls might no longer be needed by June 30, 1951—the expiration date of the new legislation.

Apart from the reasons for the extension of export controls, the congressional hearings focused on three questions: (1) the licensing policies of the Office of International Trade, (2) the effect of excluding the operation of section 4 of the Administrative Procedure Act, and (3) the criminal penalties for violation of regulations under the Act.

1. *The Licensing Policies of the Office of International Trade.* The business community generally, and the small merchant exporters in particular, were especially concerned with the licensing policies of the Office of International Trade. The most general complaint was that there was no equitable or systematic method of granting licenses in most commodity branches; witnesses testified that applications to export similar goods were treated unequally, that is, that some licenses were approved while others were denied

15. See Note, *Export Controls*, 58 YALE L.J. 1325, 1336 n.41 (1949); *Hearings on S. 548*, *supra* note 13, at 16-20.

16. Statement of Francis McIntyre, Assistant Director of the Office of International Trade, N.Y. Times, March 5, 1949, at 21, col. 1.

17. Economic Cooperation Act of 1948, § 117(d), ch. 69, 62 Stat. 154.

18. See S. REP. No. 1775, pt. 2, 80th Cong., 2d Sess. 15 (1948).

and that export quotas were not evenly or fairly divided. Several representatives of the business community urged that the Office of International Trade establish and follow workable and uniform standards in the issuance of export licenses and, in addition, that the Congress define more sharply its policy in sections 1 and 2 of the Act and thereby place express restraints on the limits of the Office of International Trade's authority. "All we ask for," said one lawyer, "is that we have a little more definitive language in the statute. With that definitive language we can then go to the officials who may be trampling on the intent of the statute and point out this language."¹⁹ Unfortunately, no way was found to satisfy these complaints.

In addition, the merchant exporters were concerned with licensing practices which discriminated in favor of the manufacturers. They charged that Office of International Trade officials were trying to eliminate the "middleman" from the export business.²⁰ As a result of such devices as "price criterion" as a factor in licensing, a "historical" method of licensing for basic goods (which discriminated against export houses whose principals had served in the war as well as against newcomers), and a "letter of commitment" procedure by which an exporter holding firm orders could not get an export license without a letter of commitment from a supplier (who, in turn, would not furnish such a letter without presentation of an export license), the merchant exporters were effectively precluded from a large part of the export business. On the other hand, by reserving even a small share of the available quotas to merchant exporters, the Office of International Trade may in fact have secured for some of them a larger volume of export sales than they might have been able to make in an uncontrolled market. The congressional remedy for this dilemma was a directive in section 4(b) of the Act that "insofar as practicable" consideration be given "to the interests of small business, merchant exporters as well as producers, and established and new exporters," and that provisions "be made for representative trade consultation to that end."²¹

2. *Section 4 of the Administrative Procedure Act.*²² Section 2 of the Administrative Procedure Act provides that that Act shall not apply to activities of an emergency character, except for section 3 thereof, which requires publication of information, rules, opinions, orders and public records. The Commerce Department contended that since the Office of International Trade was a "temporary emergency agency,"²³ it should be exempt from the

19. Statement of Milton R. Wexler, legal counsel to the National Association of Steel Exporters, *Hearings on S. 548*, *supra* note 13, at 96.

20. Statement of Louis I. Freed, Executive Secretary, Independent Merchant Exporters Association, *id.* at 176.

21. Ch. 11, 63 Stat. 7 (1949), *as amended*, 50 U.S.C. App. § 2024(b) (1964).

22. 5 U.S.C.A. § 553 (Special Pamph. 1966).

23. Statement of Isidore Ostroff, Office of International Trade, *Hearings on S. 548*, *supra* note 13, at 199.

operation of the Administrative Procedure Act altogether (except for section 3). The business community generally urged that it *not* be exempted from section 4, which requires notice and public hearing on agency rule-making activities but which does not apply to interpretive rules, general statements of policy, or to any situation in which the agency for good cause finds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Business representatives agreed with the Office of International Trade that the voluminous applications for export licenses made it impracticable to hold hearing procedures on individual license applications but they did argue forcefully that the Office should not be exempt from "notice and hearing on substantive and legislative rules to be promulgated which may effectively curtail the right to remain in business."²⁴ The Senate Report, adopting the Administration's view, concluded that only section 3 of the Administrative Procedure Act should be applicable to the export control program "in view of the temporary character of this legislation and its intimate relation to foreign policy and national security."²⁵ Other temporary regulatory activities had been granted comparable exemptions, including the Sugar Control Extension Act of 1947,²⁶ the Housing and Rent Act of 1947,²⁷ the Veterans Emergency Housing Act of 1946,²⁸ and the War Housing Insurance Act.²⁹ Section 7 of the Export Control Act embodied the Senate recommendation.³⁰

3. *Criminal Penalties.* The Administration proposed, and the Congress accepted, a change in the criminal sanctions of the export control law of 1940, which had provided a maximum penalty of \$10,000 and two years in prison for "the violation of any provision of any proclamation, or of any rule, or regulation issued hereunder."³¹ Section 5 of the 1949 Act reduced the maximum sentence to one year and thus changed the nature of the offense, under federal criminal law, from a felony to a misdemeanor.³² This was done in order to eliminate the requirement of a grand jury indictment and thus to expedite prosecution of violators. Neither the Senate nor the House hearings give any indication as to whether the omission—as in the 1940 law—of words relative to intent or negligence on the part of the violator serves to eliminate the requirement thereof.

To facilitate both criminal and administrative proceedings, section 6 of the Act grants to the Executive the power to conduct investigations, to issue

24. Statement of Milton R. Wexler, *id.* at 37.

25. S. REP. No. 31, 81st Cong., 1st Sess. 6 (1949).

26. H.J. Res. 146, ch. 30, 61 Stat. 35 (1947).

27. Act of June 30, 1947, ch. 163, 61 Stat. 193.

28. Act of May 22, 1946, ch. 268, 60 Stat. 207.

29. Act of March 28, 1941, ch. 31, 55 Stat. 55.

30. Ch. 11, 63 Stat. 79 (1949), as amended, 50 U.S.C. App. § 2027 (1964).

31. Act of July 2, 1940, § 6, ch. 508, 54 Stat. 714, repealed by Act of Aug. 10, 1956, § 53, ch. 1041, 70 Stat. 641.

32. Ch. 11, 63 Stat. 78, 50 U.S.C. App. § 2025 (1964).

subpoenas, and to require testimony under oath. Such powers were lacking in the pre-existing law. The Senate Committee considered that:

[a]mple safeguards against administrative misuse of these enforcement powers [were] provided [(a)] by the requirement that they be utilized solely "to the extent necessary or appropriate to the enforcement of this act . . . ;" [(b)] by the intervention of the United States district courts in any proposed enforcement of a subpoena; [(c)] by the inclusion of the standard immunity provisions of the Compulsory Testimony Act of 1893 . . . ; and [(d)] by the prohibition against disclosure of confidential information furnished.³³

B. *Extensions and Amendments of the Export Control Act*

Whatever doubts may have been entertained in 1948-1949 about the propriety and wisdom of maintaining a comprehensive system of export controls were dispelled by the outbreak of armed conflict in Korea in June 1950. When the Export Control Act came up for renewal in June 1951, shortages of goods had become more acute, and national security required an even more careful scrutiny of exports to the Communist countries allied with North Korea. Nevertheless, the Administration was still willing to treat the Export Control Act as a temporary measure and frequently declared its intention to eliminate controls under it at the earliest possible moment. Congress also insisted on periodic review of the Act, which was extended—without amendment—first to 1953, then to 1956, then to 1958, then to 1960, and again to 1962.³⁴

With the end of the Korean War in 1953, however, the reasons for maintaining export controls under the Act changed substantially. Short supply controls were progressively eliminated; by 1956, only eight items were controlled for reasons of scarcity, and in 1960 there were none. Indeed, it is doubtful that the domestic supply situation at any time warranted the application of controls as comprehensive in scope as those imposed by the Office of International Trade (or by its successors, the Office of Export Supply and the Office of Export Control).³⁵ Moreover, considerations of national security also became less important: on the one hand, Stalin's successors in the Soviet Union—first Malenkov and then Khrushchev—adopted a more friendly posture toward Western Europe and the United States, and the possibility of a European War, though always present, appeared to be greatly reduced; on the other hand, in view of the economic recovery of the countries of Western Europe, and their declared policy to expand trade with Eastern Europe and the Soviet Union, American restrictions became less and less effective from a security standpoint. Under these circumstances, the contin-

33. S. REP. No. 31, 81st Cong., 2d Sess. 5-6 (1949).

34. See note 4 *supra*.

35. The current administrator is the Office of Export Control of the Bureau of International Commerce.

uation of controls under the Export Control Act came to be justified almost wholly in terms of foreign policy, and their severity fluctuated with successive international crises and accommodations. Throughout the 1950's, the Administration spoke of a "Sino-Soviet bloc" and of a "Sino-Soviet policy" which, with respect to trade, consisted of a complete embargo on all economic dealings with Communist China, North Korea, and North Vietnam, and selective controls on shipments to the USSR and Eastern Europe (excluding Yugoslavia). From 1957 on, Poland was accorded special treatment.

During the 1950's and early 1960's there was little if any substantial opposition to the systematic use of export controls as a foreign policy weapon, either in the Congress or in the business community. Whatever congressional debate accompanied the successive extensions of the Export Control Act was directed largely to the Administration's failure to secure a greater degree of cooperation from friendly foreign nations in the implementation of multi-lateral trade controls.

1. *The 1962 Amendments.* In June 1962 the Administration sought a single change in the existing law, namely, the repeal of section 12, establishing a date for the expiration of the Act. The Commerce Department strongly urged that Congress make the Act permanent, instead of following the previous practice of two-year or three-year extensions. The reasons given for permanence were (a) that there was no substantial likelihood that the Act would not be needed in the foreseeable future, (b) that the establishment of a permanent system of controls would make it easier to persuade other friendly countries to maintain their own export controls at an appropriate level, and (c) that temporary extensions create difficulties in obtaining qualified employees to administer the Act. This was the first such request by the Administration in the history of the Act. The Senate bill adopted the Administration's request, but the House bill granted only a three-year extension, and the conference substitute, subsequently enacted, followed the House amendment.

At the same time Congress on its own initiative introduced certain changes in the language of the Act which in terms substantially broadened the scope of the controls, though in fact the changes only reflected previous licensing practices. An amendment to section 1(b) set forth the finding of Congress that "unrestricted export of materials without regard to their potential military *and economic* significance [and not only, as before, their potential military significance] may adversely affect the national security of the United States";³⁶ and an addition to section 3(a), sponsored by the Chairman of the House Select Committee on Export Control, Paul Kitchin, provided for the denial of any license to export any item "to any nation or combination of nations threatening the national security of the United States,

36. 50 U.S.C. App. § 2021(b) (1964) (emphasis added).

if the President shall determine that such export makes a significant contribution to the military *or economic* potential of such nation or nations which would prove detrimental to the national security *and welfare* of the United States.”³⁷

These amendments, which were opposed by the Administration, underscored the broad economic aspects of what had come to be called “strategic,” in contradistinction to military, controls and reflected a widespread sentiment that exports of nonmilitary items which might assist the industrial development of the Soviet Union would be detrimental to the national security of the United States.³⁸

Congress also amended the Act in order to confront the problems created by the fact that the less restrictive policies of other non-Communist countries toward trade with Communist countries were frustrating United States controls. Senator Jacob K. Javits of New York sponsored an addition to section 2 which, as finally adopted, declared it to be the policy of the United States “to formulate, reformulate, and apply such controls to the maximum extent possible in cooperation with all nations with which the United States has defense treaty commitments, and 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.”³⁹ In the words of Senator Javits, “the line of economic action must run along the outside boundary of the community of industrialized nations.”⁴⁰

There is, of course, a glaring ambiguity here which was not resolved in the language of the amended section 2. A “unified commercial and trading policy” could be achieved either by inducing the European countries to raise their restrictions to the level of ours or by reducing American restrictions to the lower European levels. Nothing said by Senator Javits in support of the amendment suggested that he intended the second of these two alternatives. In its published interpretation of the amendment, the Department of Commerce stated that it was formulating, reformulating, and applying U.S. export controls as much as possible to accord with the multilateral agreement level, “subject, of course, to one major qualification. . . . that the United States should *not* refrain from exercising control over any item or toward any country, which is regarded as important to U.S. national security or foreign policy, merely because multilateral agreement cannot be obtained.”⁴¹ Thus

37. 50 U.S.C. App. § 2023(a) (1964), as amended (Supp. I, 1965) (emphasis added).

38. See Hearings on Extension of Export Control Act of 1949 and Issuance of Gold Medal to Bob Hope Before the Subcomm. of the House Comm. on Banking and Currency, 87th Cong., 2d Sess. 21, 27 (1962).

39. 50 U.S.C. App. § 2022 (1964), as amended (Supp. I, 1965).

40. SENATOR JAVITS OF SUBCOMM. ON FOREIGN ECONOMIC POLICY OF THE JOINT ECONOMIC COMM., THE POLITICAL STAKES IN EAST-WEST TRADE, 87TH CONG., 2D SESS. 3-4 (Comm. Print 1962).

41. DEP’T OF COMMERCE, EXPORT CONTROL, 61ST QUARTERLY REPORT 5 (1962) [hereinafter cited as EXPORT CONTROL, QUARTERLY REPORT].

the Javits amendment merely has the effect of declaring a new policy for other countries rather than a new policy for the United States.

The 1962 amendments also included a declaration of the policy of the United States "to use its economic resources and advantages in trade with Communist-dominated nations to further the national security and foreign policy objectives of the United States."⁴² The Department of Commerce—which did not seek this amendment—has given it the following interpretation:

... Having in mind that the economic resources and advantages in trade possessed by the United States obviously includes much more than the power to impose export controls, the Department construes the scope of this amendment as transcending the preexisting statutory authority and responsibility vested in the Department under the act . . . [T]he Department construes this amendment as providing congressional policy authorization to vary the scope and severity of export control to particular countries, from time to time, as national security and foreign policy interests require . . .⁴³

Clearly, however, the new language of "economic resources and advantages" was not needed to give the Department flexible power "to vary the scope and severity of export control to particular countries . . . as . . . foreign policy interests require." In the first place, the inherent difficulties of classifying goods for strategic purposes are so great, and the standards so obscure, that Department officials had always been able to vary the scope and severity of export control towards individual Communist nations. The Department of Commerce has always treated Yugoslavia—since it asserted its independence from the USSR—as a Western European nation and, as early as August 1957, the Department of Commerce initiated a more liberal export policy with regard to Poland, in recognition of various changes in Poland's domestic and foreign policy. More recently—since July 1964—the Department has accorded Rumania more favorable treatment than the other "Soviet bloc" countries (except Poland). The congressional amendment implies that American economic resources and advantages in trade can be used as a bargaining instrument to influence the internal evolution and external behavior of Communist countries and, in particular, to encourage the movement toward greater national independence in Eastern Europe.

Finally, the Export Control Act was amended in 1962 to increase the maximum penalty for a second and subsequent violation to three times the value of the exports involved or \$20,000, or five years' imprisonment, or both,⁴⁴ and also to impose a maximum penalty of five times the value of the exports involved or \$20,000, or five years' imprisonment, or both, for a "wilful exportation" made "with knowledge that such exports will be used for the benefit of any Communist-dominated nation."⁴⁵ Previously there had

42. 50 U.S.C. App. § 2022 (1964), *as amended* (Supp. I, 1965).

43. EXPORT CONTROL, 61ST QUARTERLY REPORT 5 (1962).

44. 50 U.S.C. App. § 2025(a) (1964), *as amended* (Supp. I, 1965).

45. 50 U.S.C. App. § 2025(b) (1964), *as amended* (Supp. I, 1965).

been no provision for increased penalties in case of repeated violations, and no provision relating to wilful violations.

2. *The 1965 Amendments.* In 1965 as in 1962, the Administration sought the indefinite extension of the Act by the repeal of section 12 thereof. Congress again rejected this proposal. It did, however, extend the expiration date for four years—the longest in the history of the Act—to June 30, 1969.⁴⁶

The Administration bill also sought the amendment of section 5 to authorize the administrative imposition of a civil penalty not exceeding \$1000 for a violation of any regulation, order, or license issued under it. The Administration's reason, as expressed by Secretary of Commerce Connor, was that "license revocation or denial in many cases is too much a punishment for the crime."⁴⁷

The final amendment—sections 5(c)-(g)⁴⁸—differs from the bill originally proposed by the Department of Commerce in two major respects. First, the proposed bill would have given to the Commerce Department, by implication, the power to withhold or suspend export licenses or privileges until the civil penalty was paid. The Senate decided that this was too important a feature of the statutory scheme to be left to implication. Congress therefore limited to a maximum of one year the period for which export privileges may be withheld as a means of inducing payment of a penalty.⁴⁹ In addition, the amendment as finally adopted clarifies the rights of persons who wish to contest in court the imposition of any civil penalty. In the case of a person who does not pay the penalty, the revised amendment provides that the Government may collect it only by bringing a civil action, in which the court is to determine *de novo* all issues necessary to the establishment of liability.⁵⁰ However, in order to preclude the possibility that an offender may pay the fine in order not to lose his export privileges and then sue for a refund of the fine, the amendment provides that no suit for refund may be brought in any court.⁵¹ Thus the administrative character of the penalty is preserved, and an exporter who chooses to challenge it in court must risk the cessation of his export business for one year.

The amendment does not prescribe any period following an offense within which the civil penalty must be imposed. The Senate Report, however, states that the general five-year limitation imposed by 28 U.S.C. § 2462 shall govern both administrative and judicial proceedings.⁵²

The Act was further amended by the addition of a new paragraph stating

46. 50 U.S.C. App. § 2032 (Supp. I, 1965).

47. *Hearings on H.R. 7105 Before the House Comm. on Banking and Currency*, 89th Cong., 1st Sess. 19 (1965).

48. 50 U.S.C. App. §§ 2025(c)-(g), as amended (Supp. I, 1965).

49. 50 U.S.C. App. § 2025(d) (Supp. I, 1965).

50. 50 U.S.C. App. § 2025(f) (Supp. I, 1965).

51. *Id.*

52. S. REP. No. 363, 89th Cong., 1st Sess. 7 (1965).

that it is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States and to encourage domestic export firms to refuse to take any action which has the effect of furthering such restrictive trade practices or boycotts.⁵³ This amendment, which was proposed in various forms in both the Senate and the House, was directed exclusively against the Arab boycott of American firms doing business with Israel. To effectuate the boycott, the League of Arab States sends questionnaires to American firms, and it was the object of the various bills presented on this subject to require the Department of Commerce to issue regulations prohibiting American exporters from responding to such questionnaires. The proposed amendments were vigorously opposed by the Department of State and the Department of Commerce and the final version merely "encourages" and "requests" exporters to refuse to furnish such information as will assist the boycott practices. Although one may sympathize with the objectives of the proponents of the amendment, it may be seriously questioned whether the export control law is the proper means to implement them. This was the first amendment in the history of the Act which introduced provisions wholly outside the scope of export controls.

Finally, the President's authority under section 3(a) of the Act to prohibit or curtail exportations from the United States was extended to cover "any other information" (in addition to technical data).⁵⁴ The Senate Banking and Currency Committee Report states that the new term was added "in connection with the new policy provision relating to boycotts, since controls over furnishing of information may be deemed appropriate as a part of the regulations issued in connection with this new policy provision."⁵⁵

II. THE ADMINISTRATIVE STRUCTURE OF EXPORT CONTROLS

It was easy enough for Congress to give the President virtually unlimited power to prohibit or curtail exports; it proved more difficult for him to create a rational administrative structure for exercising that enormous power—involving, as it now does, the control of some \$30 billion worth of exports to all countries of the world.

53. 50 U.S.C. App. § 2022(4) (Supp. I, 1965).

54. 50 U.S.C. App. § 2023(a) (Supp. I, 1965).

55. S. REP. No. 363, 89th Cong., 1st Sess. 8 (1965). Minor changes included amendments to §§ 3, 4, and 5. The last phrase of § 3(c) of the Act, "except to the extent required to effectuate the policies set forth in clause (b) and clause (c) of section 2 hereof," was amended to read "except to the extent required to effectuate the policies set forth in section 2(1)(B) or 2(1)(C) of this Act," a change necessitated by the redesignation of the different paragraphs of § 2. Pub. L. No. 89-63, § 3(b), 79 Stat. 210 (1965). § 4(a) of the Act, "In determining which articles, materials, or supplies . . ." was amended to read "In determining what . . ." and § 5(b) of the Act, "Whoever willfully exports any material . . ." was amended to read "Whoever willfully exports anything . . ." Pub. L. No. 89-63, §§ 4(b), (c), 79 Stat. 210 (1965). These changes apparently reflected the desire to include technical data within the prohibition.

The Export Control Act does not indicate what department of the Executive branch shall administer export controls. It merely states that "the President may delegate the power, authority, and discretion conferred upon him by this Act to such departments, agencies, or officials of the Government as he may deem appropriate";⁵⁶ and that the "department, agency, or official" charged with determining what exports shall be controlled, and to what extent, "shall seek information and advice from the several executive departments and independent agencies concerned with aspects of our domestic and foreign policies and operations having an important bearing on exports."⁵⁷

These provisions of the Export Control Act, which have remained unchanged since 1949, hardly disclose the actual structure of controls. In fact from the early 1940's on, the day-to-day regulation of exports has been in the hands of a relatively autonomous body of administrators, relatively constant in personnel, now called the Office of Export Control, formerly the Office of Export Supply, before that the Office of International Trade, and at one time the Board of Economic Warfare. During the period from 1940 to 1945, economic defense and economic warfare were vested in an Administrator of Export Control and successive independent agencies.⁵⁸ In 1945, export controls were transferred to the jurisdiction of the Secretary of Commerce,⁵⁹ where they have been ever since—under a succession of bureaus (Bureau of Foreign and Domestic Commerce, Bureau of Foreign Commerce, Bureau of International Programs, and now Bureau of International Commerce)⁶⁰ responsible to the Assistant Secretary of Commerce for Domestic and International Business. However, whatever the name of its superior agency within the Commerce Department, the Office of Export Control is bound to feel a certain lack of congeniality in its surroundings, since the main purpose of export controls is to restrict exports, whereas a primary function of the Department of Commerce as a whole is to foster, promote, and develop exports.⁶¹ Indeed, in 1949 Secretary of Commerce Sawyer frankly said of export control that "[i]t is a rather difficult and somewhat unpleasant task,"

56. 50 U.S.C. App. § 2023(b) (1964).

57. 50 U.S.C. App. § 2024(a) (1964), *as amended* (Supp. I, 1965).

58. Controls exercised by the Administrator of Export Control pursuant to Pres. Proc. No. 2413, 5 Fed. Reg. 2467 (1940), were transferred to the Economic Defense Board (renamed the Board of Economic Warfare by Exec. Order No. 8982, 6 Fed. Reg. 6530 (1941)) in 1941, Exec. Order No. 8900, 6 Fed. Reg. 4795 (1941), to the Office of Economic Warfare in 1943, Exec. Order No. 9361, 8 Fed. Reg. 9861 (1943), and later in 1943, to the Foreign Economic Administrator. Exec. Order 9380, 8 Fed. Reg. 13081 (1943).

59. Exec. Order No. 9630, 10 Fed. Reg. 12245 (1945). On October 21, 1945, the Secretary of Commerce delegated his export control authority to the Director of the Requirements and Supply Branch, Office of International Trade. Dep't of Commerce Order No. 390, 10 Fed. Reg. 13130 (1945).

60. Dep't of Commerce Order No. 182, 28 Fed. Reg. 1073 (1963).

61. Funds were first appropriated to the Department of Commerce and to Labor's Bureau of Foreign and Domestic Commerce in 1912 to "promote and develop the foreign and domestic commerce of the United States." Act of Aug. 23, 1912, ch. 350, 37 Stat. 408.

and that "I would be very glad if some other department would take it all over."⁶²

The principal tasks of the Office of Export Control are to issue export regulations, to grant or deny applications for export licenses, and to investigate violations of the Export Control Act and of its own regulations thereunder. The Office of Export Control has four licensing divisions—for Technical Data and Services, Scientific and Electronic Equipment, Production Materials and Consumer Products, and Capital Goods, respectively.⁶³ In addition, an Operations Division is responsible for the mechanical processing of license applications and for maintaining liaison with the Customs Bureau, the Post Office, and the Bureau of the Budget. An Investigation Division cooperates with the General Counsel of the Department of Commerce in the prosecution of violations. Finally, a Policy Planning Division reviews all license applications forwarded to it by the four licensing divisions, and prepares documentation on those applications to be forwarded to higher reviewing bodies; also the Policy Planning Division classifies commodities and technical data and reviews the items on the various strategic lists.⁶⁴

Although the Office of Export Control is located within the Commerce Department's Bureau of International Commerce, it is advised by a three-tier hierarchy of interdepartmental committees, on which are represented the Departments of Commerce, State, Defense, and Treasury, in conjunction with that amorphous body known as the "intelligence community." Each of the three committees is chaired by a Commerce Department official. Also, representatives of the Departments of Agriculture and Interior, as well as of various administrative agencies (the Federal Aviation Agency, the National Aeronautical and Space Agency, the Atomic Energy Commission, the Office of Emergency Planning), occasionally serve on these committees in an ad hoc capacity.⁶⁵

At the first level of interdepartmental review stands the Operating Committee, which is consulted in determining what items shall be controlled and the extent to which exports thereof shall be limited. The Operating Committee considers all matters referred to it by the Policy Planning Division of the Office of Export Control (license applications, licensing requirements, programs affecting particular countries or areas); in addition, each of the permanent representatives on the Operating Committee may bring policy

62. *Hearings on S. 548*, *supra* note 13, at 8.

63. Dep't of Commerce Order No. 182, 28 Fed. Reg. 1073 (1963); Dep't of Commerce, Organization and Function Supp. to Dep't Order No. 182, 30 Fed. Reg. 2041 (1965); EXPORT CONTROL, 63d QUARTERLY REPORT 6 (1963).

64. *Id.*

65. See *Hearings Pursuant to H. Res. 402 Before the House Select Comm. on Export Control*, 87th Cong., 1st Sess., pt. 1, at 10 (1961); *Hearings on Export of Strategic Materials to the USSR and other Soviet Bloc Countries Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Security Laws of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 2, at 169 (1961).

matters directly to it for consideration. Ad hoc representatives may bring before the Operating Committee license applications relating to their special interests or expertise. The recommendations of the Operating Committee are supposed to be based on the policies and guidelines set down by the higher level interdepartmental committees.⁶⁶

When unanimity is not reached in the Operating Committee—whether on specific license applications or on general policy matters—the subject is pushed up to the Advisory Committee on Export Policy, which consists of interdepartmental representatives at the Assistant Secretary level and which is chaired by the Assistant Secretary of Commerce for Domestic and International Affairs.⁶⁷ Presumably because of disagreements within the Advisory Committee, or dissatisfaction with some of its decisions, or both, President Kennedy in 1961 established a still higher committee, the Export Control Review Board, consisting of the Secretaries of Defense, State, and Commerce, and chaired by the latter, to assure the highest level consideration of trade control policies and actions and to obtain, as far as possible, agreed action among the departments chiefly concerned with advising the Secretary of Commerce in accordance with section 4(a) of the Export Control Act.⁶⁸ The Export Control Review Board is, of course, subject to major policy decisions established on the cabinet level or by the President himself.

Thus section 4(a) of the Act, which provides that the department, agency, or official in charge of export controls "shall seek information and advice" from other departments and agencies, has served as a basis for integrating the work of the Office of Export Control with that of governmental bodies other than the Department of Commerce. Indeed, it is sometimes said that the Office of Export Control could be shifted from Commerce to State, or even to Treasury, without substantially affecting its operations. Yet there are sound technical and policy reasons for continuing export controls in the Department of Commerce, since this ensures that at higher levels above the Office of Export Control there will be officials who are involved in the promotion, and not merely the restriction, of exports. In addition, the Office of Export Control must have access to the expertise of Commerce Department desk officers for each basic commodity (copper, steel, sugar, etc.), who are also concerned with the promotion of exports.⁶⁹

66. *Id.*

67. *Id.*

68. Exec. Order No. 10945, 3 C.F.R. 473 (Comp. 1959-1963); 50 U.S.C. App. § 2023 (1964).

69. Although the Office of Export Control is charged with the day-to-day administration of export controls, three other offices of the Bureau of International Commerce are utilized in the administration of the Export Control Act. The Office of the Director of the Bureau of International Commerce provides for hearings on violations of export controls through a Compliance Commissioner, and provides secretariat services for the Operating Committee, the Advisory Committee on Export Policy, and the Export Control Review Board. The Office of International Regional Economics contains a "Sino-

The work of the Office of Export Control and of its superior inter-departmental committees is made still more complex by the necessity of relating controls under the Export Control Act to export controls under two other pieces of legislation: the Mutual Security Act of 1954,⁷⁰ which created an office of Munitions Control in the Department of State, and the Trading With the Enemy Act of 1917,⁷¹ pursuant to which the Treasury Department in 1950 created an Office of Foreign Assets Control. The regulations and controls administered by these two offices are intimately—though in quite different ways—connected with controls under the Export Control Act.

The State Department's Office of Munitions Control, in administering the United States Munitions List, licenses the export and import of arms, ammunition, and implements of war, and also technical data relating thereto, as well as classified technical data.⁷² However, items on the Munitions List sometimes overlap with items on the Commodity Control List⁷³ administered by the Office of Export Control. For example, while the Office of Export Control regulates the shipment of wooden gun stock blanks, the Office of Munitions Control licenses the export of all firearms and firearms silencers. And while the Commodity Control List includes sidearms, not elsewhere classified, and parts, export authorization is required from the Department of State for bayonets and parts. So too, parts and components for ammunition fall within the licensing jurisdiction of the Office of Export Control but cartridge cases, powder bags, and shells fall within the licensing jurisdiction of the Office of Munitions Control.

The Treasury Department's Office of Foreign Assets Control licenses (1) commercial transactions by United States persons or firms (including foreign affiliates or subsidiaries of United States persons or firms) with the government or nationals of Communist China, North Korea, North Viet-

Soviet Division" which is expected to maintain an expert familiarity with the economies of all Communist countries in order to provide information and policy recommendations. This division functions as a clearing house for information forwarded to it by the foreign offices of the State Department and other departments and forwarded by it, in turn, to the Policy Planning Division of the Office of Export Control. Finally, the Commercial Intelligence Division of the Office of International Trade Promotion prepares trade and industry data on foreign firms and their products as well as lists of state trading agencies within Communist countries. Dep't of Commerce, Organization and Function Supp. to Dep't Order No. 182, 30 Fed. Reg. 2041 (1965); EXPORT CONTROL, 63d QUARTERLY REPORT 6 (1963).

70. Ch. 937, 68 Stat. 832, *as amended*, 22 U.S.C. § 1934 (1964).

71. 50 U.S.C. App. §§ 1-4 (1964).

72. See International Traffic in Arms, 31 Fed. Reg. 15174 (1966). The export controls established under the provisions of § 414 of the Mutual Security Act of 1954, § 414, ch. 937, 68 Stat. 848 (1954), *as amended*, 22 U.S.C. § 1934 (1964) relating to technical data cover (a) the export of unclassified technical data on articles designated as arms, ammunition, and implements of war, and (b) the exportation of classified information. International Traffic in Arms § 125.02, 31 Fed. Reg. 15182 (1966). Classified information is defined as "either (a) equipment, or (b) information relating to a U.S. Munitions List article, which has been assigned a United States security classification as requiring protection in the interest of national defense." *Id.* § 125.03.

73. 15 C.F.R. Part 399 (1966).

nam,⁷⁴ and Cuba,⁷⁵ and (2) exports of strategic materials by foreign affiliates or subsidiaries or United States persons or firms to the Soviet Union and all the countries of Eastern Europe (excluding Yugoslavia).⁷⁶ To the extent that these regulations overlap Commerce Department controls over exports from the United States, the Office of Foreign Assets Control has created a general license under which exports to Communist China, North Vietnam, North Korea, and Cuba which have been licensed by the Office of Export Control are automatically licensed by the Office of Foreign Assets Control.⁷⁷ However, if an export is made to some other country under authority of a Commerce Department license, and it is thereafter desired to re-export the goods to one of the four designated countries, the general license exemption does not apply and a specific Treasury Department license is required.⁷⁸ For all practical purposes, then, the Treasury's export control authority is restricted to exports made by foreign subsidiaries or affiliates of United States firms.

Until April 1, 1964, the Foreign Assets Control Regulations and the Transaction Control Regulations of the Office of Foreign Assets Control were applicable to patent and know-how licensing agreements with foreign firms. On that date control of exports of technical data from the United States (but not of exports of technical data by foreign subsidiaries of United States firms) was transferred to the Department of Commerce. As a result of this change, the Treasury exercises no control over patent or technical data licensing agreements entered into by United States firms on or after April 1, 1964, but pre-April 1 agreements are still subject to the previous Treasury restrictions unless the agreement has been brought under the new Commerce Regulations by the voluntary execution on the part of the foreign licensee of a new (Commerce) undertaking in substitution for the pre-existing (Treasury) undertaking.⁷⁹ However, these changes in the field of technical data in

74. See Foreign Assets Control Regulations, 31 C.F.R. §§ 500.101-808 (1967).

75. See Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-808 (1967). Foreign companies (other than banking institutions) owned or controlled by United States persons or corporations are not prohibited from trading with Cuba in foreign-origin goods located abroad, provided that neither United States dollars nor transport aboard a vessel owned or controlled (by charter or otherwise) by United States interests are involved. 31 C.F.R. § 515.541 (1967).

76. See Transaction Control Regulations, 31 C.F.R. §§ 505.01-60 (1967). A Treasury Department license is required for the export by a controlled subsidiary of United States Munitions List items and items on the Commerce Department's Commodity Control List which are subject to import certificate/delivery verification procedures.

77. 31 C.F.R. §§ 500.533, 515.533 (1967). "As a practical matter, the only exports [the] Commerce [Department] licenses to Communist China are publications, the personal effects of departing travellers, and human remains for burial." Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 19 Bus. Law. 861, 865 (1964). On May 14, 1964, the Department of Commerce revoked the provision permitting the export of nonsubsidized foodstuffs and medical supplies to Cuba without a special license. On at least one occasion license applications for export of these items to Cuba have been denied.

78. Sommerfield, *supra* note 77, at 865-66.

79. The "undertaking" consists of an agreement not to sell the "end product" (the ultimate commodity produced with the data) to specified Communist destinations without

no way alter Treasury's controls affecting foreign firms which are subsidiaries of, or are otherwise controlled by, Americans.⁸⁰

If the tasks of the Office of Export Control are made more complex by the necessity of relating its functions to those of the Office of Munitions Control and the Office of Foreign Assets Control,⁸¹ the real burden of these overlapping controls must nevertheless fall on the United States exporter. Although the rules and regulations promulgated by these several agencies have been coordinated to a considerable degree, nevertheless the businessman or lawyer who seeks to comprehend the relation between one set of regulations and another is sometimes confronted with gaps and ambiguities. For example, there are situations in which an exporter would have very great difficulty in determining whether a proposed exportation of technical data falls under State, Commerce, or Treasury controls—each of which apply different criteria and impose different sanctions for violations. Further, the Office of Munitions Control, the Office of Foreign Assets Control, and the Office of Export Control carry on a measure of secret interdepartmental consultation which may work to the disadvantage of the would-be exporter. For example, wholly apart from the published "black list" of the Office of Export Control,⁸² the Departments of State, Treasury, and Commerce collectively maintain a confidential list of importing firms in friendly foreign countries, known as the "Economic Defense List" or "gray list"; the listing of a firm in this document means that there is some question about the propriety of granting a license in any transaction in which the listed firm might be involved, presumably because it has engaged in illicit transactions with Communist countries. It appears that the list is made up by an inter-agency committee; however, the committee as a whole does not make any collective decision as to whether a particular firm should be listed, but instead lists firms at the request of any one of the member agencies. Even if one could determine that a particular firm is on the list—perhaps through the inadvertence of a government official—there may be no forum in which to seek redress since there is no way of knowing which agency or department was responsible for putting the particular firm on the

the licensor's permission; the licensor cannot grant such permission without first obtaining a Treasury Department license. See pp. 826-27 *infra*.

80. The Treasury Department still retains full control over foreign firms which are subsidiaries of, or are controlled by, Americans in any way other than through the provisions of technical data licensing requirements. As a consequence, American firms are prohibited from allowing their foreign subsidiaries to engage in trade with Communist China, North Korea, North Vietnam and Cuba without a license or to ship strategic goods located abroad to the Soviet Bloc without a license. This is true regardless of the origin of the data and of the components involved. This is not *per se* a data control; it is a part of the virtually complete embargo against commercial and financial transactions by American firms, and foreign firms owned or controlled by them, with the proscribed areas.

Letter from the Chief Counsel, Office of Foreign Assets Control to the authors, Feb. 13, 1967.

81. See note 10 *supra* for export controls administered by other government agencies.

82. See Table of Denial and Probation Orders Currently in Effect, 15 C.F.R. § 382.51, Supp. 1 (1966).

list. In most cases, any of the agencies would presumably be willing to undertake a review of a listing action, alone or in concert with other interested agencies. Nevertheless, if the "gray list" were the exclusive preserve of the Office of Export Control, for example, there might be greater possibilities for remedial action, as well as more likelihood of a uniform standard for listing.

Finally, in analyzing the administrative structure of export controls, mention must be made of the Mutual Defense Assistance Control Act of 1951,⁸³ commonly called the Battle Act, which is designed in part to secure the cooperation of friendly foreign nations in the maintenance of a multilateral embargo on strategic exports to Communist countries. The Battle Act Administrator, appointed within the State Department,⁸⁴ proclaims an internationally agreed upon list of embargoed items and in addition draws up a secret list of items of "lesser strategic significance," export of which to Communist countries is unilaterally prohibited by the United States.⁸⁵ Licensing of exports of Battle Act items is vested chiefly in the Office of Export Control.⁸⁶ Since the Battle Act Administrator does not himself license exports, no additional overlapping of administrative controls is involved.

Although the Office of Export Control could conceivably be crushed by the weight of its superior committees and by the overlapping controls of other departments, it has in fact developed a high degree of autonomy and maintains a fairly smooth operation. It has been estimated that about 12% of the total volume of United States export shipments (some \$3 billion annually) moves out under specific (*i.e.*, "validated") licenses.⁸⁷ In 1966, fewer than 270 employees were processing more than 3,000 license applications each week,⁸⁸ and over 90% of all applications were being processed within 5 days of receipt, and 98% within 10 days.⁸⁹ The Office of Export Control is staffed with highly experienced personnel, most of whom have been with the Office for ten to fifteen years. They have evolved a sophisticated and effective licensing system, certainly more responsive to the needs of the business community than the controls administered by the Departments of State and Treasury.

The self-restraint and the expertise of American exporters also contribute

83. 22 U.S.C. §§ 1611-13d (1964).

84. The Battle Act Administrator is currently lodged within the Office of East-West Trade of the Department of State.

85. The Battle Act Title I List (Categories A and B) comports with the international "COCOM" embargo list, *see* p. 838 *infra*; Battle Act Title II List items have not been accepted for international embargo but are subject to multilateral "surveillance" pursuant to an international "watch" list. *See* pp. 835-36 *infra*.

86. Licensing jurisdiction over Title I, Category A items is vested in the Office of Munitions Control and the Atomic Energy Commission.

87. Haight, *United States Controls Over Strategic Transactions*, 1965 U. ILL. L.F. 337, 341.

88. In the Commerce Department's fiscal year 1964 there were received 164,567 applications for validated licenses. *Hearings on the Dep't of State, Justice, Commerce, the Judiciary, and Related Agencies Appropriations for 1966: Dep't of Commerce Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 1st Sess. 264 (1966).

89. Haight, *supra* note 87, at 340.

to the overall efficiency of export licensing, and these qualities are encouraged by the educational activities of the Office of Export Control. In accordance with section 4(b) of the Export Control Act,⁹⁰ which provides for representative trade consultation, the Office of Export Control has followed the practice of its predecessor agencies in organizing commodity advisory panels to give advice and make recommendations on export licensing policies and procedures affecting various parts of the export trade. Members of panels or committees are selected by the Office of Export Control: the committees are "formed of the minimum number of persons necessary to represent a fair cross-section of the trade" in a given commodity or group of commodities.⁹¹ The meetings are called and conducted by officials of the Office of Export Control but a meeting of a panel or committee may be proposed by any three of its members.⁹² Meetings are called prior to the promulgation of new licensing policies or procedures "except where the necessary timing or other public exigency does not permit such prior consultation."⁹³ Unfortunately, however, a "public exigency" often precludes prior consultation,⁹⁴ and in fact the commodity advisory panels are not used nearly as much as the length of the regulations relating thereto might suggest. The Office of Export Control does, however, consult frequently with various other representative exporter groups.

Perhaps the chief reason, however, for the relative smoothness of export licensing is that exporters generally have become attuned to the harshness of licensing standards and have developed some skill at predicting the course of export applications. During the calendar year 1965, the total value of all exports to the USSR and Eastern Europe for which licenses were sought amounted to only \$150.1 million; 95½% (in value) of these license applications were approved—amounting to less than \$143.4 million.⁹⁵ This fact suggests that exporters do not submit license applications unless they are reasonably confident that the licenses will be approved. It also indicates that the actual operation of export controls is in the hands of a fairly independent body of experienced bureaucrats who are able to exert a very strong influence on the volume and direction of exports through their relations with potential exporters. By the same token, however, the Office of Export Control may be to some extent insulated, both by its independence and by its contact with

90. 50 U.S.C. App. § 2024(b) (1964).

91. 15 C.F.R. § 384.1(b)(2) (1966).

92. 15 C.F.R. § 384.1(d)(1)(ii) (1966).

93. 15 C.F.R. § 384.1(d)(1)(i) (1966).

94. *E.g.*, meat packers and hide exporters were not consulted at any time prior to the imposition of short-supply controls on cattle and hides on March 7, 1966. See p. 832 *infra*.

95. EXPORT CONTROL, 74TH QUARTERLY REPORT 5 (1965). In fact, only \$139 million worth of goods were actually exported to the Soviet Union and Eastern Europe in 1965. EXPORT CONTROL, 75TH QUARTERLY REPORT 12 (1966). In 1966, exports to the Soviet Union and Eastern Europe totalled \$198 million. EXPORT CONTROL, 79TH QUARTERLY REPORT, Table C (1967).

the exporting community, from shifts in policy at the higher levels of Government.

III. THE EXPORT REGULATIONS⁹⁶

To implement the broad political, economic, and strategic objectives of the Export Control Act, as it has been interpreted by the complex inter-agency structure established to supervise its administration, 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.

A. General and Validated Licenses

The enormous complexity of the regulations is due to several factors, the first of which is that the United States exerts a substantially greater degree of control over exports to Communist countries than that exercised by any other government. As a result, the United States must guard against the possibility that goods or technical data permitted to be shipped to "friendly" countries may be transshipped from those countries to "unfriendly" (or less friendly) countries. As long as it is forbidden to ship even chewing gum to Communist China, or Cuba, some care must be taken to see that chewing gum exported to England or Switzerland will not be diverted from those countries to Peking or Havana. Even more care must be taken if the product is not chewing gum but machinery, and it is to be prevented from going not only to China or Cuba but also to Eastern Europe or the Soviet Union. Because of the possibility of transshipment, the United States Government is concerned to know, in the case of every export, what will be the ultimate destination of the goods and who will be the ultimate consignee.

Nevertheless, it would be extremely onerous—indeed it would exceed the limits of effective administration—to require that every export transaction be scrutinized in advance before a license is granted. We approached such a requirement during World War II, when it was generally agreed that no goods should be shipped out of the country unless the Government—principally through the Office of Economic Warfare—first determined that such

96. The Export Regulations are published in the *Federal Register*, as issued. They are also published in their entirety as of December 31st of each year in 15 C.F.R. §§ 368-99 (1966). The regulations are also contained in a looseleaf publication, entitled *Comprehensive Export Schedule*, which as amended by Current Export Bulletins, may be obtained by subscription from the Superintendent of Documents. The regulations are also published in *CCH Emergency Business Law Reports*. Commerce Department orders denying export privileges to violators of the Export Regulations are published separately in the *Federal Register*, at the time of their issuance. Under § 8 of the Act, the Department of Commerce submits quarterly reports to the Congress covering its administration of the Act. 50 U.S.C. App. § 2028 (1964). These reports are obtainable from the Superintendent of Documents.

Unless otherwise indicated, references to various Export Regulations are to those which were in effect on April 1, 1967, as contained in the Comprehensive Export Schedule of that date.

shipment was in the interest of the war effort. To export to our enemies was completely prohibited, and to export to our allies or to neutrals was permitted only according to a rigorous program of priorities. In the post-War period, however, and especially with the rapid expansion of our foreign trade during the 1950's, it became possible—and necessary—to rely increasingly on so-called *general licenses*, and to reserve the requirement of special licenses, called *validated licenses*, for all goods shipped to certain countries, or for certain types of goods shipped to certain countries, or for certain types of goods shipped to any country.

A *general license* is a general authorization to export certain types of commodities to certain destinations without the necessity of filing an application.⁹⁷ A general license is not a license in the sense of a document that has been issued; it is, rather, a regulation granting permission to make the export without a specially issued document specifically authorizing it. Nevertheless, the exporter must present to the Customs Office at the place of exit a sworn statement (Shipper's Export Declaration) describing the nature and quantity of the goods and containing the names and addresses of all parties to the export transaction, including the ultimate destination and the ultimate consignee of the goods.⁹⁸ In addition, the Shipper's Export Declaration, as well as all bills of lading and commercial invoices, must contain an anti-diversion notice.⁹⁹ The anti-diversion notice in the case of exports under general license states: "United States law prohibits disposition of these commodities to [names of countries to which the commodities may not be shipped under general license] unless otherwise authorized by the United States."¹⁰⁰

As of December 1966, all anti-diversion notices under general license prohibited disposition of the commodities to Communist China, North Korea, Communist controlled areas of Vietnam, and Cuba, since virtually nothing may be exported to those countries under general license.¹⁰¹ In addition,

97. Export Regulation 371.1 [hereinafter cited as E.R.]. The term "general license" alone refers to "general license G-DEST" (shipment of commodities to destinations not requiring a validated license). General licenses GLV (shipments of limited value) and GIFT are discussed at note 138 *infra*. Technical data general licenses (GTDP, GTDU, and GTDS) are discussed at text accompanying notes 141-55 *infra*.

In addition to these general licenses, see the Export Regulations for the following general licenses: GIT Intransit Shipments (E.R. 371.9), General Licenses Baggage and Tools of Trade (E.R. 371.11), GLD Dunnage (E.R. 371.12), General Licenses Ships Stores, Plane Stores, Crew and Registered Carrier Stores (E.R. 371.13), GUS Shipments to Personnel and Agencies of the United States Government (E.R. 371.14), GLC Exports of Commercial Vehicles by Certain Civil Airlines and by Private or Common Carriers (E.R. 371.15), GTF Goods Imported for Trade Fairs (E.R. 371.16), GLR Return of Certain Commodities Imported into the United States (E.R. 371.18), GATS Aircraft on Temporary Sojourn (E.R. 371.25), GMS Shipments under the Mutual Security Act (371.26).

98. E.R. 379.3-4. The Shipper's Export Declaration was a Census statistical form long before the introduction of export licensing. Since 1949 it has been used for export control purposes with the approval of the Secretary of Commerce, who administers the Census Bureau as well as the Office of Export Control.

99. E.R. 379.10(c).

100. E.R. 379.10(c)(2)(iii).

101. Printed books, pamphlets, newspapers, periodicals, music books and sheet music,

diversion to Macao and Hong Kong is usually prohibited, as is diversion to the Communist countries of Eastern Europe and the Soviet Union, since a great many commodities may not be shipped to those destinations under general license.¹⁰² In 1965 exports to Southern Rhodesia fell under rigorous controls, and thereafter the anti-diversion notice in the case of general license was often modified to include a prohibition of disposition to that country as well.¹⁰³

The fact that under a general license a particular commodity may be exported without special permission to a particular country, or even to most countries, does not mean that it is not subject to export controls or that it may be freely exported. The Shipper's Export Declaration and, indeed, the bill of lading are termed by the export regulations "export control documents."¹⁰⁴ "Trafficking" in export control documents is a punishable offense.¹⁰⁵ The goods must be intended for a particular destination and a particular ultimate consignee, although they may be diverted—without special permission—to any country to which the goods at the time of re-exportation can be exported directly from the United States under general license.¹⁰⁶

A *validated license* is a document issued to an exporter by the Department of Commerce authorizing the exportation of a particular commodity (or technical data) to a particular consignee in a particular country for a particular use.¹⁰⁷ To obtain a validated license the applicant must be a United States exporter or the United States agent of a foreign importer, subject to the jurisdiction of the United States.¹⁰⁸ His signed license application must be accompanied by an "order" for export of the commodity in question; that is, a definite transaction must be contemplated—the export regulations define an "order" as an offer, which, if accepted by the exporter, will result in a binding contract with the importer.¹⁰⁹ The names and addresses of all parties to the

and certain types of technical data may be shipped to all destinations under general license. *See pp. 824-25 infra.*

102. For purposes of export licensing, Yugoslavia is not considered a "Communist" nation and Poland and Rumania are subject to less stringent controls than the other countries of Eastern Europe. *See pp. 820-23 infra.*

103. On December 28, 1965, all exports of petroleum and petroleum products to Southern Rhodesia were placed under special controls. On March 18, 1966, the Commerce Department extended validated license controls to Southern Rhodesia to cover all commodities except those deemed necessary for essential humanitarian or educational purposes. EXPORT CONTROL, 75TH QUARTERLY REPORT 28 (1966). The United States embargo on exports to Southern Rhodesia is grounded in the President's authority under § 5(a) of the United Nations Participation Act of 1945 to regulate or prohibit economic relations "between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof," when the United States is called upon by the Security Council to apply measures adopted by the Council pursuant to Article 41 of the United Nations Charter. 22 U.S.C. § 287(c) (1964). *See U.N. S.C. Res. 217, Nov. 20, 1965.*

104. E.R. 370.1(n)(1).

105. E.R. 381.1, 381.9.

106. E.R. 371.4 (General License), 372.12 (Validated License).

107. *See generally* E.R. Part 372.

108. E.R. 372.4(a).

109. E.R. 372.4(f)(2)(i). The order requirement evolved in the post-war short

transaction must be included in the license application, together with a description of the nature and quantity of the items to be exported. Not only the ultimate country of destination and ultimate consignee but also the "end-use" of the commodity (or technical data) must be submitted. In most instances the applicant must submit not only his own statement but also that of the ultimate purchaser or consignee concerning the end-use of the item sought to be exported.¹¹⁰ The license holder must also submit a Shipper's Export Declaration to the Collector of Customs.

The rigid requirements for a validated license have, over the years, been slightly relaxed in certain instances. As is often the case with governmental licensing, the relaxations tend to favor large-scale transactions. Thus, where an exporter is involved in multiple transactions with a single foreign importer, as where he is supplying goods for a capital expansion or for "maintenance, repair and operation" (MRO) of an existing facility or for use in production of other commodities, he may apply for a "Project License." Applications for Project Licenses will be considered by the Office of Export Control only where the total value of the validated license shipments is expected to be \$100,000 or more, and at least 40 individual validated licenses would be required to export the required commodities.¹¹¹ In addition, a "Blanket License" is available for exportation of the same commodities to two or more consignees in the same country.¹¹² Other types of special validated licenses include the "Periodic Requirements License," which authorizes the exportation over a one-year period of certain types of industrial, construction, and petroleum equipment, including aircraft, plastics, petroleum products, metals, and organic chemicals to specified countries.¹¹³ Also, the "Time Limit License" authorizes the exportation of unlimited quantities of any licensed commodity or commodities to one or more consignees in a Western Hemisphere destination for a period of one year from the issuance of the license.¹¹⁴ Since both the "Time Limit License," and the "Periodic Requirements License," are intended for the distribution of commodities which normally require validated licenses for export to any country in the world, applications for such licenses are carefully scrutinized by the Office of Export Control, which requires that applicants must prove an established business relationship with each named ultimate consignee for a period of two years preceding the date of filing, and must have exported the commodities listed in the application to each ultimate

supply period and was originally designed to reduce the use of licenses for "hunting" purposes.

110. See E.R. 373.65 (Ultimate Consignee and Purchaser Statement), E.R. 373.2 (Import Certificate), E.R. 373.67 (Swiss Blue Import Certificate), and E.R. 373.70 (Yugoslav End-Use Certificate).

111. E.R. 374.3.

112. E.R. Part 375.

113. E.R. Part 376.

114. E.R. Part 377.

consignee in an amount totaling at least \$2,000 during those two years.¹¹⁵

The burdens of exporting under validated licenses are increased by the requirement—referred to above—that in most instances the United States exporter must submit a statement procured from the foreign importer that the goods will not be re-exported contrary to United States regulations. An “ultimate consignee and purchaser statement” is required for all proposed shipments of commodities for which validated licenses are required unless the country of ultimate destination is within the Western Hemisphere (excluding Cuba) or unless the total value of the goods sought to be exported is less than \$500.¹¹⁶ In order to accommodate United States exporters who distribute commodities through foreign subsidiaries or affiliates, the Office of Export Control in 1961 established a procedure whereby the exporter may file a multiple transactions statement, which will substitute for the ultimate consignee statement for all exports made during a stated period.¹¹⁷

In the case of certain “strategic” exports, the importer’s statement must be made to his own government, which, under an international arrangement introduced in 1952,¹¹⁸ will issue to the importer an Import Certificate (IC) which is in turn forwarded to the Office of Export Control. The foreign importer who receives an Import Certificate has made a commitment to his government, under sanction of penalties enforceable by it, that he will abide by the terms of the certificate. In addition, the Office of Export Control may, if it wishes, require Delivery Verification (DV) after the shipment has been effected—whether or not the export is subject to Import Certificate procedures.¹¹⁹ The exporter obtains the Delivery Verification from the importer, who receives it from his government. The government of the importing country is thus enlisted to cooperate in the discovery and punishment of illegal transshipments. The Import Certificate-Delivery Verification (IC/DV) procedure is used by the NATO countries as well as by Japan, Hong Kong, and Austria, while Switzerland and Yugoslavia cooperate with the United States in import certification procedures that are similar to, though not identical with, the IC/DV system.¹²⁰

115. E.R. 376.4(a)(4) (Periodic Requirements License), 377.5(c) (Time Limit License).

116. E.R. 373.65(a). Shipments to Switzerland and Yugoslavia regardless of value must be supported by a Swiss Blue Import Certificate, E.R. 373.67(a)(1), or a Yugoslav End-Use Certificate, E.R. 373.70(a)(1), respectively.

117. E.R. 373.65(c)(1), 377.5(d).

118. See pp. 839-40 *infra*.

119. A “Note” to 373.2(g)(3) states:

It is the policy of the Office of Export Control to require Delivery Verifications on a selective basis where Import Certificates are required. Also, Delivery Verifications may be required relative to export licenses issued for export to any of the countries participating in the Import Certificate/Delivery Verification procedure, even though the licensed commodities are not subject to paragraph 373.2(d) above [Import Certificates], or are commodities for which exemptions and exceptions have been granted under the Import Certificate/Delivery Verification procedure.

120. See generally E.R. 373.2. See also note 116 *supra*.

Anti-diversion notices stamped on the Shipper's Export Declaration and on bills of lading and invoices in transactions under validated licenses are more stringent than anti-diversion notices used in transactions under general license. The usual anti-diversion notice in the case of exports requiring validated licenses states: "These commodities issued by the United States for ultimate destination [name of country]. Diversion contrary to United States law prohibited."¹²¹ Where the Office of Export Control has approved distribution or resale in a second country, the anti-diversion notice will read: "These commodities licensed by the United States for ultimate destination [name of country] and for distribution or resale in [name of country or countries]. Diversion contrary to United States law prohibited."¹²²

Where the export license and the Shipper's Export Declaration do not indicate that re-exportation is permitted, the exporter or importer who wishes to divert the goods must obtain prior written approval of the Office of Export Control.¹²³ However, such approval is not needed if the goods are resold in a country to which they could have been exported directly from the United States under a general license, or if the goods are of a value not exceeding the amount stated in the regulations as permissible for exporting to Western Hemisphere and non-Communist countries without a validated license.¹²⁴

B. Country Controls

A second related factor—in addition to the possibility of transshipment—which increases the complexity of export controls is the extreme refinement in the degree of restriction upon exports to different countries. Increasingly, the United States has sought to adapt its export restrictions—under both Treasury and Commerce Department regulations—to the wide variation in its political relations with various countries, relaxing or tightening controls to express approval or disapproval of economic and political developments abroad. From December 1950—when Chinese forces entered Korea—until 1957, we distinguished for purposes of export control between (a) Communist China and North Korea, (b) all other Communist countries except Yugoslavia, (c) all non-Communist countries (including Yugoslavia) not in the Western Hemisphere, (d) all Western Hemisphere countries except Canada, and (e) Canada. Virtually all exports to Communist China and North Korea were in fact prohibited,¹²⁵ and most exports to all other Communist countries required a validated license.¹²⁶ Exports of certain

121. E.R. 379.10(c)(2)(i).

122. E.R. 379.10(c)(2)(ii).

123. E.R. 371.4 (General License), 372.12 (Validated License).

124. *Id.*; see "Note" following E.R. 379.10(c)(2)(i).

125. See Foreign Assets Control Regulations, 31 C.F.R. §§ 500.101-808 (1966).

126. *Id.* Except for commodities specifically listed as available for export under general license GLSA (Soviet Area) all exports to the Soviet Union and the Communist countries of Eastern Europe (excluding Yugoslavia) required validated licenses.

goods said to be of "strategic" importance, contained on a so-called Positive List, could not be exported without a validated license to any country except Canada, for fear of the possibility of transshipment. Other goods on the Positive List could be exported under a general license to Western Hemisphere countries but not to other non-Communist countries—on the theory that the risk of transshipment from the Western Hemisphere was slight or of less strategic significance.¹²⁷

In August 1957, after the "coup" that brought the Gomulka regime to power in Poland, the Eisenhower Administration liberalized export licensing requirements to that country¹²⁸ and in July 1964 Rumania was given special treatment.¹²⁹ Because (it was said) of their desire for independence from Soviet domination, those two countries were distinguished—for licensing purposes—from the other Communist countries of Eastern Europe. Whereas all exports to the Soviet Union required validated licenses save for certain commodities on a special exceptions list—General License Soviet Area (GLSA)—all non-Positive List exports to Poland and Rumania could be made under general license save for certain specified commodities which required validated licenses.

The distinctions among various countries for purposes of export control continued to grow in the 1960's. After the victory of Fidel Castro in Cuba, that country was distinguished from the other Western Hemisphere countries.¹³⁰ In 1964, Treasury controls were imposed on exports to North Vietnam by foreign subsidiaries of United States firms.¹³¹ Political differences, coupled with United States policy against the proliferation of nuclear weapons, led to restrictions upon the export of United States computers and computer equipment to France. Southern Rhodesia, after its break from Britain and Britain's call for economic sanctions, was subjected to substantial export restrictions, amounting to a virtual embargo.¹³² East Germany was singled out for more discriminatory treatment than the other Communist countries of Eastern Europe.¹³³ The Viet Cong in South Vietnam were

127. Prior to January 1965, the world was divided into three areas: the Western Hemisphere (Country Group O), non-Communist nations outside the Western Hemisphere and Yugoslavia (Country Group R), and Communist nations (Country Group R, Subgroup A). All Positive List goods required validated licenses for export to Country Group R (including Subgroup A) and many Positive List goods required validated licenses for export to Country Group O as well. Any goods not on the Positive List could be sent to any non-Communist destination and Yugoslavia under general license.

128. See EXPORT CONTROL, 41ST QUARTERLY REPORT 312 (1957).

129. See EXPORT CONTROL, 68TH QUARTERLY REPORT 20 (1964); 50 DEP'T STATE BULL. 924 (1964).

130. See Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-.808 (1967).

131. North Vietnam was added to the Foreign Assets Control Regulations as a "designated foreign country" (in the same class as China) by an amendment published in 29 Fed. Reg. 6010 (1964).

132. See note 103 *supra*.

133. The heightening of tensions over Berlin in 1961 occasioned an especially severe scrutiny of license applications to export to East Germany. On October 12, 1966, the Department of Commerce reduced controls on some 400 items for export to all the

announced as falling within the same restrictions as those imposed on North Vietnam.¹³⁴

C. The Commodity Control List

From a purely mechanical point of view, the complexity of the Export Regulations was increased by the constant re-adaptation of licensing restrictions to changing political factors; indeed, by the end of 1957, the would-be exporter had to consult several lists (*e.g.*, the Positive List, the General License Soviet Area List, the list of commodities which required export licenses to Poland) in order to determine whether the validated license requirement applied to his particular export. Because of the U.S. embargo on trade with China and North Korea, all U.S. exports required a validated license for these countries (and most exports required a validated license for certain other countries as well). It was therefore decided, in 1964, to promulgate a comprehensive export control list containing virtually all the commodities in the census classification, each followed by the appropriate licensing requirement. The new "Commodity Control List," published by the Department of Commerce in January 1965, replaced the Positive List and several general licenses (such as General License Soviet Area), as well as the old country groupings. All the commodities under the licensing jurisdiction of the Department of Commerce are listed, and opposite each item there are listed those countries, symbolized by the letters T, V, W, X, Y, or Z, to which the particular type of product may not be exported without a validated license. Group T includes the Western Hemisphere excluding Canada and Cuba; Group V includes all the non-Communist countries of the world outside of the Western Hemisphere and Yugoslavia; Group W includes Poland and Rumania; Group Y includes the "Soviet Bloc" exclusive of Poland and Rumania, *i.e.*, Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, and the Soviet Union; and Group Z includes Communist China, North Korea, Communist-controlled areas of Vietnam, and Cuba. Canada is not included in any country group.¹³⁵ On November 14, 1966, a

countries of Eastern Europe exclusive of East Germany. See text accompanying note 140 *infra*.

134. On June 17, 1966, the following organizations or associations of persons were determined to be "specially designated nationals" of North Vietnam for purposes of the Foreign Assets Control Regulations: the "National Liberation Front of South Vietnam," the Viet Cong, and the "National Liberation Front of South Viet-nam Red Cross" (the "Liberation Red Cross"). 31 Fed. Reg. 8586 (1966); see 31 C.F.R. § 500.306(b) (1967).

135. E.R. 370.1(g). The treatment of Canada in the export control system is unique and derives from the time when the United States and Canada were engaged in joint war mobilization efforts. Except for commodities and technical data relating to nuclear weapons, nuclear explosive devices, nuclear testing, maritime nuclear propulsion plants, and the types of technical data described in E.R. 385.2(c)(5), shipments to Canada for consumption there are not subject to either validated license or general license procedure. But no person may export any commodity or technical data from the United States to Canada with the knowledge or intention that the commodity or technical data are to be transshipped or re-exported from Canada unless the re-exportation has been

new group—Country Group S—was formed, consisting of Southern Rhodesia.¹³⁶

The change in method of classification did not reflect any change in licensing policy. All items on the Commodities Control List require a validated license of export to Country Group Z. Some items on the Commodity Control List require a validated license for export to Country Group Z *only*: this is the old General License Soviet Area List. The items followed by Country Groups TVWXYZ (all countries except Canada) and VWXYZ (all countries outside the Western Hemisphere but including Cuba) constitute the old Positive List. The items followed by Country Groups WXYZ are the same goods which always required validated licenses for export to Poland and Rumania. But the mechanics of the new Commodity Control List are a vast improvement over the old system; once the commodity sought to be exported is identified by number and the country group of the destination is established,¹³⁷ a glance at the Commodity Control List informs the exporter whether or not a validated license is required.¹³⁸

licensed by the Office of Export Control or the commodity or technical data may be exported directly from the United States to the country of ultimate destination under the provisions of a general license. E.R. 370.3.

136. 32 Fed. Reg. 4344 (1967).

137. The Commodity Control List is based on the 7-digit "Statistical Classification of Domestic and Foreign Commodities Exported from the United States" (Schedule "B"), published by the Bureau of the Census, which is in turn based on the 5-digit Standard International Trade Classification system established by the United Nations. The Commodity Control List lists commodities in numerical order by Export Control Commodity Numbers. These numbers have either three or five digits and correspond with the first three or five digit numbers shown in the Schedule "B". The exporter of any given product will find the applicable 7-digit number in the Schedule "B" and then turn to the Commodity Control List.

A perusal of the Commodity Control List will show that often a number of "entries" will bear the same 5-digit or 3-digit designation. For example, crude benzene, crude toluene, and creosote, are all designated "52140" but the licensing requirements for each of these three products are different: benzene exports require validated licenses for Country Groups S and Z, toluene exports require validated licenses for Country Groups S, W, X, Y, and Z, and creosote exports require validated licenses for Country Groups S and Z and East Germany. Where the commodity description of an entry on the Commodity Control List mentions only a part of the commodities covered by an Export Control Commodity Number, only the commodity or commodities specifically mentioned are included in that entry. Each "Entry" may include hundreds of items or products, *e.g.*, "alcoholic beverages" (112).

138. In some cases, a general license designated GLV authorizes the exportation to Country Groups T (Western Hemisphere), V (non-Communist nations outside the Western Hemisphere), X (Hong Kong or Macao), or S (Southern Rhodesia)—under general license procedures—of commodities which normally require a validated license, where the net value of the export does not exceed a stated dollar limit. Shipments above the specified dollar values require a validated license. Only one general license GLV shipment may be made by one exporter to one importer per calendar week and orders may not be split into several shipments to one consignee so as to evade the requirements of a validated license. E.R. 371.10.

The Export Regulations have also established a general license exemption for gifts addressed to an individual or to a religious, charitable, or educational organization located in any destination except Communist China, North Vietnam, or North Korea. The commodities must be of a type which are "normally sent as gifts, such as food, clothing, toilet articles, and medicinals and pharmaceutical preparations in dosage form." The combined total domestic retail value of all commodities included in a single parcel cannot exceed \$100, and not more than one gift parcel may be sent by the same donor to the same donee in any one calendar week. E.R. 371.21.

Despite its complexity, the mechanics of the Commodity Control List can be mastered with effort. The logic of the underlying policies is more obscure. A great many of the items on the Commodity Control List that may be shipped to Western Europe under general license require validated licenses for export to Communist destinations. If such items possessed substantial economic, let alone military, significance, they would presumably require validated licenses regardless of destination, in view of the danger of transshipment. The harshness of the Commodity Control List with respect to nonstrategic goods reflects the largely political character of controls under the Export Control Act.

Take, for example, three different categories of goods: those which require validated licenses for Country Groups W (Poland and Rumania), X (Hong Kong and Macao), Y ("Soviet Bloc"), and Z (China, North Korea, North Vietnam, and Cuba); those which require validated licenses for Country Groups XYZ, and those which require validated licenses for Country Groups YZ. The list of commodities which require licenses for Country Groups WXYZ (but not for Country Group V, *e.g.*, Western Europe), includes—as of November 14, 1966—crude toluene, weed killers, nickel compound catalysts, rubber tires with a nondirectional tread design, silicone rubber insulating tape, and nonmilitary trucks and tractors having front and rear axle drive. These items may be shipped to Yugoslavia (V) but not to any other Communist country under general license. Validated licenses for export to Communist countries may in fact be granted but in each case the Office of Export Control must first determine whether the export is in the national interest. And the logic of the Commodity Control List dictates that applications to export these items to the "Soviet bloc" (Group Y) will be subjected to more stringent criteria than applications to export to Poland or Rumania (Group W).

Exports which require a validated license for Country Groups XYZ, but not for Poland and Rumania (W), included—as of November 14, 1966—educational aptitude testing apparatus, ordinary stroboscopes, ordinary compasses, ordinary amplifiers, nonmilitary trucks and tractors, and electric windshield wipers. The license requirement for Country Group X may help to thwart transshipment of such items from Hong Kong or Macao to Communist China, and the restriction on export to Country Group Y allows the Office of Export Control to discriminate between the different countries of the "Soviet bloc," *e.g.*, to allow the export of windshield wipers to Hungary but not to Albania.

Until October 12, 1966, there were a large number of commodities which required licenses for export to Groups Y ("Soviet bloc") and Z (China, North Korea, North Vietnam, and Cuba) but which could be exported to Hong Kong or Macao under general license (and, presumably, easily trans-

shipped to China). The list included such goods as waterproof raincoats, leatherette buttons, wigs and false beards, caps for cap pistols, and woolen underwear—hardly significant items in the Government's arsenal of "foreign policy weapons."

On October 7, 1966, President Johnson announced that "[w]e will reduce export controls on East-West trade with respect to hundreds of non-strategic items"¹³⁹ and on October 12 the Department of Commerce announced about 400 changes in the Commodity Control List.¹⁴⁰ The net effect of the revision is that most of the items which previously required validated licenses for export to Country Groups Y and Z *only*, may now also be shipped under general license to Country Group Y, excluding, however, East Germany. Thus the "Polish differential"—granting better treatment to Poland (and, since 1964, Rumania) than to the Soviet Union and other countries of Eastern Europe—has been partly eliminated or reduced. From an administrative point of view, these changes relieved the Office of Export Control of a great deal of unnecessary paperwork, since applications to export the 400 items to Country Group Y were almost always approved. From a political point of view, the changes reflect an additional refinement in the Administration's attitude toward the "Soviet bloc." The Commodity Control List now distinguishes not four but five varieties of Communist nations: (1) Yugoslavia, (2) Poland and Rumania, (3) the Soviet Union, Hungary, Czechoslovakia, Bulgaria, and Albania, (4) East Germany (which may still be denied caps for cap pistols and woolen underwear), and (5) China, North Korea, North Vietnam, and Cuba. Actually, the Office of Export Control recognizes an even larger variation within the Communist world, since exports to Hungary and Czechoslovakia, for example, are in fact judged by more liberal licensing standards than exports to Albania.

D. *Technical Data*

In addition to restricting the exportation of goods, the Office of Export Control also restricts the exportation of technical data, defined in Export Regulation 385.1(a) 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 articles or materials." "Export of technical data" is defined in Export Regulation 385.1(b) as "any release of unclassified technical data for use outside the United States [including] the furnishing of data in the United States to persons with the knowledge or

139. N.Y. Times, Oct. 8, 1966, at 12, col. 5.

140. See 31 Fed. Reg. 13699 (1966).

intention that the persons to whom it is furnished will take such data out of the United States." Excluded from the jurisdiction of the Office of Export Control is classified security data and other information relating to items whose export is specifically regulated by another agency.¹⁴¹

It is said that the same general standards applicable to control over the export of goods are applicable to control over the export of technical data since if it is in the national interest to prevent the export of widgets to the Soviet Union, for example, it cannot be in the national interest to permit the unrestricted flow of widget technology. However, restrictions upon the export of technology inevitably involve a far greater intervention by the Government in operations of business and scientific enterprise and also raise far more acute questions of constitutional freedom than do restrictions upon the export of goods. Thus the national interest in preventing the development of the widget industry in the Soviet Union must be weighed against the national interest in preserving American industry and science from excessive interference, as well as against the national interest in freedom of international communication.

If, as suggested earlier, the burdens of licensing all exports of all commodities would exceed the limits of effective administration, the regulation of all exports of all technical data would require something approaching a police state. Newspapers, periodicals, books—even letters—sent abroad would have to be censored. University classrooms would have to be monitored to ensure that foreign students could not acquire United States-origin data. The right of Americans to travel abroad might have to be severely circumscribed, especially in the case of scientists or engineers carrying valuable information in their heads. Yet if a technician may take data with him in his head, will it not be an easy matter to frustrate restrictions upon his power to export such data in the form of a "model, design, photographic file, document or other article or material"? In short, although it is easy enough to define the strategic objectives of technical data controls—to control the flow of advanced United States technology to the Soviet Union and to other Communist countries—there are complex administrative and constitutional issues involved in the mechanics and operation of such controls.

The first and most important concession which the Office of Export Control has made to the exigencies of international communication and effective administration is that unclassified technical data generally available in published form can be exported to all destinations without restrictions of any kind. "Technical data are considered as generally available in published form if they are (1) sold at newsstands or bookstores, (2) available by subscrip-

141. For an excellent description of controls administered by the State Department, the Department of Defense, the Patent Office, the Atomic Energy Commission, and the Treasury Department, see Hannon, *United States Government Controls and Aids in Foreign Licensing*, 12 U.C.L.A.L. Rev. 88 (1964).

tion or purchase without restrictions to any person or available without cost to any person, or (3) freely available at public libraries.”¹⁴² In addition, technical data which have not actually been printed but which would be freely disclosed to the general public, upon request, and which would be printed for public distribution if demand warranted, are also considered as “generally available in published form.”¹⁴³

A more limited concession to the freedom of international communication and, more particularly, to the needs of the international scientific community, is that unclassified scientific and educational technical data which are not generally available in published form can be exported to all destinations without restrictions of any kind, provided that the export does not involve dissemination of information “directly and significantly related to design, production and utilization in industrial processes.” In this connection, the regulations exempt from licensing control “attendance at, or participation in, meetings; or [i]nstruction in academic institutions and academic laboratories.”¹⁴⁴ On the other hand, the regulations of the Office of Munitions Control may come into play if there is involved the dissemination of information relating to an article on the United States Munitions List or “any technology which advances the state-of-the-art or establishes a new art in an area of significant military applicability.”¹⁴⁵ Recently, the Office of Munitions Control vetoed the presentation of four papers in the field of space engineering at the 17th International Astronautics Congress in Madrid.¹⁴⁶ Presumably the Office of Export Control has similar authority to veto the presentation of a paper which is “directly and significantly related to design, production and utilization in industrial processes” (*e.g.*, laser technology); however, no such cases have ever been reported.

Thus, the Office of Export Control’s licensing authority extends to data which are either unpublished or not generally available in published form, except for scientific and educational data not related to industrial processes. No unpublished technical data can be exported to any Communist countries except Yugoslavia without a validated license.¹⁴⁷ Most but not all of such data

142. General License GTDP (Published Technical Data), E.R. 385.2(b).

143. *Id.* The question has been raised whether a company’s technical brochures can be considered to be in published form if they are made available to many persons free of charge, although the company reserves the right to refuse requests and would not respond to a request from a competitor. It is probable that a technical report of this kind cannot be said to be available to *any* person and therefore is not in published form for purposes of general license GTDP.

144. General License GTDS (Scientific and Educational Technical Data), E.R. 385.2(d).

145. International Traffic in Arms, 31 Fed. Reg. 15174 (1966).

146. One of the papers was to have been delivered by the Chief Scientist of the Air Force, one by scientists of the Hughes Aircraft Company, and two by scientists of General Electric. In the case of the General Electric papers, the authors apparently submitted them to the State Department for review but proceeded to Madrid before approval had been obtained. While they were in Madrid, word reached the authors that the State Department had vetoed the presentations. See 154 SCIENCE 625-26 (1966).

147. E.R. 385.2(c)(2). For exports of technical data under a validated license, see E.R. 385.4.

can be exported to "free world" countries without a validated license if assurances are obtained from the foreign consignee that the technical data will not be shipped, either directly or indirectly, to any Communist country (excluding Yugoslavia) without the express permission of the Office of Export Control.¹⁴⁸

The written assurance required by the Office of Export Control may be in the form of a letter to or a licensing agreement with the United States exporter which restricts disclosure of the technical data to use in non-Communist countries and prohibits shipment of the product of the technical data to Communist countries. Even when such assurances are obtained, a validated license is still required if "at the time of exportation of the technical data from the United States, the exporter knows or has reason to believe that the direct product to be manufactured abroad by use of the technical data is intended to be exported or reexported directly or indirectly to Country Group W, Y, or Z."¹⁴⁹ A validated license will always be required if the foreign consignee refuses or is unable to give such assurances.¹⁵⁰

There are three types of written assurance requirements. The first applies to plants and processes for the treatment of petroleum or natural gas frictions or products thereof, various gas compressors, turbine pumps, rotary and other pumps, heat exchangers, pipe valves, control equipment and other items related to petroleum development, recovering and processing. In these cases, the prohibition against the re-export or transshipment of the "direct product" refers to the immediate product (including processes and services) produced directly by use of the technical data; the coverage of the term does not extend to the results of the use of such "direct product" or to end-products.¹⁵¹

The second and more general of the written assurance requirements requires the United States exporter to obtain written assurance from the foreign importer that, unless prior authorization is obtained from the Office of Export Control, the importer will not knowingly: (a) re-export to any Communist country except Yugoslavia any technical data relating to commodities which require validated licenses for export to Country Group T, V, or W (the "free world," Yugoslavia, Poland, and Rumania); (b) export

148. General License GTDU (Unpublished Technical Data), E.R. 385.2(c). Technical data which requires a validated license regardless of destination includes technical data relating to (1) civil aircraft, civil aircraft equipment, parts, accessories, or components, (2) related commodities (*e.g.*, airborne electronic equipment), (3) neutron generators, (4) porous nickel, (5) maritime civil nuclear propulsion plants, their land prototypes, and special facilities for their construction, support, or maintenance, and (6) technical data to be used for purposes related to nuclear weapons, nuclear explosive devices, or nuclear testing. E.R. 385.2(c)(3).

149. E.R. 385.2(c)(4).

150. *Id.*

151. *Id.* The "direct product" of an export of data to be used to erect a steel mill, for example, would be the physical plant and its machinery as opposed to the steel produced by the mill. Another example of the direct product of technical data is reforming process equipment designed and constructed by use of the technical data exported; the aromatics produced by the reforming process equipment are not immediate or direct products of the technical data.

to Communist China, North Vietnam, North Korea, or Cuba, any direct product of the technical data if such direct product requires a validated license for export to Country Group T, V, or W; or (c) export to Poland or Rumania or any country in the "Soviet bloc" any direct product of the technical data if the export of such product from the United States is subject to import certificate/delivery verification (IC/DV) procedures.¹⁵²

A third kind of written assurance is required when the direct product of any technical data is a complete plant or any major component of a plant which is capable of producing an end-product which requires a validated license for export to Country Groups T, V, or W, or which is included in the State Department's Munitions List. In such cases, the person in control of the distribution of the products of the plant must state in writing that, without prior authorization from the Office of Export Control, he will not export any such end-product to any Communist country except Yugoslavia (if the product is on the Munitions List or subject to IC/DV procedure), and that he will not export any such end-product to Communist China, North Vietnam, North Korea, or Cuba (if the product requires a validated license for export to Country Groups T, V, or W). In no case may he re-export to any Communist country except Yugoslavia "technical data relating to the plant or the major component of a plant."¹⁵³

The written assurance requirements are very detailed and almost staggering in their complexity. In order to avoid the labyrinth of technical data controls, some companies have stated that they have simply published much of their own technical data and then proceeded to transfer it without restrictions. Thus one effect of the complexity of these controls may be to increase publication of information which may be used without commercial obligation by friendly—and unfriendly—countries.¹⁵⁴

Because American firms may not wish to release, even with written assurances from the importer, technical data considered important to the national security, the Office of Export Control has established a "voluntary plan" whereby an official opinion may be obtained as to "the desirability of exporting or releasing for use in friendly foreign countries certain types of unpublished technical data which have significance to the common security and defense of the United States."¹⁵⁵ This so-called voluntary plan is subject to criticism, since inevitably it operates as an informal limitation on the general license. It is not surprising that exporters have seldom used it.

152. E.R. 385.2(c)(5)(i).

153. E.R. 385.2(c)(5)(ii), and "Note" immediately following E.R. 385.2(c)(5)(ii)(c).

154. See Behrman, *U.S. Government Controls Over Export of Technical Data*, 8 IDEA 303, 310 (1964).

155. E.R. 385.3. The voluntary plan is concerned with technical data in connection with (1) advanced developments, technology, and production "know-how," (2) prototypes, and (3) special installations. E.R. 385.3(b).

E. *The Question of Know-How*

It is not apparent from the Export Regulations that the concept of technical data includes "know-how"—that is, information or knowledge carried in one's head and communicated orally. The kinds of technical data listed in Export Regulation 385.1(a) are all tangible in form, and no hint is given that intangible information or knowledge is also covered. The impression that know-how is excluded is reinforced by the fact that, in contrast, the Munitions Control Regulations are expressly applicable "whether such information [subject to the licensing jurisdiction of the Office of Munitions Control] is to be exported by oral, visual, or documentary means."¹⁵⁶ Moreover, since the Export Regulations define an exportation of technical data as "any release . . . for use outside the United States,"¹⁵⁷ and since such a "release" of know-how would usually be effected through disclosures made by American persons abroad, it might be thought that the Office of Export Control has sought to avoid the promulgation of regulations which might affect the right of travel. Again, this view might be reinforced by contrast with the Munitions Control Regulations, which deal with matters much more closely related to the national security, and which define an exportation of technical data to include disclosures made "through foreign visits by American personnel."¹⁵⁸

The question is one of critical importance. If know-how is subsumed under technical data, written assurances must be obtained for dissemination of unpublished know-how in non-Communist countries and validated licenses must be obtained for its dissemination in Communist countries. Thus, for example, if a United States engineering firm is licensed to export certain blueprints to a Communist country, it would be necessary to obtain a second license to enable one of the firm's engineers to travel to that country to explain to local engineers how to put the square peg in the round hole.

Notwithstanding the language of the Export Regulations, the Office of Export Control has construed technical data to include information contained in the mind and not manifested in any written or tangible form; and it has construed the exportation of technical data to include oral communications by an American in a foreign country. In 1962, in a consent order with Hydro-carbon Research, Inc., the Office of Export Control stated that technical data includes "any information which a competent, experienced engineer thought he could furnish with his own mind using well-recognized engineering principles, texts, technical articles and patents," and that the application by certain American technicians, while abroad, "of their United States-origin know-how and experience" constituted an unauthorized use and export of technical

156. International Traffic in Arms, 31 Fed. Reg. 15174 (1966).

157. E.R. 385.1(b).

158. International Traffic in Arms, 31 Fed. Reg. 15174 (1966).

data.¹⁵⁹ By this consent order the Office of Export Control brought its policy into conformity with the technical data regulations of the Office of Munitions Control. It has been reported that in 1967, five years after the *Hydrocarbon* case, the technical data controls of the Office of Export Control will probably be amended to state that such controls are fully applicable to data in an intangible form such as an idea or technical service.¹⁶⁰

The inclusion of know-how within the definition of technical data greatly magnifies the irritation of the written assurance requirements, which, like the "firm order" rule, often place American exporters at a disadvantage vis-à-vis their foreign competitors. Many European firms, especially, to which the thought of diversion to Communist countries would not even occur, resent such regulation by the United States Government; and where the importer is itself a governmental agency, as is very often the case in Italy, France, Germany, and elsewhere, political embarrassment may arise from a request that written assurances be given that certain information will not be transmitted to certain countries. Even more important, restrictions upon oral disclosure of information and experience for use abroad pose a substantial threat to freedom of travel, freedom of speech, and, in some cases, freedom to carry on one's professional occupation.

Whether the technical data regulations are justified depends upon whether they are well adapted to the objectives they are designed to serve and upon whether those objectives are sound.¹⁶¹ Insofar as the objectives of the regulations are to prevent military and para-military ("strategic") technology from coming into the hands of Communist countries, it would seem that the written assurance requirements, at least, should be limited to technical data relating to items that are on the Munitions List or, alternatively, those that are subject to IC/DV procedure (or the COCOM list).¹⁶² The licensing of know-how should, a fortiori, be subject to a similar limitation. In particular, the State Department's control of know-how which "establishes a new art in an area of significant military applicability" suggests a workable standard under which most of the hardships of the technical data regulations could be eliminated. On the other hand, it may be argued that, apart from military or strategic considerations, the United States continues to outpace

159. *Hydrocarbon Research, Inc.*, 27 Fed. Reg. 12487 (1962), discussed in text accompanying notes 281-91 *infra*.

160. The technical data regulations are currently undergoing substantial review and it is likely that a new set of regulations to be issued later in the year will incorporate major changes.

161. See Behrman, *supra* note 154.

162. In 1965, Secretary of Commerce Connor questioned the effectiveness of the written assurance requirements: "To a considerable degree we have been held back by the sheer difficulty in ascertaining whether and to what extent U.S. technology in particular fields is so significantly superior to technology available abroad that we can fairly expect an assurance as to disposition of strategic products made with such technology to be obtainable and meaningful." *Hearings on H.R. 7105 Before the House Comm. on Banking and Currency*, 89th Cong., 1st Sess. 8 (1965).

the rest of the world in technological innovation and in research and development, and that we should not make our superior technology available to Communist countries at normal commercial prices but should, at most, bargain it for special additional concessions on their part. This is a difficult argument to evaluate. Perhaps the time for such an argument has passed. In view of the availability of Western European and Japanese technology, and in view of the technological advances of the Communist countries themselves, it may be too late to expect anyone to pay extra for our technical data. Moreover, it is by no means certain that the release or transmission of our technical data is susceptible of effective control, since, unlike commodities, such data can be microfilmed and exported by mail, or communicated orally.

F. Short Supply Controls

In 1945 and throughout the early post-War period, when supplies of many commodities were inadequate to meet combined foreign and domestic demands, export controls served to filter the drain of scarce commodities and to protect the economy against the inflationary impact of abnormal foreign demand.¹⁶³ Although in 1949, when the Export Control Act was passed, national security considerations outweighed short supply factors, nevertheless restrictions upon the export of certain commodities seemed necessary in order to ensure an adequate domestic supply at tolerable prices. These important commodities included nonferrous metals (copper, zinc, lead, tin, and aluminum), steel, machinery and equipment, building materials, textiles, petroleum, cereals, and chemicals and drugs.¹⁶⁴

In the months after the enactment of the Export Control Act, short supply controls diminished very considerably. With the outbreak of the Korean War in 1950 they revived, but by April 1953 such controls involved only about 30 commodity groups.¹⁶⁵ In 1956, only 8 commodities, and in 1958 only 5, were subject to short supply controls.¹⁶⁶ Since 1959, export controls for reasons of short supply have been imposed on only a few commodities.¹⁶⁷

"Short supply" means either that there are insufficient quantities of a given product to meet domestic requirements or that there are insufficient

163. See Comment, *Export Controls*, 58 YALE L.J. 1325, 1331 (1949).

164. EXPORT CONTROL, 6TH QUARTERLY REPORT 9 (1949).

165. Hearing on H.R. 4882 Before the House Comm. on Banking and Currency, 83d Cong., 1st Sess. 2 (1953).

166. The eight commodities controlled in 1956 were aluminum, copper, diamond bort and powder, hog bristles, iron and steel scrap, nickel, selenium, poliomyelitis (Salk) vaccine. See S. REP. No. 2147, 84th Cong., 2d Sess. 3 (1956).

167. Since 1959 short supply controls have been imposed on (1) beet and cane sugar (from June 27, 1963 to Oct. 15, 1964), (2) walnut logs, bolts, and hewn timber (Feb. 14, 1964 to Feb. 12, 1965), (3) cattle hides, calf and kip skins and bovine leathers (March 7, 1966 to Nov. 7, 1966), (4) copper and copper alloy scrap (Nov. 24, 1965 to the present), and (5) refined copper, copper base alloy ingots, and semifabricated copper products (Jan. 20, 1966 to the present). Note, *Constitutionality of Export Controls*, 76 YALE L.J. 200, 201 (1966).

quantities at prices satisfactory to domestic producers. Most recent so-called short supply situations have arisen from strong foreign demand for certain primary products, resulting in price increases but not in absolute shortages. When confronted by this kind of inflationary impact, the more powerful manufacturing lobbies will sometimes turn to the Department of Commerce to seek the imposition of short supply controls on their suppliers' products. Two instances in which this very large power has been exercised raise substantial doubts concerning the wisdom of permitting quantitative restrictions upon export for the purpose of price control.

(1) In November 1961, the American Walnut Manufacturers Association filed a request with the Department of Commerce, on behalf of the domestic walnut veneer industry, that controls be placed on export of black walnut logs from the United States. The request was supported by evidence that in the period 1954-60, consumption of veneer quality walnut logs by domestic veneer producers increased 3.18 times, while the volume of exports increased 17 times. If exports had increased at the same rate as domestic consumption, the 1960 export figure would have been approximately 2 million board-feet, instead of the actual 1960 export total of over 10 million feet. The applicants proposed two million feet as a reasonable annual export quota.¹⁶⁸

In fact, domestic walnut log prices had increased sharply as a result of high prices paid by European manufacturers. European manufacturers were able to pay high prices for walnut logs because they had developed machinery which could slice very thin veneers and get more out of each log.

In February 1964, after more than two years of study, Secretary of Commerce Hodges applied the short supply provision of the Export Control Act and imposed an export quota of 7.3 million board-feet a year, subject to the condition that the controls would be lifted if domestic use increased. In February 1965, shortly after he came into office, Secretary of Commerce Connor announced the discontinuance of the controls.¹⁶⁹ Among the reasons given for this action were (1) the harmful effect of reduced exports on the United States balance of payments, (2) the detriment to log growers and exporters, (3) the failure of the controls as a domestic price-control measure, and (4) the lack of danger of extinction of walnut.¹⁷⁰

Domestic walnut manufacturers were enraged at Secretary Connor's decision to discontinue short supply controls. "The Secretary," they said, "has thus rewritten the law and refused to apply it as written by Congress."¹⁷¹ In 1965, Senator Hartke of Indiana introduced a bill to amend section 3 of

168. *Hearing on S. 1896 Before the Senate Comm. on Banking and Currency*, 89th Cong., 1st Sess. 47-48 (1965).

169. *Id.* at 48.

170. *Id.*

171. *Id.*

the Export Control Act by requiring the President to impose controls whenever exports of any material or commodity were five times greater than the 1955 level and when a substantial number of other nations restricted exports of that material or commodity. The commodities which could be considered in short supply under the Hartke amendment—provided that a substantial number of countries restricted their exportation—included salmon, sheep and lamb glove leather, synthetic rubber, nylon yarn, pig iron, aluminum, lead and lead-base alloy pigs, crude coal tar products, alcohols, organic chemicals, and chemical pigments. Apart from the walnut log industry, none of the industries affected by the amendment had sought the imposition of short supply controls.

The bill was defeated but the Secretary of Commerce was nonetheless subjected to extensive questioning as to the propriety of having discontinued short supply controls on walnut logs. There was almost no criticism of the Department of Commerce for having imposed the controls in the first place. Ultimately, American manufacturers adopted techniques for slicing logs similar to those used by their European competitors.

(2) On March 7, 1966, short supply controls were imposed on exports of cattle hides, including calf and kip skins and bovine leathers.¹⁷² In response to complaints by shoe manufacturers about rising prices for hides, the Office of Export Control established export quotas, with licenses granted chiefly on a "historical" basis: that is, each exporter who had exported hides during a specified base period (January 1, 1964 through December 31, 1965), and who wished to claim a share of the quota, was required to submit a statement of past participation in exports to the Office of Export Control, which then informed each exporter of his share of the export quota. In addition, a small portion of the quota was reserved for new exporters.¹⁷³

In fact the domestic demand for cattle hides at no time exceeded the available supply. By substantially reducing the export markets for hides the special controls did have the effect of temporarily checking domestic hide prices. However, shoe manufacturers did not lower the prices of shoes but indeed raised them; and meat packers, incensed that the Commerce Department heeded the pleas of the shoe industry at their expense, talked of slowing the rate of cattle slaughter—which would have resulted in higher prices not only for hides but also for meat. An editorial in the *New York Times* on April 26, 1966, rightly concluded that "the establishment of a quota system on exports to keep prices artificially low is no more in keeping with the Administration's objective of trade liberalization than the imposition of import quotas to keep prices artificially high."¹⁷⁴

172. DEP'T OF COMMERCE, CURRENT EXPORT BULL. No. 929 (1966).

173. E.R. 373.18, 31 Fed. Reg. 13040 (1966) (April 1, 1966 to Nov. 7, 1966).

174. N.Y. Times, April 26, 1966, at 4, cols. 3-4.

On November 7, 1966, eight months after the cattle hide quotas had been imposed, the Department of Commerce discontinued the controls.¹⁷⁵ Validated licenses are no longer required for exports of cattle hides except for Country Group S (Southern Rhodesia) and Z (China, North Vietnam, North Korea, and Cuba). As of the present writing, only copper exports are subject to short supply controls.¹⁷⁶

It may be questioned whether short supply controls, even when judiciously applied, are an appropriate means for controlling domestic prices. In the first place, the experience with both walnut logs and cattle hides indicates that export quotas are not a particularly effective device for reducing prices, since other factors tend to replace foreign demand as an inflationary force. Second, short supply controls inevitably raise the issue of favoritism and the large danger that government officials may be too solicitous of the problems of one corner of a domestic market at the expense of another. Third, short supply controls adversely affect foreign buyers and nations and thus serve to invite retaliatory types of discrimination against American products.

Where foreign technological innovations or labor-saving devices serve to increase the foreign value of a given commodity, with consequent effect on domestic prices (as in the case of black walnut logs), government grants to the afflicted industries to effect technological change may be far less costly to both the domestic economy and the volume and direction of international trade than short supply controls.

Apart from considerations of economic policy, there is room for doubt concerning the legal policies involved in the exercise of short supply controls by the President. When the Export Control Act was passed in 1949, this special grant of authority was predicated on severe post-war shortages and dislocations as well as on the exigencies of the European Recovery Program. It

175. DEP'T OF COMMERCE, CURRENT EXPORT BULL. No. 942A (1966).

176. On November 17, 1965, in the face of an increase in domestic copper prices from 36 to 38 cents a pound (the prevailing world market price), the Administration announced that it would sell "at least" 200,000 tons from the national stockpile and impose quota controls on copper exports as part of a "series of steps to ease the severe copper shortage and relieve upward pressure on prices." N.Y. Times, Nov. 18, 1965, at 1, col. 1. It should be noted that there was no serious world-wide shortage of copper, and no abnormal foreign demand for American copper. On November 24, 1965, the Department of Commerce imposed validated license control on exports of semimanufactured copper commodities to all destinations, except Canada, and established quantitative quota restrictions on exports of copper metalliferous ash and residues, and copper and copper-base alloy waste and scrap to all destinations, except Canada. In addition, effective December 1, 1965, all validated licenses for export of copper scrap issued prior to November 18, 1965, were reduced by 50%. EXPORT CONTROL, 74TH QUARTERLY REPORT 23 (1965).

On January 20, 1966, the Department of Commerce announced the following new controls: (1) quantitative export quotas were established for refined copper, copper-base alloy ingots, and semifabricated copper products; (2) the quota for copper scrap and copper-alloy scrap was increased; (3) unrefined copper, including copper ores, concentrates, matte, and blister, was placed under a closed quota, *i.e.*, applications will generally not be approved, and (4) a quantitative quota was established for semifabricated copper products. EXPORT CONTROL, 75TH QUARTERLY REPORT 30 (1966).

was contemplated that hundreds of items—not one or two—would be subject to abnormal domestic and foreign demand. This is implicit in the congressional declaration of policy set forth in section 2 of the Act which permits the use of export controls “to protect the domestic economy from the excessive drain of scarce materials and to reduce the inflationary impact of abnormal foreign demand.” Under section 3(a) of the Act, the President may only prohibit or curtail exports “to effectuate the policies set forth in section 2.” It may therefore be argued that the power to impose short supply controls was rendered obsolete when the “domestic economy”—and not merely a few isolated sectors of it—ceased to be threatened. Thus, even when short supply controls are imposed as a general counter-inflationary measure, as in the case of copper, rather than to subsidize particular industries such as the shoe or furniture manufacturers, it may be questioned whether such controls are not ultra vires the Export Control Act.¹⁷⁷

One source of particular irritation is that since export control functions are exempt from the operations of the Administrative Procedure Act¹⁷⁸—another concession to the emergency character of the 1949 legislation—short supply controls can still be imposed without notice to, or hearing from, those most affected by the restrictions. In the case of cattle hide controls, the meat packers and the hide exporters were not granted an audience with Commerce Department officials until after the controls had been imposed.

IV. INTERNATIONAL COOPERATION AND CONFLICT IN THE ENFORCEMENT OF EXPORT CONTROLS: COCOM AND THE BATTLE ACT

A. COCOM

It has never been supposed that the United States could ensure effective restrictions on the shipment of strategic goods to Communist destinations without parallel controls exercised by other countries, both to restrict strategic exports from those countries and to prevent transshipments of American exports.

In the immediate post-war period the devastated economies of Western Europe and Japan were not in a position to export goods to Eastern Europe on a large scale. As early as November 1949, however, the United States

177. It has also been argued that export quotas imposed for reasons of domestic scarcity violate article I, § 9 of the Constitution, which provides that “No tax or duty shall be laid on articles exported from any state.” See Note, *Constitutionality of Export Controls*, 76 YALE L.J. 200 (1966). The argument is based on the premises that “[s]ince the Export Clause bans taxes or duties it would be paradoxical to suppose that it permits a technique at least as restrictive,” and that the framers of the Constitution “reached a deliberate decision to prohibit the government from burdening the export trade in any way.” *Id.* at 202-03. The author distinguishes, however, controls initiated to further military and foreign policy objectives, which, he states, may be justified on the ground of “an independent ‘foreign affairs power.’” *Id.* at 208.

178. Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified in scattered sections of 5 U.S.C.).

and six major allies—the United Kingdom, France, Italy, the Netherlands, Belgium, and Luxembourg—established a multilateral system of strategic controls on trade with the “Sino-Soviet bloc.” A series of embargo lists was agreed upon, and a body known as the Consultative Group, composed of export control officials of the various governments, was set up to supervise these lists. Membership in the Consultative Group was expanded in 1952 and 1953 to include Norway, Denmark, Canada, and West Germany, and was subsequently joined by Portugal, Greece, Turkey, and Japan.¹⁷⁹ Thus, the Consultative Group now includes all the NATO countries with the exception of Iceland, plus Japan. The headquarters of the Consultative Group is located in Paris.

The Consultative Group created two day-to-day working groups: the Coordinating Committee (COCOM), established in 1950, which was concerned with trade with Eastern Europe, and the China Committee (CHINCOM), established in 1952, which was concerned with trade with communist China. Four secret lists were promulgated: (1) items totally embargoed, (2) items for which a quota had been found appropriate, (3) items to be carefully watched, and (4) the China List, containing additional items to be denied China and North Korea in accordance with a United Nations resolution of May 18, 1951. Each of the lists constituted a minimum level which all participating countries agreed to accept.

In 1957, the special China List was abolished and the separate chairmanship of CHINCOM was discontinued. However, COCOM controls now extend to Communist China and North Korea, as well as to North Vietnam, although the United States has been unsuccessful in its attempts to secure the application of COCOM controls to Cuba.¹⁸⁰

With the abandonment of the special China List in 1957, the COCOM Lists were reduced to three categories: List I, consisting of embargoed items; List II, consisting of items subject to quantitative control; and List III, consisting of “items kept under scrutiny which may require control if exports to the bloc appear to be excessive or if new technical or other information indicates the need for more stringent controls.”¹⁸¹ In 1958, Lists II and III were abolished and a new system of secondary control was established in the

179. For background materials on the Consultative Group and the embargo lists, see the annual Battle Act Reports of the Department of State; S. METZGER, *LAW OF INTERNATIONAL TRADE* 1059-93 (1966); Oakeshott, *The Strategic Embargo: An Obstacle of East-West Trade*, 19 *WORLD TODAY* 240 (1963); Duprez, *The Strategic Embargo: Doctrine and Practice*, 19 *WORLD TODAY* 374 (1963). Certain portions of this section were informed by correspondence with Russell Baker of Baker, McKenzie & Hightower, Chicago, Ill., and with Robert B. Wright, Director, Office of East-West Trade, Dep't of State.

180. COCOM controls extend to Albania, Bulgaria, China, Czechoslovakia, East Germany, Hungary, Mongolia, North Korea, North Vietnam, Poland, Rumania, Tibet, and the USSR.

181. DEP'T OF STATE, *MUTUAL DEFENSE ASSISTANCE CONTROL ACT OF 1951 (BATTLE ACT)* REPORT No. 9, at 16 (1957) [hereinafter cited as BATTLE ACT REPORT].

form of a watch (or surveillance) list, called List IV.¹⁸² Thus the term "COCOM List" should now be understood to include List I (embargo list) and List IV (watch list).

B. *The Battle Act*

In order to induce a greater degree of cooperation from all friendly countries—and especially those not represented on the Consultative Group—Congress in 1951 passed the Mutual Defense Assistance Control Act,¹⁸³ commonly called the "Battle Act" (in honor of its sponsor Congressman Laurie Battle), designed chiefly to restrict the giving of United States aid to nations that export strategic items to Communist countries. Under this act, there was established within the Department of State a Battle Act Administrator,¹⁸⁴ who drew up two lists that went into effect on January 24, 1952. The first list, called "Title I, Category A," is composed of arms, ammunition, implements of war, and atomic energy materials.¹⁸⁵ The second list, called "Title I, Category B," contains other strategic materials, namely certain types or varieties of the following items: electronic equipment, chemicals, metalloids, and petroleum products; scientific instruments and apparatus; metals, minerals, and their manufactures; chemical and petroleum equipment; transportation equipment; metal-working machinery; electrical and power-generating equipment; general industrial equipment; synthetic rubber and synthetic film.¹⁸⁶ No United States military, economic, or financial assistance may be given to any nation which knowingly permits shipment of any of the items on either 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."¹⁸⁷ However, with respect to Title I, Category B, there is an exception: the President is given discretion *not* to withhold aid from nations that knowingly permit shipments of these

182. 14TH BATTLE ACT REPORT 3 (1960). The COCOM members have established a procedure under which any member country which wishes to export to a Communist country a product subject to the international embargo (COCOM List I) may seek the authorization of the international trade security trade control body. From July 1964 to June 1966 the COCOM group approved the export to Communist countries of embargo items from Belgium, France, West Germany, Italy, Japan, the Netherlands, and the United Kingdom. 19TH BATTLE ACT REPORT 68-71 (1966).

183. 22 U.S.C. §§ 1611-13d (1964).

184. At the present time, the Battle Act Administrator is lodged within the Office of East-West Trade of the Department of State.

185. 1ST BATTLE ACT REPORT 37 (1952).

186. *See id.* at 43 (summary of list).

187. 22 U.S.C. § 1611 (1964).

In October 1962 it was determined that Cuba came within the terms of the Battle Act because the Castro regime was clearly under the domination of the USSR and thus one of a "combination of nations threatening the security of the United States." Aid-recipient countries were notified of this determination and of the expectation of the United States Government that controls over shipment of Battle Act items to the Sino-Soviet bloc would be extended to include such shipments to Cuba.

18TH BATTLE ACT REPORT 26 (1965).

items to the prohibited destinations, if such withholding "would clearly be detrimental to the security of the United States."¹⁸⁸ The President has frequently used his discretion not to discontinue aid.¹⁸⁹ Indeed, the only application of Battle Act sanctions occurred in 1952, when Ceylon agreed to deliver rubber to China in exchange for rice. Ceylon was not in fact receiving any American aid at that time; however, it was declared ineligible for such aid, and remained so until 1956, when the restriction was removed, apparently because the Malayan, Singapore and British governments announced that they would no longer embargo the shipment of rubber to Communist China.¹⁹⁰

Title II of the Battle Act provides that the United States shall negotiate with other countries for the control of goods which, though not on the Title I Lists, should nevertheless, in the opinion of the Administrator, be subject to control. The Title II List is classified, and the Battle Act states only that it "covers the same general categories of items as the Title I, Category B List, but the specific items listed are ones of lesser strategic importance." Foreign nations can export Title II goods to Communist countries without risking the cessation of United States military, economic, or financial assistance.

The effect of the Battle Act on the trade policies of other countries is hard to estimate. Even without legislation, the State Department would presumably have brought pressure on foreign governments not to export strategic materials to Communist nations; indeed, the Department has brought pressure on friendly nations not to export to Communist countries items that are not even proscribed by the Battle Act.¹⁹¹ At the same time, the sanctions of the Battle Act are probably too crude to be effective: we would probably not wish to exert them against smaller countries which we are seeking to protect against Communist influence and we have long discontinued financial assistance to the countries of Western Europe. Such cooperation as we have been able to obtain from foreign governments in the enforcement of export controls against Communist countries has been the result primarily of the

188. Mutual Defense Assistance Control Act of 1951, § 103(b), 22 U.S.C. § 1611b (b) (1964).

189. From 1951 until August 1966, there have been 24 Presidential determinations under § 103(b) of the Act to continue United States assistance to aid-recipient countries, the full particulars of which have been made public in the various Battle Act Reports to Congress. Over half the shipments involved represented commitments for delivery by the government concerned made before the Battle Act came into effect, before the particular item was added to the embargo list, or before the country became a recipient of United States assistance. Letter from Robert B. Wright, Director, Office of East-West Trade to the authors, Aug. 31, 1966.

190. *Id.*

191. The State Department, for example, protested vigorously the sale (by Leylands) of British transport busses to Cuba, and brought great pressure on the West German government in March 1966 to abandon its decision to guarantee a \$87.5 million line of credit for a Communist Chinese steel complex to be constructed by a consortium headed by Demag A.G., a Ruhr steel and machinery company. See 54 DEPT OF STATE BULL. 567 (1966); N.Y. Herald Tribune, April 6, 1966, at 32, col. 1.

minimum consensus achieved by negotiation in the COCOM forum rather than of threats to withdraw aid under the Battle Act.

Indeed, the principal positive effect of the Battle Act has been to institutionalize the United States participation in COCOM. The Battle Act Administrator bears responsibility for cooperating with the other COCOM countries. The Department of State is charged with submitting to Congress an annual report on operations under the Battle Act, and these reports constitute a valuable source of information on United States efforts to achieve multilateral accord on export control policies. If the Battle Act were repealed it would be necessary for the State Department to create another office to negotiate and report on multilateral export controls; apart from that, this misguided piece of legislation would sink with hardly a trace.

C. The COCOM Lists and the Battle Act Lists

The COCOM Lists are classified. However, the Ninth Battle Act Report, which contains the most comprehensive survey of the multilateral security trade-control program yet published, indicates that the two Battle Act Title I Lists (Categories A and B), taken together, closely approximate COCOM List I. In the words of the Report, "the Battle Act List is arranged differently and therefore is not identical in every respect."¹⁹²

The Battle Act Title I, Category A List, which is not classified, undoubtedly corresponds to the Munitions and Atomic Energy Annex to COCOM List I. The Battle Act Title I, Category B List, which is only available in a generalized version, corresponds to the COCOM List I proper. The latest revision of the two Battle Act Title I Lists was promulgated on August 13, 1966, following a series of COCOM negotiations.¹⁹³

The Battle Act Title I, Category A List contains approximately 40 categories of goods, and the Title I, Category B List contains approximately 120 categories of goods, based on the 5-digit Standard International Trade Classification.¹⁹⁴ The published version of the Title I, Category B List does not define the embargoed items with a high degree of specificity. For example, while Category B lists simply "grinding heads and spindle assemblies," only those designed or rated for operation at speeds in excess of 120,000 revolutions per minute are said to be included in the COCOM embargo list. The British embargo list, on the other hand, which is said to correspond almost exactly to the secret COCOM embargo list, contains approximately 160 categories of goods, defined in very great detail. The British list is published for the general information and guidance of traders in that country, and does not itself have the force of law.¹⁹⁵

192. 9TH BATTLE ACT REPORT 28 (1957).

193. See 19TH BATTLE ACT REPORT 3 (1966).

194. There are 161 items on COCOM List I (including the Munitions and Atomic Energy Annex). *Id.*

195. The British embargo list is published in the Board of Trade Journal. The most

The Battle Act Title II List, which is wholly classified, corresponds to COCOM List IV.¹⁹⁶ The articles on this list are goods which the United States generally refuses to export to Communist destinations but which have not been accepted for embargo by the other COCOM nations. The COCOM group has nonetheless agreed to the periodic review of information on actual exports of these items.

Licensing jurisdiction over Battle Act Title I, Category A goods is vested in the Office of Munitions Control and the Atomic Energy Commission. Licensing jurisdiction over Title I, Category B goods and Title II goods is, for the most part, vested in the Office of Export Control.¹⁹⁷

D. *The COCOM Lists and IC/DV Procedures*

The Import Certificate/Delivery Verification (IC/DV) mechanism, described above,¹⁹⁸ was worked out by the United States and her partners on the Consultative Group—prior to the enactment of the Battle Act—as a multilateral check on the transshipment of strategic goods. According to Commerce Department officials, COCOM List I (embargo) items are subject to IC/DV procedures, but COCOM List IV (watch list) goods are not.¹⁹⁹ Therefore, the symbol "A" on the Commodity Control List, indicating goods subject to the IC/DV requirement, may be taken as denoting COCOM List I goods.

However, the Battle Act Title I List, and presumably, therefore, COCOM List I to which it corresponds, cannot be matched on a one-for-one basis with the Commodity Control List. For example, approximately 36 Commodity Control List "entries" are needed to cover the various fluorocarbon compounds and mixtures listed in Category B of Battle Act Title I. Because Commerce Department officials tend to err on the side of caution when transposing COCOM List I (or Battle Act Title I List) goods to the Commodity Control List, there are in fact a number of goods subject to IC/DV procedure that are not embargo items.

The caution of Commerce Department officials in this respect may perhaps be defended on the ground that if the IC/DV requirement were imposed on those varieties of a given commodity that are subject to the international embargo but not on other varieties of the same commodity, licensing and customs officials in other countries would have to make highly technical and

recent list was published August 19, 1966, following a series of Coordinating Committee negotiations.

196. Letter from Robert B. Wright, Director, Office of East-West Trade, Oct. 14, 1966.

197. The export of tankers and warships, which are within Category B of Title I, is licensed by the Maritime Administration.

198. See text accompanying notes 118-20 *supra*.

199. Letter from Robert B. Wright, Director, Office of East-West Trade, Oct. 14, 1966; Letter from Edward P. Walinsky, Director, Policy Planning Division, Office of Export Control, Nov. 15, 1966.

complex judgments concerning whether particular strategic exports fall within or without the range of the COCOM embargo. In fact, some licensing officials in other countries have stated to the authors that there have been certain disagreements with the Office of Export Control concerning whether a given item was on COCOM List I but that, in any event, they have never refused to cooperate with requests for import certification or delivery verification.

In contrast to its policy of overcoverage of goods subject to IC/DV procedure, the Office of Export Control will often approve the export of such goods to friendly countries which do not apply IC/DV procedures. In this connection it may be noted that the other COCOM countries will permit the export of COCOM goods to countries which do not participate in the IC/DV system.

E. Policy Conflicts

The degree to which the United States export control policies have conflicted with those of its allies may occasionally be read between the lines of official American pronouncements. Thus the Eighteenth Battle Act Report states:

While there may be differences of opinion at any given time among the countries participating in COCOM as to the details of what should be regarded as strategic, those differences have been resolved in recent years through frequent technical reviews that have preserved the basic scope of the international strategic lists. These reviews have resulted in the addition of new items of technological importance and the deletion of items which are considered to be no longer of strategic significance from the standpoint of Sino and Soviet-bloc capabilities.²⁰⁰

Most of these "differences of opinion" have been differences between the United States, on the one hand, and the other COCOM nations, on the other. For example, both the abandonment of the "China List" and the refusal of the Consultative Group to impose COCOM controls on Cuba represented policy setbacks for the United States, which is alone, at least among the major industrial nations, in maintaining a total embargo on trade with Communist China, North Korea, North Vietnam, and Cuba. Also, the fact that the United States list of goods which, under the Commodity Control List, require validated licenses for export to the Communist countries of Eastern Europe (including the Soviet Union) is considerably larger than the corresponding list of any of her major allies,²⁰¹ reflects substantial disagreement

200. 18TH BATTLE ACT REPORT 41 (1965).

201. The United Kingdom, for example, permits the unlicensed export of most non-COCOM goods to all Communist countries. Except for goods listed in Schedule I, Export of Goods (Control) Order 1965, [1965] 2-2 STAT. INSTR. 3745, 3749 (No. 1324), promulgated under authority of the Import, Export and Customs Powers (Defence) Act

concerning what should be regarded as strategic. The other COCOM nations have exerted continual pressure to reduce the international embargo list which in fact, judging from statements in the Battle Act reports and conversations with Commerce Department officials, seems to be considerably shorter today than it was in 1951.

Basic to the differences of opinion between the United States and other COCOM countries concerning what goods should be permitted to be shipped to what countries is a difference in philosophy concerning the relationship of international trade to international politics. The United States is more willing to encourage or withhold trade to accomplish specific foreign policy objectives. British or French or German trade with the Eastern European countries is in the main commercially rather than politically oriented. The United States, on the other hand, according to an Administration spokesman, welcomes "increased trade in nonstrategic goods with Eastern European countries to weaken their ties with what was once a monolithic Soviet bloc."²⁰² When American political objectives and European commercial objectives do not happen to coincide—as in the case of trade with the Soviet Union itself—these differences are reflected in changes in the COCOM Lists.

The annual reformulation of COCOM controls and the successive bilateral and multilateral debates which accompany additions to, or deletions from, the COCOM Lists are conducted within the confines of "strategic" considerations. But even a highly technical argument as to whether or not a particular item, *e.g.*, electric vacuum furnaces, is strategic, must betray the political orientation of the experts involved. At the same time, a study of the Battle Act Reports indicates that even apart from accepting reductions of the COCOM embargo list, United States authorities have over the years

of 1939, 2 & 3 Geo. 6, c. 69, all goods may be shipped to all countries except Southern Rhodesia without a license of any kind. "Schedule I" goods identified by the symbol "A" may not be exported to any country without an export license; goods which are not identified by the symbol "A" may be exported to Commonwealth countries, Ireland, South Africa, and the United States without an export license.

To take another example, the most recent edition of the West German export control list (Beilage zum Bundesanzeiger, June 24, 1965, at 114), promulgated under authority of the Foreign Trade and Payments Law of 1961 (Aussenwirtschaftsgesetz, [1961] BGBI. 481), lists some 225 non-COCOM goods which are subject to export licensing. These commodities are controlled in order to fulfill commitments under Common Market obligations, *e.g.*, agricultural products; to meet domestic supply requirements, *e.g.*, basic metals; and to prevent disturbances in export commerce from the delivery of products of inferior quality, *e.g.*, jewelry, leather goods, and clock works. Baker & Bohlig, *The Control of Exports—A Comparison of the Laws of the United States, Canada, Japan, and the Federal Republic of Germany*, 1 INT'L LAWYER 163, 181 (1967).

202. N.Y. Times, Sept. 13, 1966, at 15, col. 1. The *Report to the President of the Special Committee on U.S. Trade Relations with East European Countries and the Soviet Union*, the so-called Miller Report (after its Chairman, J. Irwin Miller), concluded that "[t]he case for expanding peaceful trade comes down to the proposition that we can use trade to influence the internal evolution and external behavior of Communist countries." 18TH BATTLE ACT REPORT 57 (1965). The Miller Report also stated that "there has been a tendency among those charged with the administration of trade controls to give more emphasis to the restrictive rather than to the discretionary provisions of the [Export Control Act]." *Id.* at 61-62.

gradually modified their strategic objectives to conform more closely to those of her allies. By 1963, the United States had come around to the view that "nonstrategic Western trade with the Soviet bloc, or the denial thereof, cannot affect basic Soviet military capability," and that "[t]hat capability is independently based on the Soviet's own advanced weapons technology and military production."²⁰³ Indeed, recent Battle Act Reports have contained not only sections headed "Preventing the Communists From Extending Their Domain," but also sections headed "Achieving Agreements Which Lead to Peace and Encouraging Peaceful Evolution Within the Communist World."²⁰⁴ On the other hand, the abandonment of the COCOM China List did not affect in any way the United States position on trade with China, North Korea, or North Vietnam.

Multilateral arrangements through COCOM will probably continue into the indefinite future, although it seems likely that COCOM nations such as England, Japan, and the major Western European countries will exert increasingly strong pressure on the United States to agree to continued reduction of the list of embargoed items. On the other hand, the other COCOM countries will probably continue to be amenable to multilateral controls on new United States products and technical data which they are anxious to import for their own consumption and use. Basically, the bargaining power of the United States in COCOM depends on her capacity to outpace her allies in technological innovation. In other words, so long as United States concepts of the significance of export controls as a foreign policy weapon continue to diverge fundamentally from those of the other members, international strategic controls, apart from a certain hard core of military and para-military commodities, will be predicated chiefly on superior American industrial know-how.

V. EXPORT LICENSING POLICIES AND PROCEDURES

The Commodity Control List and the accompanying regulations indicate when validated licenses are required, but do not indicate under what circumstances they will be granted or denied. Some general clues to the policies of the Office of Export Control with respect to the issuance of validated licenses are provided in the quarterly reports of the Bureau of International Commerce ("Export Control"). Thus, although the Commodity Control List shows merely that all exports to Communist China require a validated license, it is obvious from the quarterly reports that applications for such licenses will not be approved except for a few exports to friendly foreign embassies in Peking.²⁰⁵ Similarly, it may be inferred that the Office of Export Control will

203. 16TH BATTLE ACT REPORT 8 (1963).

204. See the table of contents, 18TH BATTLE ACT REPORT (1965).

205. During the second quarter (April-June) of 1966, an application for a household

not grant licenses to export goods accepted for international embargo, *i.e.*, COCOM List I goods, to Communist countries except possibly Yugoslavia. Some clues to the licensing policies may also be found in statements made from time to time by the President or high Administration officials concerning the need to "build bridges" to Eastern Europe, or the need to restrict exports to such specific countries as Rhodesia. Thus, if the Administration expresses an interest in expanding trade in peaceful goods with Czechoslovakia, Hungary, and Bulgaria, for example, an exporter may confidently expect approval of an application to ship to Czechoslovakia a commodity that requires a validated license for export to Country Groups Y ("Soviet bloc") and Z (China, North Korea, North Vietnam, and Cuba) but not to any other destinations, since presumably such a commodity is not possessed of large strategic value.

Most applications for validated licenses, however, do not fall into any of these neat categories. We may assume that the Office of Export Control does not receive many applications to export anything to Communist China, or to export COCOM goods to any Communist country. Indeed, of the six-hundred odd license applications received each day by the Office of Export Control, only about 16 to 18 per day are for exports to Country Groups Y and W.²⁰⁶ The great majority of applications are for exports to Country Group V and these generally fall into a "gray area," either because their re-exportation is not controlled by the country to which they are to be shipped or because they are destined for a "less friendly" Group V country, such as Indonesia or Egypt or Algeria, and hence will often be judged by criteria different from those applied to our NATO allies.

The fact that the great majority of export license applications involve a difficult judgment as to whether or not they should be granted is, of course, as it should be, since it makes no sense to invite license applications for exports which are either consistently approved or consistently denied. It would be simpler and more efficient to permit general license shipments of the former and to flatly prohibit any shipments of the latter. Nevertheless, the absence of clear criteria for the exercise of judgment by the Office of Export Control is a matter of concern. Both the individual exporter and the interested public can only guess what factors are taken into account by licensing officials in passing on applications.

refrigerator, valued at \$150, was approved for shipment to Communist China because it was for a diplomatic mission of a friendly country. EXPORT CONTROL, 76TH QUARTERLY REPORT 16 (1966).

206. Haight, *United States Controls Over Strategic Transactions*, 1965 U. ILL. L.F. 337, 340. In calendar year 1966, the Office of Export Control received 6,850 applications to export to Country Groups W and Y, 1,550 of which were for technical data exports. Address by Dr. Robert L. McNeill, Deputy Ass't Secretary for Trade Policy, Dep't of Commerce, to American Management Ass'n Seminar on East-West Trade, New York City, March 6-8, 1967.

Such guesses can be informed, however, by past experience.²⁰⁷ Indeed, it is chiefly their experience in previous license application cases that guides the judgment of the licensing officials themselves.

A. *The "Case Method" of the Office of Export Control*

Within the Office of Export Control, licensing officers are organized by commodity groups. For example, all applications to export ball bearings are handled by a single officer in the Capital Goods Division. The discretion exercised by such officers in passing on license applications is severely circumscribed by previous decisions and instructions issued after consultation in the complex interdepartmental structure described above.²⁰⁸ The better part of this collective wisdom is contained in a huge departmental manual, about five inches thick, which is not available to the public. Licensing decisions by lower echelon officers must be supported by reference to this manual, and will usually be reviewed by section and division supervisors. A great many of the applications that are not denied by licensing officers are referred to the Policy Planning Division, which in turn refers to the Operating Committee those applications that are not clearly covered by previous guidelines or that raise questions about existing guidelines. When agreements are finally reached in the inter-agency advisory complex, such determinations become a part of the instructions to officers in the commodity division.²⁰⁹

Inevitably, a kind of case method, or, more strictly, case-by-case method, has developed to facilitate the work of passing on license applications. The factors to be considered—such as the level of Soviet and Western European technology, potential end uses, the risks of transshipment, current political attitudes to particular countries—are too numerous and too vague to permit formulation in precise rules. It is only by analogizing the case at hand to previous cases authoritatively decided in inter-agency adjudications that some degree of consistency can be maintained.

Although resort to past experience is inevitable, the case method used by the Office of Export Control has many adverse consequences. One of these is

207. In the case of exports to Communist nations, the exporter's guesses are aided by the quarterly reports, in which statistics are published concerning products licensed for export to Communist nations as well as illustrative approvals and denials. However, the statistics do not include exports which were not approved for Communist destinations, and the illustrations of shipments approved or rejected are too few in number and too general in description to be of much value to the exporter. For example, a manufacturer of computers would not be much enlightened by the statement made in the *73d Quarterly Report*, in 1965, that an "electronic computer system with parts and accessories," valued at \$500,000, was approved for export to East Germany, and that an "electronics computer," valued at \$900,000, was rejected for export to East Germany. See EXPORT CONTROL, 73d QUARTERLY REPORT 4-5 (1965).

208. See pp. 806-07 *supra*.

209. See Hearings Pursuant to H.R. Res. 403 Before the House Select Comm. on Export Control, 87th Cong., 1st Sess. 251-54 (1961); Hearings on Export of Strategic Materials to the U.S.S.R. and Other Soviet Bloc Countries Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., pt. 2, at 169-70 (1961).

the refusal of licensing authorities to speculate on the propriety of future transactions. Since they do not wish to lay down general rules, they avoid hypothetical questions and will usually consider an application only in connection with a firm order.²¹⁰ While the regulations do not rule out the possibility of departure from this general policy on a showing of great hardship, such a showing must be more than the common desire to avoid the expense and bother of negotiating futile contracts.²¹¹

Another adverse consequence of the case method used in passing on export licenses is its excessive conservatism. The Commerce Department's case method of decision differs substantially from the case method to which we are accustomed in our judicial system. Several essential characteristics of our judicial doctrine of precedents are wanting: publication, distinctions between *dictum* and holding, and the inclusion of dissenting opinions. Hence the resort to previous experience by the Department of Commerce accentuates the elements of continuity inherent in the doctrine of precedent while ignoring its element of growth. If a past decision was made under a highly restrictive policy, the tendency will be to repeat it even after the restrictive policy has lost its justification, unless a major change in international relations has compelled a general re-evaluation of the controls. Moreover, technological advance is often so rapid that last year's "sensitive" item may have become obsolete or commonplace. An item once controlled because it would have helped an Eastern European country to overcome a bottleneck in its industrialization plans may have since become easily available from Western European sources. Because of the great variety of factors involved, it may be very difficult to revise the background data upon which licensing decisions depend. Although frequent attempts are made to update background information in the processing of current applications, a piecemeal approach is of necessity slow, and it is the applicant who suffers most from the delay.

B. *Review of Denials of License Applications*

If a license application is denied, the exporter may either submit a request for administrative review by the Office of Export Control or appeal directly

210. E.R. 372.4(f).

211. E.R. 372.4(f)(3) states that "Where, due to unusual circumstances . . . an exporter believes that an exception to the requirement of an export order . . . should be granted, the Office of Export Control will consider a request for such exception. . . ." A note to this regulation gives three examples of reasons which, if fully substantiated, might warrant an exception: (1) "The transaction between the applicant and the purchaser or ultimate consignee does not involve a normal purchase and sale contract in the customary form." (2) "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." (3) "The applicant is under an unusual obligation to supply the ultimate consignee immediately with the commodities covered, because of a special trade or industry practice." There are indications, however, that the office of Export Control often exercises considerably less stringency with respect to the order requirement than is indicated by the regulations.

to an Appeals Board for the Department of Commerce.²¹² If he chooses administrative review and it is unfavorable, he still may appeal to the Appeals Board.²¹³ Since direct appeals to the Appeals Board are, customarily, first referred by it to the Office of Export Control,²¹⁴ most exporters will first seek relief through administrative review.

The grounds for administrative review and for appeals are the same: "where such regulation, order, or other administrative action works an exceptional and unreasonable hardship upon [the exporter] or improperly discriminates against him."²¹⁵ However, the regulations state in a footnote that "[a] rejection of an export license application on the ground that the proposed exportation is contrary to the national interest may be appealed."²¹⁶ This footnote, which appeared for the first time in 1950, is significant, for without it the licensing officer could easily avoid reversal of his decision by basing it on the unchallengeable ground of national interest.

Even with the footnote, however, the exporter is under severe handicaps in appealing from a denial of his application. The licensing officer is not required to disclose to the exporter any reasons for rejection of the application. In practice, rejections usually state merely that the proposed export "is not in the national interest." The license may have been denied because the importing firm or some intermediate consignee is included in the secret "gray list"²¹⁷ of persons considered unreliable for export control purposes, or because it is feared that the proposed export may be transshipped to a Communist country, or because it embodies technology whose divulgence would be inimical to the national security.

Requests for administrative review are forwarded to the Office of Export Control.²¹⁸ If the license application was rejected by lower-level officials and was not considered by the Policy Planning Division or the Operating Committee, the request for administrative review may serve to bring the application to the attention of higher echelon officials, in which case it will be processed in much the same way as an application *de novo*. If, on the other hand, the application has already been considered by high level officers, they may not bother to hold another review of the matter unless the exporter has submitted written information which justifies a second look (*e.g.*, that a foreign competitor is prepared to sell equally good or better products to the country involved). The exporter is not permitted to be present or to be represented

212. See E.R. Part 383, Administrative Reviews and Appeals.

213. E.R. 383.3.

214. E.R. 383.3(d)(1).

215. E.R. 383.1(c).

216. E.R. 383.3(c)(1) n.2. The word "appealed" in this context presumably includes requests for administrative review, since such a review, as indicated above, is involved in all appeals.

217. See pp. 810-11 *supra*.

218. E.R. 383.2.

during these deliberations. In practice, however, the exporter and/or his counsel is permitted to discuss the matter informally with the licensing officer and to present his arguments for approval of the application.

If administrative action is unfavorable, a written decision will be forwarded to the petitioner from which he may appeal to the Appeals Board. This Board, consisting of a Chairman and two members, has been established as an impartial body in the Office of the Secretary of Commerce to consider appeals from actions taken by various agencies within the Department and to render final decisions thereon.²¹⁹ The Appeals Board is wholly independent both of the Office of Export Control and of the Bureau of International Commerce.

When an appeal is filed from a decision on an administrative review, the appellant may request the Office of Export Control, in writing, to transmit to the Appeals Board the documentation originally submitted to the office.²²⁰ If the appellant so requests or the Appeals Board believes it to be necessary to a proper determination, the appellant "may be granted an opportunity to present orally further facts and argument. Such presentation will be heard informally; generally, no oaths will be administered to witnesses, and the Appeals Board will not necessarily abide by the rules of evidence."²²¹ The appellant may choose to be represented by counsel.²²²

The regulations do not give the appellant the right to question or to confront licensing officers or to examine the sources of information which resulted in denial of the license. The Office of Export Control may, as a matter of grace, make known to him the grounds for the license denial. Sometimes, however, particularly in cases involving the reliability of a foreign importer or intermediate consignee, the Office will refuse to divulge such information on the ground that its release might compromise a confidential government source of information. Indeed, it may be doubted whether the Appeals Board itself always has full access to all relevant confidential information.

Thus despite the impartiality and independence of the Appeals Board, its procedures in export license cases have little of the flavor of regular adversary proceedings.

C. Congress is Watching

In the formulation, revision, and application of policy, as well as in the handling of specific license applications, it is to be expected that in close cases the administrators of the Export Control Act will lean heavily toward the restriction of exports. All bureaucracies tend to inhibit initiative and experimentation at lower echelon levels, and, especially in a governmental organiza-

219. E.R. 383.3(a).

220. E.R. 383.3(b)(1).

221. E.R. 383.3(d)(3).

222. *Id.*

tion charged with safeguarding the national security, there is little inclination "to take chances." Even at the higher echelons, however, where some boldness might be expected, export control officials are severely inhibited by congressional hostility to any expansion of trade with Communist nations. The attitudes of Congress may, indeed, have more effect on the policies of the Office of Export Control than the attitudes expressed from time to time by the Executive branch of government to which it is subordinate. In this connection, there is some reason to believe that the strong expressions of desire to develop trade with Eastern Europe and the Soviet Union made by President Kennedy in 1963 and by President Johnson, Secretaries of Commerce Hodges and Connor, and other high government officials from 1964 on,²²³ have been frustrated in some measure by the licensing policies of their subordinates; and if this is so, a partial explanation may be found in the fear of congressional criticism.

Indeed, export control officials have been urged to err on the side of caution. Congressman Lloyd once stated to them that the citizens of his district "would prefer to have you make mistakes in preventing shipments rather than in . . . being a little too sophisticated in allowing some shipments which would be damaging."²²⁴ When Luther Hodges was appointed Secretary of Commerce he was immediately subjected to congressional pressure to make available the names of all firms to which licenses are granted "to make shipments behind the Iron Curtain."²²⁵ In order to protect exporters from any stigma associated with East-West trade, Secretary Hodges did not accede to this request, but he did institute the practice of making available, each day, a list of licenses granted, including a general description of the commodity licensed, the value, and the Communist country of destination.²²⁶

Since 1951 Congress has again and again expressed its antagonism toward

223. The last months of 1966 witnessed a great many high-level Administration statements as to the desirability of expanded trade with the Soviet Union and the countries of Eastern Europe. See, e.g., President Johnson's speech of October 7, 1966, on improving relations with Eastern Europe, N.Y. Times, Oct. 8, 1966, at 12, col. 1; Deputy Under Secretary of State Foy Kohler's speech of Dec. 12, 1966, urging greater flexibility in U.S. trade relations with Eastern Europe, N.Y. Times, Dec. 12, 1966, at 4, col. 4; Under Secretary of State Eugene Rostow's proposal to the annual ministerial meeting of the Organization for Economic Cooperation and Development on November 24, 1966, that the western industrial powers make a joint effort to expand economic ties with Eastern Europe, N.Y. Times, Nov. 25, 1966, at 1, col. 2. On September 12, 1966, the State Department made public a 20-page pamphlet entitled *Private Boycotts Versus the National Interest*, which states that private boycotts against United States importers of Communist merchandise are "harming the United States national interest by obstructing a foreign policy that has been developed by four Administrations since World War II."

224. Hearings on Export Controls Before the Subcomm. on International Trade of the House Comm. on Banking and Currency, 88th Cong., 1st Sess. 14 (1963).

225. EXPORT CONTROL, 56TH QUARTERLY REPORT 23 (1961).

226. These daily lists ("Export Licenses Approved") are not published but they are available for inspection in the Office of Export Control and in the field offices of the Department of Commerce.

trade with Communist countries, often against the wishes of the Executive. Legislative restraints have been placed upon imports from Communist countries, sales of surplus agricultural commodities to Communist countries, the authority of the Export-Import Bank to finance exports to Communist countries, and the furnishing of United States assistance to friendly countries which trade with Communist countries. Some of these restrictions are directed against particular Communist countries, some against countries "dominated or controlled by the foreign government or foreign organization controlling the world Communist movement," some against countries "dominated or controlled by Communist China," some against "any Communist countries," and some against "unfriendly countries."²²⁷

In the light of repeated expressions of congressional hostility toward trade with Communist countries, it is not to be wondered that export control officials are especially sensitive to charges that they have been too lenient in applying export controls, and immune to charges that they have been too severe. The fear of congressional criticism has been further enhanced by a number of especially militant watchdogs in both the House and the Senate who are only too ready to question the propriety of particular licensing actions.²²⁸ Export control officials have come to learn the agonies of a visit to the Hill, and this has unquestionably affected the formulation of export licensing policies.

227. The most complete summary to date of United States restrictions on trade with Communist countries is contained in STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 1ST SESS., BACKGROUND DOCUMENTS ON EAST-WEST TRADE (Comm. Print 1965). For an excellent discussion of these restrictions see Metzger, *Federal Regulation and Prohibition of Trade with Iron Curtain Countries*, 29 LAW & CONTEMP. PROB. 1000-18 (1964).

228. The seven successive extensions of the Export Control Act of 1949 (1951-1965) have occasioned a large number of hearings in the Senate and House Committees on Banking and Currency in which export control officials have been questioned on licensing policies and procedures. In addition, various congressional committees have held hearings on export controls generally, especially with reference to the export of strategic materials to Communist countries. See *Hearings Pursuant to H.R. Res. 403 Before the House Select Comm. on Export Control*, 87th Cong., 2d Sess., pts. 1-4 (1962). See generally S. CLABAUGH & R. ALLEN, EAST-WEST TRADE: ITS STRATEGIC IMPLICATIONS—ANALYSIS AND INVENTORY OF CONGRESSIONAL DOCUMENTS 1959-1963 (Center for Strategic Studies of Georgetown University 1964). For a good case study of congressional hostility to a particular licensing decision, see *Hearings on the Export of Ball Bearing Machines to Russia Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pts. 1-2 (1961). The Commerce Department, in 1960, had approved the export to the Soviet Union of 45 ball bearing machines manufactured and sold by Bryant Chucking Grinder Co. of Springfield, Vermont. After the license was granted, the President of Miniature Precision Bearings Co., Inc., of Keene, New Hampshire, attempted, in his own words, "to demonstrate to the Department of Commerce the tragedy of these machines being sold to Russia," and, after having failed to do so, brought the matter to the attention of the Internal Security Subcommittee of the Senate Committee on the Judiciary. *Id.* at 2. After a lengthy hearing, the Internal Security Subcommittee recommended to the Secretary of Commerce that the license be revoked. On March 2, 1961, Secretary Hodges informed Senator Dodd that the license would be permanently revoked "as we are informed that the Defense Department has need of these machines and will enter purchase negotiations with the Bryant Co." *Id.* at 272.

VI. ENFORCEMENT OF EXPORT CONTROLS: ADMINISTRATIVE AND CRIMINAL SANCTIONS

The Export Control Act leaves almost the entire mechanism of export controls to be established by the Executive. One must therefore look to the Export Regulations and to administrative practice thereunder in order to discover the substantive and procedural rules by which the controls are enforced.

The Office of Export Control has taken full advantage of its delegated powers to proscribe and punish conduct that might thwart its operations. In addition to (1) prohibiting solicitation, attempt, or conspiracy to violate the controls,²²⁹ the Regulations provide (2) that no person may deal in any way with any commodity or technical data with knowledge that a violation of the controls has occurred or is about to occur or is intended to occur;²³⁰ (3) that no person may—with or without knowledge—make any false or misleading representation to any United States official in connection with any exportation, transshipment, or diversion;²³¹ (4) that except as specifically authorized by the Office of Export Control, no person may knowingly dispose of commodities or technical data contrary to the terms of any export control documents, prior representations, or notices, orders, or regulations;²³² (5) that an applicant to whom a license is issued “will be held strictly accountable for use of the license,” and that no one else may use it except as his agent;²³³

229. E.R. 381.3. E.R. 381.2 states: “No person may knowingly cause, or aid, abet, counsel, command, induce, procure, or permit the doing of any act prohibited by, or the omission of any act required by, the Export Control Law or any proclamation, order, rule, regulation, or license issued thereunder.”

230. E.R. 381.4 states:

No person may order, buy, receive, conceal, store, use, sell, dispose of, transport, finance, forward, or otherwise service, in whole or in part, any commodity or technical data exported or to be exported from the United States, or which is otherwise subject to the Export Regulations with knowledge that a violation of the Export Control Law or any proclamation, order, rule, regulation, or license has occurred, is about to, or is intended to occur with respect to the whole or any part of such transaction.

231. E.R. 381.5(a) states:

No person may make any false or misleading representation, statement, or certification, or falsify or conceal any material fact, whether directly to the Office of Export Control, any Customs Office, or an official of any other United States agency, or indirectly to any of the foregoing through any other person or foreign government agency or official:

(1) In the course of an investigation or other action instituted under the authority of the Export Control Act of 1949, as amended;

(2) In connection with the preparation, submission, issuance, use, or maintenance of any export control document or document relating thereto; or

(3) For the purpose of or in connection with effecting an export from the United States, or the reexport, transshipment, or diversion of any such export.

232. E.R. 381.6 states:

Except as specifically authorized by the Office of Export Control, no person may knowingly export, dispose of, divert, transship, or reexport commodities or technical data to any person or destination or for any use in violation of or contrary to the terms, provisions, or conditions of any export control document, any prior representation, any form of notification of prohibition against such action, or any provision of the Export Control Law or any proclamation, order, rule, regulation, or license issued thereunder.

233. E.R. 381.7.

(6) that without prior approval of the Office of Export Control, no person may transfer any export control document, including dock receipts and bills of lading, except where necessary to complete a transaction authorized by the export license;²³⁴ (7) that without specific authorization, no person may participate directly or indirectly in any transaction subject to export controls with another person who he knows is subject to an order revoking or denying his export privileges or is excluded from practice before the Office of Export Control;²³⁵ and (8) that certain records concerning export-controlled transactions must be made, and all records must be kept for three years, by persons in the United States and abroad, and that such records must be available for inspection and copying upon request.²³⁶

The phrase "no person" is intended to apply to foreign as well as American persons, firms, carriers, and banks, and the prohibitions extend to acts committed anywhere in the world.²³⁷ Also, the phrase "with knowledge" and the term "knowingly" are broadly interpreted to include imputed knowledge, and misleading representations are punished even if made innocently.²³⁸

A. Administrative Sanctions and Procedures

A battery of administrative sanctions have been devised by the Office of Export Control to enforce its regulations. The most severe sanction is the permanent denial of export privileges.²³⁹ Discretion is often used to impose lesser penalties, such as denying the privilege of exporting under validated licenses,²⁴⁰ or limiting the restriction to particular commodities,²⁴¹ or lessening the term of the proscription,²⁴² or suspending the denial order pending good behavior.²⁴³ Violators may also be excluded from practice before the Bureau of International Commerce.²⁴⁴

In addition, the Export Regulations provide that "commodities or technical data attempted to be, or being, or intended to be, or which have been exported or shipped from or taken out of the United States [in violation of export controls] are subject to seizure and forfeiture, as are vessels, vehicles, and aircraft carrying such commodities or technical data."²⁴⁵ The Collector

234. E.R. 381.9 ("Trafficking and Advertising Export Control Documents"). Cf. E.R. 381.8 ("Unauthorized Use and Alterations of Export Control Documents"). Export control documents are defined in E.R. 370.1(n).

235. E.R. 381.10.

236. E.R. 381.11.

237. See E.R. 370.1(a); pp. 867-76 *infra*.

238. See pp. 855-59 *infra*.

239. E.R. 381.1(b)(1).

240. See, e.g., Charles Y. Rofe, 18 Fed. Reg. 6365 (1953), *privileges conditionally restored*; Charles Y. Rofe & Johart Int'l Co., 19 Fed. Reg. 6885 (1954).

241. See, e.g., Standard Int'l Corp., 19 Fed. Reg. 4429 (1954).

242. See, e.g., Joachim Wilhelm Krugel, 18 Fed. Reg. 5521 (1953); E.A. Bromund Co., 14 Fed. Reg. 1689 (1949).

243. See, e.g., Willys-Overland Export Corp., 20 Fed. Reg. 4191 (1955).

244. E.R. 381.1(b)(2).

245. E.R. 381.1(b)(4).

of Customs is authorized to inspect, search, or prevent the departure of an exporting carrier if he has reason to believe that commodities or technical data are being shipped in violation of the law;²⁴⁶ the carriers may be recalled and ordered to unload shipments.²⁴⁷ Forfeiture proceedings are brought in the federal district court under the Espionage Act of 1917, as amended in 1953,²⁴⁸ rather than under the Export Control Act.²⁴⁹ Under the Espionage Act, jurisdiction depends on the actual presence of the goods in the United States; however, by linking the forfeiture provisions of the Espionage Act to its own provisions on seizure, the Export Regulations make it possible to require an exporting carrier to return and deliver up the goods to be forfeited. Moreover, as an alternative to instituting forfeiture proceedings, the Bureau of Customs has often exercised its power, with Commerce Department approval, to compromise seizure actions.²⁵⁰

An additional administrative sanction is the imposition of a civil penalty up to \$1,000 for each violation of the Export Control Act or any regulation, order, or license issued thereunder. This is the only administrative sanction specified in the Export Control Act itself. It was introduced in 1962 at the behest of the Administration, which felt the need of a penalty that would be milder than denial of export privileges and at the same time stronger than a letter of reprimand. Congress, however, insisted on adding a provision that if a person fails to pay the penalty, he cannot be required to do so except by a civil action brought in the name of the United States, "in which action the court shall determine de novo all issues necessary to the establishment of liability."²⁵¹ To date the Office of Export Control has not imposed the civil penalty, presumably because of the risk of being required to bring suit to collect it.

Congressional sensitivity to questions of judicial review has not extended, however, to the far more severe penalty of denial of "export privileges"—which in effect may drive the exporter out of business. Also it might be thought that if a civil penalty of \$1,000 cannot be imposed without specific legislative authority, the same ought to be true a fortiori of the harsher non-pecuniary penalty of the denial order.

The sweeping prohibitions of the Export Regulations and the severe administrative sanctions applicable to violators are supplemented by broad

246. E.R. 379.8(d), (e), (f).

247. E.R. 379.11(a)(2).

248. 22 U.S.C. § 401 (1964).

249. Cf. *United States v. Twenty-One lbs. 8 oz. of Platinum*, 147 F.2d 78 (4th Cir. 1945); *United States v. Two Hundred Watches*, 66 F. Supp. 228 (S.D.N.Y. 1946); *The Cachalot III*, 60 F. Supp. 527 (S.D. Fla. 1945); *United States v. Two Hundred and Fifty-One Ladies Dresses*, 53 F. Supp. 772 (S.D. Tex. 1943).

250. "There have been since 1949 hundreds of seizures effected for export control violations, involving commodities totalling in value millions of dollars." W. SURREY & C. SHAW, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 81-82 (1963).

251. Export Control Act § 5(f), 50 U.S.C. App. § 2025(f) (Supp. I, 1965); see E.R. 381.1(b) (3).

procedural flexibility in prosecuting violators. The Export Control Act itself gives the Executive the power to subpoena any person to appear and testify or to produce records and writings.²⁵² Also, as noted earlier, the Act expressly excludes the operation of the Administrative Procedure Act, except with respect to the publication of regulations and orders in the *Federal Register*.²⁵³ The Export Regulations do not require that administrative proceedings be brought within a particular time;²⁵⁴ proceedings may be reopened at any time for hearing new evidence.²⁵⁵ In fact, the Commerce Department has on occasion reopened cases several months after a previous "final" determination.²⁵⁶

If a violation occurs or is suspected, a so-called "compliance action" is instituted. A charging letter is sent to the accused party reporting the alleged violation.²⁵⁷ The respondent then has thirty days to submit a written answer or he will be in default and export privileges may be denied.²⁵⁸ The answer must respond directly to the charges and the respondent may demand an oral hearing²⁵⁹ before a Commissioner, often a lawyer, who is appointed ad hoc to make a report including findings of fact and a recommendation.²⁶⁰ If the Commissioner finds no violation, the Director of the Office of Export Control dismisses the charges. If the Commissioner finds a violation, his recommendation is "advisory only [and the Director will] review the record, consider the report of the Commissioner, and determine the disposition of the case."²⁶¹

If export privileges are denied, the respondent may appeal in writing to the Appeals Board on the ground (1) that the findings are not supported by substantial evidence, (2) that prejudicial error of law was made, or (3) "that the provisions of the order are arbitrary, capricious, or an abuse of discretion."²⁶² About 20% of all denial orders have been appealed.²⁶³ All determinations by the Appeals Board are final.²⁶⁴ The Export Control Act does not provide for judicial review and, so far as the authors have been able to discover, no administrative sanction imposed under its authority has ever been challenged in court.

Administrative orders denying export privileges may be entered not

252. Export Control Act § 6(a), 50 U.S.C. App. § 2026(a) (1964); *see* E.R. 382.6(a).

253. Export Control Act § 7, 50 U.S.C. App. § 2027 (1964).

254. *See* E.R. 382.3.

255. E.R. 382.12.

256. *See, e.g.*, Union Européenne de Produits Chimiques and Jean Richard, 21 Fed. Reg. 4322 (1956) (denial of privileges extended from one year to duration of controls).

257. E.R. 382.3(a).

258. *Id.*

259. E.R. 382.5.

260. E.R. 382.8. "Compliance Commissioners shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions." E.R. 382.2. The Director of the Bureau of International Commerce will often ask practicing lawyers or law professors to serve as Compliance Commissioners on an ad hoc basis.

261. E.R. 382.9.

262. E.R. 382.13(a)(1).

263. W. SURREY & C. SHAW, *supra* note 250, at 83.

264. E.R. 382.13(d).

only following compliance proceedings as described above but also summarily and *ex parte*, subject to a motion to vacate or modify "at the earliest convenient date." Any person who is under investigation for export control violations, or against whom administrative or judicial proceedings are pending, may be denied export privileges until final disposition of the investigation or proceeding when this is deemed necessary to protect the public interest.²⁶⁵ Also, foreign parties who fail or refuse to reply to written interrogatories in connection with a United States export transaction in which they participated may be subjected summarily and *ex parte* to denial of export privileges.²⁶⁶

All denial orders are published in the *Federal Register* and a press release is issued with the entry of each order. A denial order usually applies not only to the person or firm named in the order, but also to "other persons with whom said named persons may then or thereafter be related by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or related services."²⁶⁷ Since no one may participate directly or indirectly with such persons in any transaction subject to export controls, all exporters must make sure that these transactions are not tainted by contact with anyone named or implicated in a denial order. This can be accomplished only by actually checking the names of all known participants in an export transaction against the names of the many hundreds of firms and individuals throughout the world who are on the export "blacklist." These names appear alphabetically in the Table of Denial and Probation Orders Currently in Effect, Supplement No. 1 to Part 382 of the Export Regulations. Moreover, not only the exporter but his foreign distributors and affiliates are prohibited from dealing with blacklisted firms. In many cases the Investigations Division of the Office of Export Control will assist in notifying foreign branches. In a recent case, the Investigations Division wrote to a large American firm suggesting that "In order to avoid any possible violation of the terms of the Temporary Denial Order by your distributors and affiliates abroad, you may want to make copies of the press release available to your foreign distributors and affiliates, inasmuch as Mr. —— appears to be actively seeking the products of your company and may attempt to circumvent the Temporary Denial Order." From 1949 to 1966, there have been over 400 denial orders against more than 1,200 American and foreign companies and individuals.²⁶⁸

B. Consent Orders

The Export Regulations provide for disposition of compliance actions by agreement between the Office of Export Control and the respondent. The

265. E.R. 382.11(b) (1).

266. E.R. 382.15.

267. E.R. 382.1(b), 381.10.

268. From 1949 to 1963 there had been over 325 denial orders against more than 1,100 American and foreign companies and individuals. W. SURREY & C. SHAW, *supra* note 250, at 83.

vast majority of violations of the regulations have been dealt with through such consent order procedures, and it may be said that such procedures now constitute the usual mechanism through which the administrative sanctions are imposed.

Export Regulation 382.10 ("Consent Orders") provides:

The Investigations Division, Office of Export Control, and the respondent may, after transmission of charging letter, by agreement submit to the Compliance Commissioner a proposal for the issuance of a consent order. The Compliance Commissioner shall review the facts of the case and the proposal and, for this purpose, may conduct informal conferences with the parties and may require the informal presentation before him of the evidence in the case. If he does not approve the proposal, he shall so notify the respondent or his attorney and the Investigations Division, and the case shall proceed to hearing. If he approves the proposal, he shall report the facts of the case with his recommendations to the Director, Office of Export Control. The Director, Office of Export Control, may reject the proposal, in which event the case will proceed to hearing, or he may accept the proposal and issue an appropriate order.

The following analysis of two cases in which compliance orders proceeded from consent order proposals drafted jointly by the Investigations Division and respondents will indicate the nature of, and some of the problems inherent in, consent order procedure generally.

1. *Raytheon Manufacturing Co., et al.*²⁶⁹ In 1959, the Investigations Staff charged (a) Raytheon Manufacturing Company of Waltham, Massachusetts, (b) Thomas Kelly, Director of Licensing of Raytheon's International Division, and (c) Eliseo Blanco, an employee of Raytheon, with violation of the Export Regulations in connection with the exportation of certain television microwave link equipment and parts to Pye Telecommunications Ltd., of Cambridge, England; it similarly charged (d) Pye Telecommunications Ltd., and (e) Pye Ltd., also of Cambridge, England, by reason of their transshipment of some of the said goods to unauthorized destinations. All five respondents, after having been served with charging letters and after informal conferences with the Investigations Staff "qualifiedly admitted negligence amounting to violations of the regulations," and submitted evidence of mitigating circumstances.

The facts of the case—assuming that they are correctly stated in the consent order—were that Raytheon, having obtained a validated license from the Department of Commerce, exported certain television microwave link equipment to Pye Telecommunications; which in turn transferred part of the equipment to its corporate parent, Pye; and Pye assembled and incorporated the materials into completed equipments and then shipped these completed equipments to unauthorized destinations, that is, to countries to which Ray-

269. 24 Fed. Reg. 2626 (1959).

theon could not have exported them in the first instance. Since the compliance order says nothing to the contrary, it may be assumed that the exportation by Pye from England did not contravene the British export control regulations.

The consent order stated that Raytheon and Kelly violated the Export Regulations²⁷⁰ in that, although neither Raytheon nor Kelly had any actual knowledge of any transshipments, Kelly "failed to make effective inquiries as to the possible transshipment by the consignee abroad of the goods so exported and failed to report to Raytheon's Order Service Department facts which had been communicated to him and which would have alerted the Order Service Department to the possibility that such transshipments might be accomplished."²⁷¹ Further, Raytheon and Blanco were said to have violated the Export Regulations²⁷² in that Blanco "improperly assumed and therefore represented to the Bureau . . . that the country of ultimate destination of the goods to be exported was the country in which the consignee conducted his business, and further failed to have endorsed, on the commercial invoices for said goods and for goods exported to other consignees abroad, the destination control notice required so to be endorsed by the regulations."²⁷³

Pye Telecommunications was said to have violated the Export Regulations²⁷⁴ in that it

received the goods so exported with knowledge that they were subject to United States Export Control Regulations restricting their re-exportation and transshipment to destinations not approved by the Bureau of Foreign Commerce but (a) nevertheless turned over portions thereof to Pye Ltd., without informing it of the said restrictions and Pye Ltd., with knowledge that the goods had been received from the United States and therefore were subject to the export controls, re-exported or transshipped a part thereof to unauthorized destinations . . . and (b) concluded erroneously that, because some of the goods received by it from the United States had been received in a disassembled state and were assembled and incorporated by it into complete equipments in England, they thereby became freed from United States controls and Pye Ltd. then transshipped completed equipments to unauthorized destinations. . . .²⁷⁵

The various sanctions announced in the consent order were prefaced by

270. E.R. 381.2, 381.4, 381.5, notes 229-31 *supra*.

271. 24 Fed. Reg. at 2626.

272. E.R. 381.5, note 231 *supra*, and 379.10(c)(3) which states: "No licensee, shipper, or consignor, exporter, or agent thereof, or any other person, shall prepare or issue any commercial invoice with respect to any shipment of commodities . . . unless such invoice or invoices . . . shall contain on the face thereof the [appropriate] destination control statement"

273. 24 Fed. Reg. at 2626.

274. E.R. 381.6, note 232 *supra*, and 379.10(d)(2) which states: "No person, including the ultimate consignee or intermediate consignee, shall, after notification of the prohibition against diversion . . . whether by such Bill of Lading or by any other means, divert or cause to be diverted any of the commodities described in such Bill of Lading to any country of ultimate destination other than that named in such notification."

275. 24 Fed. Reg. at 2626-27.

general observations concerning the nature and character of the respective defendants. These observations give the appearance of having been drafted jointly by the Investigation Staff, on the one hand, and Raytheon and Pye Ltd., the principal defendants, on the other.

The Compliance Commissioner has reported that the nature of the business of Raytheon Manufacturing Company, its recognized record of cooperation with United States Government departments in connection with national defense and with mutual security and related export programs in which it has participated, and the procedures which it has set up within its organization to prevent a recurrence of violations make inappropriate at this time the imposition upon it of a denial of export privileges. He has stated, on the other hand, that employees of large companies or of companies vitally involved in the national defense, should not, by reason of such employment, have a refuge therein from remedial action which should be taken in the event of violations by them. He has reported also that Pye Ltd. is the central and dominant factor in a vast organization of communications and electronics manufacturers and distributors in many and widely separated parts of the world and that such organization, which includes Pye Telecommunications Ltd., is a vital supplier of important communications and defense equipment to countries having a common interest with the United States in international affairs which should be taken into consideration in determining what is adequate as well as appropriate remedial action to achieve effective enforcement of the law. I [Director, Office of Export Supply] concur in these observations.²⁷⁶

Raytheon was placed on probation in its participation in exportation from the United States for one year and was required to furnish to the Bureau, at the end of each three-month period during the period of probation, a report summarizing the procedures being employed by Raytheon to assure compliance with the Export Regulations. The making of such periodic reports is a severe inconvenience. Indeed, an export control official in the Department of Commerce was hired by Raytheon to implement a new system of export procedures within the company.

Respondents Pye, Pye Telecommunications, Kelly, and Blanco, were denied all privileges of participating in all validated license exports from the United States for one year. However, Kelly's export privileges were to be restored after seven months and export privileges were to be restored to the other respondents after six months, on condition that "during the next twelve (12) months from the date hereof, said respondent[s] shall comply in all respects with this order and with all other requirements of the Export Control Act of 1949, as amended, and all regulations, licenses, and orders issued thereunder."²⁷⁷ In addition, it was stated that "Nothing herein contained shall be deemed to prohibit Pye Ltd. or Pye Telecommunications Ltd.,

276. *Id.* at 2627.

277. *Id.*

at such time as it may believe that the interests of the United States Government . . . so require, from applying for an exception from any provision hereof. . . .”²⁷⁸

Finally, it was ordered that:

No person, firm, corporation, or other business organization, whether in the United States or elsewhere, during any time when respondents Kelly, Blanco, Pye Ltd. or Pye Telecommunications Ltd. or any related party is prohibited under the terms hereof from engaging in any activity within the scope . . . hereof, shall, without prior disclosure to, and specific authorization from the Bureau . . . directly or indirectly, in any manner of capacity, (a) apply for, obtain, or use any export license, shipper's export declaration, bill of lading, or other export control document relating to any such prohibited activity, (b) order, receive, buy, sell, deliver, use, dispose of, finance, transport, forward, or otherwise service or participate in any exportation from the United States, on behalf of or in any association with such respondent or related party, or (c) do any of the foregoing acts with respect to any exportation in which such respondent or related parties may have any interest or obtain any benefit of any kind or nature, direct or indirect.²⁷⁹

The case against Raytheon, Kelly, and Blanco turns on the question of whether or not the company's principals or its employees “knew” that the corporate parent of Pye Telecommunications intended to transship completed equipment to unauthorized destinations. If they had actual knowledge of the intended transshipments, they were no less guilty than Pye itself, in which case the wisest course from their point of view was to agree to a settlement including an admission of “negligence amounting to violations of the regulations.” If, on the other hand, neither the company's principals nor its employees were in fact aware that transshipments to unauthorized destinations would take place—and there is no reason to believe that they had such knowledge—settlement procedures still had the advantage of offering an alternative to long and expensive hearings concerning the function of the words “knowledge” and “knowingly” as they appear in the regulations, and specifically, whether or not “knowingly” means something more than “voluntarily” or “ought to have known.”

It seems clear from the consent order that Blanco was careless in not stamping the appropriate destination control statement on the commercial invoices. On the other hand, it may be doubted that he “knowingly” made a misleading representation by stating England to be the country of ultimate destination on Raytheon's application for a validated license. As to Kelly, the report does not make clear the nature of the facts which, according to the consent order, he should have communicated to the Order Service Depart-

278. *Id.*

279. *Id.*

ment and which would have alerted it to the possibility that illegal transshipments might be accomplished.

Pye's defense was that it "concluded erroneously" that the assembly and incorporation of United States materials into complete equipment freed such materials from United States controls. Indeed, the Export Regulations do not expressly cover this situation. Thus, as a consequence of Pye's decision to circumvent protracted hearings, an extensive interpretation of regulation 381.6²⁸⁰ was obtained, by consent, and this interpretation may be used by the Government in future cases. Presumably, there will be some point in a reassembly or manufacturing process at which United States-origin goods lose their national identity; however, the technique of the consent order avoids that question.

The sanctions imposed on Pye are severe to the extent that Pye depends on United States exports. Indeed, the inclusion of Pye on the "blacklist" ensures not only that American firms will not export to Pye but that they will instruct their European branches, subsidiaries, and affiliates to guard against the possibility of transshipping any goods exported from the United States under validated license to Pye or to any of Pye's affiliates.

In view of the sanctions available to the Department of Commerce it is easy to understand why foreign firms charged with violations of the Export Control Law generally display a highly cooperative attitude to Bureau investigations. Although foreign nationals charged with violations of United States export control regulations cannot be forced to reply to written interrogatories or to appear in Washington, the threat of the blacklist is a powerful inducement for them to do so. In this connection, it should be noted that most of the entries on the blacklist involve foreign firms and individuals.

2. *Hydrocarbon Research, Inc., et al.*²⁸¹ In 1962, the Investigations Staff charged (a) Hydrocarbon Research, Inc., of New York City (hereinafter referred to as HRI), (b) its president, Percival Keith, and three other officials, (c) Hydrocarbon Mineraloel, GmbH, of Germany (hereinafter referred to as HM), a firm which was affiliated with HRI, and (d) Hydrocarbon Engineering, SARL, of France (hereinafter referred to as HE), a wholly owned subsidiary of HRI, with exporting unpublished technical data of United States origin and products manufactured abroad therefrom to Rumania, in violation of the Export Control Act.

In the late 1950's the Department of Commerce had informed HRI that it was free to accept a contract with a Rumanian state agency to design and supervise the construction of a petrochemical plant in Rumania provided that it did not make use of any "unpublished technical data of U.S. origin" as defined and controlled by the Export Regulations. The same company had

280. See note 232 *supra*.

281. 27 Fed. Reg. 12487 (1962).

previously been authorized to design and supervise construction of a plant using a similar process in France, and this had required the exporting to France of unpublished technical data of U.S. origin.

During the construction of the Rumanian plant, the Department of Commerce initiated administrative proceedings, charging the respondents with the unauthorized use in Rumania of the same unpublished technical data that had been authorized for use in the construction of the French plant. Keith's defense, according to the consent order, rested on a denial that the technical data which he exported constituted unpublished technical data—or, alternatively, on a denial that he knew that they constituted unpublished technical data. "Keith," the consent order recites, "construed unpublished technical data in the engineering field to be limited to fundamental secret know-how held by persons or companies, so that any information or documents which a competent, experienced engineer thought he could furnish or prepare with his own mind using well-recognized engineering principles, texts, technical articles, and patents, would be published technical data as described in the Export Regulations."²⁸²

The consent order concedes that Keith did not intentionally violate the regulations. Rather "he seriously misconstrued the technical data regulations," and "his failure to undertake to verify or confirm his unilateral interpretation of the export regulations was at least negligent."²⁸³ Nevertheless, he was found guilty of knowingly exporting unpublished technical data in violation of the Export Control Act.

If the crime was one of ordinary negligence, the sanctions imposed on Keith and HRI would seem to be inordinately severe; Keith and HRI—and all its officers, directors, employees, agents, successors, and assigns—were denied all privileges of participating in any transaction involving any commodity or technical data for export or re-export to any Communist country (excluding Yugoslavia) "for the duration of export controls or for five years from the date of this order, whichever is less,"²⁸⁴ except that a project already authorized for Poland was allowed to be completed. Further, all export transactions by Keith and HRI for a period of two years from the date of the order were made subject to "surveillance." Such surveillance, it was stated, "shall include and require submission to the Bureau of each written or oral proposal, offer, contract and material change thereto, during the course of each such transaction. . . ."²⁸⁵ In addition, Keith, individually, was denied all export privileges for six months and all of the HRI respondents, including Keith, were placed on probation for three years. The charges against HM and HE were dismissed.

282. *Id.* at 12488.

283. *Id.*

284. *Id.*

285. *Id.*

An article²⁸⁶ by J. Forrester Davison,²⁸⁷ who was the hearing officer in the *Hydrocarbon* case, provides some insight into these charges and into the nature of consent order procedure generally. Although his report of the proceedings is inhibited by the delicacy of his position—he does not reveal what Keith or HRI actually did to incur the wrath of the Commerce Department—he does state unequivocally that “agreement as to facts and engineering values was reached only for the purpose of supporting the findings and conclusions of the consent order, and for no other purpose.”²⁸⁸ Since the “findings” of the consent order are at variance with the real facts of the case, whatever they may be, there is no reason to suppose that Keith’s defense—as it appears in the consent order—is any less fictitious. “The admission,” Davison notes, “that the head of the parent firm, himself an expert engineer, had taken full responsibility for the erroneous interpretation meant that the issue as to what subordinates might have developed of their own initiative, and how far this had been derived from the unpublished data, did not have to be passed upon.”²⁸⁹

Because of the novelty and scientific complexity of the case, the proceedings promised to be both long and costly. Davison reports that the respondents and the Investigations Division both incurred enormous costs even before the informal hearings had begun:

The government technique in this case . . . had been to present a case of overwhelming strength by massing all its exhibits, charts, flow sheets, and lists of witnesses in a preliminary hearing presentation, with the expectation . . . that the respondents would do likewise as rapidly as possible, and that the consent order might emerge as more than the cloud on the horizon. The government’s presentation was accomplished with efficient dispatch, significantly with the

286. Davison, *Export of Technical Data and the Export Control Act: Hearing Examiners and Consent Decrees*, 33 GEO. WASH. L. REV. 209 (1964).

287. Professor, George Washington University Law School and Graduate School of Public Law.

288. Davison, *supra* note 286, at 239. The truth of the facts stated in a consent order is particularly open to question when the consent order is drafted in part by a defendant willing to assist related prosecutions and to incriminate related persons. In William Kurt Wallersteiner *et al.*, 22 Fed. Reg. 1650 (1957), one George McKee Todd, a British accountant who was a director of a New York corporation controlled by Wallersteiner, was implicated in the illegal transshipment of over \$1 million of United States chemicals and drugs to East Germany. The consent order with Wallersteiner states that Todd (who was not a party to the consent order) “well knew” that United States goods were being purchased for transshipment from England to East Germany and that false certifications were being made in violation of the Export Control Act. Todd made various affidavits and depositions on his own behalf but was denied export privileges for one year. On appeal by Todd, the Appeals Board of the Department of Commerce reversed the denial order, since as it found, Todd had little to do with Wallersteiner’s export operations, and did not know that false certifications were made or that the transshipments from England to East Germany were illegal under United States law. George McKee Todd, 23 Fed. Reg. 880 (1958). The facts stated by the Appeals Board give a quite different picture of Todd’s participation from that presented in the consent order.

289. Davison, *supra* note 286, at 238.

aid of the dissident foreign respondents whose fate was attached to the degree of cooperation they would display.²⁹⁰

A consent order has many advantages for the Office of Export Control. In regular adversary proceedings before a Compliance Commissioner, the Office may have to expend a great deal of time and energy to make out its case, especially when confronted by large firms with unlimited legal and financial resources. Also, where the prosecution is successful, the respondent may appeal to the Appeals Board, and this in turn necessitates more work for department officials. But the principal advantage of the consent order is that it affords the Office of Export Control an opportunity to give a unilateral interpretation of its own regulations. Since the consent orders are published in the *Federal Register*, and presumably read by persons concerned with the export business, they provide a particularly effective mechanism for enlarging the scope and content of the Export Regulations.

In the *Hydrocarbon* case, publication of the consent order served as a flag of warning to United States engineering and production firms. In finding that the facts recited in the consent order constituted a use of "unpublished technical data of U.S. origin," the Office of Export Control gave notice that the commingling of United States unpublished technical data with published technical data of United States or foreign origin does not deprive the former of its "unpublished" status. Also, in rejecting Keith's defense, the Office served warning that the technical data regulations do encompass "information or documents which a competent, experienced engineer [could] furnish or prepare with his own mind." Finally, and most important, in finding that the application by certain technicians, while abroad, of their United States origin "know-how and experience" constituted an unauthorized release of unclassified technical data, the Office of Export Control gave an expansive interpretation of Export Regulation 385.1(b), which defines "export of technical data" as "any release of unclassified technical data for use outside the United States."²⁹¹ Although the phrase "any release" may be read literally to include a release made outside of the United States, nevertheless the word "release" must be read in connection with the word "export" which, in normal commercial usage, is not usually associated with acts done abroad. Further, constitutional propriety does not favor the extraterritorial application of a regulatory system absent express language to that effect. The conclusion of the Department of Commerce that the phrase "any release" extends to a release made while abroad is too important a feature of the regulatory scheme to be left to implication, or to be articulated in a consent order. Such an important amplification of, and possibly amendment to, the regulations should be spelled out in the regulations themselves.

290. *Id.* at 227.

291. See text accompanying notes 156-62 *supra*.

C. Criminal Sanctions Under the Export Control Act

Apart from administrative sanctions, violators of export controls are subject to severe criminal penalties.²⁹² However, judging from the number of reported cases, criminal prosecutions have seldom been instituted. One reason may lie in the fact that the administrative sanctions available to the Office of Export Control—ranging from mild letters of warning to loss of export privileges “for the duration of export controls”—are sufficient to deal with almost any kind of violation. A second reason is that the success of such prosecutions is usually limited by difficulties of proof. Often, necessary witnesses reside abroad. In the usual case of transshipment most of the evidence will be hearsay and probably inadmissible. Also, in many instances of violation, the evidence is classified for security and foreign policy reasons and cannot be used without a breach of classification.²⁹³

Nevertheless, over the years there have been a number of cases, both reported and unreported, of persons convicted and fined or sentenced to imprisonment for violation of the export control law. Of the reported cases, several were instituted under the wartime predecessor of the Export Control Act of 1949;²⁹⁴ only three have been instituted under the 1949 Act.²⁹⁵ Commerce Department officials have confirmed that there have not been any criminal prosecutions (reported or unreported) under section 5(b).²⁹⁶

The criminal penalties under section 5(a) of the Export Control Act raise several serious questions of legal policy. The first is whether it is wise for Congress to delegate to the President, and hence to the Office of Export Control, so large a jurisdiction to make criminal law. Congress has said, in effect, that whatever substantive rules are made by the Office shall be enforced

292. The wartime (1940-1948) predecessor of the Export Control Act provided: “In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment.” Act of July 2, 1940, ch. 508, 54 Stat. 714.

§ 5 of the Export Control Act of 1949 preserved this language, except that it reduced the maximum length of imprisonment from 2 years to 1 year. The purpose of the reduction in penalty was to convert the offense from a felony to a misdemeanor, in order to expedite the prosecution of violators by allowing an information to be filed with a United States District Court rather than requiring an indictment by a grand jury. In 1962, § 5 was renumbered § 5(a) and a new § 5(b) was added. See text accompanying notes 44-45 *supra*.

293. “[H]earsay and confidential evidence to establish the fact of transshipment and the guilty knowledge and participation of the accused party is, of course, not usable in a criminal trial.” Thau, *Control of Exports from the U.S.A.*, 19 Bus. LAW. 845, 858 (1964).

294. See, e.g., *United States v. Leviton*, 193 F.2d 848 (2d Cir. 1951), cert. denied, 343 U.S. 946 (1952); *United States v. Rosenberg*, 150 F.2d 788 (2d Cir.), cert. denied, 326 U.S. 752 (1945); *United States v. Kertess*, 139 F.2d 239 (2d Cir.), cert. denied, 321 U.S. 795 (1944).

295. *United States v. Sorkin*, 275 F.2d 330 (2d Cir. 1960); *United States v. Lodewijkx*, 230 F. Supp. 212 (S.D.N.Y. 1964); *United States v. Zongos*, 89 F. Supp. 228 (E.D.N.Y. 1950).

296. The Office of Export Control does not have a record of unreported prosecutions under § 5(a).

by criminal sanctions. Thus, for example, if a freight forwarder affixes an incorrect destination control statement on a bill of lading, in violation of the Export Regulations, he is subject to a maximum penalty of \$10,000 and one year's imprisonment.²⁹⁷

The Supreme Court has upheld the constitutionality of a statute empowering an administrative body to make rules, violation of which will be ipso facto penal, where the statute itself creates penalties enforceable in the judicial process.²⁹⁸ Nevertheless, one may still question the wisdom of so extensive a sharing of congressional responsibility for declaring what acts should be punished as crimes. Indeed, it is doubtful that apart from violations of section 5(b), any criminal sanctions are needed in the Export Control Act, since all other violations of the export regulations that deserve the stigma of criminal sanctions are amply covered by the federal false statement statute²⁹⁹ and the federal conspiracy act.³⁰⁰

A second related question of legal policy is whether the omission from section 5(a) of words relative to intent or negligence leaves to the Office of Export Control the determination of the degree of criminal fault that will be required to invoke criminal sanctions. There is no doubt that the practice of the Office of Export Control of broadly construing the *scienter* requirement of its own regulations, so as to convert negligent acts into "knowing" violations, would not bind the courts in criminal cases. Here the policy of strict construction of criminal statutes would surely be applicable to the subordinate regulation. A more difficult question is whether a regulation such as 381.5 (misrepresentation and concealment of facts), which was amended to eliminate the requirement of knowledge, creates an absolute criminal liability.³⁰¹ The fact that the federal false statement statute, which covers the same offense, requires that the misrepresentation or concealment be made "knowingly and willfully,"³⁰² emphasizes the intent of the Office of Export

297. 15 C.F.R. § 379.10(c) (1966); cf. Raytheon Mfg. Co. et al., 24 Fed. Reg. 2626 (1959), discussed in text accompanying notes 269-80 *supra*.

298. In *United States v. Grimaud*, 220 U.S. 506 (1911), the Supreme Court stated that although Congress cannot delegate legislative power, the authority to make administrative rules is not a delegation of legislative power, and such rules do not become legislation because violations thereof are punished as public offenses. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 110 (1965).

299. 18 U.S.C. § 1001 (1964).

300. 18 U.S.C. § 371 (1964).

301. See note 231 *supra*. Prior to February 1965 the regulation stated that "It is unlawful . . . for any person . . . knowingly to make any false or misleading representation, statement, or certification, or to falsify or conceal . . ." 21 Fed. Reg. 4177 (1956).

302. Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1964).

Control to impose a wider standard. Has Congress, by the omission of any requirement of *scienter* in section 5(a), bound the courts to this policy?

It might be thought that Congress intended that result when it amended the Export Control Act in 1962 by adding section 5(b), with its requirement of willfulness. The statute, it may be argued, now distinguishes between a "willful" violation under 5(b) and "any" violation under 5(a); if Congress had wanted to restrict 5(a) to intentional (or negligent) violations, it could easily have done so. A closer reading of section 5(b), however, shows that it refers not to a willful violation of export regulations as such but to a willful exportation, and that it requires in addition a knowledge of benefit to a Communist-dominated nation. For example, if an American exporter under general license shipped a butter churn to Austria, which was then transshipped to East Germany in violation of the regulations (since exports of butter churns to East Germany require validated licenses), a conviction under 5(b) would have to rest on proof that the exporter intended the product to reach, and to benefit, East Germany (or some other Communist-dominated nation). Without proof of benefit, and of knowledge thereof, he could only be prosecuted under section 5(a). Thus the express requirement of a particular intent under 5(b) does not negate the implication that a general intent is required under 5(a).

This interpretation of the language of the Act is supported by the doctrine of *Morisette v. United States*³⁰³ that the failure to specify the requirement of intent or negligence in a criminal statute will not generally be construed as creating an absolute criminal liability. *Morisette* has come to stand for a policy that goes far beyond its specific facts.³⁰⁴ In the words of Professor Kadish: "the proliferation of convictions without grounds for condemnation tends in the long run to impair the identity of the criminal sanction and its ultimate effectiveness as a preventive sanction, both in the area of economic crimes and in the areas of its traditional application."³⁰⁵

It is possible that the question whether section 5(a) of the Export Control Act imposes an absolute criminal liability will never be judicially decided, at least so long as the Office of Export Control continues to use its discretion to select only a few cases for criminal prosecution and to make sure that those are cases in which there is abundant evidence of culpability. Of the three reported cases under section 5(a) (or its predecessor section 5), two included a felony count for violation of the false statement statute,

303. 342 U.S. 246 (1951).

304. "The infamy of American absolute criminal liability is known all over the world. Nevertheless, in the United States, as in sister countries of the common law, the battle against absolute liability is gradually being won." Mueller & Pieski, *Criminal Law and Administration*, in ANNUAL SURVEY OF AMERICAN LAW 107, 110 (1961).

305. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 444 (1963).

which includes "willful" knowledge as a constituent element.³⁰⁶ In the third, the Court found that "guilty knowledge and intent . . . are clearly established by the evidence in the case."³⁰⁷

If in the future a case arises in which a defendant charged with violation of both section 5(a) and the false statement statute is found not guilty of violating the false statement statute for want of willfulness, the court will then have to determine whether the absence of these elements affects responsibility under section 5(a). Also if a case arises in which the false statement statute is not invoked and the defendant pleads lack of knowledge of wrongdoing, the court will then have to decide whether the omission from section 5(a) of words relative to intent or negligence results in an absolute criminal liability.

D. Extraterritorial Application of Criminal Sanctions

A further question of legal policy arising from the criminal penalties of the Export Control Act relates to the fact that the Export Regulations are expressly applicable to "any person" within or without the United States.³⁰⁸ Indeed, as we have seen, the most severe administrative sanction applied by the Office of Export Control, namely, denial of export privileges, has been imposed in the majority of cases against foreigners, often for acts committed by them in foreign countries. To date no foreign national has been prosecuted criminally. It is, nevertheless, of some concern that, under the regulations, a foreign national residing abroad may become criminally liable in the United States for a violation committed abroad which is entirely legal in the place where it is committed.³⁰⁹

As a practical matter, we have seen that the Office of Export Control will resort to the sanction of the "blacklist" rather than to the institution of criminal proceedings in cases of export control violations by nonresident aliens situated abroad.³¹⁰ Nevertheless, a foreign national who desires to participate in an administrative compliance proceeding in order to mitigate the harshness of a denial order might well hesitate to come to Washington without some assurance that he would not be arrested on arrival and prose-

306. *United States v. Sorkin*, 275 F.2d 330 (2d Cir. 1960); *United States v. Lodewijkx*, 230 F. Supp. 212 (S.D.N.Y. 1964).

307. *United States v. Zongos*, 89 F. Supp. 228, 231 (E.D.N.Y. 1950).

308. E.R. 370.1(a).

309. Cf. *Raytheon Mfg. Co. et al.*, 24 Fed. Reg. 2626 (1959), discussed in text accompanying notes 269-80 *supra*, in which Pye Ltd. of England was subjected to severe administrative sanctions for an exportation which was legal under British law.

310. Where a foreign national acts in violation of his own law, the Office of Export Control will usually defer enforcement action until the government of the foreign country has completed its own investigation and prosecution, in order not to prejudice the foreign government's case. See STAFF OF SUBCOMM. TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS OF THE SENATE COMM. ON THE JUDICIARY, 87TH CONG., 2D SESS., REPORT ON EXPORT CONTROLS IN THE UNITED KINGDOM, FRANCE, ITALY, FEDERAL REPUBLIC OF GERMANY, BELGIUM, AND THE NETHERLANDS 17 (Comm. Print 1962) (report by Senators Dodd and Keating).

cuted in the Federal District Court.³¹¹ The Office of Export Control has confirmed that such assurances have in fact been made.

VII. EXTRATERRITORIAL APPLICATION OF ADMINISTRATIVE CONTROLS

The Export Control Act restricts not only exports from the United States and its territories and possessions, but also, as we have seen, the transhipment of United States exports from one foreign country to another,³¹² as well as the "release" of technical data of United States origin by persons and firms situated abroad.³¹³ Moreover, "persons" and "firms" subject to the Export Regulations are defined to include persons or firms situated, residing, or doing business in any foreign country, whether or not they (or any of their stockholders or directors) are of American nationality.³¹⁴ In addition, exports originating in foreign countries are subject to regulations issued under section 5(b) of the Trading With the Enemy Act, which are applicable to foreign subsidiaries and affiliates of United States firms.³¹⁵ One who "knowingly and wilfully" violates the Treasury Regulations issued under the Trading With the Enemy Act may be fined as much as \$10,000 or imprisoned for as long as ten years or both. Neither the Trading With the Enemy Act nor the regulations issued thereunder impose administrative sanctions for violations—except to the extent that the Office of Foreign Assets Control can recommend that persons or firms be placed on the secret "gray list."

Apart from technical problems inherent in the application of American administrative law on a world-wide scale, the assumption by the United States of jurisdiction over foreign persons and firms has given rise to serious political and legal problems. Foreign governments have expressed their resentment of American prohibitions directed against their nationals. In some instances there have been unpublicized diplomatic protests against administrative sanctions imposed on foreign firms for acts which were lawful in the country where they were committed but which were later held to be in violation of American controls.

A. Extraterritorial Enforcement of the Foreign Assets and Cuban Assets Control Regulations

The most acute political questions have arisen in connection with the Foreign Assets Control Regulations, affecting sales to Communist China,

311. Cf. the *Wallersteiner* case, discussed in note 288 *supra*. In view of the criminal sanctions imposed against Watford Chemical Corporation of New York and the especially serious nature of his offenses, it may be inferred that Mr. Wallersteiner sought and received assurances that he would not be criminally prosecuted in the United States.

312. See p. 817 *supra*.

313. See p. 862 *supra*.

314. See p. 851 *supra*.

315. See p. 808 *supra*.

North Korea, or Communist-controlled areas of Vietnam by foreign firms owned or controlled by persons subject to the jurisdiction of the United States.³¹⁶ Since the export controls of most of our allies are no more stringent with respect to those countries than they are with respect to the Communist countries of Eastern Europe and the Soviet Union, the enforcement of the United States regulations inevitably produces a strong negative reaction, especially since the foreign firms affected are usually nationals of the foreign country, being incorporated in that country, and sometimes the majority of the stockholders and of the directors are not Americans.

Typically, action under the Foreign Assets Control Regulations is initiated by a notice from the Treasury Department to the American parent of a foreign subsidiary to the effect that in connection with an export contract entered into by the subsidiary, it, the parent, by virtue of its degree of ownership or control, is in violation of the regulations and liable to sanctions thereunder. The parent then instructs its subsidiary to repudiate the illegal contract. Both the subsidiary and the foreign government may well be outraged by this turn of events, especially since the foreign government will probably have given its blessing to the sale, *e.g.*, by having granted an export license. Indeed, the Treasury Department has frankly admitted that the Foreign Assets Control Regulations have proved impossible to enforce without raising a great many foreign policy issues with our allies.

Exports to China by Canadian subsidiaries and affiliates of American firms have been a major source of aggravation, both because Canadian and United States policies concerning such trade have been diametrically opposed and because so large a proportion of Canadian manufacturer-exporters are controlled, or partly controlled, by American companies. Matters came to a head in 1957, when the Canadian subsidiary of Ford Motor Company contracted to sell a thousand trucks to Communist China. The Treasury Department ordered Ford to require its subsidiary not to deliver. A significant deterioration in United States-Canadian relations resulted from this episode. As an American writer put it, "Where is the national sovereignty of Canada if the Treasury tries to prevent the Canadian manufacturing subsidiary of Ford Motor Company from selling a thousand trucks to Red China?"³¹⁷

316. 31 C.F.R. §§ 500.101-808 (1967). The Transaction Control Regulations, 31 C.F.R. §§ 505.01-60 (1967), are less repugnant to our friends and allies since the list of commodities in which transactions are proscribed is more or less consonant with the so-called strategic lists of the NATO members and Japan, *i.e.*, goods which are subject to IC/DV procedure and Munitions List items. See p. 839 *supra*. American-controlled firms in England or France or Germany, for example, are not placed at a competitive disadvantage with locally-owned firms since these countries also prohibit the export of the same goods to Communist destinations.

317. Haight, *United States Controls Over Strategic Transactions*, 1965 U. ILL. L.F. 337, 353. A Canadian newspaper protested this infringement of Canada's sovereignty: In principle every single Conservative minister will agree it is intolerable. But in practice, they feel bound to admit the U.S. Government cannot let U.S. companies evade the United States law through foreign subsidiaries.

Subsequent negotiations between the two governments may have led to a certain reduction in the zeal with which the Treasury Department has enforced its Foreign Assets Control Regulations in Canada. As recently as 1965, however, in a report prepared at the request of President Johnson and Canadian Prime Minister Pearson, on "principles of partnership" between the two countries, a former Canadian ambassador to the United States and a former American ambassador to Canada stressed the importance of mutual respect for national jurisdiction. The report stated:

[61] It is important that each country should avoid efforts, or apparent efforts, to extend its domestic law into the territory of the other. A case in point—the administration of foreign assets control under the United States Trading with the Enemy Act, as it relates to United States-owned branches and subsidiaries in Canada, occasionally comes into conflict with the laws, regulations and policies of the Canadian Government. We strongly recommend that the two governments examine promptly the means, through issuance by the United States of a general license or adoption of other appropriate measures, by which this irritant to our relationship may be removed, without encouraging the evasion of United States law by citizens of the United States.³¹⁸

Unpleasant experience under the Foreign Assets Control Regulations was undoubtedly an important factor in the decision later adopted with respect to the Cuban Assets Control Regulations *not* to prohibit foreign companies (other than banking institutions) owned or controlled by United States persons from trading with Cuba in foreign-origin goods located abroad—provided that neither United States dollars nor transport on a vessel owned or controlled by United States interests are involved, and provided further that affiliated United States persons or companies do not participate in the transactions in any fashion, for example, by advising the foreign company that the terms of sale or of financing are acceptable.³¹⁹ The reason for this exemption, according to one Treasury official, is that "The United States has had difficulties in our relations with some foreign countries because they

If genuine Canadian subsidiaries can trade with China, Washington will argue then any United States subsidiaries may establish a Canadian dummy to do what it is itself forbidden to do.

The present difficulty stems basically from the opposing views about China, and about east-west trade in general, held in Canada and the U.S.

Yet—as things stand now it suggests that whenever such a difference exists, the U.S. Government can make its will prevail in Canada as well as within its own jurisdiction.

The Financial Post, July 5, 1958, at 9, cols. 1, 3. See generally Marshall, *Foreign Policy Aspects of Trade Regulation: Effects on Canada*, 24 U. TORONTO FACULTY L. REV. 70 (1966).

318. Merchant & Heeney, *Canada and the United States—Principles for Partnership*, 53 DEPT STATE BULL. 193, 202 (1965).

319. See 31 C.F.R. §§ 515.541(a)-(e) (1967). The exemption is very narrow. American visitors to Canada's Expo 67 should note that United States law prohibits the purchase (but not necessarily the consumption) of a Havana cigar or of a rum drink at the Cuban pavilion. N.Y. Times, April 23, 1967, at 30, col. 3.

have disliked the application of our Regulations to subsidiary firms in such countries," and "it was felt that . . . it would only aggravate our foreign policy problems to exercise a regulatory control over such firms."³²⁰

The Cuban Regulations, though they reduce the irritant inherent in extraterritorial enforcement of our trade controls, do not solve all problems. On one occasion, a foreign airplane which had been used for carrying goods to Cuba was seized by the Treasury Department when it was sent to Florida for repairs. Also the blanket prohibition against any degree of participation in Cuban transactions by American directors of foreign companies may raise difficult questions of interpretation.³²¹ Moreover, the so-called Cuban exemption has been greatly weakened by the combined efforts of the State Department and the Treasury Department to secure "voluntary compliance" with the spirit of the regulations—that is, to persuade Americans to induce foreign subsidiaries and affiliates not to trade with Cuba. Indeed, a Treasury Department official has stated that "[i]f it develops that a substantial amount of trade is being conducted by subsidiaries with Cuba (and constant checks are made on this point) then the exemption will be reconsidered."³²²

Over the years, the "voluntary compliance" program has been highly successful. For example, in July 1966, three American-controlled flour firms in Canada (Robin Hood, Quaker, and Pillsbury) repudiated their contracts to mill Canadian wheat destined for Cuba. Earlier, the Pearson government had given an assurance to Mr. John Diefenbaker, the leader of the opposition, that "strong Canadian protests would be made if investigations confirmed reports that the U.S. had ordered three U.S.-controlled subsidiaries located in Canada to cease converting Canadian wheat into flour for shipment to Cuba. . . ." Mr. Diefenbaker insisted that the United States was "asserting extraterritoriality over Canadian corporations." "They [the United States] tried that when I was Prime Minister [the Ford deal with China]," he stated, "and I want to find out where the courage is now on the part of the government to face this situation."³²³

It is ironic that, although United States subsidiaries abroad may not trade with China as a matter of law and are severely restricted as a matter of policy in trading with Cuba, nevertheless Americans may and do share in the profits from sales to China and Cuba made by foreign firms that are only

320. Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 19 Bus. Law. 861, 868 (1964).

321. 31 C.F.R. § 515.541(e) (1967) states:

This section does not authorize any person subject to the jurisdiction of the United States other than [nonbanking associations incorporated abroad] to engage in or participate in or be involved in any transaction. For the purpose of this section only, no person shall be deemed to be engaged in or participating in or involved in a transaction solely because of the fact that he has a financial interest in [a nonbanking association incorporated abroad].

322. Sommerfield, *supra* note 320, at 868.

323. The Gazette (Montreal, Canada), July 13, 1966, at 4, col. 6.

partly owned or controlled by them. The Regulations speak of ownership or control, without specifying the meaning of those terms. The Treasury Department has taken the view that less than 50% ownership may constitute sufficient control for purposes of the regulations; it has stated, for example, that where a United States firm owned 40% of the stock of a foreign firm, and no other person owned more than 1%, it would rule that the United States firm controlled the foreign firm.³²⁴ Nevertheless, no effort has been made to apply the regulations to all foreign firms in which Americans have shareholder interests.

Apart from the political and diplomatic repercussions of our Foreign Assets and Cuban Assets Control Regulations, there has been one reported case of legal resistance to them by a foreign court. In 1965, French shareholders procured a temporary receivership of an American-controlled company in order to thwart the effect of a decision by the parent, under orders from the Treasury Department, to cancel a contract.³²⁵ In that case, Fruehauf-France, S.A., a French company in which the Fruehauf Corporation (United States) held a two-thirds stock interest, signed a contract with Automobiles Berliet, S.A., another French company, for delivery of 60 "Fruehauf" vans, valued at 1,785,310 francs, for eventual delivery to Communist China. In January 1965 the Treasury Department issued an order directing the Fruehauf Corporation to suspend execution of the contract as violating the Trading With the Enemy Act regulations. After Fruehauf-France failed in its efforts to induce Automobiles Berliet (its largest customer) to rescind the contract, the French minority directors instituted a proceeding against the Fruehauf Corporation and the American directors of Fruehauf-France before the Tribunal of Commerce of Corbeil Essonnes. In February 1965 the President of the Tribunal appointed a temporary administrator to head Fruehauf-France for three months and to execute the contract. The Court of Appeals, in affirming the order of the lower court, stated:

The evidence demonstrates, without serious question, not only the clear and present interest Fruehauf-France, S.A. has in the execution of a contract made with its principal customer, Berliet, S.A., which accounts for about 40 per cent of its exports, but above all the catastrophic results which would have been produced, on the eve of delivery date, and which would be felt even today, if the contract had been breached, because the buyer would be in a position

324. Flynn, *Trading with Communists: Use of Foreign Trade for Policy Objectives*, 49 A.B.A.J. 1092, 1094 n.24 (1963).

325. Fruehauf Corp. v. Massardy, [1965] Sem. Jur. II 14274, [1965] Gaz. Pal. II 86, 5 INT'L LEGAL MATERIALS 476 (Cour d'appel, Paris). See also Nam Sun Trading Co. v. Andersen, Meyer Co., 35 Hong Kong L.R. 113 (1951), where, following frustration of a contract by the American embargo on shipments to China, the Hong Kong court rejected the American seller's argument that it was an implied term of the contract that refunds be made where the deposits were paid, i.e., New York, and therefore frozen by Treasury Department regulations. The court said it was only "natural" that refunds be made where the buyer carried on its business.

to demand of its seller all commercial damages resulting therefrom, valued at more than five million francs, following upon the break-off of its dealings with China.

. . . [T]hese damages, which Fruehauf Corporation of Fruehauf-International [the United States parent companies] did not indicate any intention of assuming, would be of such an order as to ruin the financial equilibrium and the moral credit of Fruehauf-France, S.A. and provoke its disappearance and the unemployment of more than 600 workers; . . . in order to name a temporary administrator the judge-referee must take into account the interests of the company rather than the personal interests of any shareholders even if they be the majority.³²⁶

The implications of the *Fruehauf* judgment will probably not be lost on minority shareholders in other countries, and the case may serve to bring about a reformulation of policy within the Office of Foreign Assets Control and, possibly, some needed amendments to the Foreign Assets Control Regulations. It has never been explained why the logic which compelled the so-called Cuban exemption is any less valid with respect to China.

B. Effect of Export Controls on Contractual Liability

If Fruehauf-France had obeyed the instructions of its American parent, it would have subjected itself to the risk of a civil action for damages for breach of a contract (with Automobiles Berliet) which, though illegal under United States law, was valid in the place where it was made and where it was to be performed. It is, indeed, an inevitable consequence of the extra-territorial reach not only of the Foreign Assets Control Regulations but also of the Export Regulations, that foreign firms will be required by the United States Government to break contracts that are legal in the country where made.

Of course, the foreign consignee of United States exports may protect himself against liability by including in his subcontracts an express provision excusing nonperformance arising from instructions of the United States Government. Without such a clause it may be doubted that any court should excuse him,³²⁷ although an American court would not seek to compel performance when the United States Government has forbidden it, but would at most grant damages. Whether courts of other countries would permit United

326. 5 INT'L LEGAL MATERIALS at 476 (1965). Technically, despite the French decree, the American parent is liable to criminal sanctions under the Trading With the Enemy Act, which is applicable if the parent either owns or controls the foreign subsidiary. However, no criminal prosecution has been—or presumably will be—brought.

327. See Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1436 n.49 (1963): "The absence of a reference to licenses or governmental prohibitions in the contract should be taken to mean, unless there is evidence to the contrary, that the parties understood that the risk of export license was on the exporter (and of import license on the importer). This conclusion is supported by the fact that the overwhelming majority of contracts in international trade contain an express disclaimer of liability by the seller in the event of failure to obtain a license." See also Berman, *Force Majeure and the Denial of an Export License Under Soviet Law: A Comment on Jordan Investments Ltd. v. Sovzneft-eksport*, 73 HARV. L. REV. 1128, 1141-43 (1960).

States law to reach the second link in the transaction, absent a contractual provision express or implied, may be doubted.³²⁸ If the re-export were also prohibited by the government of the country of re-export, however, presumably the courts of any country would refuse to decree specific performance but would grant damages unless the contract cast the risk of denial of an export license upon the subpurchaser.

Similar problems arise with respect to the contractual liability of carriers affected by U.S. export controls. Export Regulation 379.11(a)(2) provides that "where there are reasonable grounds for believing that a violation of the Export Regulations has occurred or will occur with respect to a particular export from the United States," the Office of Export Control may order any person in possession or control of such shipments including any exporting carrier carrying them, to return or unload the shipment, and, in the latter case, "to assure that such shipment is placed under bond or other guaranty not to enter the commerce of any foreign country without prior approval of the Office of Export Control." For purposes of this regulation, the term "exporting carrier" includes "a connecting or on-forwarding carrier, as well as the owner, charterer, agent, master, or any other person in charge of the vessel, aircraft, or other kind of carrier, whether such person is located in the United States or in a foreign country."³²⁹ Thus the Office of Export Control is authorized to interrupt a shipment from one foreign country to another, on a foreign-flag vessel, provided that the goods had been first exported from the United States and that there are reasonable grounds to believe that a violation of the Export Regulations has occurred or will occur.

The provisions of this regulation are supplemented by Commerce Department Orders T-1 and T-2, which impose additional restraints on United States flag ships and aircraft. Transportation Order T-2 prohibits United States carriers to transport goods destined for Communist China, North Korea, or the Communist-controlled area of Vietnam.³³⁰ Transportation Order T-1 restricts the discharge at any destination in Country Group X (Hong Kong and Macao), Y (the "Soviet bloc," excluding Poland and

328. For authority that the law of the place of performance controls matters relative to illegality and impossibility, see *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S.D.N.Y.), *aff'd per curiam*, 84 F.2d 993 (2d Cir.), *cert. denied*, 299 U.S. 585 (1936); *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678 (C.A.); *Zivnostenska Banka Nat'l Corp. v. Frankman*, [1950] A.C. 57 (1949).

"I may note in passing that the modern tendency is to deny extraterritorial validity to legislation, for example, on moveables situate outside the state at the time of the legislation . . ." *Re Helbert Waggs & Co.*, [1956] 1 All E.R. 129, 138 (Ch. 1955).

329. E.R. 379.11(a)(1).

330. 32A C.F.R. ch. VII, T-2 (1966). The order was issued under authority of the Defense Production Act of 1950, § 704, 50 U.S.C. App. § 2154 (1964). Although § 704 gives the President authority to "make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this act," the Transportation Orders issued thereunder are in no way related to the Defense Production Act and are neither necessary nor appropriate to its implementation. § 3(a) of the Export Control Act, on the other hand, would provide a statutory basis for these orders.

Rumania), or Z (Communist China, North Korea, Communist-controlled area of Vietnam, and Cuba) of (a) Munitions List items, (b) items whose export is controlled by the Atomic Energy Commission, and (c) commodities which under the Commodity Control List require a validated license for export to the "free world" (Country Groups T and V), unless a validated license has been obtained from the appropriate agency. Transportation Order T-1 does not, however, prohibit an American flag ship or aircraft from going to or calling at one of the restricted ports (except Communist China, North Korea, or North Vietnam), even though it has on board a commodity which could not be discharged at that port.³³¹

A United States flag vessel ordered by the United States Government not to deliver goods is, of course, bound to comply with the order. It will normally be excused from civil liability to the consignee under its contract of carriage by the "restraint of princes" clause in the bill of lading.³³² In one case, however, the Supreme Court of Hong Kong held that after the goods had left the ship's tackles, the restraint of princes clause no longer applied, and the American carrier was not excused from liability for nondelivery to a Chinese buyer although it acted in response to the orders of the United States Government.³³³ The Hong Kong court held that once the goods were unloaded United States law could not be applied. If United States law were applicable, the American carrier could not be held liable since Transportation Order T-1 itself provides: "No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this order or any provision thereof, notwithstanding that this order or such provision shall thereafter be declared by judicial or other competent authority to be invalid."

Where the carrier is a foreign flag vessel or aircraft, and is outside the territorial jurisdiction of the United States, a Commerce Department order prohibiting discharge or delivery need not be obeyed. If it is obeyed, a strong doubt would arise as to the protection afforded by the restraint of princes clause in the bill of lading; unless the clause expressly authorizes the carrier to honor requests of foreign governments that are not binding upon it, it may be supposed that the contractual obligation to deliver would withstand voluntary compliance with such a request, even though it be made

331. Transportation Order T-1, Interpretation 1, 32A C.F.R. ch. VII, § 4 (1966).

332. See *Carriage of Goods by Sea Act* § 4(2)(g), 46 U.S.C. § 1304(2)(g) (1964).

333. American President Lines, Ltd. v. China Mutual Trading Co., Ltd., 1953 A.M.C. 1510 (Hong Kong Sup. Ct.). The court's decision hinged on its interpretation of the word "discharge" as it appears in Commerce Department Transportation Order T-1. Both American and British courts have held that "discharge" occurs the moment the goods leave the ship's tackle. See *Remington Rand, Inc. v. American Export Lines, Inc.*, 132 F. Supp. 129, 137 (S.D.N.Y. 1955); *Federal Ins. Co. v. American Export Lines, Inc.*, 113 F. Supp. 540, 542 (S.D.N.Y. 1953) (act does not apply when cargo is on a lighter). Discharge is completed when the goods are on the lighter when all goods to be unloaded have in fact been unloaded. *Lindsay Blee Depots, Ltd. v. Motor Union Ins. Co.*, 37 Lloyd's List L.R. 220 (K.B. 1930).

in the form of a command and under threat of administrative (or even criminal) sanctions. On the other hand, if American law is held to be applicable to the contract of carriage, it is arguable that even the foreign carrier in a foreign port would be excused from liability for damages arising from its obedience to a requirement of the American Government. This argument would be stronger if Transportation Order T-1, with its provision excusing the carrier from liability, were applicable to foreign flag carriers. Even were that the case, however, the public policy of the forum might require that laws of the United States Government which are in effect confiscatory must yield to the contractual obligation of the carrier to honor the bill of lading.

The question has never been tested in court, so far as we can discover. In a South African case, a consignee sued to compel delivery by the carrier—apparently not an American flag vessel—of goods ordered by the Office of Export Control to be withheld from him. The suit was at first opposed by the carrier and by representatives of the United States Government, but subsequently the Office of Export Control permitted the goods to be landed, and the plaintiff withdrew his suit.³³⁴ Presumably if the carrier had not complied with the initial order not to land the goods it would have incurred administrative sanctions under the Export Regulations. Foreign carriers which have complied with Commerce Department orders have apparently been able to settle informally whatever contract damages may have been thereby incurred.

It is easy to understand why the Office of Export Control has taken the position that its controls follow the goods to their ultimate destination.³³⁵ Given the more lenient policies of other governments toward trade with Communist countries, the Export Regulations might be largely frustrated in the absence of extraterritorial controls, including controls on foreign importers and foreign carriers. On the other hand, in extending criminal penalties to acts committed by foreigners abroad, which are permitted by the law of the country where committed, the Export Regulations impose a serious strain on those international legal principles that restrict the extraterritorial application of criminal law; and in imposing administrative requirements on foreign firms, and on foreign subsidiaries of American firms, the Office of Export

334. See Ihsan M. Beydoun, 16 Fed. Reg. 3671 (1951). A Commerce Department order suspending export privileges reports that the respondent, Ihsan M. Beydoun, of South Africa, falsely represented to the Office of International Trade (through an American freight forwarder) that a quantity of Indian jute bags then in the Foreign Trade Zone at New York City was destined for Venezuela, and that he caused the goods to be diverted to Durban, South Africa. After Beydoun, who was both the shipper and the consignee, instituted legal proceedings to compel the delivery of the jute bags, the Office of International Trade amended its regulations to permit general license shipments of jute bags from the United States and withdrew its order to the vessel not to land the bags. However, the Office reserved "the right to proceed against respondent by administrative action or criminal action" and shortly thereafter Beydoun was denied all export privileges for the duration of the export controls. The Compliance Commissioner stated in his report that "respondent has shown himself to be untrustworthy and not above resort to subterfuge and falsehood." As of January 1, 1967, Beydoun's name was still on the "blacklist."

335. See Sudexport & General Import Export Co., 22 Fed. Reg. 4512 (1957).

Control and the Office of Foreign Assets Control sometimes have overreached their actual power to secure compliance and at other times have succeeded only at a heavy cost to American prestige and American business.

VIII. THE FUTURE OF UNITED STATES EXPORT CONTROLS

The time is ripe for a full-scale debate on the future of United States export controls. As we have seen, the Export Control Act was enacted in 1949 on the premise that it was a temporary measure largely designed to facilitate the program of European economic recovery. Although it has been re-enacted seven times, neither the policies underlying it nor its actual operation have ever been thoroughly examined by Congress.³³⁶ Moreover, the Act has never been subjected to close scrutiny in scholarly literature; the present article, with all its inadequacies, is the first attempt at a comprehensive analysis. The most extensive recent discussion of it has come from hearings before the Senate Foreign Relations Committee, but inevitably such hearings are discursive and unsystematic.³³⁷ The Treasury Regulations issued under the Trading With the Enemy Act have received even less attention than the Export Control Act. Congress has only endorsed by silence the use (or abuse) of the Trading With the Enemy Act as authority not only for the virtual prohibition of trade with the Communist countries of Asia and Cuba but also for the restriction of exports by foreign subsidiaries of American firms to the Soviet Union and Eastern Europe.

An authentic debate on United States export controls must start with an analysis of the serious adverse effects which they have had, and must weigh those adverse effects against the benefits obtained. Alternatives to the present system of export controls must then be considered, for unless there are feasible alternatives the debate will tend to become academic.

In the present concluding section of this article, we shall offer a summary of the adverse effects and the benefits of United States export controls, based upon the foregoing analysis of their history and operation, and shall propose alternatives to the present law.

One adverse effect of United States export controls is that they have diverted a large amount of trade with Communist countries from American exporters to Western European, Japanese, and other exporters. In 1965, United States exports to Communist countries amounted to \$139 million; in the same year, Western European exports to Communist countries amounted to \$4 billion, and total "free world" exports to Communist countries amounted to \$7.5 billion.³³⁸ Since total United States exports in 1965

336. See note 288 *supra*.

337. See Hearings on East-West Trade Before the Senate Comm. on Foreign Relations, 89th Cong., 1st Sess. (1965).

338. 19TH BATTLE ACT REPORT 23 (1966). For purposes of these statistics, the term

constituted 16% of total "free world" exports, it may be estimated—very roughly, to be sure—that our export controls may well have cost us, in that year, approximately \$1 billion in exports to Communist countries.³³⁹ This figure does not include the possibly substantial amount of trade which we might have conducted with Communist countries at the expense of each other, that is, by diverting such trade not from Western Europe, Japan, and other non-Communist countries but from individual Communist countries themselves.³⁴⁰

"free world" includes Yugoslavia and Cuba. These figures do not include sales of technology, either by the United States or by the "free world." The figure of United States exports to Communist countries does not include (and the figure of "free world" exports does include) exports of goods made in Western Europe under license agreements with United States firms and exports by subsidiaries of United States firms.

339. "Free world" (including Yugoslavia and Cuba) exports in 1965 totalled \$165 billion. United States exports in 1965 totalled \$26.5 billion. It has been contended that the elimination of United States export controls would not bring about a significant increase in the United States share of East-West trade. Cf. M. HARVEY, EAST-WEST TRADE AND UNITED STATES POLICY 49-54 (1966). The principal arguments in support of this contention are: (1) the long history of trade ties between Western Europe and Eastern Europe would withstand American efforts to compete; (2) the relative scarcity of foreign exchange in Eastern Europe and the Soviet Union would mean that Americans would have to purchase an equivalent amount of Communist goods for which there is no commercial market in the United States; (3) according to export control officials, three-fourths of the commodities sold each year to Eastern Europe from Western European COCOM countries would have been approved for export from the United States; (4) the Communist countries will only purchase from the United States that which they cannot purchase elsewhere, i.e., advanced technology; and (5) United States exports to Western Europe have released West European commodities for export, so that increased American exports to Communist countries would affect the level of American exports to "free world" countries.

Against these arguments it may be noted: (1) that notwithstanding the long history of trade ties between Western Europe and Eastern Europe, most East European countries have openly expressed a desire for expanded trade with the United States; (2) that the Soviet Union and the East European countries have a favorable trade balance with the "free world" which has in turn released foreign exchange for purchases in the United States, and that in any event they produce a considerable number of goods for which there exist commercial markets in the United States and other hard-currency countries; (3) that the contention that the United States would have approved the export of a large percentage of the commodities sold by Western Europe to Eastern Europe leaves out of account the deterrent effects, both psychological and political, of United States export controls on the import agencies of the countries of Eastern Europe and on American exporters; (4) that Soviet and East European import agencies have shown an increasing interest in purchasing a wide variety of American products and not only advanced technology; and (5) that the assumption that United States exports to non-Communist countries would decrease in relation to any increase in exports to Communist countries assumes a static world demand.

It should be added that the low level of United States exports to Communist countries is partly due also to our discriminatory tariffs and other import restrictions, which serve to deprive Communist countries of foreign exchange for increased imports from the United States, as well as our credit controls which serve to divert to West European countries sales of plants and equipment. See Berman & Garson, *Possible Effects of the Proposed East-West Trade Relations Act Upon U.S. Import, Export and Credit Controls*, 20 VAND. L. REV. 279 (1967). One of the more serious restraints on the granting of export credits to Communist countries was removed on May 9, 1967, when the Attorney General ruled, in a letter to the Secretary of State, that the prohibitions contained in the Johnson Act of 1934, 18 U.S.C. § 955 (1964), do not apply to the financing of export sales "provided that the terms of such transactions are based upon bona fide business considerations and do not involve a public distribution of securities."

340. "The possibility of breaking into the much larger market which the Communist countries have created among themselves is generally ignored—probably because the nature of what might be called 'East-East' trade is not understood." Berman, *We Can Trade with the Communists*, 202 THE NATION 766, 767 (1966).

A second adverse effect of United States export controls cannot be so easily measured: that is their effect upon exports to non-Communist countries. Well over 95% of all applications for validated licenses are for exports not to Communist countries but to Country Groups T and V—the “free world.” The fear of transshipment has led to the imposition of stringent licensing requirements which undoubtedly make it more difficult for British or French firms, for example, to import from us than from each other.

A third adverse effect of United States export controls is that they may be used, and have been used, not for reasons of national security, and not even for reasons of foreign policy, but for reasons of economic protection of particular industries: we refer particularly to the so-called short supply controls, used as a means of price support. The adverse effect in such instances is upon American producers and exporters of the products in question (most recently, walnut logs, cattle hides, and copper), who are subjected to economic losses by fiat of the Office of Export Control, without a hearing.

A fourth adverse effect of United States export controls is the subjection of American and foreign firms and individuals to secret and inherently arbitrary procedures in the grant or denial of export licenses, the revocation of “export privileges,” and the imposition of the sanctions of the blacklist and the gray list.

A fifth adverse effect of United States export controls is the threat to legality inherent in the vagueness of the standards by which the controls are exercised, coupled with the enormous powers vested in the bureaucracy which exercises them.

If these are some of the costs of our export controls, what are some of the offsetting benefits? The first and most important benefit is the restriction of the exportation—to Communist and non-Communist countries alike—of munitions and atomic energy materials. We have only dealt in passing with this aspect of export controls, which is within the jurisdiction of the State Department and the Atomic Energy Commission, since we assume that no one will seriously contest the need for maintaining the strictest governmental supervision of exports of goods and technology that are clearly military in nature. Nevertheless, in any general debate concerning export controls it will be necessary to examine the extent to which the regulations issued under the Mutual Security Act of 1954 go beyond the President's authority under that act to curtail the export of “arms, ammunition, and implements of war, including technical data relating thereto”; in particular, the definition of technical data in the International Traffic in Arms Regulations extends, as we have noted, to “[a]ny technology which advances the state-of-the-art or establishes a new art in an area of significant military applicability,” and there is reason to believe that under this definition restrictions are imposed

on the exportation of many kinds of technical data that have only a remote relationship to military considerations.³⁴¹

A second benefit of our export controls is the protection of our national security viewed in broader terms as including the restriction of exports of goods and technology which, though not themselves of a military nature, would nevertheless directly and significantly affect the military potential of countries whose interests are considered hostile to ours. We would call such exports "strategic," as contrasted with "military," defining "strategic" by two interdependent criteria: first, the criterion of direct utility in the production of implements of war, and second, the criterion of unavailability elsewhere. Thus the export of a certain type of engine which can be used *either* in automobiles *or* in tanks would be strategic only if it (or its equivalent) could not easily be procured by the importing country from other countries.

The restriction of strategic exports, thus defined, is effected by the existing controls over Battle Act Title I List items and over technical data relating to such items. The Battle Act Title I List covers "arms, ammunition, and implements of war, atomic energy materials, petroleum, transportation materials of strategic value, and those items of primary strategic significance used in the production of arms, ammunition, and implements of war."³⁴² Since this list is apparently co-extensive with the list of goods accepted for embargo by the international trade control body (COCOM), it is unlikely that there are many items *not* on this list which Communist countries cannot procure elsewhere; and by the same token, it is unlikely that United States controls over items on this list divert any large volume of business from the United States.

341. In January 1967, the Soviet Academy of Sciences offered to purchase a two-man research submarine from the General Dynamics Corporation for use in the under-water exploration of the Black Sea. The submarine is an unclassified research vehicle and is probably not subsumed under "Vessels of War and Special Naval Equipment" in the United States Munitions List. International Traffic in Arms § 121.01 (Category VI), 31 Fed. Reg. 15174 (1966). If licensing jurisdiction is in fact vested in the Office of Munitions Control (which, as of March 1967, was considering a license application to make the sale), rather than in the Office of Export Control, it is because the technique for welding the steel hull so that it can resist the extreme pressures encountered by a deep-diving submarine has been determined to fall within "[a]ny technology which advances the state-of-the-art or establishes a new art in an area of significant military applicability." International Traffic in Arms § 125.01(c), 31 Fed. Reg. 15182 (1966). According to an Administration spokesman, the Navy is opposed to the sale. The State Department, however, "was reported to be wavering in favor of the sale, and the ultimate decision, it was conceded by officials, probably will have to be made by the White House." N.Y. Times, Feb. 26, 1967, at 23 col. 1. In April 1967, the license application was rejected. N.Y. Times, April 15, 1967, at 1, col. 4.

342. The export of arms, ammunition, implements of war, and atomic energy materials, as well as technical data relating thereto, are controlled by the Office of Munitions Control and the Atomic Energy Commission respectively. Battle Act Title I items whose export is controlled by the Office of Export Control are identified by the symbol "A" on the Commodity Control List. See pp. 839-40 *supra*.

A third benefit claimed for United States export controls—in addition to protection of our national security viewed in military and strategic terms—is the prevention of exports to Communist countries which would substantially contribute to the *economic* potential of those countries. The Office of Export Control and the intelligence community have often taken the view that the export to Communist countries of commodities and technology which would make a significant contribution to their economic potential and which are not otherwise available to them would prove detrimental to the national security and welfare of the United States. The presumption that such exports would be detrimental to the United States derives from our concern with “lead-time,” that is, our desire to maintain the existing time-gap, with respect to economic and technological progress, vis-à-vis our Communist competitors.

It is by no means clear, however, that the economic progress of Communist countries is against our interests; indeed, the Soviet Union was far more hostile to us in the late 1940's and early 1950's, when it was weaker economically, than it has been since the later 1950's when its economy began to expand much more rapidly. Moreover, the assumption that the export of technology will substantially reduce American “lead-time” over the Communist countries neglects the dynamic character of American technological progress. It is noteworthy, in this connection, that American technological superiority over Western Europe seems to be actually increasing despite the fact that most United States technology is freely available to Western European countries. In addition, the divergence between the export control policies of our European allies and our own has largely frustrated the alleged benefits of our non-military restrictions.³⁴³ Finally, it should not be supposed that our exports are in the nature of gifts, or that they are a form of foreign aid. It may be assumed that the recipient of our goods and technology will be charged their full value, and that Communist countries, in order to meet the cost of increased imports from us, will have to invest additional resources in the production of goods and technology for export. In short, the market is itself a regulator of the transfer of economic benefits among nations, and may generally be relied upon to be more effective in this regard than governmental restrictions.

A fourth benefit sometimes claimed for our system of export controls

343. In his report on the 1967 Leipzig Trade Fair, Philip Shabecoff of the *New York Times* states that “Britons, West Germans and Frenchmen smile when asked about supposedly still applicable restrictions on trade with the Communists, such as credit limitations and embargoes on certain products.” The chairman of the foreign trade board of the West German machine industry stated that “we now trade with the Communist countries in exactly the same way we would trade with any Western country.” According to Mr. Shabecoff, “Ideology, propaganda and bloc solidarity have seemingly faded far into the background at Leipzig as the countries of East and West Europe compete for trade.” N.Y. Times, March 9, 1967, at 15, col. 1. It should be noted that United States businessmen have for many years been strongly discouraged by the State Department from participating in the Leipzig fair.

is that it may be used as an instrument of foreign policy, to grant or withhold favors from particular countries in order to show our pleasure or displeasure and in order to induce favorable responses from them. The clearest examples are the especially militant treatment of East Germany for export control purposes, our transfer of Poland and Rumania out of the "Soviet bloc" (from Country Group Y to Country Group W), and our embargo on Southern Rhodesia. Again any short-term gains from such use of export controls for immediate political purposes must be weighed the long-term harm that arises from this simple merger of politics and economics. There are, in other words, substantial long-range advantages, from a political as well as an economic standpoint, in refraining from using foreign trade as a weapon of foreign policy except in extreme situations. Nondiscrimination in international trade is one of the principal foundations of the stability and integrity of the international economic and legal order. Trade with the Communist countries, on the basis of mutual advantage, can help to persuade them that their own long-range interests are linked with those of their trading partners. 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 subordinating economics to politics, with refusal to trade, and with discriminatory trade practices.

Finally, a benefit claimed for our system of export controls is that it satisfies a moral requirement—namely, that we should avoid doing business with evil people, even if no military, political, or economic purpose is served thereby. This has been our justification for imposing a total embargo, and not merely selective controls, upon trade with Communist China.³⁴⁴ It rests upon a form of Puritanism that is hard to reconcile with moral realities. Even countries engaged in war with each other may exchange prisoners. If the Chinese wish to sell us their yak hair or to buy our wheat, a nonutilitarian morality would seem to dictate that we permit such transactions, no matter how bitterly we oppose Chinese foreign and domestic policies; a utilitarian morality would compel the same conclusion if the only consequence of a contrary position is that the Chinese sell their yak hair to Britain and buy wheat from Canada.

We have not intended to exhaust, but only briefly to summarize, the

344. "[T]he embargo has only a symbolic meaning. It stands as a symbol of our determination to isolate China, to treat her as an outlaw, and to refuse to have any dealings with her." A. ECKSTEIN, COMMUNIST CHINA'S ECONOMIC GROWTH AND FOREIGN TRADE 273 (1966).

principal losses and gains which we believe are incurred under our present system of export controls. If our analysis is correct, the difficult question remains: can the United States devise a system of export controls which will achieve the most important benefits of the present system—especially the control of military and strategic exports—and at the same time reduce its very substantial adverse effects?

Such a system of export controls can be devised, we believe, by making several changes in the existing legislation and in the existing administrative regulations.

First, the "Findings" and "Declaration of Policy" of the Export Control Act should be amended in such a way as to limit the scope of the controls to those exports which have a potential military significance. Short supply controls, foreign policy controls, and controls of exports which have only a potential economic significance should be eliminated. Section 1 and section 2 of the Act could be combined to state: "The Congress hereby declares that it is the policy of the United States to exercise the necessary vigilance over exports which have potential military significance in order to protect the national security."³⁴⁵ We would also propose that it be added: "It is not the purpose of this Act to discourage trade in peaceful goods."

Although the President would still be left with a large amount of discretion to determine what goods have potential military significance, nevertheless the proposed amendments would certainly result in a drastic revision of the Commodity Control List. To the extent that the Battle Act Title I List exhausts "items of primary strategic significance used in the production of arms, ammunition, and implements of war," it would be possible to eliminate the requirement of a validated license for all goods except those which require a validated license for export to all the countries of the world (except Canada) and which are at the same time subject to import certificate/delivery verification procedure. As of January 1, 1967, there were approximately 600 such categories of goods. On the other hand, even if the test of "potential military significance" is thought to be broader than the criteria of the Battle Act, it would still be possible to eliminate the requirement of a validated license for all goods except those which require a validated license for export to all the countries of the world (except Canada). As of January 1, 1967, there were approximately 1,050 such categories of goods.

Acceptance of the principle that the scope of the Export Control Act should be limited to strategic exports—in the sense of commodities and

345. Parallel changes should be made in § 3(a) of the Act which requires the denial of authority to export "to any nation or combination of nations threatening the national security of the United States if the President shall determine that such export makes a significant contribution to the military or economic potential of such nation or nations which would prove detrimental to the national security and welfare of the United States." The words "or economic," if not, indeed, the entire sentence, should be eliminated.

technical data which have potential military significance and are not easily available to the importing country—would thus result in the elimination of the validated license requirement for most categories of exports; at the same time it would make it possible greatly to simplify the administration of export controls. The complex classification of the Commodity Control List into seven Country Groups would be unnecessary, since if a given commodity is strategic it should be subject to the validated license requirement regardless of destination, and if it is not strategic it should be permitted to be exported regardless of destination. Corresponding changes could and should be introduced into the technical data regulations. Neither validated licenses nor written assurances should be required in connection with the export of unpublished technical data except for data related to Battle Act Title I List items, *i.e.*, commodities which are either on the U.S. Munitions List or which are subject to IC/DV procedure.

The elimination of Country Groups under the Export Control Act would obviate the need for the general license. For purposes of observation and statistics, the Customs authorities should continue to insist upon the filing of a Shipper's Export Declaration, and anti-diversion notices may still be required with respect to transshipment to countries embargoed under special legislation or under the Trading With the Enemy Act. Even with these restrictions, however, the elimination of the general license would have the very considerable significance of removing the conception that exporting, unlike importing or domestic selling and buying, is only a privilege.

There is, of course, a large body of opinion which would make a special exception to any liberalization of export controls for so-called Country Group Z, that is, mainland China, North Korea, North Vietnam, and Cuba. As a practical matter, the Export Control Act is not needed at all to continue the embargo against those countries, or, indeed, against Southern Rhodesia. Embargoes, where they are insisted upon, should be subject to special legislation—or even to the Trading With the Enemy Act—but not to the Export Control Act.

In addition to amending the Export Control Act and the Export Regulations to limit the requirement of a validated license to commodities which have potential military significance and are not easily available elsewhere, we would propose several other changes to reduce the oppressive burden of present practices and procedures of the Office of Export Control.

One of the heavier burdens of export licensing is the general rule that license applications will not be considered unless accompanied by a "firm order" for the goods which are sought to be exported. This, together with the Office of Export Control's reluctance to define with any degree of specificity the commodities for which license applications will be approved, is more than a severe inconvenience to the would-be exporter. It places him at a

serious competitive disadvantage with manufacturers and exporters in other countries (such as the United Kingdom) who can negotiate contracts with knowledge that their efforts will not be frustrated by denial of a license. Although the United States regulations illustrate a few cases in which the firm order requirement will be waived, the vast majority of exporters have to carry negotiations through to a binding contract before they can submit license applications. The Office of Export Control should either give advance opinions concerning contemplated transactions or else should abolish the order requirement altogether.

It may be noted that on at least one occasion the Office of Export Control has been prepared to exercise considerable flexibility with respect to the firm order requirement. In connection with inter-governmental trade negotiations with Rumania in 1964, the Government gave tentative assurances to a Rumanian delegation that export licenses would be granted for some 10 categories of goods, and it gave the Rumanian trade 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.³⁴⁶ At the very least, it is to be hoped that the Export Regulations will be amended to permit the Office of Export Control to give similar assurances to American traders who, in negotiating with state trading agencies of Communist countries, wish to indicate the categories of goods which they can commit themselves to deliver.

Further protection should be afforded the exporter by giving him the right to participate in the review of a denial of a license application. The present Regulations make no provision for the exporter to present his case except at the Appeals Board level of review, although in practice he is permitted an opportunity to be heard informally. Since he is often the person best qualified to assist the investigation—especially with respect to the availability elsewhere of the goods he proposes to export—it would seem sensible to establish a regular formal procedure for hearings at the first level of review.

We do not propose that there should be a requirement of notice and hearing on license applications or judicial review of licensing decisions. It may be judged on the basis of the 1949 Senate hearings that the business community agrees with the view of the Office of Export Control that such notice, hearing, and judicial review would be impractical. However, the Office of Export Control should itself review, at least annually, its decisions with respect to the export of particular commodities to particular destinations. This is especially important in view of the practice of the Office to judge license applications according to "precedents" which may soon become outdated.

It has never been explained why the Office of Export Control should

346. See text accompanying note 129 *supra*.

be immune from provisions of the Administrative Procedure Act not relating to the denial of a license application, and, in particular, why there should not be an express right to judicial review of administrative sanctions. It is clear from the legislative history of the 1949 law that exemption from the Administrative Procedure Act (except as to the requirement of publication) was thought to be justified "in view of the temporary character of this legislation and its intimate relation to foreign policy and national security."³⁴⁷ But it was the understanding of the 1949 Congress that export controls would expire in 1951 and that the nature of the domestic supply situation justified a two-year extension of the emergency-type immunities which had characterized the wartime predecessor of the Export Control Act. Although there was a measure of opposition to exemption from the Administrative Procedure Act at the time of the 1949 hearings, the issue was not raised in 1951 or at any of the subsequent extensions of the Export Control Act. Indeed, when the Administration proposed, both in 1962 and 1965, that export controls be extended indefinitely, there was no suggestion that the Office of Export Control be deprived of its immunity from the Administrative Procedure Act.

The Administrators of the export control program have often stated that although the functions exercised under the Export Control Act are not subject to the requirements of the Administrative Procedure Act, they "adhere closely" thereto. If the statement is true, such adherence is only an act of grace on the part of the Office of Export Control, that is, a conditional privilege which may be revoked without notice. In fact, however, the statement is not true, as is evidenced by the vagueness of standards for determining what goods or technical data to control and what licenses to issue or deny, the absence of procedural requirements with respect to notice and hearings on classification and licensing decisions, the imposition in some cases of severe administrative sanctions for acts of mere negligence, and, with respect to both licensing decisions and administrative sanctions, an appeal process which lacks a genuine adversary character. Underlying these abuses is the absence of a clearly defined right of judicial review.

The Export Control Act should therefore be amended to state that the functions exercised thereunder shall be subject to the Administrative Procedure Act, except that that Act shall not be deemed to require notice and hearing on license applications or judicial review of license decisions. Although judicial review of administrative sanctions may be available independent of a general statutory review provision, an express provision for judicial review (under section 10 of the Administrative Procedure Act) would remove all doubts on this score. At the same time, judicial review of administrative sanctions would probably result in much-needed changes in the ill-defined *scienter* requirements of the Export Regulations. In addition, the other provisions of

347. S. REP. No. 31, 81st Cong., 1st Sess. 6 (1949); see pp. 797-98 *supra*.

the Administrative Procedure Act would place procedural restraints on the rule-making and administrative functions exercised by the Office of Export Control.

The Export Control Act should also be amended to provide that criminal sanctions can be imposed only for intentional violations, and only for acts committed either by citizens of the United States or persons within the territorial jurisdiction of the United States. This would bring the law into conformity with generally accepted standards of criminal justice and would be consistent with the actual practices of the Office of Export Control.

We have noted earlier some of the burdens imposed on exporters by virtue of the fact that most export controls are vested in three different agencies—the Commerce Department's Office of Export Control, the Treasury Department's Office of Foreign Assets Control, and the State Department's Office of Munitions Control. Ideally, it would be more efficient to have all or most export controls in the hands of a single office. Yet there are sound reasons for leaving Munitions Control in the hands of the State Department; and Commerce Department control of exports which have only a potential military significance has the advantage that the Commerce Department is in close touch with the business community and is charged not only with the restriction of exports but also, and more importantly, with their promotion. There is wisdom, therefore, in leaving the Office of Export Control, as well as the inter-agency bodies which supervise its operations, within the overall jurisdiction of the Secretary of Commerce.

The question remains, however, whether the Treasury Department should be charged with any responsibility for export controls. It is at least awkward that under the Transaction Control Regulations a foreign subsidiary of a United States firm must get the permission of the Office of Foreign Assets Control to export goods or technical data of foreign origin, to Eastern Europe or the Soviet Union, whereas if the goods or the technical data are exported from the United States, the American parent must get the permission of the Office of Export Control. Moreover, the Treasury Department is known to be considerably "tougher" in policing United States subsidiaries under the Transaction Control Regulations—as well as subsidiaries *and* parents under the Foreign Assets Control Regulations—than is its sister office in the Commerce Department. If the Transaction Control Regulations are to be continued, it would seem to be desirable to vest their operation in the Office of Export Control even if that would mean amending the Export Control Act to apply not only to goods exported from the United States but also to goods exported to the Communist countries of Eastern Europe and the Soviet Union by subsidiaries of United States firms located abroad. On the other hand, since virtually all of our major allies curtail the export to all Communist countries of the goods which are subject to the Transaction

Control Regulations, namely, Battle Act Title I items, and since such items cannot in practice be manufactured in most of the countries which do not participate in the COCOM embargo, that is, in nations which are not highly industrialized, we would propose that the Transaction Control Regulations be eliminated. The fact that they have been applied in only a few instances makes them no less an irritant to our friends and allies who have as little inclination as ourselves to maximize the military potential of the Soviet Union.

The Foreign Assets Control Regulations and the Cuban Assets Control Regulations—applicable to the Communist countries of Asia and to Cuba, respectively—pose a different kind of problem. Here the United States Government is pursuing a policy of embargo: although theoretically exports may be permitted, in fact licenses are almost never granted. Indeed, no system of licensing exports from the United States exists at all within the Office of Foreign Assets Control; instead, in the rare cases where exports are approved to Communist China (say, of a car for a foreign embassy in Peking) or Cuba (say, of medical supplies), they are licensed by the Office of Export Control. Thus it would be simple enough to place the Foreign Assets Control Regulations, as well as the Cuban Assets Control Regulations, under the jurisdiction of the Office of Export Control; however, we would not propose this, because we would not favor enlarging the scope of the Export Control Act to include restriction of nonstrategic exports.

This does not mean, however, that changes in the present system of embargo controls are not needed. In the first place, the Foreign Assets Control Regulations should be amended to give foreign subsidiaries of United States firms the same privileges with respect to Communist China and North Korea—though presumably not with respect to North Vietnam, until the Vietnam War is over—that they now have with respect to Cuba, namely, exemption from United States controls and subjection only to the controls of the foreign country in which they are situated. If it is objected that United States citizens should not be allowed to “trade with the enemy” by establishing production facilities abroad, it would seem to us a sufficient answer that if Communist China, North Korea, or any other country with which we are not at war is free to buy particular goods that are the products of Country X (say, Britain or France), Americans making such products in Country X should not be at a disadvantage vis-à-vis their competitors in that country.

Secondly, and more important, an embargo on trade with a country, at least when we are not at war with that country, is not a matter which should be left to the President to decide. The Trading With the Enemy Act was adopted in 1917 to meet the problems of a shooting war, not the problems of cold war. If the Executive wishes to cut off trade in peaceful goods with a particular country, it should seek specific legislation from Congress authorizing it to do so. Otherwise, those who would oppose such a major step have

no opportunity to be heard. Moreover, if special legislation were adopted to authorize embargoes against specific countries, there would be advantages in vesting controls under such legislation in the State Department, rather than in the Treasury Department. Although the Treasury Department presumably does not now make policy in such matters without the concurrence of the State Department, nevertheless, the extraterritorial application of embargoes to foreign subsidiaries of United States firms in individual cases is fraught with delicate foreign policy issues beyond the scope or competence of the Treasury Department.

Of course, profound constitutional questions lurk in the background of these and many other of our criticisms of United States export controls. It is thought by many that nothing is now left of the constitutional doctrine prohibiting an unlimited delegation of legislative power, at least where foreign affairs are concerned. Although no court has ever expressly adopted this view, some authority for it is to be found in *United States v. Curtiss-Wright Export Corp.*,³⁴⁸ in which the Supreme Court upheld a power conferred on the President to embargo the export of arms to the Chaco, a region of South America, on the ground that the President as the exclusive constitutional organ of foreign affairs must possess "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."³⁴⁹ Indeed, despite the limited scope of the export control authority there involved, export control officials have cited *Curtiss-Wright* as proof of the futility of constitutional objections to either the Export Control Act or the regulations issued thereunder.³⁵⁰

Even if it were true, however, that the courts would never annul legislation touching foreign affairs on the ground of delegation, this does not mean that Congress should disregard its responsibility for helping to maintain our system of checks and balances, or that the Executive should disregard the advantages of submitting its policies to the glare of congressional debate and to the legislative process.

Moreover, apart from any question of delegation of legislative powers, the constitutional standards of due process of law require intelligible, rational, and equitable standards and procedures with respect both to licensing and to the imposition of sanctions. This, too, is a matter of concern both to the

348. 299 U.S. 304 (1936).

349. *Id.* at 319-20.

350. Cf. Thau, *Control of Exports from the U.S.A.*, 19 Bus. L.W. 845, 858 (1964). Mr. Thau cites *Curtiss-Wright* in defending the Office of Export Control's practices with respect to classified information. Legal challenges to the constitutionality of the wartime predecessor of the Export Control Act were repulsed on the authority of *Curtiss-Wright*. See *United States v. Rosenberg*, 150 F.2d 788 (2d Cir.), cert. denied, 326 U.S. 752 (1945); *United States v. Bareno*, 50 F. Supp. 520 (D. Md. 1943). The constitutionality of the Export Control Act has never been challenged in the courts.

Congress and to the Executive, regardless of whether or not the courts should intervene.

Just as important constitutional issues underlie the problems posed by the administration of export controls, so important issues of international relations underlie the constitutional issues themselves. Export controls are—or should be—part of our general foreign economic policy. In fact, however, they have acquired a life of their own, and this is due in part to the fact that their administration has become segregated in the hands of a virtually autonomous permanent bureaucracy whose activities have never been closely scrutinized from without. Export controls have not even been integrated into our general policy regarding so-called East-West trade: they were conceived, in the first post-war decade, as a powerful weapon for restricting such trade, and in that they succeeded, but in the mid-1950's, when more positive approaches were needed to respond to Soviet and East-European initiatives, the requirement that virtually every American sale to a Communist country (other than Yugoslavia) be cleared in Washington frustrated the desire, expressed by successive Presidents, to expand "trade in peaceful goods" with the Soviet Union and Eastern Europe. In the mid-1960's, the export community has become inured to the domestic hazards of trading with Communists. As of the present writing, it is possible that only a relatively few of the largest manufacturer-exporters are even aware that the licensing policies of the Office of Export Control have been greatly relaxed in the past few years. Moreover, one can never be sure that a change in the international situation will not result in the reversal of this policy and in the revocation of outstanding licenses.

In this connection, it is of some significance that the proposed East-West Trade Relations Act, first presented by the Administration in 1966, which would empower the President to abolish discriminatory tariff and other restrictions on imports from the Soviet Union and other Communist countries of Eastern Europe (excluding East Germany) in the context of bilateral commercial agreements, stipulates that nothing contained therein shall be deemed to modify or amend the Export Control Act of 1949 or the Mutual Defense Assistance Control Act of 1951 (the Battle Act).³⁵¹ Nevertheless, the underlying purpose of the proposed act is to make it possible to expand United States exports to those countries, by relaxing the restrictions upon their exports to us and thereby enabling them to earn more foreign exchange with which to buy our goods. The passage of such legislation would be a valuable step forward in creating a suitable legal framework for East-West trade. Yet so long as the Office of Export Control retains its enormous power, a considerable doubt remains whether American businessmen will make the necessary effort to meet the potential demand of Eastern markets.

351. For the text of the proposed East-West Trade Relations Act of 1966, see 54 DEPT STATE BULL. 838 (1966); 19TH BATTLE ACT REPORT 36 (1966). The proposed act is discussed in Berman & Garson, *supra* note 339.

The United States Government could long ago have used export controls not only to restrict trade in strategic goods with Communist countries but also to expand trade in non-strategic goods on the basis of mutual advantage—by bargaining (as the Western European governments have done) reductions in our restrictions in return for reciprocal trade commitments on the other side.³⁵² We have probably now lost the opportunity to do this effectively, since it is doubtful today that any Communist country would be willing to make substantial concessions in return for our non-strategic exports, in view of the fact that most of them are available elsewhere. Even if they would agree to purchase certain quantities of our non-industrial goods and to sell us certain quantities of their own producer goods and advanced technology, such commitments would probably not be of sufficient magnitude to justify any longer the retention of our present system of export licensing, which has become, in fact, almost as much of a burden upon our exports to Western Europe as upon our exports to Eastern Europe.

Indeed, export controls should be seen not only in terms of East-West trade but in larger terms, as part of world-wide trade. Ultimately what is at stake here is the stability and integrity of the international economic and legal order. A principle of nondiscrimination in export controls can tolerate a broad distinction between military (and potential military) goods, internationally accepted as such, and peaceful goods. Such a principle of non-discrimination in exports can play a role similar to the principle of most-favored-nation treatment in imports. Admittedly, there are some special problems of dealing with countries whose foreign trade is wholly conducted by state agencies operating under a national economic plan. Admittedly, also, there are special problems of dealing with countries with which we are at war. But a blanket system of export licensing such as the United States has had since World War II starts from the principle of discrimination, rather than from the principle of nondiscrimination, and is too blunt an instrument for dealing with special problems.

It is to be hoped that before the Export Control Act is again renewed, Congress will be provided with an opportunity to conduct a full-scale inquiry into the wisdom as well as the mechanics of our trade policy as a whole, including restrictions both on exports and on imports, and that in the context of such an inquiry the Export Control Act will get the exposure and the debate which it deserves.

352. See Berman: *Thinking Ahead: East-West Trade*, 32 HARV. BUS. REV. 147 (1954); *A Reappraisal of U.S.-U.S.S.R. Trade Policy*, 42 HARV. BUS. REV. 139 (1964); *The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example*, 24 LAW & CONTEMP. PROB. 482 (1959); Statement of Feb. 26, 1965, in *Hearings on East-West Trade Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess., pt. 2, at 105 (1965).