The Export Administration Act of 1979: Refining United States Export Control Machinery

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I. INTRODUCTION

A peacetime system of direct controls on commercial exports1 has been imposed by the United States Government since World War II.2 Export controls restrict the free flow of goods out of the United States. Consequently, any system of governmental regulation in this field must balance the policy gains to be achieved through controls with the economic costs of their use.3 This cost-benefit approach to export controls challenges legislators' efforts to design a legal framework which serves multiple, and often contradictory, policies.4

Recently, the restrictions on exports to Iran and the Soviet Union5 have required the Carter Administration to assess the purposes of such controls against their economic costs. The present use of export controls by the United

1. This Comment discusses civilian, commercial exports. Such exports may have potential military uses. See note 4, infra. The export of implements of war is controlled by the Department of State. The State Department issues export licenses for commodities listed on the United States Munitions List which is established by the Arms Export Control Act, § 38, 22 U.S.C. § 2778 (1980). For the claim that the Arms Export Control Act, by authorizing the President to control the export of defense related articles (defined as any arms or technical data on the U.S. Munitions List, 22 C.F.R. § 121.01, n.1 (1978) (emphasis added)), infringes first amendment rights implicit in the flow of international business communications, see Note, International Trade: Export Restrictions — United States v. Edler Indus. Inc., 579 F.2d 516 (9th Cir. 1978), 20 HARV. INT'L L. J. 201 (1979).


5. For a discussion of the recent U.S. restrictions placed on trade with the Soviet Union and Iran, see § IV infra.
States has in turn generated a measure of controversy over the role of export controls in solving international crises. Such current debate makes the subject of export control law one which deserves scholarly attention.

This Comment will analyze and evaluate past and present U.S. export control law, along with the policies behind it. After briefly recounting the history of U.S. export control legislation and the policies and procedures under which the United States is currently operating, the author will examine the major modifications made in this area by the recently enacted Export Administration Act of 1979 (Act of 1979). The changes made by the Act of 1979 will be discussed in terms of their ability to solve problems which arose under the predecessor act, the Export Administration Act of 1969 (Act of 1969). In addition, recent U.S. economic sanctions against the Soviet Union, imposed by President Carter pursuant to the authority delegated to him by the Act of 1979, will be analyzed in light of the restrictions placed upon such executive actions by the same Act.

The author concludes that the Act of 1979 is a positive step towards a rationalization of the U.S. export control system. In mandating a closer inspection of the harm resulting from export controls, by weighing that harm against the intended purpose of the controls, the new provisions of the Act of 1979 should force government decision-makers to limit the use of export restrictions to instances where such controls will be effective. A necessary by-product of this process presumably will be a lessening of the restraint on the flow of United States goods abroad.

II. THE PURPOSES OF EXPORT CONTROLS

In contrast to other free trade obstacles, which typically are justified by a desire to protect domestic industries from foreign imports, export controls traditionally have been imposed to further a vast array of external governmental policies. Unlike some import controls that indirectly stem the free

6. For a discussion of other U.S. legislation which directly or indirectly affects exports, see Whitman, A Year of Travail; The U.S. and the International Economy, 57 FOR. AFF. 527, 550-53 (1978) [hereinafter cited as Whitman].
10. For a listing of tariff (a duty on imports) and non-tariff trade barriers, see Streng, Foreign Controls on U.S. Exports, 65-93 in EXPORTING: GOVERNMENTAL ASSISTANCE AND REGULATION (Practicing Law Institute of New York City, ed. 1975) [hereinafter cited as Streng].
12. For example, Section 3 of the Act of 1979 declares it to be the policy of the United States to use export controls to further the foreign policy and national security interests of the United States. Act of 1979, § 3(2)(A), (B), 50 U.S.C. app. § 2402(2)(A), (B) (1980).
flow of trade, export controls represent direct restrictions on international commerce. In the United States, as in many other countries, the system of export controls is implemented by governmental agencies which, pursuant to legislative authority, regulate the flow of certain commodities by prohibiting their export without a license issued by the agency. Under the American system, the Office of Export Administration of the Department of Commerce has the authority to grant or to deny licenses to exporters which seek to ship commodities whose export has been restricted by the Government.

A. National Security Rationale

Historically, export controls have been used widely in the United States as a tool to further major policy goals. Frequently, export controls have been utilized to promote national security interests by denying the benefits of free trade to hostile governments. In times of war, controls have been implemented for this reason. Controls also are employed in peacetime to prevent the export of certain civilian-use products that might be converted to military uses by the importing country. This latter purpose of controls-implementation, whose current justification will be discussed, has received

13. Import restrictions of this variety would include: tariffs, government participation in trade, product quality standards and customs procedures. Strong, supra note 10, at 65-90.
17. The power of Congress to regulate commerce with foreign nations, U.S. CONST. Art. I, § 8, cl. 3, is delegated to the President under the Act of 1979, §5(a), 50 U.S.C. app. § 2404(a); § 6(a), 50 U.S.C. app. § 2405(a); § 7(a), 50 U.S.C. app. § 2406(a) (1980). The Act of 1979 mandates that the President's authority be vested in the Secretary of Commerce. Id. The Secretary's authority to regulate exports is vested in the Office of Export Administration of the Department of Commerce which is empowered to approve or disapprove all export license applications. 15 C.F.R. § 370.1(c) (1980). For a brief discussion of the organization and daily operations of the Office of Export Administration, see INDUSTRY AND TRADE ADMINISTRATION, DEPARTMENT OF COMMERCE, OVERVIEW OF THE EXPORT ADMINISTRATION PROGRAM 8-9 (1979) [hereinafter cited as COMMERCE DEPARTMENT OVERVIEW].
18. For a discussion of the policies which led to the original establishment of a non-wartime system of export controls following World War II, see Berman & Garson, U.S. EXPORT CONTROLS — Past, Present and Future, 67 COLUM. L. REV. 791-94, 799-800 (1967) [hereinafter cited as Berman & Garson].
20. For the statutory source of presidential authority to impose wartime controls, see the Trading With The Enemy Act of 1917, 50 U.S.C. app. § 1 et seq. (1980).
22. See § III.C.1.b infra.
notoriety recently and has ignited significant political confrontation within Congress over the role of export controls in safeguarding American security.\textsuperscript{23}

One example of this controversy over national security controls is seen in the debate concerning the Government's approval of the export of American diesel engine technology to the Soviet Union for use in the Soviet Union's Kama River truck plant.\textsuperscript{24} There are indications that this truck plant is presently producing military vehicles, some of which were apparently used by the Soviets in their January 1980 invasion and occupation of Afghanistan.\textsuperscript{25}

B. Foreign Policy Rationale

Export controls also have been employed in carrying out U.S. foreign policy objectives.\textsuperscript{26} The traditional role of export controls in the area of foreign relations has been to symbolically express U.S. disapproval of certain foreign conduct, with the intent of reversing the unfavorable foreign conduct.\textsuperscript{27} It has been argued that the implementation of controls demonstrates a U.S. commitment to a particular position, while failure to so act could lead to misunderstanding among U.S. allies.\textsuperscript{28} However, the effectiveness of export controls in significantly furthering U.S. foreign policy goals has been questioned.\textsuperscript{29}

Nevertheless, the use of export controls to achieve foreign policy aims has been popular with the Carter Administration as part of an overall plan to influence the human rights stance of various foreign governments.\textsuperscript{30} Likewise, the United States has participated in U.N. economic sanctions against Zimbabwe-Rhodesia and South Africa in an attempt to influence the internal policies of those two nations.\textsuperscript{31} In addition, foreign policy-motivated export

\begin{itemize}
\item 26. For a discussion by former State Department officials of the role which export controls have played in furthering U.S. foreign policy goals, see \textit{S. REP. No. 169, 96th Cong., 1st Sess. 5-8, reprinted in} [1979] \textit{U.S. CODE CONG. & AD. NEWS} 1152-55.
\item 27. Bingham & Johnson, supra note 3, at 908.
\item 29. See § III.C.1.a infra.
\item United Nations Security Council Resolution No. 5386, adopted August 7, 1963, authorized the imposition of an arms embargo on South Africa by member states in opposition to the policy
\end{itemize}
controls are resorted to under other circumstances including, but not limited to, the following: when foreign countries have imposed export controls on certain products, thereby decreasing the supply and increasing the price of those products in the United States; when foreign countries have used export controls in an attempt to influence the foreign policy of the United States; and when foreign countries have permitted their territories and resources to be used for international terrorism.

C. Short Supply Rationale

Although export restrictions are usually employed for reasons of national security and foreign policy, a third major purpose of export controls is to restrict the outflow of scarce domestic goods to prevent the inflationary effect of foreign demand on the U.S. economy. When short supply controls are imposed, the amount available for export is allotted among the interested exporters and destination countries on the basis of their respective shares of the U.S. export market for that commodity during a prior period in which supply was "normal." For most of the period following the Korean War, there were only sporadic and temporary short supply controls. However, recent shortages in commodities, such as soybeans and petroleum, have resulted in the imposition of more permanent export monitoring.

Within the past decade, export control policy has had important economic and political effects within the United States. For example, President Carter's recent decision to suspend grain exports to the Soviet Union has had direct consequences on both the vitality of the American agricultural sector and the future of Carter's reelection bid. The sensitivity of the issue of export controls is exacerbated by the fact that further restrictions on U.S. trade for foreign policy or for national security reasons serves to increase the sizeable U.S. deficit caused by reliance on oil from the Middle East. The Act of 1979

33. Id.
34. Id. at § 3(8), 50 U.S.C. app. § 2402(8) (1980).
35. See Berman & Garson, supra note 18, at 830-34. See also Comment, Export Controls, 58 YALE L.J. 1325, 1331 (1949).
36. COMMERCE DEPARTMENT OVERVIEW, supra note 17, at 5.
37. Id.
38. Id.
39. See § IV infra.
41. During the House Debate on the Act of 1979, 50 U.S.C. app. § 2401 et seq. (1980), Senator Stevenson stated:

The U.S. is becoming less competitive at home and abroad. In 1975, the Nation had a
will be discussed within the context of the political, economic and external policy implications which arise when export control determinations are made.

III. THE EXPORT ADMINISTRATION ACT OF 1979

A. History of the Act

The Act of 1979 is only the most recent legislative enactment by which Congress has authorized the President to regulate U.S. exports.42 The Executive has had the power, since the enactment of the Trading with the Enemy Act of 1917,43 to prohibit all exports to countries at war with the United States and its allies. It was under the authority of that Act that the President, in 1950, placed a halt on all economic dealings with Communist China and North Korea following the incursion of Communist Chinese forces into Korea.44 In contrast to the wartime power given the President under the Trading with the Enemy Act of 1917,45 the Mutual Security Act of 195446 authorized the President to restrict the peacetime exportation of arms, munitions, implements of war and $20 billion trade surplus in manufactured goods; last year it ran a $5.8 billion [deficit]. . . .

A factor in declining U.S. competitiveness is Government restriction of U.S. exports. U.S. exporters face export license controls, anti-trust, anti-bribery, anti-boycott, anti-nuclear proliferation, human rights, [environmental] reviews and other restrictions not faced by foreign competitors. We are the only nation in the world which treats exports as a favor to bestow upon worthy foreigners rather than an essential contribution to our economic well-being.


[r]estrictions on U.S. trade with the Soviet Union in the interests of national security have long been an integral part of U.S. foreign policy — indeed, for most of the postwar period, such trade was essentially embargoed entirely. Over the past decade, however, economic relations between East and West have been expanding and, by the heyday of détente, U.S. restrictions were largely confined to items having a direct military application. Most recently, the Administration has attempted a broader balancing of the trade-offs between the effects of a particular export decision on restraining Soviet expansionism, U.S.-Soviet relations, and the United States' trade competitiveness and world leadership position.

Id. at 551-52.

43. 50 U.S.C. app. § 1 et seq. (1980).

44. 31 C.F.R. §§ 500.101-.808 (1967).

45. 50 U.S.C. app. § 1 et seq. (1980).

related technology to any nation.\textsuperscript{47} A third statute dealing with U.S. export controls was the Mutual Defense Assistance Control Act of 1951\textsuperscript{48} which conditioned the extension of Marshall Plan Aid to U.S. allies upon assurances that they would not export goods subject to U.S. strategic export control to the Soviet Union.\textsuperscript{49} The leverage provided by Marshall Plan Aid assured the compliance of U.S. allies in imposing multilateral trade controls against the eastern block countries.\textsuperscript{50} However, since World War II, the economic growth of Western Europe, coupled with changing international political relationships, has resulted in a reduction of U.S. export control leverage and a less-than-unified export control approach by the United States and its allies.\textsuperscript{51} The extent of multilateral export control cooperation between the United States and its allies, and the role that this factor has in the formulation of U.S. export control policy, is a topic of current concern. The ramifications of multilateral export control cooperation will be explored in detail, below, within the context of the new provisions of the Act of 1979 which are intended to increase U.S. participation in multilateral controls.\textsuperscript{52}

The Act of 1979, the current authority for the regulation of U.S. exports, has two predecessors: the Export Control Act of 1949 (Act of 1949)\textsuperscript{53} and the Export Administration Act of 1969.\textsuperscript{54} The successive statutory changes in the degree of export control, evidenced in these three statutes, reflect the changing political relationship between the United States and the Communist world. The Act of 1949, passed in the midst of the Cold War, imposed an almost complete embargo on all trade with the Soviet bloc; exports which would contribute to either the military or economic strength of the Communist nations were prohibited.\textsuperscript{55} The Act of 1969 narrowed the broad controls mandated by the earlier Act of 1949; only goods of potential strategic value were banned for export to the Communist bloc.\textsuperscript{56} Essentially, there were three reasons for the shift in U.S. policy from a broad economic embargo under the Act of 1949 to a more narrow, national security approach to export controls under the Act of 1969.\textsuperscript{57} First, trade with the Soviets, a part of the Nixon-Kissinger era détente

\textsuperscript{49} \textit{Id.} at ch. 575, § 103, 65 Stat. 645 (1951).
\textsuperscript{50} See 125 CONG. REC. S9795 (daily ed. Jul. 18, 1979).
\textsuperscript{51} Bingham & Johnson, \textit{supra} note 3, at 906.
\textsuperscript{52} See \$ III.C.2 infra.
\textsuperscript{57} \textit{Id.} at 896-97.
would create a relationship of interdependence and interreliance between East and West, thereby making it difficult for the Soviets to take any harmful unilateral actions.\(^5\) Second, the USSR had become one of the world's major economic and military powers, despite the broad embargo of the Act of 1949.\(^6\) Third, the uniformity of allied multilateral export restrictions against the Eastern bloc had waned as the leverage provided by the Marshall Plan had declined, with the result that the allies were exporting goods to the Soviets that were subject to U.S. trade restrictions.\(^7\) Indeed, the relaxation of export controls under the Act of 1969 resulted in the opening and the expansion of East-West trade.\(^8\) During the first year of the existence of the Act of 1969, 1,550 commodities in 775 Commodity Control List (CCL)\(^9\) entries were removed from the CCL and were made available for export to the Soviet bloc countries.\(^10\)

Similarly, the Act of 1979 indicates a still greater willingness on the part of Congress to expand East-West trade. The preface to the statute discloses that it is "An Act to provide authority to regulate exports, to improve the efficiency of export regulation, and to minimize interference with the ability to engage in commerce."\(^11\) In reality, the Act of 1979 is more of a legislative effort at improving the procedural and administrative efficiency of the existing export control system than a direct attempt to promote U.S. export performance.\(^12\) However, by improving the technical and functional aspects of export licensing and by mandating a more careful consideration of the economic and balance of payments impacts of controls, the new legislation should serve to free many unjustifiably controlled commodities.

B. The Licensing Framework

1. Unilateral Controls

The Act of 1979, like its predecessors, allows the President to employ controls to (1) restrict exports of possible military significance to the importer,\(^13\)

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id.


\(^{62}\) The Act of 1979, 50 U.S.C. app. § 2401 et seq. (1980), authorizes the Secretary of Commerce to establish a list, referred to as the "commodity control list" (CCL), which consists of goods and technology subject to control under the Act. Id. at 4(b), 50 U.S.C. app. § 2403(b) (1980). The CCL is incorporated by reference at 15 C.F.R. § 399.1 (1980).

\(^{63}\) DEPARTMENT OF COMMERCE, 95TH QUARTERLY REPORT: EXPORT CONTROL 5 (1971).


use controls to further the foreign policy of the United States and (3) restrict the export of scarce domestic goods in order to reduce the inflationary impact of foreign demand. The President is authorized to delegate the authority conferred upon him to appropriate Executive Departments which carry out the interagency licensing function required by the Act of 1979.

68. Id. at § 7(a)(1), 50 U.S.C. app. § 2406(a)(1) (1980). See id. at § 3(2), 50 U.S.C. app. § 2402(2) (1980). Professors Berman and Garson noted the President’s unfettered discretion under the Act of 1949:

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 U.S., 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.


In addition, see United States v. Rosenberg, 47 F. Supp. 406 (E.D.N.Y. 1942), aff’d, 150 F.2d 788 (2d Cir. 1945), cert. denied, 326 U.S. 752 (1945), for the constitutionality of export control legislation. In that case, the defendants were indicted for violating the Export Control Act of 1940, ch. 508, § 6, 54 Stat. 714 (1940) (codified as the Act of 1949, Pub. L. No. 80-11, 63 Stat. 7 (1949) (repealed 1969)), and claimed as a defense that the Act was an unconstitutional delegation of authority to the President. United States v. Rosenberg, supra at 47 F. Supp. 406, 406-07. The district court upheld the constitutionality of the statute by distinguishing between Congressional grants of authority to the Executive over domestic affairs and those delegations dealing with foreign affairs. Id. at 408. The court stressed the President’s unique and traditional role as the representative of the United States in the world community. Id. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), where the Supreme Court approved the discretionary delegation of legislative authority to the President to control the export of arms by U.S. citizens to nations involved in the Chaco War in South America. Id. at 325-29. For a discussion of the nature and distribution of federal power in foreign affairs, see Lofgren, United States v. Curtiss-Wright Export Corporation: An Historical Reassessment, 83 YALE L. J. 1 (1973); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972). It should be noted that although section 4(d) of the Act of 1979, 50 U.S.C. app. § 2403(d) (1980), refers to a “right of export,” the legislative history of the Act makes it clear that there is no right of constitutional dimensions, to export. There is, however, a presumption in favor of the exporter under the Act of 1979, 50 U.S.C. app. § 2401 et seq. (1980), with the burden of proof on the Government to show “important public interests” for the denial of an export license. S. REP. No. 169, 96th Cong., 1st Sess. 4, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1147, 1150.

A relatively recent constitutional attack on U.S. export control legislation was made in United States v. Brumage, 377 F. Supp. 144 (E.D.N.Y. 1974), where the district court held that the statutory penalty for willfully exporting goods (1) without a license and (2) with the knowledge that exports will be used for the benefit of a Communist nation was not void for vagueness. Id.

though the Act places primary responsibility for export licensing decisions with the Department of Commerce, it requires the Secretary of Commerce to consult with the Secretaries of State and Defense when controls are imposed to further the foreign policy or national security interests of the United States. It is through this interagency, consultative framework that the various Executive Departments make the conflicting policy determinations mandated by the statute.

Whether a particular export is subject to control depends upon whether that commodity is listed on the CCL which is established by the Secretary of Commerce. Exporters seeking to ship items listed on the CCL must apply to the Department of Commerce for a "validated license" prior to exporting the product. The ease with which an exporter may obtain a license depends largely on whether the destination is a restricted, "controlled" country as established by Department of Commerce regulations issued pursuant to the statute. Exports of commodities not requiring a validated license are exported under a "general license" without formal application by the exporter.

In general, only four categories of goods are listed on the CCL: (1) civilian products with possible military application (e.g., computers), (2) nuclear weapons and crime control equipment restricted for foreign policy reasons, (3) petroleum products under short supply controls and (4) technical data relating to design and manufacturing knowledge. In addition to national security, foreign policy and short supply considerations, the foreign availability of a particular commodity to controlled countries from sources outside the United States is an important factor in the Government’s decision to place an item on

73. For example, if controls are imposed on a commodity for national security reasons, the Secretary of Commerce, in consultation with the Secretary of Defense, would weigh the risk of diversion of an export from civilian to military use against the economic harm of license denial. See generally Computer Exports to the Soviet Union: Hearings Before the Subcomm. on Int’l Econ. Policy and Trade of the House Comm. on Int’l Relations, 95th Cong., 1st Sess. (1977) [hereinafter cited as Computer Hearings].
74. See note 62 supra.
the CCL.\textsuperscript{79} The Government also considers what safeguards should be attached to the export of a certain item to prevent unauthorized military diversion from its stated civilian end-use.\textsuperscript{80}

The controlled countries generally fall into one of two broad categories: the Communist nations and those specific nations to which exports are restricted for foreign policy reasons.\textsuperscript{81} Several factors are considered in determining the controlled nature of a certain recipient country, including the country's present and potential relationship with the United States and its willingness to control retransfers of U.S. exports in accordance with U.S. policy.\textsuperscript{82} Although the above analysis may suggest that validated license controls are substantial, ninety-five percent of U.S. exports are shipped under a general license without a formal application to the Department of Commerce.\textsuperscript{83}

2. Multilateral Controls

In addition to these unilaterally-imposed controls, the United States participates in a multilateral export control system with its allies.\textsuperscript{84} Since World War II, the United States, its NATO allies,\textsuperscript{85} except Iceland, and Japan have participated in an informal, cooperative system of national security export controls, known as the Consultative Group Coordinating Committee (COCOM).\textsuperscript{86} The party primarily responsible for the creation of COCOM was the United States, which sought the cooperation of its allies in complying with the American strategic controls imposed against the Soviet Union and its satellites following World War II.\textsuperscript{87} Allied compliance with U.S. trade restrictions was considered a necessary prerequisite to the effectiveness of U.S. controls since Eastern bloc countries could easily circumvent U.S. controls by

\textsuperscript{79} Act of 1979, \textsection 4(c), 50 U.S.C. app. \textsection 2403(c) (1980). Generally, controls are not placed on items for national security or for foreign policy reasons if they are freely available from foreign sources in comparable quantity and quality to those produced in the U.S. \textit{Id.} However, the President can still impose controls, notwithstanding foreign availability, if he determines that the absence of controls would be detrimental to the national security or foreign policy interests of the United States. \textit{Id.}

\textsuperscript{80} \textit{Id.} at \textsection 5(a)(3), 50 U.S.C. app. \textsection 2404(a)(3) (1980). An example of a safeguard attached to an export would be the possibility of on-site visitation by a company representative to insure that the product is under civilian use in the importing nation. \textit{Computer Hearings, supra} note 73, at 64-65.

\textsuperscript{81} See 15 C.F.R. \textsection 370 (Supp. 1) (1980).

\textsuperscript{82} Act of 1979, \textsection 5(b), 50 U.S.C. app. \textsection 2404(b) (1980).

\textsuperscript{83} \textit{Extension Hearings, supra} note 78, at 89-90 (statement of Stanley J. Marcuss).

\textsuperscript{84} \textit{See Act of 1979, \textsection 3(3), 50 U.S.C. app. \textsection 2402(3); \textsection 5(i), 50 U.S.C. app. \textsection 2404(i) (1980).}

\textsuperscript{85} Member countries of the North Atlantic Treaty Organization include: Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Turkey, United Kingdom and the United States. \textit{NATO Information Service, NATO HANDBOOK} 5 (1972).

\textsuperscript{86} U.S. participation in COCOM was first officially recognized in the Mutual Defense Assistance Control Act of 1951, ch. 575, \textsection 101, 65 Stat. 645 (1951) (superseded 1979).

\textsuperscript{87} Bingham & Johnson, \textit{supra} note 3, at 904.
buying U.S. restricted commodities from the Allies. A combination of the threat of withdrawal of U.S. economic aid, plus the depressed economic condition of Western Europe and Japan in the post-war period assured allied accord with U.S. controls.

The need to limit the foreign availability of U.S. controlled goods through the establishment of multilateral controls has continued to the present and serves as the principal justification for the continued existence of COCOM. Although COCOM remains an informal arrangement without enforcement sanctions, written charter or agreement, COCOM's validity and U.S. participation in it is recognized under the Act of 1979. While the United States still exercises considerable influence over the purpose and direction of COCOM, the ability of that organization to effectively coordinate the strategic controls of participating nations has recently been brought into question. Current controversy surrounding COCOM is focused in two general areas: (1) the extent to which member countries uniformly abide by the COCOM controls and (2) the extent to which U.S. controls exceed COCOM controls. The difficulty of coordinating the multilateral COCOM controls which the United States is informally required to impose and those controls which the United States decides to implement unilaterally will be discussed below within the context of the new statutory provisions in the Act of 1979 dealing with multilateral controls.


The Act of 1979, carries over many of the provisions of the Act of 1969, but also makes significant modifications and improvements in export control authority. The new Act adds the following congressional findings to those existing under the Act of 1969 for the purposes of highlighting the significance of exports to the U.S. economy and of restricting the use of export controls to

88. Berman & Garson, supra note 18, at 834.
89. See id. at 834 and text accompanying notes 49-50 supra.
90. Extension Hearings, supra note 78, at 261.
91. Bingham and Johnson attribute the informality of the COCOM "arrangement" to domestic, political considerations with COCOM countries other than the United States, i.e., some European governments with major leftist factions must be cautious in joining in the implementation of anti-Communist trade controls with the United States. Bingham & Johnson, supra note 3, at 904.
94. Id. at 1.
95. See § III.C.2 infra.
instances where they are needed for national security, foreign policy or short supply reasons.97

The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy. . . .

It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which would strengthen the Nation's economy.98

These additional findings are important indications of Congress' intent that export licensing procedures be, at a minimum, more sensitive to economic and balance of payments considerations. In view of the sizeable U.S. trade deficit, Congress has directed the Administration to give economic factors more weight when using controls to further the foreign policy or national security objectives of the U.S.99 This cost-benefit approach to export controls100 permeates many of the new provisions of the Act of 1979 and serves as a central policy statement against which the Act can be assessed.

The Act of 1979 adds another congressional finding to those contained in the Act of 1969:

Minimization of restrictions on exports of agricultural commodities and products is of critical importance to the maintenance of a sound agricultural sector, to achievement of a positive balance of payments, and to reducing the level of Federal expenditures for agricultural support programs. . . .101

This new indication of congressional concern is of current significance as it is by the authority of the Act of 1979 that President Carter recently suspended grain sales to the Soviet Union in retaliation for Soviet intervention in Afghanistan.102

1. Policy Modifications in the Act of 1979

a. Foreign Policy Controls

Export controls, as a form of economic leverage, traditionally have been used in the Executive Department as a means of securing political objec-

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99. Act of 1979, § 3(2)(A), 50 U.S.C. app. § 2402(2)(A) (1980), specifically states the cost-benefit approach to export control, embodied in the statute, by declaring it to be the policy of the U.S. to use export controls only after full consideration of their impact on the domestic economy and only to the extent necessary to restrict the export of goods which would significantly improve the military potential of a controlled country (emphasis added). Id.
100. Id.
101. Id. at § 2(9), 50 U.S.C. app. § 2401(9) (1980).
This popularity of foreign policy controls is due to a variety of factors: the lack of a requirement of congressional approval prior to implementation, the symbolic importance of the restrictions in crisis situations and the perception that controls are comparatively less costly in terms of achieving the intended foreign policy goal when compared to alternative means. However, this historical rationalization for the use of foreign policy controls was seriously questioned during congressional debate on the Act of 1979. The result was the inclusion of several new provisions in the statute which restrict the ability of the President to use export controls in furtherance of foreign policy objectives.

The modifications reflect the unsettling attitude taken toward foreign policy controls by American exporters who view this form of trade restriction as a major source of unpredictability in their decision to export a certain product to a willing importer. Export controls imposed to further U.S. foreign policy objectives are viewed as a hindrance on the development of U.S. export trade at both the buying and selling end of trade contacts: (1) American businessmen are unwilling to enter uncertain markets where ad hoc controls can be imposed for vague foreign policy reasons and (2) foreign buyers slowly reevaluate their opinion of the United States as a reliable supplier. In fact, the legislative history of the Act of 1979 states that "[n]o aspect of U.S. export control policy received sharper criticism during Committee and Subcommittee hearings than controls maintained for foreign policy purposes." Former high-ranking government officials testified to the need for weighing the increasing financial costs of foreign policy controls on the deficit-ridden American economy. The possible use of alternatives to export controls, such as the granting...
and withholding of export credits to target nations, was suggested, during the hearings, as a less economically harmful technique of securing American political objectives.\(^\text{112}\)

Additional shortcomings of using export restrictions as a foreign policy tool have been pointed out by several commentators. If imposed for symbolic reasons, their inflexibility makes it difficult to remove them without sending unintended messages to other nations.\(^\text{113}\) Export restrictions employed as a foreign policy tool are rarely effective in influencing the internal or external policies of economically powerful nations like the Soviet Union, which is not dependent on U.S. exports, because such use makes it impossible for foreign leaders to change their conduct without damaging their individual or national pride.\(^\text{114}\) The use of foreign policy controls is also inconsistent with U.S. export promotion programs.\(^\text{115}\) Thus, although the use of export controls for foreign policy reasons is often justified in terms of its symbolic significance of a U.S. commitment to a particular political or moral position,\(^\text{116}\) notwithstanding the resulting harm to the domestic economy, weighty counter-arguments question this particular use of export controls in terms of its economic detriment and political ineffectiveness.\(^\text{117}\) Indeed, some commentators view the usual ad hoc application of foreign policy controls as underlining the absence of a comprehensive, long-term U.S. foreign policy dealing with the subject of the controls.\(^\text{118}\)

Congress reacted to the arguments of U.S. businessmen and government

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112. S. REP. NO. 169, 96th Cong., 1st Sess. 6, reprinted in [1979] U.S. CODE CONG. & AD NEWS 1147, 1152-53. Although the granting and withholding of export credits was not accepted as a substitute for export controls under the Act of 1979, the use of trade financing to provide political leverage is used under other U.S. legislation. See Export-Import Bank Act, 12 U.S.C. § 635(e)(b) (1978). See also note 126 infra.

113. Bingham & Johnson, supra note 3, at 908.

114. Extension Hearings, supra note 78, at 20 (statement of George Ball).

115. See Extension Hearings, supra note 78, at 69.


117. Bingham & Johnson, supra note 3, at 908.

118. Various witnesses before Congress testified to the need for long-term foreign policy strategies, in lieu of the stop-gap use of export controls, to achieve American foreign policy objectives. Dimitri K. Simes, Director of Soviet Studies at Georgetown University's Center for Strategic and International Studies, stated: "... linkage ..., in order to be effective, should be implicit rather than explicit and should be related to long-term trends rather than being a form of instant retribution as soon as some Soviet dissident is arrested and put on trial." Extension Hearings, supra note 78, at 42. James H. Giffen, President of Armco International, Inc., distinguished between using trade as leverage in securing U.S. foreign policy goals and using export controls for foreign policy purposes. Extension Hearings, supra note 78, at 64. For a discussion of the Administration's linkage of the scope of U.S.-Soviet economic relations to the achievement of U.S. security and political objectives, see Huntington, Trade, Technology and Leverage: Economic Diplomacy, 32 FOR. POL. 63 (1978).
officials by imposing certain statutory limits on the discretion of the Executive in using export controls in furtherance of U.S. foreign policy. Section 6(b) of the Act of 1979 requires the President to consider the following six criteria when "imposing, expanding, or extending" foreign policy controls:

1. The probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls;
2. the compatibility of the proposed controls with [overall U.S. policy toward the target country];
3. the reaction of other countries to the imposition or expansion of such export controls by the United States;
4. the likely impact of the proposed controls [on the domestic economy, including U.S. export performance, the reputation of the United States as a reliable supplier, and the competitive position of the United States in the international economy];
5. the ability of the United States to enforce the proposed controls effectively; and
6. the foreign policy consequences of not imposing controls.119

Although these six criteria constitute the major new policy limitation on executive discretion under the new Act, Congress imposed additional restrictions on executive power in this area to discourage the use of foreign policy controls and to prevent the commercial uncertainty which arises from their implementation. Section 6(a)(2) of the Act of 1979 imposes certain durational time limits on foreign policy export controls — one year unless extended by the President for an additional 1 year period(s).120 In addition, the Act of 1979 requires the President to consult with affected sectors of U.S. industry and to make a determination that "reasonable efforts have been made to achieve the purposes of the controls through negotiations or other alternative means," prior to imposing foreign policy controls.121 Notification to Congress of the rationale for imposing the controls is also a condition to their implementation under the Act of 1979.122

Although it might appear that these provisions place some specific limits on executive discretion, the new enactments may constitute more of a change in form than in substance. In response to objections by the Administration that

119. § 6(b), 50 U.S.C. app. § 2405(b) (1980). Other proposals have been advanced to reduce executive discretion (and the concomitant unpredictability) in this area. One plan would have the Congress more clearly define the priority of the foreign policy objectives themselves which might be the basis for the implementation of export controls. Note, Export Licensing: Uncoordinated Trade Repression, 9 GA. J. INT'L & COMP. L. 333, 350 (1979).
121. § 6(c)(d), 50 U.S.C. app. § 2405(c)(d) (1980).
122. Id. at § 6(e), 50 U.S.C. app. § 2405(e) (1980).
inclusion of the Section 6(b) criteria in the Act of 1979 would restrict the necessary ability of the President to respond swiftly to crises situations, the Senate Committee on Banking, Housing and Urban Affairs reported that "the provision did not establish criteria to be met but factors to be considered, and recognized that the President, having considered them, might find one or more of the factors irrelevant to a decision to impose or remove controls." Thus, while there has been much technical revision in the statutory language with the appearance of a congressional attempt to discourage the use of foreign policy controls, broad executive discretion in this area has been left substantially intact.

Nevertheless, the cost-benefit framework enunciated in Section 6(b) of the Act of 1979 is significant in several respects. First, regardless of whether such a balancing process actually reduces the scope of controls, the new provisions of the Act should insure that conflicting policy objectives actually do receive simultaneous consideration prior to the imposition of controls. In a statute such as the Act of 1979, where congressional control is necessarily limited by the need to accord the Executive certain discretion over foreign affairs, perhaps the best compromise which can be achieved is such an airing of competing policy interests prior to the time when control decisions are made.

Second, although, undoubtedly, some of the Section 6(b) factors were previously weighed by the Executive Department in its control decisions, by an explicit requirement of a consideration of such factors, Congress has given an indication of its intent that such controls be accorded a more limited role in achieving American foreign policy objectives. This new provision signifies the need to search for less economically harmful techniques than the use of export controls to advance U.S. foreign policy interests.

Third, Section 6(b), by requiring an antecedent consideration of various governmental policies, attempts to eliminate the role of export controls (trade sanctions) as an automatic executive response to objectionable foreign conduct, often to be followed by high-level sanctions (e.g., military force).

124. See id. at 3, 6-8; 1149, 1152-55.
125. See id. at 9; 1155.
126. See, e.g., the 1974 Stevenson Amendment to the Export-Import Bank Act, 12 U.S.C. § 635(e)(b) (1978), which, by limiting credits to the Soviets to $300 million, was designed to influence Soviet human rights policy. See also the Jackson-Vanik provision of the 1974 Trade Act, 19 U.S.C. § 2432 (1979), which prohibited export credits and MFN tariff treatment for non-market economies imposing restrictions on the right to emigrate. Id.
127. See § 6(b), 50 U.S.C. app. § 2405(b) (1980).
While the new criteria will not entirely eliminate the inherent unpredictability arising from the use of foreign policy controls,\textsuperscript{128} these criteria could help minimize business uncertainty by narrowing the use of such controls to situations in which controls will be effective.

In short, new provisions of the Act of 1979, by requiring a balancing of competing policy concerns, attempt to limit executive use of foreign policy controls. However, congressional efforts at restraining executive authority in this area are necessarily limited by the need to accord the President some degree of discretion in the area of foreign affairs. Nevertheless, the Act of 1979 expresses a willingness on the part of Congress to give economic factors more weight in export control policy and may be an indication of further congressional control of this area in the future.\textsuperscript{129}

b. National Security Controls

In the area of controls used to inhibit the export of civilian products with possible military applications, the Act of 1979 introduces certain statutory revisions which refine the control process and indirectly attempt to improve export performance without comprising national security interests. The U.S. system of national security export controls starts with the assumption that such controls only serve the limited purpose of delaying, rather than totally preventing, the acquisition by controlled countries of whatever leadtime the United States may have in militarily applicable technologies.\textsuperscript{130} Theoretically,

\begin{itemize}
  \item \textsuperscript{128} Although less than one-half of one percent of all license applications received in 1978 were rejected, \textit{Extension Hearings, supra} note 78, at 91, such statistics disguise the ever present unpredictability which underlies the licensing process thereby causing exporters to be unwilling to approach Eastern markets. \textit{Note, Export Controls — A National Security Standard?}, 12 \textit{Va. J. Int'l L.} 92, 99 (1971).
    \begin{quote}
    In agreeing to eliminate the House provision for Congressional veto of export controls for foreign policy purposes, the conferees emphasized their expectation that the executive branch would consult fully with Congress prior to employing any such controls, and agreed to give further consideration to a congressional veto mechanism in subsequent legislation in the event prior consultation on foreign policy controls proved inadequate under the provisions of this act.
    \end{quote}
  \item \textsuperscript{130} Dr. Ellen Frost of the Department of Defense explained the leadtime concept as follows:
    \begin{quote}
    Now our object is not, and cannot, be to delay the export of something once and for all. Technology is a moving train and the Russians are going to get there anyway in their own way and their own time. But our object is to delay their acquisition of certain critical technologies for certain periods of time. We are dealing here with a marginal concept. That is what “leadtime” means.
    \end{quote}
\end{itemize}
the United States would reach a higher level of technology during the delay provided by the controls. This view of the limited use of national security controls is justified considering the ease with which such controls can be circumvented or, alternatively, considering the difficulty with which they can be enforced. For example, re-exports of U.S. goods to controlled countries may constitute a major source of leakage under a national security control program.

A second shortcoming of national security controls is the difficulty of devising effective safeguards to prevent a country hostile to the United States from diverting U.S. exported critical technologies to military use. Indeed,

131. Id.
132. Presently, re-exports of U.S. origin goods, on the CCL, to controlled countries require a re-export license issued by the United States. S. Rep. No. 169, 96th Cong., 1st Sess. 11, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1147, 1157-58. In COCOM countries that control goods to the same extent as the United States, two licenses would be required for the re-export of U.S. origin goods: one from the COCOM country and one from the United States. Id. An amendment which would have eliminated the need for the U.S. license was shelved. Id.

Also, note that the Act of 1979 authorizes the President (as did its predecessor, the Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (superseded 1979)) to "prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States" (emphasis added). Act of 1979, § 5(a), 50 U.S.C. app. § 2404(a) (1980). Thus, although the President has never used this power, the Act of 1979, id., authorizes him to impose controls on non-U.S. origin exports of foreign subsidiaries of U.S. companies. An amendment which would have banned the imposition of controls on exports of foreign subsidiaries of U.S. companies, "except in international economic emergencies declared pursuant to section 202 of the International Emergency Economic Powers Act," 50 U.S.C. § 1702 (1980), was withdrawn. S. Rep. No. 169, 96th Cong., 1st Sess. 4-5, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1147, 1151-52. This amendment may have been proposed due, in part, to the friction caused in host countries where the U.S. seeks to extra-territorially impose its export control laws on foreign subsidiaries of U.S. based corporations located within the host country. For a general discussion of the conflict between the extra-territorial application of U.S. export control law and the foreign sovereignty of host countries see Skol and Peterson, Export Control Laws and Multinational Enterprises, 11 INT'L LAW. 29 (1977). See also Fruehauf Corp. v. Massardy [1968] D.S. Jur. 147, where the U.S. Treasury Department, pursuant to regulations issued under the Trading with the Enemy Act of 1917, 50 U.S.C. app. § 5(b)(1)(1980), attempted to prevent the sale of truck assemblies by a French subsidiary of the U.S. based Fruehauf Corporation to Automobiles Berliet, S.A., France's largest truck manufacturer. The Fruehauf assemblies were to be used by Berliet in manufacturing trucks to be exported to the Peoples Republic of China. The Court of Appeals of Paris upheld the decision by the Commercial Court of Corbeil which insured performance of the Fruehauf contract with Berliet by appointing a temporary administrator to manage Fruehauf-France. Craig, Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy, 83 HARV. L. REV. 579, 580 (1970). The relief was justified on grounds that the interests of the French economy in performance of the contract outweighed possible legal exposure of the American directors of Fruehauf-France under U.S. law. Id. at 580-81.

133. For example, on-site visitation safeguards, designed to insure against diversion of civilian exports to military use, have been criticized because the inspector in the importing country, often not American, is interested in future sales and unconcerned with possible military diversions. 125 Cong. Rec. S9791 (daily ed. Jul. 18, 1979). Other safeguards with varying degrees of effectiveness include: civilian end-use assurances by the importer, withholding of spare parts and repair service by the exporter and possible attachment of electronic monitoring equipment to the product. Computer Hearings, supra note 73, at 25-26. Note that, despite the difficulty in devising technical safeguards, significant diversion of U.S. technology exports to military use by controlled countries is unlikely as this diversion would most likely lead to an increase in U.S. controls and
the Act of 1979 makes explicit reference to this problem by requiring the issuance of regulations based on the assumption that effective safeguards cannot be devised. A third factor which impairs the effectiveness of national security controls, thereby justifying the leadtime approach, is the practical impossibility of effectively controlling international flows of information technology. The new provisions introduced by the Act of 1979 in the national security area will be discussed against this background of the limited use of export controls in maintaining U.S. leadtime in militarily applicable technologies.

The Act of 1979 retains the basic division of responsibility within the Executive Department with regard to the licensing of commodities controlled for national security reasons. The Secretary of Commerce retains formal decision-making authority over licenses, the Secretary of Defense is accorded an influential consultative role and the President retains veto power. However, the new Act mandates the implementation of a new "method" of national security control which supplements the current leadtime rationale outlined above. Section 5(d) of the Act of 1979 implements the findings of the Bucy Report of the Defense Science Board Task Force on Export of U.S. Technology by requiring the identification and control of "militarily critical possible interruption of the free flow of American technology to the East. Bingham & Johnson, supra note 3, at 900. See also Act of 1979, § 5(l), 50 U.S.C. app. § 2404(l) (1980), for sanctions available to the Secretary of Commerce upon reported diversion.


135. For a discussion of the inability of export controls to fully inhibit international transfers of technical data, see Rubin, supra note 28, at 642.


137. Id. at § 5(a), 50 U.S.C. app. § 2404(a); § 5(d)(2), 50 U.S.C. app. § 2404(d)(2); § 10(g), 50 U.S.C. app. § 2409(g) (1980). For the weight given the Department of Defense's opinion in the interagency decision-making process, see McQuade, U.S. Trade with Eastern Europe: Its Prospects and Parameters, 3 LAW & POL'Y INT'L BUS. 42, 94 (1971).

An amendment offered by Senator Jackson would have reversed the respective roles of the Secretaries of Defense and Commerce by placing the Secretary of Commerce in the consultative role and giving the Secretary of Defense greater licensing responsibility. 125 CONG. REC. S10,050 (daily ed. Jul. 20, 1979). There was some support for this amendment in Congress, based on the view that the Department of Commerce was biased in favor of trade promotion and, therefore, possibly applying the controls too loosely. However, certain counterarguments defeated the amendment, including the fact that Defense's recommendations had never been overruled by the President and both Commerce and Defense approved of the current division of responsibility. 125 CONG. REC. H6407 (daily ed. Jul. 23, 1979) (remarks of Rep. Bingham).


139. The Bucy Report is named after Mr. J. Fred Bucy of Texas Instruments, Chairman of the Defense Science Board Task Force on Export of U.S. Technology. Defense Policy Hearing, supra note 130, at 4. Its major finding was that U.S. qualitative superiority in military technologies could only be maintained by controlling exports of design and manufacturing know-how. Id. In its implementation of the Bucy Report, the Department of Defense has sought to identify for control a list of key technologies which would make a significant contribution to the military potential of U.S. adversaries. Id.

140. OFFICE OF THE DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING, DEPARTMENT OF
This change represents a shift away from the former approach of controlling end-products, towards an approach of controlling critical technological know-how.\textsuperscript{141} Previously, national security controls were implemented on a case-by-case product review basis without any systematic reference to the military significance, if any, of the technology embodied in the end-product.\textsuperscript{142} Under the critical technology approach, all end-products will be uniformly reviewed against a list of critical technologies which the Department of Defense will control.\textsuperscript{143} The new approach emphasizes: (1) the need to control the export of the information technology itself in order to maintain the United States' comparative superiority in qualitative weaponry technology and (2) the task of identifying "keystone equipment" — unique equipment that completes a product line.\textsuperscript{144}

The shift from end-product control to critical technology control was prompted by two basic factors. First, under the end-product review method, products were not judged according to a specific series of technologies that the United States considered strategically important, consequently, certain key technologies were seeping through the control system.\textsuperscript{145} Second, controls under the end-product approach, without the benefit of specific targeted technologies, tended to be overly broad to the detriment of U.S. export trade.\textsuperscript{146}

Thus, the adoption of the critical technology approach was necessary to correct controls which were simultaneously too broad and too narrow.

The adoption of the critical technology approach in the Act of 1979 was a basic substantive change which was long in the making and, probably, long overdue. The replacement of the end-product control method with the critical technology approach represents an effort to serve both economic and national security goals by eliminating needless controls on products devoid of critical technologies.\textsuperscript{147}


\textsuperscript{142} See generally, \textit{Defense Policy Hearing}, supra note 130.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.} at 4-5 (statement of Dr. Ellen Frost). Section 16(4) of the Act of 1979, 50 U.S.C. app. § 2415(4) (1980), defines technology as: "... the information and knowhow that can be used to design, produce, manufacture, utilize or reconstruct goods, including computer software and technical data, but not the goods themselves." Act of 1979, § 16(4), 50 U.S.C. app. § 2415(4) (1980).

\textsuperscript{146} \textit{Defense Policy Hearing}, supra note 130, at 18.

\textsuperscript{147} \textit{Id.} at 7-9.

\textsuperscript{148} Act of 1979, § 5(d), 50 U.S.C. app. § 2404(d) (1980).
technology and by tightening controls on key technological know-how.\textsuperscript{149} Under the case-by-case, end-product approach, exporters could only rely on past control decisions by the Government in determining whether a product could be exported freely.\textsuperscript{150} In contrast, the new approach serves to provide U.S. businessmen with greater predictability in entering into export markets, by explicitly listing certain technologies subject to restriction.\textsuperscript{151} The critical technology approach to national security controls, when coupled with the traditional view of controls in protecting U.S. technological leadtime, further refines the U.S. export control system by insuring the simultaneous fulfillment of competing policy concerns. In this way, the critical technology approach should narrow the scope of national security controls thereby reducing the restraint on U.S. export trade.\textsuperscript{152}

2. Modifications on Multilateral Controls in the Act of 1979

Since the United States employs both multilateral controls with its allies, as “mandated” by the informal COCOM arrangement, and unilateral controls imposed at its own discretion, there has been a need for more active monitoring of the extent to which the U.S. control system is properly aligned with the controls imposed by U.S. allies under COCOM. Without the proper coordination of U.S. controls with COCOM controls, the effectiveness of U.S. foreign policy or national security trade restrictions could be undermined by the United States’ allies which might export goods which are controlled according to U.S. standards (i.e., COCOM itself would become a source of foreign availability to controlled countries).\textsuperscript{153}

\textsuperscript{149} Bingham & Johnson, supra note 3, at 897. Debates concerning the use of national security controls typically have posited arguments of U.S. businessmen that controls were excessively tight against arguments of government officials that lax control on Eastern-bound trade was facilitating Soviet military development. See generally, Computer Hearing, supra note 73. However, rarely did one argument address the other in terms of possible criteria which would serve both interests simultaneously as does the critical technology approach.

\textsuperscript{150} Berman & Garson, supra note 18, at 820-23.

\textsuperscript{151} See Defense Organization Hearing, supra note 141, at 32 (statement of Vitalij Garber).

\textsuperscript{152} The implication of the Bucy Report was that, once critical technologies were identified, most items on the CCL could be decontrolled. Defense Policy Hearing, supra note 130, at 1. However, the actual extent of decontrol under the critical technology approach will depend, to a large extent, on the interpretation of certain key language in the statute, i.e., “of potential military significance.” See Act of 1979, § 3(2)(A), 50 U.S.C. app. § 2402(2)(A) (1980). See also Note, U.S. Technology Transfers to the Soviet Union and the Protection of National Security, 11 LAW & POL’Y INT’L BUS. 1037, 1055-56 (1979). This phrase can be interpreted very broadly to include the control of many nonstrategic commodities, the export of which might free Soviet resources from other sectors of the economy for possible redirection into the military sector. Id. at 1056. Or, the phrase can be interpreted more narrowly to prevent the diversion of critical technologies to controlled countries. Id. at 1056, 1063.

\textsuperscript{153} For an account of the Carter Administration’s attempt to secure the cooperation of COCOM in the U.S. grain embargo against the Soviet Union, see Lewis, Europe Backs U.S. On Grain: Won’t Help Fill Soviet Shortfall, N.Y. Times, Jan. 8, 1980, § D, at 5, col. 1.
Maintaining a uniform export control system among a group of diverse national economies is difficult due to a variety of factors, all of which contribute to a discrepancy between the goods controlled by the United States (unilaterally and under COCOM) and the products controlled by its allies. Typically, the list of goods controlled by U.S. allies has been narrower in scope than the list controlled by the United States. The more liberal approach taken by the U.S. allies stems from several factors, including: the greater dependence of their economies on exports for growth, their traditional patterns of trade with the East, their practice of keeping trade and politics separate and the absence of a vigorous anti-Communist element within their societies. The more restrictive approach taken by the United States has been criticized by American exporters who view the effectiveness of U.S. foreign policy and national security restrictions as being undermined by the lax controls maintained by U.S. allies, i.e., the tighter controls imposed by the United States only serve to shift business to foreign competitors. The problem is underlined by the fact

154. U.S. Controls have been said to be more restrictive on two levels: (1) the allies interpret the COCOM list more narrowly than the United States and (2) the list of U.S. unilateral controls has been claimed to be more extensive than those of the other western powers. See Matsushita, Export Control and Export Cartels in Japan, 20 Harv. Int'l L. J. 103 (1979) [hereinafter cited as Matsushita], where the author contrasts the looser approach taken by Japan to export control with that of the United States. Under U.S. law, exports can be controlled for national security or for foreign policy reasons; however, the only ground for restricting exports in Japan is when "necessary for the maintenance of the balance of international payments and the sound development of international trade or the national economy." Art. 48(2) of Foreign Exchange and Foreign Trade Control Law, Law No. 228 of 1949, as amended in 1968 (translated in 5 Eibun-Horei Sha Law Bulletin Series AA). Matsushita also documents a 1969 Japanese case which is illustrative of not only the more lax approach to export control taken by Japan, but also of the difficulty of enforcing controls to which COCOM has already agreed. In Pekin-Shanhai Nikon Kogyo Tenramkai v. Nikon, 20 Gyosei Reishu 842 (Tokyo District Court, July 8, 1969), a Japanese court held that the Japanese Government (Ministry of International Trade and Industry) had exceeded its power to regulate exports for economic reasons under the Foreign Exchange and Foreign Trade Control Law, Law No. 228 of 1949, as amended in 1968, by attempting to prevent the export of over 3,000 items as part of a Japanese industrial exhibition to China. See Matsushita, supra at 107-08. The Court rejected the Government's argument that the export control was required under the COCOM arrangement since there was no statutory basis for COCOM in Japanese law. Id. at 108.

155. Bingham & Johnson, supra note 3, at 905-06. The United States exports only 8% of its GNP, compared with 27% for Germany and 14% for Japan. 124 Cong. Rec. H6406 (daily ed. July 23, 1979) (remarks of Rep. Bingham). In addition, the United States accounts for only 13% of the West's technology transfers to the Soviets. Id.

156. See generally Export Licensing: Foreign Availability of Stretch Forming Presses, Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 1st Sess. (1977) [hereinafter cited as Foreign Availability Hearing]. In contrast, some government officials feel (1) that the foreign availability of U.S. controlled goods from its allies is exaggerated, (2) that attempts by U.S. allies to circumvent COCOM have been infrequent and (3) that COCOM has been effective in promoting the national security and foreign policy interests of the West. See Defense Policy Hearing, supra note 130, at 13-14 (statement of Dr. Ellen L. Frost); Computer Hearings, supra note 73, at 14 (statement of William A. Root). Also, it has been argued that the United States, not its allies, has undermined COCOM. Will House Beef Up USSR Military Capability?, Human Events, June 2, 1979, reprinted in 125 Cong. Rec. S10,140 (daily ed. Jul. 21,
that the President can use foreign policy or national security controls, notwithstanding the availability of the controlled product(s) from foreign sources, if he determines that restriction is in the national security or foreign policy interests of the United States.\footnote{157}

In addition to claims by American exporters that the U.S. export control system fails to give the factor of foreign availability sufficient weight in control policy, several government officials and commentators have criticized the absence of effective U.S. participation in multilateral control efforts.\footnote{158} They point to the rapid economic growth of many COCOM countries as significant in two respects with regard to U.S. participation in multilateral controls: (1) U.S. economic and military aid, once an effective means of inducing COCOM compliance with U.S. control policies, no longer provides the leverage it once did\footnote{159} and (2) the United States is no longer the sole source of advanced technology, therefore, truly effective controls can only be imposed on a multilateral basis within the COCOM framework.\footnote{160}

Aware of the need to achieve a closer coordination of U.S. unilateral controls and COCOM controls, Congress included several remedial provisions in the Act of 1979 which emphasize U.S. participation in COCOM and which give added weight to foreign availability in determining unilateral controls. The Act of 1979 requires the Secretary of Commerce to issue regulations providing for annual review of U.S. controls and for tri-annual review of COCOM controls.\footnote{161} In addition, the regulations must provide for an assessment of the foreign availability of goods controlled by the United States as part of such annual and tri-annual reviews.\footnote{162} By requiring review of the respective lists (COCOM and U.S.) \emph{concurrent with} a foreign availability assessment, the new provisions give foreign availability more deliberate and systematic treat-

\footnotetext{157}{Act of 1979, \S 4(c), 50 U.S.C. app. \S 2403(c) (1980).}
\footnotetext{158}{See generally, COCOM List Review Hearings, supra note 93; Extension Hearings, supra note 78.}
\footnotetext{159}{Bingham & Johnson, supra note 3, at 906.}
\footnotetext{160}{125 CONG. REC. S10,123 (daily ed. Jul. 21, 1979) (remarks of Sen. Stevenson).}
\footnotetext{161}{Act of 1979, \S 5(c)(3), 50 U.S.C. app. \S 2404(c)(3); \S 6(k), 50 U.S.C. app. \S 2405(k) (1980).}
\footnotetext{162}{Id. The Act of 1979, 50 U.S.C. app. \S 2401 et seq. (1980), also authorizes the establishment of a “capability for assessing foreign availability on a continuous basis” within the Office of Export Administration of the Department of Commerce. S. REP. NO. 169, 96th Cong., 1st Sess. 9, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1147, 1156; see Act of 1979, \S 18(b), 50 U.S.C. app. \S 2417(b) (1980). This provision was necessitated by the duplication which had resulted from different agencies conducting separate foreign availability assessments. S. REP. NO. 169, 96th Cong., 1st Sess. 9, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1147, 1156.}
ment as a factor in U.S. licensing decisions than was the case under the Act of 1969. These changes made under the new provisions should contribute to the narrowing of U.S. controls where foreign availability makes them ineffective.

In addition to the new provisions that call for a more careful consideration of foreign availability, the Act of 1979 contains a more comprehensive provision directed at the general need for greater cooperation among the United States and its allies in the implementation of export controls. Section 5(i) of the Act of 1979 establishes the following objectives for the President in his negotiations within COCOM:

1. Agreement to publish the list of items controlled for export by agreement of the Committee, together with all notes, understandings and other aspects of such agreement of the Committee, and all changes thereto.

2. Agreement to hold periodic meetings with high-level representatives of such governments, for the purpose of discussing export control policy issues and issuing policy guidance to the Committee.

3. Agreement to reduce the scope of the export controls imposed by agreement of the Committee to a level acceptable to and enforceable by all governments participating in the Committee.

4. Agreement on more effective procedures for enforcing the export controls agreed to pursuant to paragraph 3.

These executive objectives in COCOM express a congressional intent to both formalize the Coordinating Committee and increase its enforcement powers in order to achieve a more effective multilateral export control system among the United States and its allies. The new section reflects the obsolescence of unilateral controls in today’s diversified, multi-supplier international economy and the need for a more cooperative, multilateral control effort as a necessary step to safeguarding Western political and national security interests.

Some government officials maintain that such attempts to formalize COCOM, including the implementation of enforcement machinery, will
have the reverse effect of inducing less cooperation within COCOM.\(^{168}\) However, this view assumes that multilateral controls can be improved on a truly cooperative basis within the existing informal framework — an assumption not beyond question in view of past experience.\(^{169}\) Indeed, the confusion generated among U.S. allies by the recent sporadic use of export controls by the Carter Administration\(^ {170}\) demonstrates that a more formal cooperation with COCOM may be, perhaps, the best way to achieve allied security.\(^ {171}\)

In sum, new provisions in the Act of 1979 attempt to make U.S. export controls more sensitive to those of U.S. allies. Foreign availability is to be given more direct attention under the U.S. licensing system and Congress has expressed the need for a broader U.S. commitment to COCOM. These changes are another example of how the Act of 1979 attempts to make export controls more effective in terms of their purpose while simultaneously making the licensing system a less cumbersome restraint on U.S. export trade.

3. Procedural Modifications in the Act of 1979

In addition to the policy revisions introduced by the Act of 1979,\(^ {172}\) procedural changes, which attempt to make the U.S. export control structure less trade restrictive and more accessible to American exporters, have been implemented.

a. *Time Limits and Qualified General License*

The need to streamline the procedural framework involved in issuing export licenses was clearly expressed during the congressional hearings concerning the Act of 1979.\(^ {173}\) Representatives of U.S. industry testified concerning the fundamental problems arising under the licensing procedure and its lack of sensitivity to the need for predictability and reliability in the export business.\(^ {174}\) Business leaders recommended major legislative reform designed to

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169. *See, e.g., Foreign Availability Hearing*, note 156 supra.
170. For example, the recent cancellation (and subsequent approval) of the sale of a Sperry-Univac computer to the Soviet news agency, TASS, and the tightening of controls on exports of oil-drilling equipment to the Soviet Union have been interpreted, first, as motivated by national security factors and, later, as sanctions applied against the Soviets for human rights violations. *Extension Hearings*, supra note 78, at 42.
171. The position taken here should not be misinterpreted as advocating identity of COCOM controls and U.S. controls because, in certain situations, the United States may wish to impose controls unilaterally, notwithstanding foreign availability as a symbol of U.S. dissatisfaction with certain foreign conduct. Rubin, *supra* note 128, at 641. This Comment merely states the proposition that whether controls are imposed unilaterally or multilaterally by the United States, international cooperation with those controls is crucial to achieving their objectives.
172. *See §§ III.C.1 and 2 supra.*
174. *Id.* at 15-22.
reduce licensing delays, (2) allow for greater input by the applicant in the licensing decision and (3) require more specific reasons on the part of the Government for license denial beyond the vague and unhelpful reasons of foreign policy, national security and short supply. Lengthy licensing periods, in particular, were said to contribute to the diversion of U.S. export sales to foreign competitors not subject to such time delays. In fact, many of these criticisms were justified as the lack of an effective time limit on licensing decisions in the Act of 1969 had resulted in excessive delays, backlogs and an average intake of 300 license applications per day by the Department of Commerce.

Congress was sensitive to the demands of U.S. exporters and revised export licensing procedure in the Act of 1979 in order to cope with the above problems. Section 10(b) of the Act of 1979 requires the Secretary of Commerce to make an "initial screening" within 10 days of receipt of the export license application and to inform the applicant of whether the application is properly completed, whether referral of the application to another department or agency is necessary, and whether referral of the application for multilateral (COCOM) review is necessary. The new provisions of the Act also change the time limits in which licensing decisions must be made by the Government. The Act of 1969 provided for a 90-day time limit but also authorized the extension of this limit whenever deemed to be necessary by the Secretary of Commerce or other official exercising authority under the Act. The new provisions continue the 90-day decision limit for applications which require no departmental referral, but restrict the authority of the Secretary of Commerce to extend this limit to applications of "exceptional importance and complexity" where time is needed to modify the application.

For applications which require referral to other agencies and departments

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175. See Extension Hearings, supra note 78, at 69-70 (statement of James Henry Giffen); Computer Hearings, supra note 73, at 20-21, 46-47 (statement of Robert D. Schmidt).
176. See Extension Hearings, supra note 78, at 495 (statement of George Bardos).
177. Bingham & Johnson, supra note 3, at 902.
179. The time involved in processing individual export license applications has been said to be a function of three factors: (1) the nature of the product itself, (2) whether the destination is a controlled country and (3) the number of Executive Agencies involved in reviewing the application. See Note, Export Licensing: Uncoordinated Trade Repression, 9 GA. J. INT'L AND COMPL. L. 333, 342-44 (1979).
182. Id. at § 10(f)(4), 50 U.S.C. app. § 2409(f)(4) (1980). Although the legislative history of the Act of 1979, id., gives no definition of the phrase "of exceptional importance and complexity," it is most probable that the new interagency decision deadlines (discussed infra at text accompanying notes 183-88), coupled with the new right of the applicant to petition a U.S. district court for an injunction to compel compliance with the statutory time limits (Act of 1979, § 10(j)(3), 50 U.S.C. app. § 2409(j)(3) (1980)) should effectively reduce licensing delays.
for advice, the Act of 1979 establishes an interagency timetable with specific decision-making deadlines. The Secretary of Commerce must refer the license application within 30 days of receipt,\footnote{Id. at § 10(d), 50 U.S.C. app. § 2409(d) (1980).} the consulted department must make a recommendation to the Secretary within 30 days of receipt (unless an additional 30 days is requested)\footnote{Id. at § 10(e), 50 U.S.C. app. § 2409(e) (1980).} and the Secretary of Commerce must make a final decision on the license within 90 days after receipt of the respective department's recommendation.\footnote{Id. at §10(f)(1), 50 U.S.C. app. § 2409(f)(1) (1980).} The Act of 1979 also establishes a 5-day deadline for informing the applicant of (1) a license denial, (2) the statutory basis for the denial, (3) the policies set forth in the Act which would be promoted by denial and (4) the availability of appeal procedures.\footnote{Id. at § 10(f)(3), 50 U.S.C. app. § 2409(f)(3) (1980).}

In view of these changes, an applicant should receive a licensing decision within 90 days, if referral by the Secretary of Commerce to other departments is not necessary, and within 180 days if referral is required.\footnote{S. REP. No. 169, 96th Cong., 1st Sess. 10, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1147, 1157.} These changes attempt to reduce the number of "complaints by applicants about applications languishing indefinitely within the Government bureaucracy."\footnote{Extension Hearings, supra note 78, at 620-21. The technical evaluation and policy analyses which many license applications undergo were cited as factors making a specific license resolution deadline inappropriate. Id.} The new decision-making time limits were included in the Act of 1979 despite the recommendation of the Executive Department that self-imposed, agency deadlines were preferrable to unworkable, statutory time limits.\footnote{See Act of 1969, 50 U.S.C. app. § 2403(q)(i) (1979).} However, in view of a history of excessive, bureaucratic delays lasting well beyond previous statutory time limits,\footnote{S. REP. No. 169, 96th Cong., 1st Sess. 11, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1149.} Congress felt the need to enact stricter procedures to insure a more expeditious treatment of license applications by executive agencies.\footnote{Act of 1979, § 4(a)(2), 50 U.S.C. app. § 2403(a)(2) (1980).}

Two related procedural additions made under the new law are of special significance. The Secretary of Commerce is now authorized to issue a qualified general license.\footnote{Act of 1979, S 4(aX2), 50 U.S.C. app. $ 2403(aX2) (1980).} By authorizing multiple shipments to a particular importer for a particular end use, the new license should reduce licensing delays and simplify present procedures which require separate validated licenses for each
shipment to controlled destinations.\textsuperscript{193} Also, where licenses are denied for foreign policy or for national security reasons, the Act of 1979 now requires the Secretary of Commerce to inform the applicant of possible "modifications or restrictions" which could be placed on the commodity so as to prevent its control on national security or foreign policy grounds.\textsuperscript{194} This provision should not only lead to a greater degree of decontrol, but also lead towards a more informed private export sector, a more cooperative relationship between government and industry and a greater degree of predictability in U.S. export trade.\textsuperscript{195}

\textbf{b. Periodic Review of Controlled Commodities}

The Act of 1979 makes important revisions with respect to the continuation of controlling commodities already subject to export control. Specifically, the Act of 1979 provides two new provisions designed to insure a systematic, periodic review of the Commodity Control List so as to remove items from the CCL which no longer need to be controlled.\textsuperscript{196} First, whether controls are imposed on a commodity for national security or for foreign policy reasons, the Secretary of Commerce is required to issue regulations providing for annual review of the CCL.\textsuperscript{197} This provision represents an effort to remedy complaints by exporters that items which are either obsolete or freely available from abroad are needlessly continued on the CCL without active review of the need for their continued control.\textsuperscript{198}

Second, the Act of 1979 contains an "indexing" provision.\textsuperscript{199} The new section authorizes the Secretary of Commerce to issue regulations providing for annual increases in the performance levels of goods or technology subject to control so as to decontrol items on the CCL which subsequently become obsolete with respect to the national security interests of the United States.\textsuperscript{200} Indexing was a subject of lengthy controversy within Congress as it was perceived that such an automatic decontrol procedure could make available to controlled countries commodities which were obsolete by U.S. standards but not by the standards of controlled countries.\textsuperscript{201} Nevertheless, several factors

\begin{itemize}
\item \textsuperscript{195} See generally Reform Hearing, \textit{supra} note 109, at 20.
\item \textsuperscript{196} § 5(c)(3), 50 U.S.C. app. § 2404(c)(3); § 6(k), 50 U.S.C. app. § 2405(k); § 5(g), 50 U.S.C. app. § 2404(g) (1980).
\item \textsuperscript{197} Act of 1979, § 5(c)(3), 50 U.S.C. app. § 2404(c)(3); § 6(k), 50 U.S.C. app. § 2404(k) (1980).
\item \textsuperscript{198} See Extension Hearings, \textit{supra} note 78, at 500 (statement of Edward J. Best).
\item \textsuperscript{199} § 5(g), 50 U.S.C. app. § 2404(g) (1980).
\item \textsuperscript{200} Id.
\end{itemize}
appear to have insured the passage of the provision: (1) the cumbersome and inefficient alternative to indexing — reviewing performance levels through the full export licensing machinery; 202 (2) the safeguard built into the new provision authorizing the Secretary of Commerce, upon recommendation by the Department of Defense, to retain under control items which would otherwise qualify for decontrol; 203 (3) the need for a procedure which would serve both the national security and economic interests of the United States simultaneously. 204 The new indexing provision, and the systematic annual review of the CCL, are measures intended to refine the control machinery in order to minimize its trade impeding impact. 205

C. Short Supply Controls: Public Petition and Hearing Procedure

With respect to controls used to alleviate domestic shortages and inflation caused by foreign demand for U.S. exports, the Act of 1979 establishes, for the first time, a formal, public petition and hearing procedure. 206 Groups representative of U.S. metal processing industries can now petition the Secretary of Commerce to impose controls or begin monitoring certain metals whose prices have increased and whose domestic supply has decreased as a result of foreign demand. 207

The new provisions are implemented as follows: within 15 days of receipt of any such petition, the Secretary must publish a notice in the Federal Register of the proposed monitoring and/or controls called for in the petition; 208 if a public hearing is called for by an industry representative to debate the need for monitoring or controls, the Secretary must, in addition to conducting the hearing, allow a period of 45 days (from the date of publication of the petition in the Federal Register) for public submission of views to the Secretary regarding the proposed controls; 209 within 45 days after the end of the above 45-day period for public comment, the Secretary must decide whether in fact to impose the requested controls or monitoring (or both) on such material and he must publish his determination, together with the reasons for it, in the Federal Register. 210

The new petition and hearing procedure attempts to give the private sector a larger share of the decision-making process inherent in the export control system. 211 The right of aggrieved parties to be heard, coupled with the
requirement of an explanation on the part of the agency for its short supply control decisions, were intended to improve the quality of administrative decisions by insuring an open discussion of competing viewpoints.\textsuperscript{212} Although there was some concern that the filing of a petition could cause panic ordering of the commodity in question, thereby exacerbating both shortages and inflationary pressures,\textsuperscript{213} the legislative history of the Act of 1979 states that:

\begin{quote}
Once the procedure has been in effect for a period of time and it has been demonstrated that the filing of a petition does not necessarily result in a decision to impose monitoring or controls, the market is not likely to respond unduly to the mere filing of a petition.\textsuperscript{214}
\end{quote}

Reservations were also expressed that extending the right of petition to such a wide array of entities, including firms, unions and trade associations,\textsuperscript{215} as long as they were representative of an industry, could result in duplicitous petitions and a substantial increase in the Commerce Department’s administrative workload.\textsuperscript{216} This possibility of abuse in the filing of short supply petitions contributed to the narrowing of the amendment which, in its final form, limits the right to file petitions to groups representative of metal processing industries.\textsuperscript{217} These industries, particularly the steel industry, had also been experiencing abnormal price increases and shortages of their primary raw material, scrap metal, as a result of near record level exports.\textsuperscript{218}

d. \textit{Due Process}

The export licensing system created under the Act of 1979 vests broad, discretionary powers in the Executive Department,\textsuperscript{219} powers which have been

\begin{footnotes}
\item[212] See id. at 741, 47-48.
\item[213] Id. at 743.
\item[214] S. REP. No. 169, 96th Cong., 1st Sess. 12, \textit{reprinted in [1979] U.S. CODE CONG. & AD. NEWS} 1159. Note also that Section 7(c)(8) of the Act of 1979, \textsection 1 et seq., 50 U.S.C. app. \textsection 2401 et seq. (1980), allows the Secretary of Commerce to impose temporary controls during the petition and hearing period. Act of 1979, \textsection 7(c)(8), 50 U.S.C. app. \textsection 2406(c)(8) (1980). This provision was included so as to remove the possibility of speculation after the filing of a petition and to allow a period for rational discussion concerning the need for monitoring or controls. \textit{See Extension Hearings, supra note 78, at 748.}
\item[215] Act of 1979, \textsection 7(c), 50 U.S.C. app. \textsection 2406(c) (1980).
\item[216] \textit{See Extension Hearings, supra note 78, at 749.}
\item[217] Act of 1979, \textsection 7(c), 50 U.S.C. app. \textsection 2406(c) (1980). \textit{See Extension Hearings, supra note 78, at 749-50. Earlier versions of the short supply hearing procedure extended the right to petition for monitoring and/or controls to all industries. See S. REP. No. 169, 96th Cong., 1st Sess. 12, \textit{reprinted in [1979] U.S. CODE CONG. & AD. NEWS} 1158; \textit{Extension Hearings, supra note 78, at 739. Note also that \textsection 7(c)(6) of the Act of 1979, \textsection 1 et seq., 50 U.S.C. app. \textsection 2401 et seq. (1980), allows the Secretary of Commerce to determine that a petition is sufficiently similar to a petition formally decided within the previous six months that it does not justify complete consideration in accordance with the new procedures. Act of 1979, \textsection 7(c)(6), 50 U.S.C. app. \textsection 2406(c)(6) (1980).}
\item[218] \textit{Extension Hearings, supra note 78, at 662, 741.}
\item[219] \textit{See Act of 1979, \textsection 4(e), 50 U.S.C. app. \textsection 2403(e) (1980). Chief Justice Warren wrote regarding the President’s power in the area of foreign affairs: . . . because of the changeable and explosive nature of contemporary international rela-}
\end{footnotes}
criticized as lacking a sufficient measure of public accountability and an observance of the minimum standards of due process. In fact, almost all functions exercised under the Act are exempt from administrative safeguards and judicial review due primarily to the foreign affairs nature of export regulation and its traditional classification as a non-justiciable political question. In addition, information obtained by the Government pursuant to the licensing process is generally held confidential. The use of such unreviewable power and the secrecy surrounding licensing deliberations has led to demands that there be more private sector input into the licensing process and a provision made for a right of appeal. This, it is thought, would render the system more accountable and would make exporters more informed of the current control rationale.

Congress incorporated several provisions in the Act of 1979 that were intended to make the licensing system more accessible to private industry while also providing the applicant with limited procedural rights. Under these new provisions, an applicant whose license is not processed within the new decision	
tions, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas.


221. Act of 1979, § 12(c), 50 U.S.C. app. § 2411(c) (1980). See also United States v. International Business Machines, 461 F. Supp. 732 (S.D.N.Y. 1978), where the court stated that export documentation received from exporters by the Government pursuant to the statute must, of necessity, be confidential if the Government is to continue to receive reliable information from the business community. Id. at 732-33.

222. Reform Hearing, supra note 109, at 3 (statement of Frederick W. Huszagh). The Act of 1979, § 1 et seq., 50 U.S.C. app. § 2401 et seq. (1980), carries over the provision of the Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (superseded 1979), providing for the establishment of "Technical Advisory Committees" (TAC's) made up of members of private industry who advise the various agencies of the Executive Department on technical matters within their respective areas of industrial competence. Act of 1979, § 5(h), 50 U.S.C. app. § 2404(h) (1980). However, as of March 1, 1979, there were only six TAC's. OFFICE OF COMPTROLLER GENERAL, COMPTROLLER GENERAL REPORT TO CONGRESS, EXPORT CONTROLS: NEED TO CLARIFY POLICY AND SIMPLIFY ADMINISTRATION 20 (March 1, 1979). Given the variety of industries affected by export controls, this statistic indicates that the overall impact of TAC's on agencies' decisions has not been significant. See generally, Reform Hearing, supra note 109, at 3.

223. Reform Hearing, supra note 109, at 7 (statement of Frederick W. Huszagh).
time limits established under the Act of 1979 has ultimate recourse to a U.S. district court where he can maintain an action for injunctive relief so as to bring his application in compliance with the new time limits. Regulations imposing controls under the Act of 1979 are, to the extent possible, to be issued in preliminary form and only made final after "meaningful opportunity for public comment." Also, Section 10(j)(1) of the Act of 1979 requires the Secretary of Commerce to establish procedures for any applicant to appeal the denial of an export license application to the Secretary. These new provisions attempt to make the licensing system, and the officials who operate it, more susceptible to the restraint of public oversight and more accountable to those parties directly affected by licensing decisions. Greater accountability, it is contended, will lead to more rational licensing decisions.

It has been argued that license applicants should be accorded a full hearing prior to license denial, in accordance with the dictates of the Administrative Procedure Act. Those who defend the limited input and secrecy surrounding the current process argue that greater public participation would endanger U.S. national security interests in an area that is essentially a matter of executive competence. However, some commentators question whether national security and foreign policy considerations are always at stake in licensing decisions. A reasonable proposal would protect sensitive national security data relevant to a licensing decision while allowing a full hearing on disputed questions of fact (e.g., foreign availability).

IV. RECENT DEVELOPMENTS

The use of export controls to achieve U.S. foreign policy and national security goals has been a subject of great concern to the U.S. Government and to the American public in view of recent international crises. In response to the November 4, 1979, seizure of the U.S. embassy and of American diplo-

226. Id. at § 13(b), 50 U.S.C. app. § 2412(b) (1980).
228. See Bingham & Johnson, supra note 3, at 903.
229. Id.
234. For the position that the use of trade as a political weapon may be on the rise, see Raitiner, Trade as a U.S. Weapon: Administration, in Reversal, Adopts View that Economic Warfare Can Be Useful, N.Y. Times, Jan. 8, 1980, § D, at 5, col. 2.
matic personnel by Iranian militants in Teheran, the Carter Administration took a series of official actions against Iran including a freezing of Iranian assets in the United States, the breaking of diplomatic ties and the imposition of a trade embargo.\(^{235}\) The imposition of economic sanctions essentially was regarded as a symbolic gesture because a *de facto* trade vacuum had existed between the two countries after the freeze placed on Iranian assets on November 14, 1979.\(^{236}\) In a more significant export control decision, the Carter Administration placed a halt on all grain exports to the Soviet Union in retaliation for Soviet armed intervention in Afghanistan.\(^{237}\) In addition to the obvious implication of this action in terms of overall U.S. security and foreign policy, the embargo is significant as it is the first major use of export controls by the Executive Department under the Act of 1979.\(^{238}\) In general, the Administration’s action contradicts many of the new policy priorities embodied in the Act of 1979.\(^{239}\) The statute specifically calls for a minimization of restrictions on agricultural exports in order to achieve a positive balance of payments and a reduction of federal expenditures on agricultural support programs.\(^{240}\) The Administration’s decision to have the Commodity Credit Corporation of the Department of Agriculture take over grain contracts which dealers had with the Soviets prior to the embargo could result in a heavy burden on the American taxpayers.\(^{241}\) Also, the Administration’s reliance on a combination of national security and foreign policy grounds as justification for


\(^{238}\) *Id.

\(^{239}\) *See Act of 1979, § 2(9), 50 U.S.C. app. § 2402(9); § 3(11), 50 U.S.C. app. § 2403(11) (1980). Section 7(g)(3) of the new Act allows Congress to disapprove, by concurrent resolution, the imposition of export controls on agricultural commodities for foreign policy purposes within 30 days of implementation. Act of 1979, § 7(g)(3), 50 U.S.C. app. § 2406(g)(3) (1980). The Congress has taken no such action.

\(^{240}\) *Id. at § 2(9), 50 U.S.C. app. § 2402(9); § 3(11), 50 U.S.C. app. § 2403(11) (1980).

the grain controls appears to contradict the mandate of the Act of 1979 which requires a separation of the national security and foreign policy rationales.

It has been argued that the trade sanctions are serious measures, primarily of symbolic importance, which demonstrate to the Soviets and Iranians the seriousness of their actions in relation to major American interests. However, this rationalization of the controls ignores consideration of their long-term utility and the future reliability of the United States as a major world exporter — considerations which the new provisions of the Act were attempting to bring to executive attention when implementing foreign policy controls. Nor has the Administration had much success in securing the cooperation of U.S. allies in supporting recent American trade sanctions. With regard to the Soviet embargo, the Western powers have essentially agreed to review the COCOM list of high technology items and to prevent an increase in their grain exports so as to avoid undercutting the U.S. sanctions. However, they have refused to officially match U.S. restrictions on exports. Similarly, U.S. allies have considered a trade cut-off to be an inappropriate method, as compared to diplomatic channels, of dealing with the hostage crisis in Iran. This lack of true unanimity among the Western powers points either to the future need to establish COCOM on a more formal basis as mandated by the Act of 1979, or to the impossibility of such formalization due to deep-rooted political differences within NATO.

249. Although most of the Western powers and Japan eventually imposed economic sanctions against Iran in May and June of 1980, seven months into the crisis (see Reuter, U.S. Boycott Hurts Iranian Air Defenses, Boston Globe, Sept. 23, 1980, at 6, col. 1), earlier there was considerable disagreement among the allies concerning the usefulness of export controls as a solution to the hostage issue. See U.S. Plans Embargo On Iran On Its Own, N.Y. Times, Jan. 18, 1980, § A, at 1, 7, col. 1; Stokes, Japan Indicates It Would Not Join In Trade Curbs On Iran and Soviet, N.Y. Times, Jan. 17, 1980, § A, at 1, col. 4.
The recent events in Afghanistan and Iran are of utmost significance to the future of U.S. export control policy. These crises could signal the reimposition of more stringent controls reminiscent of the broad restrictions used under the Export Control Act of 1949.252 The successive ad hoc use of trade restrictions by the Carter Administration reinforces the traditional role of export controls as cost-free, low-level economic warfare.253 Recent control decisions have frustrated the design of the Act of 1979 which attempts to curb the use of exports as a weapon in international politics.254 However, certain proposals within the Executive Department, in line with the pro-trade intent expressed by Congress throughout the Act, have demonstrated a search for imaginative "alternative means"255 to the imposition of export controls in order to achieve foreign policy objectives (e.g., the U.S. boycott of the 1980 Summer Olympics in Moscow).256 Thus, although recent export control decisions shed light on the effect of the new provisions of the Act of 1979 dealing with foreign policy controls and COCOM, the true impact of the new legislation cannot be judged on the basis of isolated executive actions implemented pursuant to the Act's authority. Any meaningful evaluation must be made over the long term.

V. CONCLUSION

The Export Administration Act of 1979 makes several important modifications in the U.S. export control system. Overall, it attempts to make export controls more effective in achieving the purposes for which they are imposed, while also reducing the trade restricting impact of the licensing machinery. Export controls implemented to achieve U.S. foreign policy objectives are to be employed on a more selective basis and only after a more deliberate assessment of the costs and benefits of such trade restrictions.257 By requiring an antecedent rationalization for export control decisions, plus its trade sanctions, there is evidence that third country sources of supply would fill the import losses of the target nation. See Peagam, U.S. Grain Embargo Against the Soviets Is Facing Growing Opposition in Canada, Wall St. J., June 20, 1980, at 38, col. 2; Soviets Circumvent Embargo By Buying U.S. Meal in Europe, Wall St. J., June 2, 1980, at 34, col. 6.

252. See Act of 1949, Pub. L. No. 80-11, 63 Stat. 7 (1949) (repealed 1969). For a brief discussion of how recent events have strengthened the position of those within the Administration who wish to challenge the entire concept of East-West trade, see What Trade Sanctions Will Cost, BUS. WEEK, Jan. 28, 1980, at 34-35.
253. See III.C.1.a supra.
254. See Pryor, supra note 243, at 6.
256. Congress Reacts Swiftly; Mood Hawkish But Wary: House Backs Olympic Boycott; China Trade is Given Boost, Boston Globe, Jan. 25, 1980, at 1, col. 3. For a discussion of the attempt by the Administration to recruit the voluntary cooperation of American companies in restricting the export of all commodities to the Soviet Union relating to the 1980 Summer Olympics, see Carter Asks Olympics Export Ban; Cost Put at Over $20 Million to 30 Companies, N.Y. Times, March. 13, 1980, § D, at 1, col. 6.
subsequent justification before Congress, the new law reduces the discretion of the Executive Department in using export controls to further U.S. foreign policy objectives. Congress has expressed its intent that export controls be accorded a more limited role in the foreign policy context by allowing their implementation only after alternative methods for advancing U.S. foreign policy interests have been exhausted. These statutory revisions question the effectiveness of export controls as a tool in international politics and emphasize the importance of international trade to American economic stability and growth.

Export controls designed to maintain U.S. national security are to be implemented in order to serve the purpose of preserving U.S. leadtime in militarily critical technologies. By requiring Executive Department agencies to restrict the export of certain key, strategic technologies, the Act of 1979 brings focus and direction to the U.S. system of national security controls. The new approach stresses the need for greater definition and specificity in controlling strategic exports as a means of promoting both the national security and economic interests of the United States.

New provisions of the Act of 1979 direct greater attention to similar controls used by U.S. allies. By making the U.S. licensing system more sensitive to foreign availability, the new legislation attempts to reduce the scope of U.S. controls when foreign availability makes them ineffective. On a broader plane, the Act of 1979 points toward U.S. participation in COCOM on a more formal basis. In effect, this constitutes a recognition that unilateral controls are obsolete and that cooperative efforts are necessary in a multi-supplier international economy.

Procedural revisions have been enacted which are designed to simplify the export licensing machinery and to reduce the regulatory impact of the statute so as to make it a less formidable obstacle to free trade. Other procedural aspects of the new law attempt to make the regulatory structure more responsive to the needs of the private sector.

In sum, the Act of 1979 is a positive legislative development. It rationalizes and clarifies U.S. export control policy. In the difficult job of achieving a balance between competing policy concerns, the new law provides decision-making criteria to insure that controls are implemented when needed to further

259. Id. at § 6(d), 50 U.S.C. app. § 2405(d) (1980).
260. Id. at § 5(d), 50 U.S.C. app. § 2404(d) (1980).
261. Id. at § 5(c)(3), 50 U.S.C. app. § 2404(c)(3); § 6(k), 50 U.S.C. app. § 2405(k) (1980).
262. Id. at § 5(i), 50 U.S.C. app. § 2404(i) (1980).
263. See §§ III.C.3.a, b supra.
265. See §§ III.C.3.c, d supra.
U.S. national interests and lifted when their only purpose is to hinder U.S. export trade. The Act of 1979, while acknowledging the need for controls in certain situations, forces government decision-makers to weigh the costs and benefits of controls in order to limit their use to situations in which they will be effective. A by-product of this process should be less control of U.S. export trade.

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