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International Economic Sanctions: Improving the Haphazard U.S. Legal Regime

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Barry E. Carter

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International Economic Sanctions: Improving the Haphazard U.S. Legal Regime

Barry E. Carter†

The United States has resorted increasingly to economic sanctions as a major tool in its foreign policy. Recent targets include Panama, South Africa, Nicaragua, Libya, the Soviet Union, Poland, and Iran. These sanctions encompass controls on government programs (such as foreign aid), U.S. exports, imports, private financial transactions, and assistance by international financial institutions.

In this Article, Professor Carter demonstrates that the present U.S. legal regime governing the use of sanctions for foreign policy reasons is haphazard and in need of reform. Current U.S. laws provide the President with nearly unfettered authority to cut off government programs and exports, but very little nonemergency authority in other areas, such as the regulation of imports and private financial transactions. This imbalance either skews presidential decisionmaking toward the use of easily imposed sanctions that might not be in the best interests of the United States, or encourages presidential declarations of dubious national emergencies to invoke his sweeping emergency powers.

Professor Carter proposes thoroughgoing but selective reform of the present legal regime. He recommends correcting the disparity in the President's nonemergency authority by substantially increasing the President's authority over imports and private financial transactions, while reducing the control over exports. He also proposes trimming the President's ability to employ emergency powers for imposing economic sanctions.

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I wish to thank the many people who have read all or parts of various drafts of this Article and offered thoughtful comments. Among those who have been especially helpful are Kenneth Abbott, Madeleine Albright, Kathleen Ambrose, Samuel Dash, Arthur Downey, John Jackson, David McCarthy, Paula Newberg, L. Edward Shaw, and Phillip Trimble. Thanks also go to several law students for their research, analysis, and editing skills. They include Hugh Grambau, Marian Hagler, David Laufman, Anthony Majestro, Ines Radmilovic, and Craig Zimmerman.

I INTRODUCTION

Against a wide range of target countries, the United States is resorting with increasing frequency to economic pressure as a major tool in its foreign policy. Recent examples include:

- a variety of trade and investment sanctions against South Africa;
- financial and other sanctions against Panama;
- wide-ranging measures against Libya;
- the trade embargo against Nicaragua;
- continuing controls on high-technology exports;
- sanctions against Poland and the Soviet Union, including the grain embargo and the ill-fated attempt to stop exports of pipeline equipment; and
- the ban on trade and the freezing of assets during the hostage crisis in Iran.

Other countries have also used economic sanctions for foreign policy purposes, although the United States employs them most often.

This frequent use reflects the special utility of economic sanctions, at least on first impression. Sanctions do not involve the violence and destruction of armed force, yet they provide a nation's leader with the appearance, and often the reality, of taking decisive steps. They are also more acceptable in the international community than the use of force. Yet they are usually more concrete than diplomatic protests or other diplomatic moves.

Considerable debate continues over the effectiveness of economic sanctions. Today's conventional wisdom questions whether they work. Despite significant failures, however, detailed studies suggest that sanctions have been successful in some situations.¹ For example, U.S. economic sanctions helped to topple Haiti's Duvalier in 1986, Uganda's Idi Amin in 1979, Chile's Allende in 1973, and the Dominican Republic's Trujillo in 1961. The threat of U.S. sanctions also helped to discourage South Korea from buying a nuclear fuel reprocessing plant from France in 1975-76. While the evidence is still unclear, comprehensive U.S. sanctions probably helped free the hostages from Iran in 1981. Similarly, sanctions against South Africa, by the United States and other countries, appear to be having an impact on the economy and on the political climate there.

Although the use of sanctions has been studied extensively, there has not yet been a comprehensive analysis of U.S. laws governing the imposition of sanctions. This Article presents such an analysis. An

1. See, e.g., sources cited *infra* note 29.

important starting point is to delimit the broad range of possible economic sanctions. They can roughly be grouped into five categories, as limits on: (1) U.S. government programs, such as foreign assistance and landing rights; (2) exports from the United States; (3) imports; (4) private financial transactions; and (5) international financial institutions.

In the absence of a declared national emergency, present U.S. laws for imposing economic sanctions are at best haphazard. For example, the President has nearly unfettered legal authority to limit the government's bilateral programs, such as by cutting off economic assistance to a foreign country. The President also has broad discretion to stop almost all exports. On the other hand, restricting imports is legally much more difficult. Similarly, the President has little legal control over foreign loans by private U.S. banks, and even less control over international financial institutions.

Since passing new legislation in a timely fashion is often difficult or even impossible, existing laws can strongly influence the President's choice of sanctions, frequently in a way that is not in the best interests of the United States. For instance, if the President wants to impose economic sanctions for foreign policy reasons, current laws encourage him to resort to export controls where he has relatively unfettered authority, rather than to impose import controls or restrict U.S. bank lending where his powers are limited. Yet, in certain situations, import sanctions or restraints on private credit would be more effective against the target country and cause less harm to U.S. industry and workers than export controls. Indeed, export controls can often amount to the economic version of shooting oneself in the foot.

The President can prevent the laws from skewing his choice of sanctions by declaring a national emergency under the International Emergency Economic Powers Act (IEEPA).² This statute gives him sweeping powers over exports, imports, and private financial transactions.

Congress passed IEEPA in 1977 to reduce casual resort to "national emergencies." That goal, however, has not been realized. The criteria for invoking IEEPA are vague, and the major provision for Congressional review was gutted by an adverse Supreme Court decision.³ IEEPA's flaws have become increasingly evident in light of President Reagan's questionable declarations of national emergencies and use of the Act's powers against Nicaragua, South Africa, and Libya.

The present bias toward either applying export controls under the nonemergency laws or declaring a dubious national emergency under

2. Pub. L. No. 95-223, tit. II, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701-1706 (1982)); *see infra* text accompanying notes 272-336.

3. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); *see infra* text accompanying notes 315-23.

IEEPA is not the only possible legal approach. Many present laws were passed primarily for other purposes and without serious consideration of the best legal regime for imposing economic sanctions. Many import laws, for example, aim to protect U.S. industries, while the banking laws seek to protect domestic depositors, borrowers, and investors.

The analysis of the laws that follows strongly suggests the need for constructive change. Moreover, recent developments demonstrate that reform is possible. For example, the 1985 Export Administration Amendments Act⁴ places a few limits on the President's broad discretion over exports. Also, the 1985 foreign aid law⁵ included provisions that authorize the President to prohibit almost all imports from Libya or other countries that support terrorism. Finally, the 1986 sanctions against South Africa,⁶ passed over President Reagan's veto, contain a variety of specific restrictions on certain U.S. exports, imports, loans, and investments involving South Africa. These developments, however, are all very limited in scope. Comprehensive legislative changes are still needed.

Since present U.S. laws for international trade and finance serve many purposes, reform must be undertaken carefully to avoid unintended results. For instance, if the President's authority to impose import sanctions were expanded, would domestic industry pressure the President to use the new laws for protectionist purposes? Also, could certain proposed sanctions—such as limits on private bank credit—be effectively enforced? For example, if the President were able to prohibit new loans to Poland, would the money simply pass through Western European banks to Poland at a slightly higher interest rate?

To address these issues, Part II briefly discusses the use of sanctions and analyzes their possible purposes and effectiveness. Part III then examines present U.S. laws governing economic sanctions in nonemergency situations. Of special note are recent changes in the export laws that, in very limited situations, protect existing contracts, compensate injured exporters, and prohibit certain controls on agricultural products lasting more than sixty days, absent congressional approval. Such provisions suggest possible approaches for more comprehensive reform.

Part IV analyzes present U.S. laws covering a declared national emergency, including the recent uses of IEEPA. The possible powers of the President beyond the statutes are briefly considered in Part V.

4. Pub. L. No. 99-64, 99 Stat. 120 (1985) (codified in scattered sections, primarily at 50 U.S.C. app. §§ 2401-2420 (Supp. III 1985)); see *infra* text accompanying notes 96-130.

5. Pub. L. No. 99-83, § 504(a), 99 Stat. 221 (1985) (codified at 22 U.S.C. § 2494aa-8(a) (Supp. III 1985)); see *infra* text accompanying notes 163-65.

6. The Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (codified at 22 U.S.C.A. §§ 5001-5116 (West Supp. 1987)); see *infra* text accompanying notes 254-71.

Part VI builds on the previous parts to address major alternatives for reform. The wisest course among the possible options would be to increase, in carefully structured ways, the President's nonemergency authority to limit imports and private financial transactions, while decreasing his authority to control exports. This approach would allow the President to select sanctions based on their expected effectiveness, rather than to choose those easiest to invoke under present laws. This should also reduce the President's incentive to resort casually to national emergency powers, and would thus pave the way toward trimming the use of those sweeping powers.

Scope of the Article

Economic sanctions can be defined as coercive economic measures taken against one or more countries to attempt to force a change in policies,⁷ or at least to demonstrate the sanctioning country's opinion of another's policies. The terms "economic boycott" and "embargo" are often used interchangeably with "economic sanction."⁸ The nation that imposes the sanctions is sometimes termed the "sender," while the object of the sanctions is sometimes called the "target."

This Article focuses on the use of economic sanctions for foreign policy purposes. Foreign policy is defined broadly here, to include national security considerations.⁹ As a result, this Article addresses economic sanctions with goals ranging from influencing the target country's specific policies (such as on human rights, terrorism, or nuclear non-proliferation) to destabilizing a government or stopping a military adventure.

The definition of foreign policy used here does not, however, include economic policies. In trade disputes or negotiations, the United States (like other countries) often takes, or threatens to take, economic steps to protect itself or to enhance its bargaining power. For example, the

7. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2008-09 (1981) ("sanctions"); see also D. LOSMAN, INTERNATIONAL ECONOMIC SANCTIONS: THE CASES OF CUBA, ISRAEL, AND RHODESIA 1-3 (1979).

8. See, e.g., WEBSTER'S, *supra* note 7, at 264 ("boycott"), 738-39 ("embargo"); D. LOSMAN, *supra* note 7, at 2. The word boycott has an interesting history. It came into use during the nineteenth century when absentee English landlords owned much property in Ireland. Captain Charles C. Boycott was an agent in County Mayo, Ireland who collected the rents for absentee landlords. When he refused to reduce the rents, the community retaliated by completely ostracizing him, economically and socially. He could not endure his isolation and returned to England. *Id.* at 2-3.

9. The 1979 and 1985 Export Administration Acts, 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. III 1985), tried carefully to define and distinguish between "foreign policy controls" and "national security controls." That distinction, however, does not appear in every law authorizing economic sanctions, and is still not entirely clear even in U.S. export laws. Both types of export controls will therefore be subsumed in this Article's broad definition of foreign policy. See discussion of these Acts, *infra* text accompanying notes 96-130.

United States recently imposed import sanctions against certain Japanese goods in retaliation for Japanese violation of a trade agreement regarding sales of semiconductor chips.¹⁰ While interesting and important, the use of sanctions for economic purposes is beyond the scope of this Article. It brings in a host of other situations, raises new and difficult issues, and often involves different laws. Consequently, this Article analyzes only those economic sanctions used for noneconomic foreign policy purposes.¹¹

In considering these particular sanctions, the emphasis is on the relevant U.S. laws. These include international agreements in which the United States is involved, such as the General Agreement on Tariffs and Trade (GATT). The discussion also addresses possible presidential powers beyond those granted by statute. This Article, however, does not analyze the question of the legality of economic coercion under customary international law.¹²

As Part II indicates, there is already a substantial body of literature on the history of sanctions and extensive empirical scholarship regarding their effectiveness. The literature, however, does not include a comprehensive overview and analysis of the U.S. laws governing the imposition of a range of possible economic sanctions, or a consideration of alternative legal regimes.¹³ Presumably this results partly from the traditional

10. See, e.g., 4 Int'l Trade Rep. (BNA) 754 (June 10, 1987); *id.* at 428, 467 (April 1, 1987).

11. This Article does, however, occasionally consider the use of economic sanctions against expropriation of U.S. businesses abroad. This is because expropriation cases are often part of a larger political dispute between the United States and another country, as was the case with Chile under Salvador Allende.

12. The frequent use of these sanctions by many countries constitutes persuasive evidence that no clear norm exists against them in customary international law. See, e.g., Shihata, *Destination Embargo of Arab Oil: Its Legality under International Law*, 68 AM. J. INT'L L. 591, 625-26 (1974). But cf. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405, 411-13 (1985).

In its case against the United States before the World Court, Nicaragua asserted that the United States had violated the principle of nonintervention by cutting off economic aid, by reducing Nicaragua's sugar quota by 90 percent, and through a comprehensive trade embargo. While the World Court ruled that the United States had violated customary international law by training and arming the anti-government contras, the majority nevertheless concluded on the economic sanctions: "[T]he Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention." *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, 126.

13. There are only brief references to the comprehensive approach. For example, Professor Kenneth Abbott discusses laws other than export laws in the introduction to his excellent article on export laws. Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L. REV. 739, 741 n.1 (1981). Gary Hufbauer and Jeffrey Schott have two short references to the statutory framework in their impressive empirical analysis of economic sanctions. G. HUFBAUER & J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 28, 59-60 (1985). The U.S. General Accounting Office presents a list of alternatives to the use of foreign policy export controls in its report, U.S. GENERAL ACCOUNTING OFFICE, *EXPORT CONTROLS: ASSESSMENT OF COMMERCE DEPARTMENT'S FOREIGN POLICY REPORT TO CONGRESS*

focus by legal scholars, government officials, and practitioners on individual parts of the puzzle—government programs, export laws, import laws, or banking laws—rather than on the whole.

Given the already formidable task of analyzing the U.S. federal law on economic sanctions, this Article does not delve into state and local laws that seek to use economic regulation for foreign policy purposes.¹⁴ These laws often differ substantially from federal laws in both their approach and coverage, and raise unique constitutional issues.¹⁵

This Article also does not consider in any depth alternatives to economic sanctions. Sanctions fall somewhere in the middle of a spectrum of possible actions for promoting U.S. foreign policy interests. The spectrum ranges from the coercive use or threat of military force,¹⁶ to covert action, to economic sanctions, and finally to diplomatic measures, such as expulsion of some of the target country's diplomatic personnel, recall of the ambassador, or suspension of cultural exchanges.¹⁷

II

THE PURPOSES AND EFFECTIVENESS OF ECONOMIC SANCTIONS

Economic sanctions for foreign policy purposes have had a long and controversial history. They were employed in ancient Greece,¹⁸ and have

12-13 (Aug. 1986) [hereinafter *EXPORT CONTROLS*], based partly on the analysis that I provided to the report's authors in an interview.

14. State and local governments have a long and active history of trying to influence other countries through laws or other steps, such as the efforts against the Arab boycott and more recently against apartheid in South Africa. These laws often include restrictions on a public entity purchasing goods from the target country (even from U.S. companies doing business there) and restrictions on the public entity investing its cash reserves or pension funds in U.S. banks or corporations that have operations in the target country. Indeed, state and local efforts appear to have been a significant factor in the decision by many U.S. banks and corporations to change their business practices, or even to reduce or terminate their activities, in South Africa. See, e.g., *Wash. Post*, Oct. 24, 1986, at F1, col. 3; *N.Y. Times*, Sept. 9, 1986, at 1, col. 5.

15. See Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986). While containing much useful information, this note does not thoroughly analyze the variety or the constitutionality of state and local activity.

16. See, e.g., C. VON CLAUSEWITZ, *WAR, POLITICS, AND POWER* 254-68 (Gateway ed. 1962) (war should be a continuation of state policy by another means); see also, G. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971); B. BLECHMAN & S. KAPLAN, *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* 11-20 (1978). The boundaries between the different types of sanctions—military, economic, and diplomatic—are often unclear. For example, see the discussion of arms sales, *infra* text accompanying notes 136-50.

17. See, e.g., W. CHRISTOPHER, *DIPLOMACY: THE NEGLECTED IMPERATIVE* (1981); Maynes, *Logic, Bribes, And Threats*, 60 FOREIGN POL'Y 111 (Fall 1985).

18. The best known example was Pericles' decree of 432 B.C., limiting the entry of products from Megara into the markets of Athens in response to Megara's territorial expansion and its kidnapping of three women. At least one scholar has noted Aristophanes' suggestion that the decree played a major role in starting the Peloponnesian War. See Fornara, *Plutarch and the Megarian*

been a U.S. tradition since the colonial era.¹⁹ Sanctions were employed both as a substitute for force²⁰ and as a complement to it.²¹

Since World War II, economic sanctions have been used frequently and for a variety of purposes. Indeed, countries employed economic sanctions for foreign policy reasons in at least ninety-one cases from 1945

Decree, 24 YALE CLASSICAL STUD. 213-14, 219-20 (1975); see also R. ELLINGS, EMBARGOES AND WORLD POWER: LESSONS FROM AMERICAN FOREIGN POLICY 17-18 (1985).

19. In one of the well-known steps leading to the American Revolution, the colonists resorted in 1765 to a boycott of English goods in response to the Stamp Act, and raised the famous cry of "No taxation without representation." J. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 123, 150, 109-163 (1957). The British repealed the Stamp Act the next year, but followed in 1767-70 with the Townshend Acts, designed to tax the salaries of colonial governors and judges. The colonists again retaliated with a boycott that eventually led to the Boston Tea Party of 1774. *Id.* at 268-73, 345-50.

The new United States of America soon resorted to economic sanctions as an instrument of foreign policy. Hoping to avoid war with England or France in late 1807, President Thomas Jefferson successfully urged Congress to enact a trade embargo that was as thoroughgoing as any known trade sanction. The embargo prohibited American ships from leaving for foreign ports and banned the carriage of American goods by other vessels. Encountering virulent domestic opposition, the embargo was ended in March 1809.

In 1811, however, the United States stopped trade with Great Britain in response to British orders limiting U.S. trade with France. The British revoked their orders, but, unaware of the revocation, the United States declared war two days later, starting the War of 1812. I S. MORISON & H. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 394-402 (1962); R. RENWICK, ECONOMIC SANCTIONS 4-7 (1981) (Paper 45, Harvard Studies in International Affairs).

20. For example, the creation of the League of Nations after World War I generated considerable hope and enthusiasm for economic sanctions as an alternative to force. Article 16 of the League's charter provided that all League members were to cease all economic intercourse with any other member that resorted to war. LEAGUE OF NATIONS COVENANT art. 16. See generally F. NORTHEDGE, THE LEAGUE OF NATIONS: ITS LIFE AND TIMES 1920-1946, at 59 (1986). While trying to convince the American people of the need for the League, President Woodrow Wilson proclaimed:

A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.

WILSON'S IDEALS 108 (S. Padover ed. 1942). Two early successes by the League in the 1920's against smaller powers, Yugoslavia and Greece, further encouraged supporters of sanctions. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 124-31.

Nevertheless, the League itself, and hopes for the peace-keeping powers of economic sanctions, were severely damaged by the League's weak response to Italy's invasion of Ethiopia in October 1935. While the League approved an arms embargo and other trade and financial sanctions, it failed, after much-publicized vacillating, to embargo the vital exports of petroleum, coal, steel, and pig iron. Moreover, non-League countries such as the United States and Soviet Union did not adhere to the sanctions, and many League members were less than punctilious in observing them. As a result, the selective sanctions did not deter Italian aggression. Addis Ababa fell to Mussolini in May 1936, and the League discontinued its sanctions in July. See H. FEIS, SEEN FROM E.A.; THREE INTERNATIONAL EPISODES 195-283 (1947); R. RENWICK, *supra* note 19, at 9-24.

21. For instance, economic sanctions proved useful during World War II. The trade embargo against Europe and Japan and the Allies' preemptive buying of strategic materials from neutral countries played at least a modest role in defeating the Axis countries. Japan, especially dependent on imports, was particularly vulnerable. See G. HUFBAUER & J. SCHOTT, *supra* note 13, 155-70; K. KNORR, THE POWER OF NATIONS: THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 140 (1975); 2 W. MEDLICOTT, THE ECONOMIC BLOCKADE (1959).

through 1984, according to Hufbauer and Schott's excellent, comprehensive study.²² The United States leads the world in resorting to economic sanctions for foreign policy purposes. Of the study's ninety-one cases, the United States employed sanctions sixty-two times, either alone or with other countries.²³ Other frequent users include the United Kingdom, the Soviet Union, and the Arab League.²⁴

The remainder of this Article focuses on the U.S. uses of sanctions since World War II. These recent cases generally offer more lessons for the present and future than do older examples. Moreover, these sanctions were invoked under laws that are the same as or similar to current laws, and therefore help illustrate the haphazard nature of the present U.S. legal regime.

A. *The Purposes of Sanctions*

There are three broad rationales for imposing sanctions:

- seeking to influence a country to change its policies or even its government;
- punishing a country for its policies; and
- symbolically demonstrating opposition against the target country's policies to many possible audiences, including constituencies in the sender country as well as audiences in the target country, other potential target countries, or allied countries.²⁵

22. G. HUFBAUER & J. SCHOTT, *supra* note 13. This 753-page study has several overview chapters and then abstracts of the authors' analyses of 103 cases of economic sanctions for foreign policy goals. These cases begin with the economic blockade of Germany in World War I. The study's definition of "foreign policy goals" is similar to the use of "foreign policy reasons" in this Article. Compare *id.* at 2 with *supra* text accompanying note 9.

The study recognizes, for understandable reasons, that it "probably omits many uses of sanctions imposed between powers of the second and third rank." *Id.* at 3. The study also "may have overlooked instances where sanctions were imposed by major powers in comparative secrecy to achieve relatively modest goals." *Id.*

In addition, the United States has resorted to economic sanctions several times since the study's 1984 cutoff. Examples include: a suspension of U.S. assistance to Haiti that began in November 1987 and had not been lifted as of February 1988, in addition to the prior suspension of aid to that country in early 1986; a ban on almost all imports from Iran that began in October 1987 and remains in effect; the current freeze on most U.S. foreign assistance to Panama that began in July 1987 and the other, more recent sanctions; and steps to limit travel to Greece and Lebanon after the 1985 hijacking of a TWA airliner. Moreover, the continuing U.S. sanctions against Nicaragua, South Africa, and Libya in 1985-88 are expansions of "episodes" in the study.

23. See *id.* at 7, 13-20. The totals at page seven of the study are adjusted to include only post-World War II sanctions (i.e., 91 of 103 total cases, and 62 of 68 U.S. cases have occurred since World War II).

24. For example, the 12 British uses include: the trade and financial embargo against Argentina during the war over the Falklands Islands; financial and trade sanctions against Idi Amin's Uganda from 1972 to 1979 in cooperation with the United States; financial and trade sanctions against Rhodesia from 1965 to 1979 in cooperation with the United Nations. The 10 Soviet episodes were often against recalcitrant satellites. The Arab League and its members used its petroleum power four times. *Id.*

25. E.g., EXPORT CONTROLS, *supra* note 13, at 5; Abbott, *supra* note 13, at 798-857.

More than one rationale can be involved in the decision to employ a sanction or set of sanctions in a particular situation. For example, the widening U.S. sanctions against South Africa stem from a mix of all the above considerations. The sanctions involve an effort to influence South Africa to change its apartheid policy, a dose of punishment, and a symbolic statement of U.S. opposition to apartheid.²⁶

Besides these broad rationales, a sender country generally has more specific foreign policy motives for imposing sanctions. Hufbauer and Schott characterized these objectives as follows:

(1) "Change target country policies in a relatively modest way (modest in the scale of national goals, but often of burning importance to participants in the episode)." These goals include slowing nuclear proliferation, promoting human rights, fighting terrorism, and resolving expropriation claims;

(2) "Destabilize the target government," and thus change its policies;

(3) "Disrupt a minor military adventure," as illustrated by the United Kingdom's sanctions against Argentina over the Falkland Islands dispute;

(4) "Impair the military potential of the target country," as illustrated by sanctions against the Warsaw Pact by the United States and its allies; and

(5) "Change target country policies in a major way," as illustrated by U.S. efforts and those of other countries against South Africa's system of apartheid.²⁷

Again, more than one specific foreign policy objective can underlie a set of sanctions. For example, the recent U.S. efforts against Nicaragua are ostensibly designed to promote human rights, destabilize the Sandinista government, and disrupt the Nicaraguan support of rebels in El Salvador.

B. Effectiveness of Sanctions

It is difficult to measure the success of sanctions because of the frequent ambiguity of the rationales and objectives behind their use. Even if the real goal is discernible, it still may be difficult to determine the extent to which the sanctions contributed to the desired outcome.²⁸

26. Delineating the exact rationales behind sanctions can be problematic. In the United States, the sanctions might be imposed by the President based on his existing statutory discretion, through a new law passed by Congress and signed by the President, or under a new law enacted by Congress over the President's veto. It is very difficult to divine the intentions of Congress, with its many members, and it becomes still more difficult to decipher the intentions of Congress and the President acting together. It may even be difficult to determine the President's exact rationale when he acts alone.

27. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 29.

28. Many questions can arise. For example, if a sanction is designed to influence a country to

Numerous studies have examined the effectiveness of one or more recent uses of sanctions.²⁹ The Hufbauer-Schott study is the most comprehensive. It evaluated the effectiveness of sanctions against the five specific foreign policy objectives listed above.³⁰ To measure "success," the study examined two issues: (1) "the extent to which the policy outcome sought . . . was in fact achieved," and (2) "the contribution made by sanctions to a positive outcome."³¹ These policy outcomes were measured "against the *stated* foreign policy goals of the sender country."³² The study did not consider domestic political purposes.³³

Despite the difficulty of measuring effectiveness, the study indicates that economic sanctions have been "successful" more often than current conventional wisdom recognizes. For the sixty-two cases since 1945 where the United States was one of the sender countries, the study found a success rate of about 40%.³⁴ This success rate has declined somewhat in recent years, notably in the realm of sanctions seeking modest policy results. Target countries are perhaps becoming more immune to sanctions because of two factors. First, the recent targets have been less dependent on trade with the United States. Second, other countries, such as the Soviet Union, have stepped forward more often to assist the target states.³⁵

change its human rights policy, is the sanction successful if the target country releases 10 political prisoners, but leaves 10 more in jail, and only partly modifies its state of emergency?

29. Some of the better studies include: G. HUFBAUER & J. SCHOTT, *supra* note 13; D. LOSMAN, *supra* note 7; M. DOXEY, *INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE* (1987) R. ELLINGS, *supra* note 18; R. RENWICK, *supra* note 19; *ECONOMIC COERCION AND U.S. FOREIGN POLICY: IMPLICATIONS OF CASE STUDIES FROM THE JOHNSON ADMINISTRATION* (S. Weintraub ed. 1982).

30. When a use of sanctions was found to have more than one objective, the sanction was categorized according to the most difficult objective. Where two objectives were judged equally important, however, the case was analyzed under both categories. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 29.

31. *Id.* at 32.

32. *Id.* (emphasis in original). Hufbauer and Schott employed a numerical calculation for measuring success. To measure the policy outcome, they assigned values on a scale of 1 (failure) to 4 (success). To measure the contribution of the economic sanctions, they assigned values on a scale of 1 (zero or negative contribution) to 4 (significant contribution). They then multiplied the two assigned numbers together, giving values ranging from 1 to 16. A score of 9 or higher was viewed as a "successful" outcome. *Id.* at 33.

33. The authors concluded that it was impossible to evaluate these domestic motives systematically. *See id.* at 3, 32.

34. *See id.* at 80. As noted earlier, the study did not include the U.S. actions against Haiti in 1987-88 and early 1986, Iran in 1987-88, Panama in 1987-88, and Greece and Lebanon in 1985. *See supra* note 22. Also, the sanctions against Ethiopia were rated unsuccessful, but the outcome now appears to be successful. *See infra* text accompanying note 38. The success rate for all 103 cases in the study (from 1914 on) was 36 percent, very close to the post-1945 rate for the United States. *Id.*

35. *Id.* at 81.

1. *Effectiveness as a Function of Purpose*

The success rate varies according to the foreign policy objective being pursued. Sanctions designed to *destabilize* a government (objective 2) have been especially effective. Examples include the toppling of Haiti's Duvalier in February 1986,³⁶ Uganda's Idi Amin in 1979, Chile's Allende in 1973, and the Dominican Republic's Trujillo in 1961. Indeed, it would appear that in the study's fourteen cases since 1954 where the United States applied economic sanctions for destabilization purposes, it was successful in ten episodes and unsuccessful in two.³⁷ The outcome of two cases is still uncertain, as U.S. sanctions continue against Libya and Nicaragua.

U.S. sanctions designed to achieve *more narrow policy goals*—such as dealing with expropriation of U.S. corporations, nuclear proliferation, terrorism, or human rights abuses (objective 1)—have been effective about 40% of the time, though the rate varies according to the particular goal.

The United States has been successful in as many as eight out of nine uses of sanctions against expropriation. The continuing effort against Cuba is the only unsuccessful case. The most recent success was against Ethiopia. In December 1985, the United States and Ethiopia signed an agreement providing that Ethiopia pay \$7 million to settle claims by U.S. nationals.³⁸

The impact of U.S. sanctions against Iran during 1979-81 in resolving an expropriation dispute and in obtaining the release of the American hostages remains uncertain, though most observers rate them a success. The comprehensive sanctions, including a freeze on about \$12 billion in Iranian assets, presumably had some influence, particularly since Iran had been attacked by Iraq and was in need of money to finance its war effort. It is not yet clear, however, what finally led Ayatollah Khomeini

36. See N.Y. Times, Feb. 27, 1986, at A3, col. 1.

37. The other six successful efforts were: Somoza in Nicaragua in 1979; Ian Smith in Rhodesia in 1979; Goulart in Brazil in 1964; Diem in South Vietnam in 1963; Prince Souvanna Phouma and General Phoumi in Laos in 1960-62; and Mossadegh in Iran in 1951-53. The two failures were Sukarno in Indonesia in 1963-66 and Castro in Cuba from 1960 to the present. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 6, 43-44, 50-53. Other measures, such as covert action and military operations, have usually accompanied economic sanctions seeking to destabilize a government, and thus could affect the above results. As of early March 1988, the U.S. effort against General Manuel Noriega of Panama was just commencing in earnest, and is not included in the tables here. See *supra* note 22.

38. The Compensation Agreement and related documents are reproduced at 25 I.L.M. 56 (1986). For a history of the episode, see *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 660 (W.D. Mich. 1985). Other successful cases include Chile in 1970-73, Peru in 1968-74, Brazil in 1962-64, Ceylon in 1961-65, Egypt in 1956, and Iran in 1951-53. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 236-40 (Iran), 269-75 (Egypt), 324-29 (Ceylon), 340-46 (Brazil), 430-45 (Peru), 439-44 (Chile).

to come to terms with the United States.³⁹

Economic sanctions have also been used on occasion to further non-proliferation policy. For example, in 1975-76, the United States and Canada threatened financial and export sanctions to persuade South Korea not to buy a French reprocessing plant that could produce weapons-grade nuclear materials.⁴⁰

In the area of human rights, sanctions such as cutting back on U.S. military and economic assistance usually have not been successful in stopping the target countries' gross violations of internationally recognized rights.⁴¹

The United States has also used economic sanctions—such as restricting various financial assistance programs and imposing export controls—against countries designated as supporting terrorism. It does not appear, however, that these selective sanctions had much effect in the 1980's on the policies of two of the principal target countries—Syria and Libya.⁴²

The study of efforts to destabilize governments or to achieve narrower policy goals (objectives 1 and 2) leads to the further conclusion that those sanctions having an immediate impact are the most effective. It also helps to target a country with a much smaller economy. Moreover, a government already plagued by significant economic problems and political turmoil is more easily destabilized.⁴³

The use of sanctions to *disrupt military adventures* (objective 3) has

39. See Carswell and Davis, *Crafting the Financial Settlement*, in *AMERICAN HOSTAGES IN IRAN* 232 (P. Kreisberg ed. 1985); Saunders, *Beginning of the End*, in *id.* at 290-92; see also G. HUFBAUER & J. SCHOTT, *supra* note 13, at 635 (noting, however, that the sanctions were "painstakingly slow" and costly to the United States both economically and politically).

40. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 505-07. Similarly, the United States delayed shipments of nuclear power reactors to stop the Taiwanese from reprocessing spent fuel. *Id.* at 540-43. But, U.S. restrictions on the export of nuclear fuel and technology to South Africa, India, Argentina, Brazil, and Pakistan were unsuccessful in convincing those countries to accept full multilateral safeguards, and the restrictions sometimes caused serious diplomatic repercussions. For the relevant case studies, see *id.* at 523-29 (South Africa), 587-91 (Brazil), 592-97 (Argentina), 598-602 (India), 636-43 (Pakistan).

41. Sanctions in 1977-84 did contribute to increased respect for human rights in Brazil. *Id.* at 579-82. On the other hand, the effects were limited in at least 10 other cases, including South Korea in 1973-77, Paraguay in 1977-81, Guatemala from 1977 on, and Poland in 1981-84. For the relevant case studies, see *id.* at 473-78 (South Korea), 550-53 (Paraguay), 554-59 (Guatemala), 683-95 (Poland). Some observers have argued that the lack of success on human rights was partly because the Carter administration did not try hard enough. *E.g.*, Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 264 (1982).

42. Sanctions, however, did encourage Greece in 1985 to take steps to limit terrorist activities within its borders. After the hijacking of TWA Flight 847, the United States issued a travel advisory warning of inadequate security at the Athens airport. The advisory, coupled with publicity of the hijacking, led thousands of American tourists to cancel flight reservations to and from the airport. Greek officials then agreed to make major improvements in security. *N.Y. Times*, July 23, 1985, at A3, col. 1.

43. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 83, 86.

generally been unsuccessful, as in the case of Turkey's invasion of Cyprus in 1974.⁴⁴

The effectiveness of U.S. sanctions to *impair the military potential* of a target country (objective 4) is controversial.⁴⁵ The principal example of U.S. sanctions of this sort is the continuing export controls that the United States and its CoCom⁴⁶ allies have imposed since 1948 on strategic materials (including high-technology products) to the Soviet Union and other Warsaw Pact countries. Hufbauer and Schott's conclusion that these sanctions are "distinctly unsuccessful"⁴⁷ is disputed by other studies. Estimates of the cost and effectiveness of these sanctions both to the Soviet Union and to the United States vary widely.⁴⁸ Some experts have also noted that export controls on high technology can have a chilling effect on innovation and the flow of ideas in the United States.⁴⁹ On balance, putting aside the specific issue of "success," high-technology

44. Successes include U.S. opposition to the British-French invasion of Egypt in 1956 and deterring the Netherlands in 1948-49 from forcibly resisting Indonesian independence. Failures include, among others, U.S. sanctions against the Soviet Union over its invasion of Afghanistan in 1980-81; against India and Pakistan over Bangladesh in 1971; and against China from 1949-70 for extending its control over the mainland and for invading Korea. *See id.* at 187-93 (Netherlands), 221-30 (China), 275-79 (France and United Kingdom), 445-52 (India and Pakistan), 655-65 (Soviet Union).

45. While most economic sanctions are intended in some general sense to weaken the target country, a distinction usually can be made between those sanctions that seek to achieve political goals like combating nuclear proliferation or destabilizing the government, and sanctions that seek to limit the long-term military potential of the target country. This distinction is similar to the one between national security controls and foreign policy controls written into the recent Export Administration Acts. *See infra* text accompanying notes 96-130.

46. CoCom, the abbreviation for the Consultative Group and Coordinating Committee for Multilateral Export Controls, was created secretly in 1949. It now consists of 16 countries—the NATO countries (except Spain and Iceland) and Japan.

47. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 68.

48. For example, Hufbauer and Schott estimate that the average annual cost to the Soviets of the CoCom controls was about \$1.2 billion in 1970-81 and that the added U.S. controls on oil and gas technology and equipment in 1981-82 cost the Soviets a further \$500 million. *Id.* at 218, 663, 708. A Pentagon study estimates the denial of Western technology to the Soviet Union would cost the Soviet military during 1986-96 and would save the United States and its allies \$5 to \$13.2 billion in defense expenditures during that period. U.S. DEP'T OF DEFENSE, THE TECHNOLOGY SECURITY PROGRAM 11 (1986). For a careful recent study of U.S. export controls for national security reasons, including an expert's cost calculations, see NATIONAL ACADEMY OF SCIENCES PANEL ON THE IMPACT OF NATIONAL SECURITY CONTROLS ON INTERNATIONAL TECHNOLOGY TRANSFER, BALANCING THE NATIONAL INTEREST (1987) [hereinafter NAT'L ACAD. OF SCIENCES PANEL].

Recent developments have reinforced questions about the effectiveness of the CoCom controls. Most prominent have been the large sales of propeller-milling equipment to the Soviet Union by Toshiba Corporation of Japan and Kongsberg Vaapenfabrikk of Norway. U.S. officials have said that the propellers produced by this high-technology equipment have allowed Soviet submarines to run more quietly, and thereby make detection more difficult. Companies in other western countries were apparently involved in these and other high-technology sales to the Soviets. *See, e.g.,* 4 Int'l Trade Rep. (BNA) 1317 (Oct. 28, 1987); N.Y. Times, Oct. 22, 1987, at D2, col. 5; N.Y. Times, June 12, 1987, at A1, col. 1.

49. For example, scholarly articles and intellectual interchange at conferences between U.S. experts and foreigners can generate new developments, yet such sharing of ideas could well be

controls do seem to impose costs on the Soviet Union and to reduce demands on U.S. defense spending. Moreover, U.S. concerns about the Soviet military threat ensure that U.S. policy will require these controls, or at least some variant of them, for the foreseeable future.⁵⁰

U.S. sanctions in the catchall category of *other major policy changes* (objective 5) include measures against South Africa for its apartheid policies and against the Arab League for its boycott of Israel. While Hufbauer and Schott concluded that these sanctions were also "distinctly unsuccessful,"⁵¹ this conclusion further demonstrates some of the limitations of others' measures of "success." Although the sanctions have not yet contributed significantly to a positive policy outcome, they have been important for other reasons.

Sanctions have made South Africa pay an economic price for its policy of apartheid and for its refusal to grant independence to Namibia. Even the pre-1985 sanctions cost South Africa over \$270 million per year, or about 2.8% of its gross national product.⁵² More recently, South Africa has encountered serious financial problems as a result of credit restrictions that were first imposed by several private banks for a variety of reasons, and then by the U.S. and other governments. Moreover, the U.N. and U.S. sanctions provide the world, including the people of South Africa, with an important symbol of opposition. The debate over these

limited by strict controls. See, e.g., NATIONAL ACADEMY OF SCIENCES, SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY 41 (1982).

50. There are considerable pressures, though, for some lessening of U.S. export controls on high-technology goods, as exemplified by the 1987 report of the NAT'L ACAD. OF SCIENCES PANEL, *supra* note 48. See 4 Int'l Trade Rep. (BNA) 127 (Feb. 4, 1987); N.Y. Times, Jan. 14, 1987, at D1, col. 3. Controls on the export of oil and gas equipment to the Soviet Union were relaxed in January 1987. 52 Fed. Reg. 2500 (1987) (to be codified at 15 C.F.R. pts. 371, 373, 376, 379, 385, 399). Other controls, including those on personal computers, were relaxed in January 1988. 53 Fed. Reg. 2582 (1988); see N.Y. Times, Feb. 15, 1988, at A1, col. 5. What impact the serious and widely reported diversion by Toshiba and Kongsberg, discussed *supra* note 48, will have on U.S. controls is still uncertain at this time.

Major trade bills are pending in Congress. House Resolution 3 passed both houses in 1987, though in much different versions. See Trade and International Economic Policy Reform Act of 1987, H.R. 3, 100th Cong., 1st Sess. (as passed by the House) [hereinafter 1987 House Trade Bill]; Omnibus Trade and Competitiveness Act of 1987, H.R. 3, 100th Cong., 1st Sess. (as passed by the Senate) (formerly S. 1420, 100th Cong., 1st Sess. (1987)) [hereinafter 1987 Senate Trade Bill]. As of February 1988, the two bills were in a House-Senate conference. See 5 Int'l Trade Rep. (BNA) 17, 18 (Jan. 6, 1988). These trade bills include several proposed reforms of export controls, including those on high-technology goods. See, e.g., 1987 House Trade Bill, *supra*, § 332 (entitled "National Security Controls"); 1987 Senate Trade Bill, *supra*, §§ 1030-1033 (including mandatory sanctions against Toshiba and Kongsberg). In the meantime, the continuing resolution passed by Congress and signed by the President in December 1987 did impose some limits on purchases by the U.S. Department of Defense from Toshiba and Kongsberg and any of their subsidiaries. See 5 Int'l Trade Rep. (BNA) 17, 18 (Jan. 6, 1988).

51. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 68. Similar steps were taken against Poland in 1981-84, seeking to end martial law and obtain internal reforms.

52. *Id.* at 355.

sanctions also serves to educate the American public about apartheid, and may generate still greater opposition to the policy.⁵³

Similarly, the broad limits on participation by U.S. individuals and other entities in the Arab boycott against Israel demonstrates U.S. support for Israel and opposition to religious and ethnic discrimination. Moreover, it has apparently led some Arab countries to be less energetic in enforcing their boycott.⁵⁴

2. *Effectiveness of Sanctions by Type*

An analysis of the effectiveness of sanctions must also consider whether certain *types* of sanctions are more effective than others in achieving their objectives. Relative effectiveness may, of course, also depend on the circumstances of particular situations.⁵⁵

For example, if the United States were to impose sanctions against South Korea for human rights violations, import controls might be more effective economically than export controls, given the importance of U.S. purchases to South Korean trade. The United States imports about 39% of all of South Korea's foreign sales. In contrast, U.S. exports total about 21% of South Korea's foreign purchases.⁵⁶ Product breakdowns reveal more subtle differences. The amount and type of the principal U.S. imports from South Korea (manufactured articles and clothes) suggest that South Korea cannot easily change long-established business relationships and find willing buyers in other countries.⁵⁷ At the same time, South Korea would probably have less trouble and incur fewer additional costs finding other suppliers for present U.S. exports to it, such as machinery, crude materials, and chemical products. These are generally available in world markets.⁵⁸

Even for countries where the United States plays about the same role in percentage terms as an exporter and as an importer, import controls might, for similar reasons, still be more effective than export controls. For example, the United States imports about 40% of Guatemala's foreign sales and exports about 40% of its purchases.⁵⁹ Guatemala, how-

53. For a discussion of these sanctions, see *infra* text accompanying notes 254-71.

54. For a discussion of these laws, see *infra* text accompanying notes 244-53.

55. This analysis ignores for the moment legal and diplomatic problems stemming from the conflict between GATT and U.S. laws. See *infra* text accompanying notes 192-206.

56. See *infra* Figure 1 at 1178.

57. See N.Y. Times, Oct. 6, 1985, at F1, col. 6; *id.*, Sept. 23, 1985, at D1, col. 4; *id.*, May 1, 1985, at D15, col. 1.

58. Generally, the competitive nature of export markets makes import restrictions more effective than export controls. R. RENWICK, *supra* note 19, at 80. The goods the United States exports to South Korea face substantial competition in the world markets. See, e.g., *Weaker Dollar Hasn't Helped Chemical Trade*, 65 CHEMICAL & ENGINEERING NEWS 9 (March 30, 1987) (chemicals); 3 Int'l Trade Rep. (BNA) 68 (Jan. 8, 1986) (construction machinery).

59. See *infra* Figure 1 at page 1178.

FIGURE 1

ILLUSTRATIVE POTENTIAL TARGET COUNTRIES

Country	U.S. Exports as % of Country's Imports ¹	Principal U.S. Exports ²	U.S. Imports as % of Country's Exports ¹	Principal U.S. Imports ³	U.S. Banks' Claims as % of Total Bank Claims ⁴
Chile	20%	machinery and transport equipment (MTE), chemicals, manufactured goods	22%	metals, vegetables & fruits	47%
Ecuador	32%	MTE, chemicals, manufactured goods	50%	oil, coffee, fish	48%
Guatemala	40%	chemical products, MTE, oil & gas	40%	coffee, vegetables & fruits, sugar	33%
Honduras	45%	MTE, manufactured goods, chemical products	48%	sugar, coffee, fish	N.A.
Mexico	67%	MTE, manufactured goods, chemical products	67%	oil, machinery (electronic)	43%
Panama	17%	MTE, manufactured goods, chemical products	54%	fish, vegetables & fruits, coffee	36%
Philippines	25%	MTE, food, chemical products	36%	manufactured articles, clothes	17%
South Korea	20%	MTE, crude materials, chemical products	39%	manufactured articles, clothes	26%
Taiwan ⁵	24%	MTE, crude materials, chemicals	48%	clothing, manufactured articles	24%

¹ International Monetary Fund, Direction of Trade Statistics: Yearbook (1987). The percentages, rounded to the nearest 1%, are calculated from statistics for 1986, which are based on dollar values.

² Bureau of the Census, U.S. Dep't of Commerce, U.S. Exports (Pub. FT455/1986 Dec. and Annual 1986). Data is for 1986; items are ranked in order of dollar value according to the Bureau's categories.

³ Bureau of the Census, U.S. Dep't of Commerce, U.S. General Imports (Pub. FT155/1986 Dec. and Annual 1986). Data is for 1986; items are ranked in order of dollar value according to the Bureau's categories.

⁴ These percentages for the end of June 1986 were obtained by analyzing published data for total external bank claims and total U.S. bank claims for each country (including both public and private creditors). Country totals were taken from Bank for International Settlements and Organisation for Economic Co-operation and Development, Statistics on External Indebtedness: Bank and Trade-Related Non-Bank External Claims on Individual Borrowing Countries and Territories at End-June 1986, Table I at 5-8 (Jan. 1987). U.S. bank claims are from Office of the Secretary, U.S. Dep't of Treasury, Treasury Bulletin, (Summer 1986). The data does not include lending from the international financial institutions, such as the World Bank.

⁵ The 1985 Trade figures for Taiwan, rounded to the nearest 1%, are from Council for Economic Planning and Development, Republic of China, Taiwan Statistical Data Book at 214, 216 (1986).

ever, might have serious difficulty selling elsewhere, at comparable prices, the coffee, sugar, bananas, and other vegetables and fruits that constitute its principal U.S. sales, because trade barriers against agricultural products are widespread.⁶⁰

Similarly, the United States imports a large amount of Chile's copper production, an important revenue earner for that country. Chile would probably find it more difficult to change its long-established relationships with U.S. copper purchasers than to find new suppliers for the goods it buys from the United States.⁶¹ Thus, U.S. import controls would likely be more effective than export restrictions.

An analysis of the relative effectiveness of sanctions should also assess the possible contribution of controls on private financial transactions. For example, as Figure 1 indicates, U.S. banks now make a large share of the foreign loans to borrowers in certain countries, such as South Korea (26%), Guatemala (33%), and Chile (47%). Controls on financial transactions might be effective, but there are many potential problems that are discussed below.⁶²

History provides several concrete examples of the effectiveness of controls on imports and private financial transactions. Increased U.S. duties on the Dominican Republic's sugar imports in 1961-62 helped topple the Trujillo regime.⁶³ U.S. threats to deny most-favored-nation (MFN) status to Romania seem to have encouraged it to relax its emigration restrictions.⁶⁴ As for financial controls, the freeze on \$12 billion in Iranian deposits in 1979-81 probably had the greatest impact among all the comprehensive sanctions.⁶⁵ Similarly, the private decisions by several U.S. banks not to roll over South Africa's short-term loans helped create a financial crisis there in August-September 1985. The official U.S. sanctions later included a ban on new loans to that government, and then on new investment in that country. These financial controls have probably created more problems for South Africa than any of the other recently imposed sanctions.⁶⁶

60. Wall St. J., Apr. 7, 1987, at 1, col. 6.

61. For a history of the Chilean relationship with U.S. copper companies, see T. MORAN, *MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE: COPPER IN CHILE* (1974). Finding a replacement for the U.S. market would be difficult with the present oversupply of copper. N.Y. Times, July 7, 1986, at D1, col. 6. U.S. exports to Chile are similar to those exported to South Korea and thus would be relatively easy to replace. See sources cited *supra* note 58.

62. For a detailed discussion of these problems, see *infra* text accompanying notes 430-49.

63. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 302-07.

64. N.Y. Times, May 19, 1983, at A3, col 4; See also Note, *An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade and Human Rights: The Romanian Example*, 8 L. & POL'Y INT'L BUS. 193, 206-07 (1976).

65. Christopher, *Introduction*, in *AMERICAN HOSTAGES IN IRAN* *supra* note 39, at 24; Carswell & Davis, in *id.* at 231-34.

66. See *infra* text accompanying notes 206-28, 254-71.

In short, each use of sanctions should be rooted in a careful analysis of the vulnerabilities of the target country. In terms of effectiveness, export controls do not have any natural advantage over import controls or financial controls. Indeed, one of the most interesting conclusions of the Hufbauer and Schott study was that "[t]he multiple regression analysis suggests that financial controls are marginally more successful than export controls, but that import controls are the most successful of all types."⁶⁷

The relative effectiveness of import controls and at least some financial controls suggests that these potential sanctions should be available for use if the circumstances warrant. Under present U.S. laws, however, export controls are generally much easier to impose than import controls or restraints on private financial transactions, thus skewing the President's options in selecting the most effective sanctions.

3. *Costs to the Sender Country*

It is also important to recognize that economic sanctions usually involve some costs to the sender country. The type and amount of these costs depend, of course, on the particular situation and on the type of sanctions imposed. Many costs stem from the indirect effects of sanctions, such as the loss of sales by a supplier when the manufacturer is prevented from making an export sale to a target country. Other costs result from long-term changes in business patterns, which often occur when the target country seeks to minimize the financial effects of future sanctions.

These myriad domestic costs are rarely calculated in any detail or with much reliability. Cost calculations might not be important to U.S. policymakers, particularly when the United States is imposing sanctions against a country with a much smaller economy, like Nicaragua. Moreover, there may be considerable incentives for the government *not* to calculate domestic costs. Careful estimates might highlight those costs and exacerbate political problems with domestic constituencies hurt by the sanctions.

Despite the complexities, a few general observations about U.S. costs are worth mentioning. First, terminating or reducing bilateral programs, such as foreign assistance, can initially *save* money. Such measures may, however, involve indirect costs, as in lost sales for U.S.

67. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 89. This conclusion was for all the study's 103 cases. It also appears to apply equally well to the 62 cases of U.S. economic sanctions since 1945.

This study regrettably lumped into the general catch-all phrase of "financial controls" three of this Article's categories of sanctions—U.S. government programs, private financial transactions, and international financial institutions. As detailed below, the U.S. laws for these three categories vary greatly. The study's approach reflects the fact that it did not examine U.S. laws.

companies. Foreign recipients of U.S. programs often spend much of their aid on U.S. goods and services, sometimes because U.S. laws require them to do so.⁶⁸

Second, restrictions on imports and private financial transactions often cost less than export controls, though all these sanctions have domestic costs. Export sanctions directly cause lost sales and lost jobs. The immediate impact might be reduced by finding other customers, but complete substitutability is not assured, and such alternative sales would presumably be on less favorable terms (or they would have occurred before the controls were imposed). Export restrictions also create long-term problems for U.S. sales abroad, as they jeopardize the reputation of U.S. businesses as reliable suppliers.⁶⁹

Import controls generally involve smaller costs. Since new foreign policy sanctions are usually applied against only one country or a few countries, alternative foreign suppliers frequently exist. As a result, the U.S. purchaser does not have to do without a good, but faces only the

68. See, e.g., 22 U.S.C. § 2354 (1982). "The truth is that 70% of the money appropriated for bilateral foreign assistance is spent in the United States, not abroad." Address by Under-Secretary of State Michael H. Armacost, Regional Foreign Policy Conference, in Kansas City (Sept. 11, 1985), reprinted in DEP'T ST. BULL., Dec. 1985, at 56.

69. For example, the U.S. agricultural embargo against the Soviet Union in 1980 hurt the future export sales of U.S. farmers. A careful study concluded that the U.S. share of the world market for grains and soybean products declined, as consuming countries expanded their sources of supply and U.S. competitors expanded their production. In particular, the U.S. share of the Soviet imports of grain declined sharply from 74% in 1978-79 to 19% in 1982-83. The Soviets not only increased imports from Canada, Argentina, and Brazil, but entered into new five-year agreements with each country. INT'L TRADE COMM'N, PUB. NO. 1461, U.S. EMBARGOES ON AGRICULTURAL EXPORTS: IMPLICATIONS FOR U.S. AGRICULTURAL INDUSTRY AND U.S. EXPORTS (Dec. 1983); see also SUBCOMM. ON EUROPE AND THE MIDDLE EAST OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 1ST SESS., AN ASSESSMENT OF THE AFGHANISTAN SANCTIONS: IMPLICATIONS FOR TRADE DIPLOMACY IN THE 1980s at 47-52 (Comm. Print 1981) [hereinafter HOUSE AFGHANISTAN REPORT]. See generally U.S. DEP'T OF AGRICULTURE, EMBARGOES, SURPLUS DISPOSAL, AND U.S. AGRICULTURE (1986) (extensive study of impact of embargoes).

Since U.S. farmers rely heavily on exports, the decline in their overseas market has contributed to the present plight of U.S. agriculture. INT'L TRADE COMM'N, *supra*, at viii-xi; see BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, 67 SURVEY OF CURRENT BUSINESS S-17 (Sept. 1987); 66 *id.* at S-17 (May 1986) (indicating that U.S. exports of agricultural products declined from \$37.8 billion in 1984 to \$29.2 billion in 1985 to \$26.1 billion in 1986).

In another dramatic example, the Caterpillar Tractor Company lost sales and markets as a result of the on-again, off-again restrictions on sales of oil and gas equipment to the Soviet Union. In 1978, the company had 85% of the Soviet market for pipelayers, tractors, and special hoists for laying pipelines. Those sales helped Caterpillar dominate the world market. Its exports totalled between \$50 and \$100 million per year. After the 1982 pipeline sanctions (see discussion *infra* text accompanying notes 125-30), Caterpillar's share of the Soviet market dropped to 15% and the share of its principal competitor, Japan's Komatsu, rose to 85%. That business helped Komatsu challenge Caterpillar in the world market. See 130 CONG. REC. S1712 (daily ed. Feb. 27, 1984) (statement of Sen. Danforth); see also HOUSE AFGHANISTAN REPORT, *supra*, at 72. Other factors also had an impact, such as the then increasing value of the U.S. dollar.

increased costs that must be paid to a higher-priced supplier.⁷⁰ While this increased cost might mean that the U.S. purchaser has to raise its prices and thus lose some sales of its own product, the cost differences are often so small that the resulting losses are marginal.⁷¹

Moreover, the initial U.S. purchaser should be able to pass on much of the added costs to its customers by raising its own prices.⁷² While these customers will then bear some of the costs, their individual burden will probably be a small share of the total domestic costs of import sanctions, because the costs may be spread among many purchasers at different levels of the distribution process.⁷³

A more indirect, but still potentially significant, cost of import controls is the impact on the world trading system, and on GATT in particular. As discussed below,⁷⁴ this is a problem, though steps can be taken to minimize it.

Controls on private financial transactions also entail costs. The type and amount hinge on the type of financial control involved—whether it be on trade financing (for either exports or imports), on general extensions of credit (such as large loans to a government), or on foreign deposits or other property in the possession of U.S. entities. Given the complexity of financial controls, their potential costs can best be discussed below where alternative proposals to govern their use are considered.⁷⁵

Economic sanctions, then, are often effective. And, controls on imports and private financial transactions might in some cases be more

70. Some U.S. suppliers would benefit from those import controls that lead U.S. purchasers to switch to domestic suppliers.

71. For example, the restrictions on U.S. imports of Libyan oil in 1982 and of Iranian oil in 1979 had only minimal impact on the supplies or price of oil in the United States. See U.S. Import Weekly (BNA) 576 (March 17, 1982); *Id.* at 509 (March 3, 1982) (both on Libya); see also N.Y. Times, Nov. 19, 1979, at D1, col. 4; *id.*, Nov. 16, 1979, at A17, col. 5; *id.*, Nov. 13, 1979, at A1, col. 6 (all on Iran). And the 1983 reduction of the Nicaraguan sugar quota was easily offset by increased imports from other countries at no increased price to U.S. consumers, because the United States imports sugar at preferential prices above the world market price. N.Y. Times, May 11, 1983, at A12, col. 3.

72. This is especially so if the purchaser's competitors also have to turn to higher-priced sources of supply.

73. This is not to say that import controls are never costly to domestic consumers. They sometimes are, especially if the controls are on important items. For example, the so-called "voluntary restraints" by the Japanese on automobiles shipped to the United States limited imports to 2.3 million cars per year from 1985 through March 1989. See 5 Int'l Trade Rep. (BNA) 139 (Feb. 3, 1988). A study by Robert Crandall of the Brookings Institution estimated that the restraints cost the American consumer \$26.6 billion in 1985, adding \$2,500 to the price of a Japanese car and \$1,000 to a U.S. car. Wash. Post, Feb. 13, 1986, at 1, col. 1. American manufacturers obviously benefitted through larger sales and higher prices.

74. See *infra* text accompanying notes 192-206.

75. See *infra* text accompanying notes 207-28. For a more extensive discussion of the costs of such sanctions to the sender country, see, for example, G. HUFBAUER & J. SCHOTT, *supra* note 13, at 64-69; D. LOSMAN, *supra* note 7, at 7-19.

effective than export controls, and impose fewer costs on the United States. Yet, as the following sections demonstrate, the present U.S. legal system is decidedly not structured to facilitate the President's use of these various types of sanctions according to their relative effectiveness and cost. Rather, the existing laws either skew the President's choice of sanctions or encourage him to declare a dubious national emergency.

III

THE NONEMERGENCY LAWS

In the absence of a national emergency, a wide variety of U.S. laws authorize or require the President to impose economic sanctions for foreign policy reasons. As noted earlier, the laws governing sanctions can be divided into five categories. These are limits on: (1) U.S. government programs, such as foreign assistance and landing rights; (2) exports from the United States; (3) imports; (4) private financial transactions; and (5) international financial institutions.

The order of these categories roughly reflects the relative degree of authority the President has to impose such sanctions under present U.S. law. Generally, he has the most control over the government's own programs, and he has broad discretion to cut off almost all exports. It is much more difficult, however, for the President to limit imports. Also, the U.S. government usually has little legal control over the foreign lending decisions of private U.S. banks, and even less control over international financial institutions.

The following analysis of the U.S. laws governing each type of sanction illustrates the haphazard nature of the present legal regime. Reform is possible, however, as indicated by passage of the Comprehensive Anti-Apartheid Act of 1986.⁷⁶ With its wide range of sanctions against South Africa, the Act demonstrates the possibility of creating a comprehensive statutory framework. The Act, however, is geographically limited to South Africa, provides very little discretion to the President, and required years of efforts in Congress and well-publicized events in South Africa to become law.⁷⁷

Turning to other nonemergency laws for imposing economic sanctions, the differences in the President's authority to impose sanctions are striking. (See Figure 2 on page 1184.)

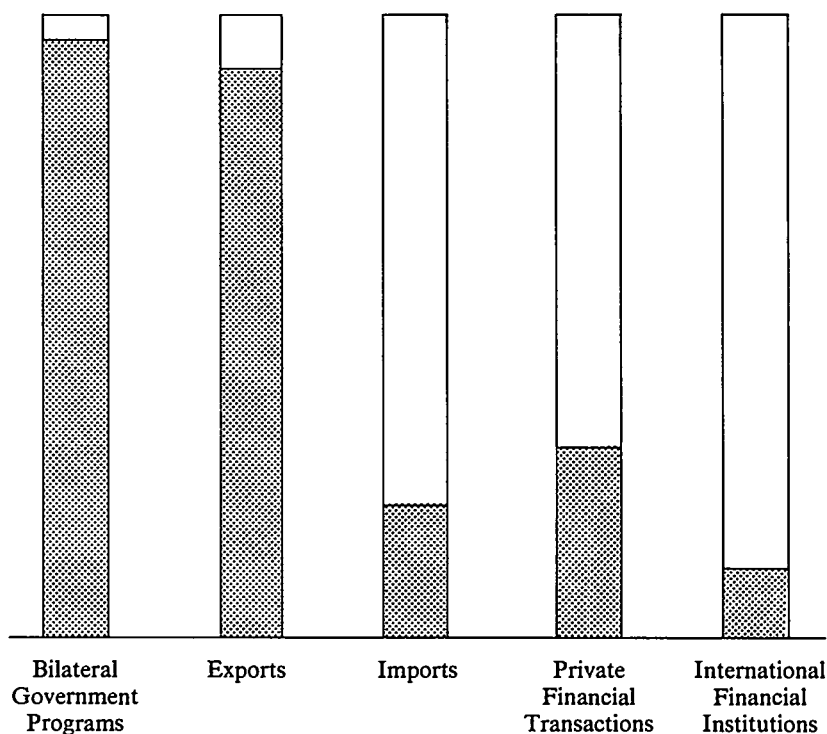
A. Bilateral Government Programs

A wide variety of U.S. government programs can be used as bases

76. Pub. L. No. 99-440, 100 Stat. 1086 (codified at 22 U.S.C.A. §§ 5001-5116 (West Supp. 1987)).

77. See *infra* text accompanying notes 254-71.

FIGURE 2

PRESENT U.S. LAWSPresidential Discretion in Absence
of a National Emergency

This chart attempts, in a roughhewn way, to summarize and highlight visually the variations in the President's authority. Each column represents one type of activity.

— The *enclosed area* of each column represents all of the possible transactions for that activity. For example, column 2 represents all U.S. exports and column 3 represents all U.S. imports.

— The *shaded area* in each column represents a crude estimate of the percentage of the dollar value that the President has discretion to terminate or otherwise limit. For example, given the President's great discretion over exports, almost all of column 2 is shaded. In contrast, very little of the import column is shaded because of the President's sparse authority.

It should be emphasized that this chart is meant to be a rough, visual approximation of the President's authority. Column 1, for example, includes a wide variety of government programs and assigning values to them is very imprecise.

for economic sanctions serving foreign policy purposes. The principal programs include: bilateral foreign assistance, low-interest credit, loan guaranties, special insurance programs, fishing rights, port access, aircraft landing rights, and passports.⁷⁸

The United States has often restricted more than one of these government programs in a sanctions episode.⁷⁹ It has also frequently combined limitations on bilateral programs with other types of sanctions, such as controls on exports or imports.

The President usually has nearly unfettered discretion to terminate or curtail government programs. Present statutes authorize him, for foreign policy reasons, to deny access to the large programs providing low-interest credit, loan guaranties, and special insurance.⁸⁰

The President also has essentially open-ended discretion to restrict or eliminate a foreign country's fishing rights in U.S. waters,⁸¹ or its access to U.S. ports.⁸² Similarly, the President has broad authority to suspend or cut back on the rights of foreign airlines to land in the United States, and even to suspend the right of any airline that flies in the United States to use a particular foreign airport.⁸³ The President can also

78. This potpourri of programs all depends on U.S. government funding, or at least requires some critical government approval. Conceivably, some of these programs, such as travel advisories and passports, could be put in the miscellaneous category discussed below. *See infra* text accompanying notes 244-72. How these programs are categorized, however, is not decisive for any of the general conclusions of this Article, which focus on exports, imports, and private financial transactions.

79. For example, the United States cut off foreign aid and low-interest credit to Allende's Chile in 1970-73, and curtailed Soviet fishing and landing rights after the 1979 invasion of Afghanistan. *See* G. HUFBAUER & J. SCHOTT, *supra* note 13, at 439-44 (Chile), 655-65 (Soviet Union).

80. The principal agencies for these programs are the Export-Import Bank (Eximbank), the Commodity Credit Corporation (CCC), and the Overseas Private Investment Corporation (OPIC). The President appoints the top officials in these agencies, with the advice and consent of the Senate, and they serve at his pleasure. 12 U.S.C. § 635a (1982 & Supp. IV 1986) (Eximbank); 15 U.S.C. § 714g(a) (1982) (CCC); 22 U.S.C. § 2193 (1982) (OPIC). Moreover, the President has broad discretion, through his appointees, to curtail these programs. *See, e.g.*, 12 U.S.C. § 635(b)(1)(B) (1982 & Supp. IV 1986) (Eximbank), 15 U.S.C. §§ 714-714p (1982 & Supp. IV 1986) and 7 C.F.R. § 1493.3(b) (1987) (CCC), and 22 U.S.C. § 2191 (1982) (OPIC). U.S. statutes impose a few specific limitations on the activities of Eximbank and OPIC for foreign policy reasons, but none is major. *See, e.g.*, 12 U.S.C. §§ 635, 635e (Eximbank).

The Eximbank has recently undergone major reforms, but these do not change the President's discretion. *See* 4 Int'l Trade Rep. (BNA) 331 (Mar. 11, 1987).

81. *See* The Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (1982). Note especially the so-called "basket clause" at section 1821(e)(1)(E)(viii), which generally allows the Secretary of State to determine a foreign state's fishing allocation based upon "such other matters as the Secretary of State . . . deems appropriate." The United States may regulate within a 200-mile "fishery conservation zone" established by section 1811. This is consistent with the 200-mile exclusive economic zone provided for in Part V of the U.N. Convention on the Law of the Sea, although the United States is not a party to the Convention. *See* 17 U.N. CLOS III GAOR at 164, U.N. Doc. A/CONF. 52/122 (1984).

82. *See* 50 U.S.C. § 191 (1982).

83. The Secretary of Transportation, a presidential appointee, can amend or cancel foreign air

attempt to limit travel by using his broad discretion to impose geographic restrictions on the use of U.S. passports.⁸⁴

U.S. bilateral foreign assistance programs have long been used as foreign policy tools, besides serving humanitarian purposes. Increases in economic and military assistance may serve as the proverbial carrot, and reductions or cutbacks as the stick. Assistance may be used as a sanction in two ways. First, aid to a specific country may simply be cut off or reduced. Or, the legislation itself may include policy prohibitions that terminate aid if certain events occur, such as when a country harbors international terrorists or expropriates U.S. property.

The President's discretion to use these government programs as sanctions has been most limited in the area of bilateral foreign assistance (both economic and military), but even here his discretion is considerable. Congress can theoretically thwart the President's efforts to invoke sanctions by opposing his decision not to spend authorized funds, or by

carrier permits "whenever [he] finds such action to be in the public interest." 49 U.S.C. §§ 1372(f)(1), 1461(a) (1982) *as modified by* 49 U.S.C. app. § 1551(b) (Supp. III 1985). Special statutory provisions give the President additional powers if a foreign country harbors hijackers or fails to take adequate security measures at one of its airports. Most wide-reaching is the President's authority to prohibit *all* air carriers from providing service between the United States and *any* other foreign airport which is even indirectly served by aircraft using *another* airport which the Secretary of Transportation has determined lacks adequate security. 49 U.S.C. app. § 1515(e)(2)(D) (Supp. III 1985).

The President can also have the Secretary of State issue a "travel advisory," warning travelers about a dangerous foreign airport. 49 U.S.C. app. § 1515a (Supp. III 1985).

The United States often has bilateral executive agreements with countries regarding fishing rights, port access, or air service. These agreements, however, do not hamstring presidential authority because Executive Branch officials negotiate the agreements, and the President has the power to terminate or suspend the agreements on behalf of the United States if he deems it necessary. *See, e.g., Leich, Contemporary Practice of the United States Relating to International Law*, 76 AM. J. INT'L L. 374, 379-84 (1982) (discussing the Reagan administration's suspension of an executive agreement regarding Polish airline privileges in the United States due to the Polish government's handling of the Solidarity movement); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 339(b) (to be published April 1988).

84. While the law now prohibits these restrictions in general, it allows major exceptions for "war, . . . armed hostilities . . . or where there is imminent danger to the public health or the physical safety of United States travellers." 22 U.S.C. § 211a (1982). *Cf. Haig v. Agee*, 453 U.S. 280, 300-01 (1981) (upholding the Secretary of State's authority to revoke individual passports for national security reasons and citing failure of Congress in 1978 amendments to restrict that authority as indicating congressional approval); *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding a restriction against travel to Cuba under a 1926 statute, amended in 1978 by section 211a). The Reagan administration invoked section 211a in 1981 to restrict the use of passports for travel to Libya. 45 Fed. Reg. 60,712 (1981), *renewed*, 52 Fed. Reg. 46,876 (1987). Similarly, the use of passports for travel to Lebanon was restricted in February 1987. 52 Fed. Reg. 3730 (1987).

The practical impact of such passport restrictions is marginal, however, since a U.S. citizen can easily circumvent them. If an off-limits country is amenable, a U.S. citizen can still enter that country without a passport. Americans regularly traveled in this way to Libya after 1981 and before the financial controls under IEEPA. *N.Y. Times*, Jan. 9, 1986, at A8, col. 1. More effective are financial controls on travel expenditures, such as those the President has imposed under IEEPA. *See infra* text accompanying notes 272-336.

authorizing new funds that he does not want.⁸⁵ Political realities make this congressional opposition unlikely, however, since the President is presumably proposing sanctions because the target country has done something objectionable to U.S. interests. Congress would be under considerable political pressure not to appear to support some foreign country over the President.

Congress can also seek to impose its own aid sanctions by resisting the President's aid requests, but it has rarely done so in recent years.⁸⁶ Moreover, experience indicates that it is difficult in practice for Congress to limit effectively the President's discretion by including policy prohibitions.⁸⁷ In fact, the recent trend had been toward giving the President

85. In these two situations, the President would have to decide whether to try to rescind or defer the authorization. In doing so, he must consider the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified in scattered sections of 1, 2 and 31 U.S.C.). The Act imposes major restraints on the President's authority to impound authorized funds. The President may not *rescind* these funds unless Congress expressly approves the rescission. 2 U.S.C. § 683(b) (1982).

Whether the President can *defer* expenditures is a more difficult question at present. While the President may defer expenditures to meet contingencies or to achieve greater efficiency in the administration of programs under 31 U.S.C. § 1512 (1982), the Chief Executive may not use this deferral authority to impose his own policy preferences. 31 U.S.C. § 1512(c)(1) (1982) (amending the Anti-Deficiency Act, 31 U.S.C. § 665(c)(2) (1970)). See *City of New Haven v. United States*, 809 F.2d 900, 901 (D.C. Cir. 1987) (distinguishing between policy and programmatic deferrals). See generally Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 GEO. L.J. 149, 180 (1974) (and sources cited there) (deferrals to meet economic and policy objectives are an abuse of impoundment authority, according to Congress).

A separate provision of the 1974 Act allowed policy deferrals subject to the legislative veto by either house of Congress. 2 U.S.C. § 684(b) (1982); 31 U.S.C. § 1513 (1982). However, the Court of Appeals for the D.C. Circuit reasoned that the legislative veto was void in light of *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). *City of New Haven*, 809 F.2d at 905. It then concluded that the veto provision could not be severed from the deferral mechanism because Congress would not have given the President such unchecked deferral powers. *Id.* at 909. Although the mechanism for policy deferrals was therefore held invalid, the court expressly indicated that programmatic deferrals under 31 U.S.C. § 1512 were not affected by its ruling. *Id.*

86. In 1975-78, over the objections of President Ford, Congress did cut off most military assistance to Turkey because of its invasion of Cyprus. T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* 34-35 (1979).

More recently, however, Congress has often backtracked. For example, Congress voted to repeal its 1976 Clark Amendment, which prohibited assistance to anti-government groups in Angola. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 811, 99 Stat. 190, 264 (1985) (codified at 22 U.S.C. § 2293 (Supp. III 1985)). Nicaragua is the most-publicized recent example of congressional foot-dragging. Nevertheless, after limiting the President in 1985 to \$27 million in humanitarian assistance for the contras, *id.* § 722, 99 Stat. at 249, Congress then appropriated \$100 million in 1986 and attached fewer conditions. Act of Oct. 30, 1986, Pub. L. No. 99-591; see Madison, *Triumph and Challenge*, 18 NAT'L J., 2492-93 (1986). For an example of recent certifications under the statute, see 52 Fed. Reg. 9107 (1987) (further assistance to Nicaraguan resistance). Recent disclosures, however, about funding the contras out of profits from arms sales to Iran could well cause Congress to resurrect the ban on, or at least impose stricter limits on, further U.S. assistance to the contras. See Wash. Post, Feb. 24, 1988, at 1, col. 5.

87. For example, in 1981-83, the President was able to make several certifications about progress in El Salvador on human rights, land reform, and other matters based on questionable facts. See International Security and Development Cooperation Act of 1981, Pub. L. No. 95-113, § 728, 95

greater discretion over U.S. foreign assistance.⁸⁸

While Congress has generally refrained from directly challenging the President's authority over U.S. government programs, Congress has not ceded all the influence in foreign affairs that it gained during the era of Vietnam and Watergate. (It is still too early to tell whether the congressional and public outcry against the Reagan Administration's sale of arms to Iran and diversion of funds to the Nicaraguan contras will generally halt or even reverse the recent trend of greater discretion to the President.) For example, Congress continues to add detailed reporting requirements to foreign assistance,⁸⁹ and it occasionally seeks to limit just how the funds will be used.⁹⁰ Moreover, Congress has sometimes pursued its own foreign policy initiatives, approving assistance⁹¹ or

Stat. 1519, 1555-57 (1981) (codified at 22 U.S.C. § 2370 (1982 & Supp. III 1985)); Christopher, *Ceasefire Between the Branches: A Compact in Foreign Affairs*, 60 FOREIGN AFF. 989, 1002 (1982); cf. *Burke v. Barnes*, 107 S. Ct. 734 (1987) (challenge to President's "pocket veto" of new bill conditioning continuance of military aid to El Salvador on semiannual certification held moot since bill had expired by its own terms). Also, there have only been limited complaints about President Reagan ignoring human rights provisions in foreign assistance laws. For military assistance and arms sales, the key human rights provision is 22 U.S.C. § 2304 (1982).

88. See paragraphs two and three of note 86. Also, Congress has authorized the President to furnish up to \$50 million in foreign assistance to a country, without regard to the aid laws, if he determines "that to do so is important to the security interests of the United States" and if he consults in advance with appropriate congressional committees. 22 U.S.C. § 2364 (1982 & Supp. III 1985). The ceiling is higher if the "country is a victim of active Communist or Communist-sponsored aggression." *Id.*

While Congress did include some policy-based restrictions on the President's discretion to grant aid in recent foreign assistance legislation, such as restrictions on his authority to grant aid to countries supporting terrorism, or ones posing a threat of nuclear proliferation, the provisions leave the President significant latitude to evade the restrictions. See, e.g., International Security and Development Cooperation Act of 1985, § 503 (prohibiting aid to countries supporting international terrorism as determined by the President, and allowing him to waive restrictions for national security or humanitarian reasons), § 902 (prohibiting aid to Pakistan unless the President certifies that Pakistan does not possess a nuclear weapon and that the proposed aid will significantly reduce the threat that it will acquire one). On Pakistan, see Oberdorfer, *U.S. Aid to Pakistan Ends as Waiver of Nuclear Laws Expires*, Wash. Post, Oct. 1, 1987, at A23, col 1.

Congress added even more discretion in the continuing resolution for fiscal year 1987, which empowered the President not to spend the appropriated funds for a country if he finds that it "is engaged in a consistent pattern of opposition to the foreign policy of the United States." Act of Oct. 30, 1986, Pub. L. No. 99-591, §§ 101(f), 528 (b), 100 Stat. 334.

89. One example is the provision regarding assistance to Latin America and the Caribbean. International Security and Development Cooperation Act of 1985, § 709; see also *id.* § 702(c)-(d) (El Salvador).

90. For example, in the massive continuing resolution that Congress passed and the President signed in December 1987 for fiscal year 1988, Congress cut off most foreign assistance to Haiti unless certain democratic processes were followed there. It also conditioned most assistance to Panama upon a certification by the U.S. President that, *inter alia*, there was progress toward civilian control of that government and that due process of law was being restored. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Publ. L. No. 100-202, § 569 (Haiti), § 570 (Panama) (Dec. 11, 1987) (enacted language can be found in 133 CONG. REC. H12,431, H12,444 (daily ed. Dec. 21, 1987)) [hereinafter 1988 Appropriations Act].

91. For example, it took the initiative on humanitarian assistance to the people of Afghanistan

enacting sanctions⁹² that the President has not requested. Nevertheless, these congressional steps do not seriously constrain the President's extensive discretion to use U.S. government programs to impose economic sanctions.

B. Exports from the United States

The President's power over government programs is almost matched by his broad authority over exports. Congress initially continued into peacetime the President's World War II authority to impose controls.⁹³ While there has since been some whittling away of the President's discretion, he still has sweeping powers to cut off almost all U.S. exports, or any segment of them.

The Export Administration Act provides the principal statutory framework for controlling U.S. exports of goods, which totalled about \$253 billion in 1987.⁹⁴ Also relevant for certain exports are the Atomic Energy Act, the Arms Export Control Act, and the Comprehensive Anti-Apartheid Act of 1986. Through use of these statutes, the United States has shown itself to be the country most willing to resort to export controls as an economic sanction, rather than relying on import controls or limits on private credit.⁹⁵

1. The Export Administration Act

The Export Administration Act of 1979 (EAA)⁹⁶ does not establish a right to export.⁹⁷ On the contrary, the EAA prohibits, with few exceptions, all exports from the United States unless they are licensed by the Department of Commerce.⁹⁸

and Cambodia. International Security and Development Cooperation Act of 1985, §§ 904-05, 99 Stat. at 268.

92. Congress mandated, for instance, the recent cutoff of air service between the United States and South Africa. *See infra* text accompanying note 257.

93. *See* Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, 791-92 (1967) (a classic article on export controls).

94. 5 Int'l Trade Rep. (BNA) 198 (Feb. 17, 1988) (citing U.S. Dept. of Commerce statistics).

95. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 59-60; *see also id.* at 70-77.

96. 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. III 1985).

97. This is recognized in the EAA's legislative history. S. REP. NO. 169, 96th Cong., 1st Sess. 3-4, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 1147, 1150; *see* Murphy & Downey, *National Security, Foreign Policy and Individual Rights: The Quandary of United States Export Controls*, 30 INT'L & COMP. L.Q. 791, 823 (1981); *cf.* *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904) (upholding an import statute, noting that "no individual has a right to trade with foreign nations").

98. For a detailed review of the EAA statutory scheme, *see* Abbott, *supra* note 13, at 745-56; Murphy & Downey, *supra* note 97, at 823-26.

The principal exceptions to the statute are: (1) most exports to Canada for consumption there; (2) certain exports to the U.S. armed forces; and (3) exports regulated by another U.S. agency, including defense articles under the authority of the Arms Control Export Act. *See* 15 C.F.R. §§ 370.3(a), 370.10 (1987).

The licensing requirement is not burdensome for most exports, which can be shipped under "general licenses."⁹⁹ The Executive Branch can decide, however, that greater control is appropriate over certain exports pursuant to the statutory grounds of national security, foreign policy, or short supply.¹⁰⁰ In this case, the Executive Branch will issue regulations requiring the specific prior approval of the Department of Commerce, such approval generally known as a "validated license."¹⁰¹

If Commerce denies an application for a validated license, the exporter's right to administrative and judicial review is sharply limited.¹⁰² Moreover, an exporter who ships goods without the required license is subject to a wide range of penalties—including civil fines, forfeiture, denial of future privileges to export or import, and felony criminal charges.¹⁰³

Since World War II, Congress has changed the export laws on several occasions, partly in response to changing perceptions about the Soviet threat, the U.S. need to export, and the President's specific uses of his statutory authority. The EAA divided national security and foreign policy controls into two categories, established different consultation and reporting requirements for them, and implicitly encouraged the President

99. These Department of Commerce licenses allow the export of specified goods and technology to certain destinations without any special authorization. 15 C.F.R. §§ 371.1-.22 (1987).

100. 50 U.S.C. app. § 2402(2) (1982) provides:

It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—

(A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and

(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

As noted above, this Article includes both the statutory grounds of national security and foreign policy within its broad definition of foreign policy. The short supply controls are generally not invoked for foreign policy purposes.

101. 15 C.F.R. §§ 372.1-.13 (1987).

102. The denied applicant may appeal certain issues to an administrative law judge and may request a hearing. 50 U.S.C. app. § 2412(e) (Supp. III 1985). The applicant is generally not accorded the protections of the Administrative Procedures Act. *Id.* § 2412(a); *cf.* 15 C.F.R. § 389 (1987) (sets forth procedures whereby any person directly and adversely affected by an action taken under EAA may appeal). The judge's determination is reviewable by the Secretary of Commerce, whose decision is "final and is not subject to judicial review." 50 U.S.C. app. § 2412(e) (Supp. III 1985). The applicant might try a judicial challenge to a denial on grounds that the agency's action is *ultra vires* or otherwise somehow not appropriate under the EAA. See discussion of the Dresser litigation, *infra* note 129 and accompanying text.

103. 50 U.S.C. app. § 2410 (1982 & Supp. III 1985). The EAA, as amended in 1985, allows the use of import sanctions against any person who violates any national security export control. 19 U.S.C. § 1864(a) (Supp. III 1985). Given the availability of many other serious penalties, the use of import sanctions might well be rare. But this new provision opens a tiny window for greater use of import controls for national security reasons.

to choose between the two categories.¹⁰⁴

The effectiveness of these provisions was called into question when President Carter imposed an agricultural embargo against the Soviet Union in 1980. The President cited as justification both national security and foreign policy.¹⁰⁵ This dual justification was contrary to the clear purpose of the EAA, which distinguished between the two grounds. Moreover, the national security basis for limiting all agricultural exports, including chickens and truffles, seemed somewhat strained.¹⁰⁶

President Carter's decision to impose the grain embargo, which was very unpopular with U.S. farmers, prompted Congress to pass some of the most important of the present limitations on the President's authority to restrict exports. The first such limitation was a 1981 provision requiring farmers to be compensated at a generous rate in the event of another agricultural embargo against a major foreign purchaser.¹⁰⁷ A 1982 law then provided that the President cannot curtail the export of any agricultural product under an existing sales contract that requires delivery within 270 days of the embargo's start, absent declaration of a national emergency.¹⁰⁸

When the EAA lapsed in 1983, Congress was deadlocked for two years before passing the Export Administration Amendments Act of 1985 (1985 EAAA).¹⁰⁹ While it essentially extends the EAA, the 1985 law imposes additional limitations on the President's power. The most important of these, as discussed below, are the time limit on agricultural embargoes, the tougher steps for imposing foreign policy controls, and the new provision on "contract sanctity."

a. *Agricultural Embargoes*

Under the 1985 EAAA, the President may not impose export con-

104. See *supra* note 100 (presenting the text of the statute); articles cited *supra* note 98 (discussing the legislative history of the act).

105. President's Message on Shipments of Agricultural Commodities to the Soviet Union, 16 WEEKLY COMP. PRES. DOC. 32 (Jan. 7, 1980).

106. It is unlikely that chickens and truffles "would make a significant contribution to the military potential" of the Soviet Union. 50 U.S.C. app. § 2402(2)(A) (1982). The basic criterion for foreign policy controls is whether they could be used "to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations." *Id.* § 2402(2)(B). Indeed, the Carter administration's own elaborations mainly rested on foreign policy grounds. See Murphy & Downey, *supra* note 97, at 818.

107. Agriculture and Food Act of 1981, 7 U.S.C. § 1736j (1982 & Supp. IV 1986). Farmers would be paid the amount necessary to achieve 100% of parity, usually a very attractive price.

108. Futures Trading Act of 1982, 7 U.S.C. § 612c-3 (1982).

109. Pub. L. No. 99-64, 99 Stat. 120 (1985) (codified in scattered sections, primarily at 50 U.S.C. app. §§ 2401-2420 (Supp. III 1985)). During the deadlock, the EAA was extended at different times by joint resolutions and the EAA regulations were kept in effect by President Reagan declaring national emergencies and invoking IEEPA. See Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, LEGAL TIMES, Aug. 5, 1985, at 17.

trols on any agricultural commodity for more than sixty days, unless Congress enacts a joint resolution authorizing the action.¹¹⁰ The provision does not apply, however, when the agricultural controls "are imposed with respect to a country as part of the prohibition or curtailment of all exports to that country."¹¹¹ Congress apparently was trying to protect farm interests from being singled out as a tool for embargoes, while also protecting the President's discretion to impose a more comprehensive embargo.

b. Foreign Policy Controls

The 1985 EAAA also tightens up the steps that the President must take before using foreign policy controls. This change reflects concerns that export controls were invoked too frequently, were often ineffective, and created unnecessary burdens on exporters.¹¹² Among the changes, the Act imposes stricter criteria on the President's exercise of discretion.¹¹³ More importantly, the Act requires the President to consult with Congress and submit a detailed report *before* imposing the foreign policy controls.¹¹⁴ This is in contrast to the 1979 provisions requiring consultation "in every possible instance" and a less detailed report only after imposing controls.¹¹⁵

It remains to be seen whether mandatory consultation and reporting provisions will significantly limit the President's discretion. The Executive Branch can still undermine the provisions' substantive impact by undertaking consultation only after making its policy decisions.

c. Contract Sanctity

The "contract sanctity" provision¹¹⁶ was perhaps the most "strongly

110. 50 U.S.C. app. § 2406(g)(3)(A) (1982 & Supp. III 1985). The Act prohibits the use of national security controls for agricultural products. *Id.* § 2404(q). Imposition of foreign policy or short supply controls over agricultural products requires congressional approval after 60 days. *Id.* § 2406(g)(3)(A)-(B).

111. *Id.* § 2406(g)(3)(B)(ii).

112. See, e.g., S. REP. NO. 170, 98th Cong., 1st Sess. 14 (1983).

113. 50 U.S.C. app. § 2405(b) (1982 & Supp. III 1985). This subsection requires the President to determine, among other considerations, that: (1) the "controls are likely to achieve the intended foreign policy purpose"; (2) "the reaction of other countries to the . . . controls is not likely to render the controls ineffective"; and (3) "the United States has the ability to enforce the proposed controls effectively." *Id.*

The criteria in the 1979 EAA were phrased in a considerably more tentative way. For example, the President was to consider "the probability that such controls will achieve the intended foreign policy purpose," rather than the current requirement that the controls "are likely to achieve" the purpose.

114. 50 U.S.C. app. § 2405(f) (1982 & Supp. III 1985).

115. See H.R. REP. NO. 180, 99th Cong., 1st Sess. 57, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 108, 119.

116. 50 U.S.C. app. § 2405(m) (1982 & Supp. III 1985).

contested”¹¹⁷ section of the 1985 EAAA. This provision allows the President to impose export controls that abrogate existing contracts. Contract sanctity became a widespread issue when preexisting contracts were overridden by the 1980 agricultural embargo and President Reagan’s 1982 pipeline sanctions.

The compromise language adopted in the 1985 EAA prohibits the President from imposing foreign policy controls on the export or re-export of goods or technology under existing contracts or validated licenses, unless the President determines and certifies to Congress that: (1) “a breach of the peace poses a serious and direct threat to the strategic interest of the United States”; (2) “the prohibition or curtailment . . . will be instrumental in remedying the situation posing the direct threat”; and (3) “the export controls will continue only so long as the direct threat persists.”¹¹⁸

This provision requires a “cause and effect” relationship between the proposed contract-breaking control and that control’s remedial effect on a situation that directly threatens U.S. strategic interests. The congressional conferees judged “that this constraint significantly narrows, but does not entirely eliminate, the authority of the President to impose controls on exports subject to” existing contracts.¹¹⁹

While the concept of contract sanctity is new to export laws, this particular provision is likely to have limited impact, especially if the President is determined to circumvent it. First, it applies only to foreign policy controls and not to national security controls.¹²⁰ Second, the certification requirement is worded so broadly that it could be interpreted to leave the President ample room to abrogate contracts. In contrast to the restrictive language of the conference report, other authoritative statements call for a broad interpretation of the “breach of the peace” exception.¹²¹

The contract sanctity provision has yet to be tested. Nevertheless, some commentators have concluded that “Congress has given the busi-

117. H.R. REP. NO. 180, 99th Cong., 1st Sess. 58, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 108, 120.

118. 50 U.S.C. app. § 2405(m)(2)(A)-(C) (1982 & Supp. III 1985).

119. H.R. REP. NO. 180, 99th Cong., 1st Sess. 59, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 108, 120. In a separate statement, one of the provision’s strongest supporters, Senator John Heinz (R.-Pa.), declared that the provision would ban retroactive controls “except in the most extreme circumstances.” 2 Int’l Trade Rep. (BNA) 856, 857 (July 3, 1985).

120. *See* 50 U.S.C. app. § 2405 (1982 & Supp. III 1985). As demonstrated earlier with the Soviet grain embargo, the President might invoke national security grounds even when inappropriate.

121. Congressman Howard Berman (D.-Ca.), an author of this exception, would construe it expansively to encompass a “violation or disturbance of the public tranquility and order.” 130 CONG. REC. H12,167 (daily ed. Oct. 11, 1984); *accord*, 131 CONG. REC. S8926 (daily ed. June 27, 1985) (Sen. Proxmire (D.-Wis.) endorsing the Berman view).

ness community a symbolic victory largely bereft of substance."¹²²

d. Extraterritoriality

The EAA affords the President considerable discretion to assert extensive jurisdiction in imposing export controls on companies and goods outside U.S. territory. In spite of recent controversy over the extraterritorial use of these controls, drafters of the 1985 EAAA ignored the matter, probably because the issues seem intractable.

The EAA authorizes the President to control the export of any goods and technology "subject to the jurisdiction of the United States or exported by any person subject to . . . [U.S.] jurisdiction."¹²³ Traditionally, the United States has imposed controls on three categories of foreign exports: (1) reexports by a foreign company of goods or technology of U.S. origin; (2) reexports of U.S.-origin parts even if included in foreign-made goods; and (3) exports of foreign-origin goods that are the direct products of U.S.-origin technology.¹²⁴ Although these controls are extraterritorial, they have generally not been controversial because they are limited in scope and were used for national security reasons.

In the 1982 pipeline sanctions against the Soviet Union,¹²⁵ President Reagan announced two controls that went beyond any previous assertion of extraterritorial jurisdiction under the EAA's foreign policy provisions.¹²⁶ First, the controls prevented foreign subsidiaries of U.S. firms from exporting certain equipment and technology, even of wholly foreign origin. Second, the controls restricted independent foreign companies from exporting foreign-origin products that were made with technology acquired through licensing agreements with U.S. companies.¹²⁷ For example, these controls covered compressors built by Creusot-Loire, a French company, under a licensing agreement with a U.S. company.¹²⁸

The U.S. policy against the pipeline clashed with that of major

122. See, e.g., Harris & Bialos, *supra* note 109, at 19.

123. 50 U.S.C. app. § 2405(a)(1) (1982 & Supp. III 1985). There is similar language in IEEPA. This act gives the President authority with respect to "any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U.S.C. app. § 1702(a)(1)(B) (1982).

124. 15 C.F.R. §§ 374.1, 376.12, 379.8 (1986). In March 1987, the Department of Commerce clarified and eased the requirements for obtaining the needed U.S. authorization for shipping foreign products with U.S.-origin content. 52 Fed. Reg. 9147 (1987).

125. 47 Fed. Reg. 27,250 (1982). For a discussion of the history of and the complex reasons for the control, see B. JENTLESON, PIPELINE POLITICS: THE COMPLEX POLITICAL ECONOMY OF EAST-WEST TRADE 172-214 (1986).

126. The extraterritorial use of IEEPA and its predecessor for national emergencies, the Trading with the Enemy Act, have occasionally been controversial. See *infra* text accompanying notes 281-92, 297.

127. 47 Fed. Reg. 27,250 (1982); see Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1, 70 (1983).

128. See Moyer & Mabry, *supra* note 127, at 70.

European countries who were not opposed to its construction. Indeed, some were contracting to buy gas from the pipeline, and many countries were encouraging their companies to participate in the construction.¹²⁹

President Reagan rescinded the regulations because of this strong allied opposition, pressures from the U.S. business community and Congress, and the controls' ineffectiveness when European companies continued to perform under their contracts.¹³⁰ Possibly chastened by the experience, the Reagan administration has not asserted such broad extraterritorial jurisdiction since 1982, not even in the IEPPA controls against Nicaragua, South Africa, and Libya. Nevertheless, the broad statutory authority remains unchanged.

2. *The Atomic Energy Act*

Exports of nuclear materials, equipment, and technology are subject to the extensive regulatory regime established by the Atomic Energy Act of 1954,¹³¹ as amended by the Nuclear Non-Proliferation Act of 1978 (NNPA).¹³² The President's authority to stop these exports is essentially unlimited, reflecting concern that such exports could facilitate the construction of dangerous power plants abroad, or result in the proliferation of nuclear weapons, thereby upsetting the military balance in many regions.¹³³

129. See B. JENTLESON, *supra* note 125, at 183-97. The U.S. government initially persisted in its policy and placed companies that did not comply with the U.S. orders on a "temporary denial" list, which prohibited all U.S. exports to these companies. *E.g.*, 47 Fed. Reg. 38,170 (1982), as amended by 47 Fed. Reg. 39,708 (1982) (sanctions against Dresser). Dresser Industries and its wholly-owned subsidiary, Dresser-France, attacked the export controls and the penalties against it in the Commerce Department and the courts. Commerce denied Dresser's petition. 47 Fed. Reg. 51,463 (1982). The U.S. District Court for the District of Columbia twice denied Dresser's request for a temporary restraining order. *Dresser Industries v. Baldrige*, No. 82-2385 (D.D.C. Nov. 4, 1982) (denying request for temporary restraining order); 549 F. Supp. 108 (D.D.C. 1982). Before the court could rule on the merits, President Reagan rescinded the regulations.

While no U.S. court ruled definitively on the extraterritorial reach of the controls, at least one European court ruled against it. *Compagnie Europeenne Des Petroles S.A. v. Sensor Nederland B.V.*, Dist. Ct. at the Hague, Netherlands (Sept. 17, 1982), reprinted in 22 I.L.M. 66 (1983). The court decided that Sensor, a Dutch subsidiary of a U.S. corporation, could not be excused from performing a sales contract under Dutch law because of the U.S. export regulations. See also *infra* note 297 (U.K. court rules against extraterritorial reach of IEPPA controls against Libya).

130. 47 Fed. Reg. 51,858 (1982); see Moyer & Mabry, *supra* note 127, at 71-73. In January 1987, the Reagan administration also ended other U.S. controls on the export of oil and gas equipment to the Soviet Union which had been in existence since 1978. 52 Fed. Reg. 2500 (1987).

131. Atomic Energy Act, ch. 1073, § 1, 68 Stat. 921 (1954) (codified at 42 U.S.C. §§ 2011-2296 (1976) (prior to amendment by Nuclear Non-Proliferation Act)).

132. Nuclear Non-Proliferation Act, Pub. L. No. 95-242, § 2, 92 Stat. 120 (1978) (codified at 22 U.S.C. §§ 3201-3282 (1979) and scattered sections of 42 U.S.C. (1982)). See generally *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981) (presenting a thorough discussion of the history and purposes of the NNPA).

133. A prospective exporter must apply to the Nuclear Regulatory Commission (NRC) for an export license. The NRC is an independent commission responsible for a variety of nuclear licensing and regulatory functions formerly handled by the Atomic Energy Commission. The NRC has five

Very concerned with nonproliferation issues in the 1970's, Congress attempted in the 1978 NNPA to impose some limitations on the President's authority to *allow* exports. (This can be viewed as an effort by Congress to require the U.S. government to impose sanctions in certain situations.) The statute added new criteria for the Executive Branch to consider in export licensing decisions, with an emphasis on limiting nuclear proliferation.

Probably the most important provision of the NNPA was its prohibition on exports of nuclear fuel and reactors to nations that did not accept International Atomic Energy Agency safeguards for those exports. While the President could waive this prohibition in certain situations, Congress was able to override a waiver by passing a concurrent resolution within sixty days.¹³⁴ Whatever the past importance of this provision, the demise of the legislative veto¹³⁵ reduced congressional influence over the presidential determination. Other strict criteria of the NNPA remain, but they limit the President's authority to *allow* exports. His ability to *prevent* exports remains sweeping.

3. *The Arms Export Control Act*

As with nuclear exports, the President has essentially unfettered power to *stop* all arms exports under the Arms Export Control Act (AECA).¹³⁶ The Act authorizes the President to "control the import and the export of defense articles and defense services."¹³⁷ The AECA, however, does impose some limits on the President's authority to *allow* arms sales.

Congress restricts the President's authority to allow arms exports by authorizing him to approve sales only under certain conditions.¹³⁸ How-

commissioners who are appointed for five-year terms by the President, with the advice and consent of the Senate. 42 U.S.C. § 5841(b) & (c) (1982). The NRC is prohibited from granting an export license unless the Secretary of State notifies it that the proposed export "will not be inimical to the common defense and security." *Id.* § 2155(a)(1). In the legislative history and in actual practice, this phrase has been generally understood to give the President broad discretion. *See, e.g., Natural Resources Defense Council*, 647 F.2d at 1364.

134. 42 U.S.C. § 2158 (1982).

135. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). *See infra* text accompanying notes 138-41, 317-20.

136. Arms Export Control Act, Pub. L. No. 94-329, 90 Stat. 729 (1976) (codified in scattered sections of 22 U.S.C. (1982)). *See generally* A. PIERRE, *THE GLOBAL POLITICS OF ARMS SALES* (1982) (an excellent study of the world's arms trade).

137. 22 U.S.C. § 2778 (1982). The President is authorized to designate those items that shall be considered defense articles and defense services. These items constitute what is called the Munitions List. *Id.*

138. The principal conditions are: (1) the recipient country agrees not to transfer the arms to a third country without prior U.S. approval; and (2) the recipient country agrees to maintain the security of the arms. *Id.* § 2753. There are also limits on the sale of arms to any government designated as supporting terrorists. *See infra* text accompanying notes 143-44. In December 1987, Congress added a special restriction on the sale of Stinger antiaircraft missiles to any country in the

ever, legislative veto provisions gave Congress its only real tool to enforce these conditions.¹³⁹ Since legislative vetoes have been held unconstitutional, these AECA provisions are now interpreted as "report and wait" requirements—if Congress does not forbid the export by passing a new law within thirty days, the license may be issued. This approach now applies to exports of defense articles or services of more than \$50 million, and exports of "significant" military equipment in excess of \$14 million.¹⁴⁰

While this waiting period does leave Congress the power to respond to proposed arms exports, it also "ups the ante." Rather than being able to stop a sale with a majority vote of both houses on a concurrent resolution (which cannot be vetoed), Congress needs a two-thirds vote to override the likely presidential veto of the joint resolution. This process is obviously more difficult for Congress, but not impossible.¹⁴¹

The highly controversial arms sales to Iran in 1985 and 1986 stand as a fascinating example of the possible impact of the AECA. Since the Secretary of State has designated Iran as a country supporting terrorism,¹⁴² the Act requires that the President first find that the sale is necessary for national security, and then report this finding to the Speaker of the House and the Senate Committee on Foreign Relations.¹⁴³ A 1986 amendment to the AECA, effective August 1986, similarly prohibits the

Persian Gulf region, except to Bahrain if the President makes a special certification. 1988 Appropriations Act, *supra* note 90, § 573.

139. The veto provisions required the President to report proposed sales or transfers of defense equipment or defense services above certain dollar amounts, which Congress could block if it promptly passed a concurrent resolution disapproving the transfer. See 22 U.S.C. §§ 2776(b)(1), (c)(2)(B), 2753(d)(2)(A) (Supp. 1987).

140. 22 C.F.R. § 123.10(e) (1986). Serious questions have been raised about whether the invalid legislative veto provision is severable from the rest of the AECA. See, e.g., Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912, 931 n.127 (1985). Nevertheless, both the Executive Branch and Congress are proceeding as if the rest of the Act is still valid. Cf. *Alaska Airlines v. Brock*, 107 S. Ct. 1476 (1987) (legislative veto provision of Airline Deregulation Act held severable).

141. For example, in early 1986, after the Reagan administration informed Congress of a proposed \$1.5 billion arms sale to Jordan, congressional leaders told the White House that Congress would have the necessary two-thirds vote to oppose the sale in both houses. The President postponed the sale indefinitely. Wash. Post, Feb. 1, 1986, at A14, col. 1. Later in 1986, when the administration proposed to sell \$354 million worth of arms to Saudi Arabia, a two-thirds majority proved more difficult to muster. After the House and Senate initially passed a joint resolution opposing the sale by margins of more than two-thirds, the President vetoed it. The House then voted to override the veto, but the Senate fell short by a single vote. The sale went through. N.Y. Times, June 6, 1986, at 1, col. 6.

In another recent case, the Reagan administration withdrew the proposed sale of 1600 Maverick air-to-ground missiles to Saudi Arabia after 67 senators sponsored a resolution disapproving the sale. N.Y. Times, June 12, 1987, at A1, col. 3; see Wash. Post, June 15, 1987, at A1, col. 3.

142. 15 C.F.R. § 385.4(d)(1) (1987).

143. 22 U.S.C. § 2753(f)(2) (Supp. III 1985). As discussed *supra* text accompanying note 140, the President would also be required to report under the normal reporting provisions if the exports were of "significant" military equipment in excess of \$14 million.

export of arms to a country designated as supporting terrorism unless the President waives this prohibition for U.S. national interests and "submits to the Congress a report justifying that determination and describing the proposed export."¹⁴⁴ The Reagan administration, however, failed to notify Congress of these arms sales until November 1986, after reports of the sales appeared in the press. This secretiveness seems to violate the reporting requirements of the AECA and possibly other export laws.¹⁴⁵

Apparently the administration believed that the sales could be justified as part of a covert intelligence activity, and thus be exempt from the export laws.¹⁴⁶ Yet, the key reporting statute for intelligence activities, section 501 of the National Security Act of 1947, requires in subsection (a) that certain members of Congress be kept "fully and currently informed of all intelligence activities."¹⁴⁷ If for some reason the required report were not given in advance, then subsection (b) directs that the "President shall fully inform the intelligence committees in a timely fashion."¹⁴⁸ Given the Reagan administration's nondisclosure to Congress

144. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 509, 100 Stat. 853, 874 (codified at 22 U.S.C. § 2780 (Supp. 1987)) [hereinafter 1986 Omnibus Act].

145. Besides the AECA, the Export Administration Act requires the Executive Branch to notify certain congressional committees "at least 30 days before any license is approved for the export of goods or technology" above a designated amount to any country which the Secretary of State has determined supports international terrorism. 50 U.S.C. app. § 2405(j) (Supp. III 1985). From 1985 through August 27, 1986, the minimum amount was \$7 million. This was lowered to \$1 million in August 1986 by the 1986 Omnibus Act, *supra* note 144, § 509(b) (codified at 50 U.S.C. app. § 2405(j)(1) (Supp. 1987)).

The U.S. government reportedly was involved in one arms sale to Iran in October-November 1986. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD III-19 (1987) [hereinafter TOWER COMMISSION REPORT]. The 500 TOW antitank missiles were worth more than \$1 million, but there was no prior notification to Congress. *Id.* However, the applicability of the EAA to the Iranian arms sales might be questioned on the ground that a sale by the U.S. government does not require an export license.

146. See HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 418 [hereinafter IRAN-CONTRA REPORT]; see also TOWER COMMISSION REPORT, *supra* note 145, at B-57 to B-67.

147. 50 U.S.C. § 413(a) (1982). See also 22 U.S.C. § 2422 (1982) (funds expended by or on behalf of the CIA in foreign countries considered a "significant anticipated intelligence activity" under 50 U.S.C. § 413).

148. 50 U.S.C. § 413 (b). The Senate report accompanying the 1980 amendments to the reporting requirements said about subsection (b):

The Senate Select Committee and the Executive branch and the intelligence agencies have come to an understanding that in rare extraordinary circumstances if the President withholds prior notice of covert operations, he is obliged to inform the two oversight committees in a timely fashion of the action and the reasons for withholding of such prior notice.

S. REP. NO. 730, 96th Cong., 2d Sess. 12 (1980). What constituted a "rare extraordinary circumstance" was not defined. The House and Senate committees investigating the Iran-Contra affair concluded that the congressional notification provisions of the National Security Act were abused by the President's delay in notifying Congress. IRAN-CONTRA REPORT, *supra* note 146, at 415-16. *But see*

more than fourteen months from the start of the operation, it seems clear that the administration also failed to adhere to these reporting requirements.

Instead, President Reagan made a "finding" in January 1986. Noting that the arms sales to Iran were "important to the national security of the United States," he instructed his Director of Central Intelligence not to report to Congress "due to . . . [the operation's] extreme sensitivity and security risks."¹⁴⁹ The administration has not formally offered any more detailed legal rationale for its refusal to report.

When news of the arms sales became public, the resulting brouhaha led President Reagan to announce that he was instructing his staff to prepare an executive order that clarified his plans for future notification. He stated that "[i]n all but the most exceptional circumstances, timely notification to Congress under section 501(b) . . . will not be delayed beyond two working days of the initiation of a [covert] activity."¹⁵⁰

Even with President Reagan's promised reforms, the controversy over the arms sales should at a minimum encourage Congress to tighten the statutory reporting requirements. One possible measure would be to mandate reports in advance of sales or within a specified time period. The requirements could even be backed by penalties for noncompliance. Congress might pass still other provisions to ensure that it is informed and has an opportunity to express its views.

In sum, the 1985 amendments to the Export Administration Act were intended to limit somewhat the President's authority to prevent exports. Nevertheless, the President in practice retains the discretion to stop almost all U.S. exports to a particular country. Even attempts by Congress to constrain the President's discretion to allow exports of nuclear items and arms have had mixed success in practice.

C. Imports

Import controls under U.S. laws differ markedly from export controls. First, while export controls are largely a post-World War II devel-

id. at 544-45 (minority report) (concluding that the "vague" language of § 501 allows the President to decide how long to wait before notifying Congress).

149. TOWER COMMISSION REPORT, *supra* note 145, at B-60. Note, however, that no finding existed at the time of the U.S. sale of 504 TOW missiles and only a retroactive finding existed for the November 1986 sale of HAWK missiles. IRAN-CONTRA REPORT, *supra* note 146, at 418. Also, Israel transferred HAWK and TOW missiles to Iran in 1985 that Israel had obtained from the United States under the AECA. The Reagan administration failed to follow the required AECA procedures for allowing the Israeli transfer to Iran. 22 U.S.C. § 2753(a) (1982 & Supp. IV 1986); see IRAN-CONTRA REPORT, *supra* note 146, at 418.

150. Letter from President Reagan to Senator David L. Boren, Chairman of the Senate Select Committee on Intelligence (Aug. 7, 1987), *quoted in* N.Y. Times, Aug. 8, 1987, at A5, col. 1; see Wash. Post, Aug 8, 1987, at 1, col. 6. As of February 20, 1988, a new Executive Order had not yet been signed.

opment and grant the President broad discretion under general guidelines, import controls—particularly tariffs—have always been subject to detailed congressional direction.¹⁵¹

Second, while export controls are designed primarily for foreign policy purposes, import controls are created for many reasons. These include the need to raise revenue (a rationale of declining importance), the continuing interest in protecting U.S. industries, and the desire for leverage in negotiations with other countries. The objective of protecting industries and jobs is supported by powerful domestic constituencies that historically wield major clout with Congress, and that often believe the Executive Branch will not sufficiently protect their interests.¹⁵²

Congress' reluctance to allow the Executive Branch broad discretion over imports and the multiple reasons for import controls have generated myriad laws. Most are triggered by economic concerns, such as injury to domestic industries, discriminatory pricing, or subsidies.

The President has no general statutory authority to restrict imports for foreign policy reasons. Instead, his authority is scattered among several statutes, allowing a mixed bag of limited actions. For example, the President may restrict imports of critical defense materials, or imports that relate to a particular country (such as South Africa or Libya), product (such as sugar), or policy issue (such as emigration). Overall, his discretion is very circumscribed.

1. Section 232 and National Security: Does It Only Cover Foreign Oil?

Section 232 of the Trade Expansion Act of 1962¹⁵³ provides the President with broad authority to limit imports for foreign policy reasons. It permits him to "adjust the imports" of an article if it "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."¹⁵⁴

The broad phrase "national security" is not defined in the statute. Nevertheless, the accompanying statutory language,¹⁵⁵ the legislative his-

151. For example, the second law passed by Congress was the Tariff Act of 1789, 1 Stat. 24 (July 4, 1789). For a history of import controls, see 6 A. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 100 (1983).

152. See generally I. DESTLER, *AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS* (1986); I. DESTLER, *MAKING FOREIGN ECONOMIC POLICY* 129-49 (1980); A. LOWENFELD, *supra* note 151, at 99-142.

153. Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962) (codified at 19 U.S.C. § 1862 (1982)).

154. The section is triggered when the Secretary of Commerce commences an investigation. Within one year, the Secretary must report his findings and recommendations to the President, who "shall take such action, and for such time, as he deems necessary," including the option of taking no action at all. *Id.*

155. This language lists factors that the President "shall . . . give consideration to." These factors include the "domestic production needed for projected national defense requirements" and

tory,¹⁵⁶ the uses of the statute, and the sparse case law indicate that section 232 is designed to limit imports of critical defense materials, especially in order to protect the domestic production base or to protect against an embargo by an important foreign supplier.

During the thirty-one-year history of section 232 and its predecessor statute, the President has used this authority sparingly. Controls have only been imposed to restrict petroleum imports.¹⁵⁷

In response to considerable political pressure, President Reagan has threatened to expand the use of section 232 to limit imports of machine tools. Manufacturing of machine tools is an important domestic industry that arguably falls within a narrow reading of the statute. After President Reagan announced in May 1986 that he would defer a formal decision under section 232 for six months, voluntary restraint agreements

generally address whether the United States will have "the industries and the capacity . . . to meet national security requirements." *Id.* § 232(c).

156. See *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 562-71 (1976) (noting legislative history and interpretation of "national security" in section 232); see also H.R. REP. NO. 50, 84th Cong., 1st Sess. 29-31 (1955) (minority views); S. REP. NO. 232, 84th Cong., 1st Sess. 4 (1955); 101 CONG. REC. 5297-98 (1955) (statements of Sens. Barkley and Flanders).

157. Relief was first granted in 1959 when President Eisenhower invoked the 1958 version of the statute to impose a system of quotas on imports of petroleum and petroleum products. 24 Fed. Reg. 1781 (1959). The statute was then used by Presidents Kennedy, Johnson, Nixon, and Ford to maintain oil quotas. See *Algonquin*, 426 U.S. at 552-55.

President Carter used section 232 to terminate all crude oil imports from Iran on November 12, 1979, shortly after the seizure of the American hostages. 44 Fed. Reg. 65,581 (1979). Two days later he declared a national emergency and exercised his IEEPA powers, but the section 232 embargo on oil continued. Iran was an important supplier of a critical commodity and had become decidedly unreliable.

Carter also used section 232 to impose a gasoline conservation fee on imports of crude oil and gasoline. As discussed below, this effort ran afoul of the courts, and Congress then terminated the program. See *infra* note 160.

President Reagan's oil embargo against Libya in 1982 appears to be the only use of section 232 that was primarily for broader foreign policy purposes. It was primarily a response to Libyan involvement in terrorist activities and efforts to promote instability in the region. 82 DEP'T ST. BULL. 68 (June 1982) (Department Statement of Mar. 10, 1982); Wash. Post, Mar. 11, 1982, at A1, col. 1. Imports of Libyan oil were then only about 3% of total U.S. energy imports. *Id.* Even in this case though, the product involved was again petroleum and the supplier was potentially unreliable.

The President, his Cabinet officers, and private entities have formally requested that the possibility of import control be investigated in other cases. Sixteen investigations were conducted between 1964 and early 1985. Letter from Paula Stern, chairwoman of the International Trade Commission, to Sen. Lloyd M. Bensten 3 (Apr. 15, 1985) (listing trade statutes and their uses by the President). Besides petroleum, these investigations have included products such as watches, movements, and parts (1965); nuts, bolts, and large screws of iron and steel (1978), see *id.*; glass-lined chemical processing equipment (1981), see 46 Fed. Reg. 45, 977 (1981); chromium, manganese, and silicon ferroalloys (1981), see U.S. Import Weekly (BNA), No. 137, at A-1 (July 21, 1982); and machine tools, see *infra* text accompanying note 158. In the ferroalloy investigation, press reports indicate that the Commerce Department determined that there was injury to an industry critical to the national security. U.S. Import Weekly (BNA), No. 142, at 640 (Aug. 25, 1982). However, President Reagan determined that ferroalloy imports did not threaten to impair national security, and thus formally denied relief under section 232. 9 U.S. Import Weekly (BNA) 1032 (May 23, 1984).

were reached with two major suppliers, Japan and Taiwan, but not with West Germany and Switzerland. He then threatened in December 1986 to "take unilateral action" under U.S. law (presumably section 232) against these two countries if their exports of machine tools to the United States exceeded specified limits. The White House also promised retaliation against any other major foreign supplier undermining the President's program to strengthen the domestic industry.¹⁵⁸

Relevant judicial interpretation of section 232 is sparse. The leading case is *Federal Energy Administration v. Algonquin SNG, Inc.*¹⁵⁹ In a unanimous—though narrow—opinion, the Supreme Court upheld license fees imposed under the oil quota systems of Presidents Nixon and Ford. The Court did not consider, however, when section 232 can properly be invoked, nor did it define "national security."¹⁶⁰

While pressures to expand use of the statute will surely continue,¹⁶¹ the statutory language and history argue strongly that the section should be invoked only in the very limited context of restricting imports of critical defense materials.

2. *Specific Countries*

For foreign policy reasons, other U.S. laws either mandate import controls or allow the President the discretion to act against particular countries or specific products, or for specific policy objectives. For example, the Comprehensive Anti-Apartheid Act of 1986, discussed below,¹⁶² mandates sanctions against South Africa on a potpourri of products.

In 1985, Libya joined Cuba as the only other specific country from which the President has broad discretion to prohibit imports.¹⁶³ Another

158. 22 WEEKLY COMP. PRES. DOC. 1654 (Dec. 16, 1986); 3 Int'l Trade Rep. (BNA) 1537 (Dec. 24, 1986).

159. 426 U.S. 548 (1975).

160. The Court did note that "national security" was a narrower criterion than "national interest." *Id.* at 569-70. The effect of this construction is unclear.

In *Independent Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614 (D.D.C. 1980), the court struck down President Carter's Petroleum Import Adjustment Program. Established pursuant to section 232(b), the program imposed a license fee on imported crude oil and gasoline. The primary purpose was conservation—to lower domestic gas consumption by raising the retail price of *all* gasoline (domestic and imported) by \$.10 per gallon. The court concluded that since "[a]ny impact on imports will be indirect," *id.* at 618, it could not be justified under section 232. (This ground for invalidating a regulation seems different from any that might be raised by a use of section 232 to limit imports for foreign policy reasons.) The government appealed. The matter was rendered moot, however, when Congress passed a law over the President's veto that repealed the program with its politically unpopular effect of raising prices. See 126 CONG. REC. 13,524, 13,593 (1980).

161. Amendments designed to facilitate use of section 232(b) have passed both houses of Congress. 1987 Senate Trade Bill, *supra* note 50, § 501; 1987 House Trade Bill, *supra* note 50, § 191.

162. See *infra* text accompanying notes 254-71.

163. 22 U.S.C. § 2370(a)(1) (1982) (Cuba). The provision for Libya reads: "Notwithstanding any other provision of law, the President may prohibit any article grown, produced, extracted, or

1985 provision authorizes the President to ban imports "from any country which supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations."¹⁶⁴ These two provisions trace their roots to the increasingly strong public reaction against terrorism and countries like Libya that support it. Limited only by country, these provisions represent a potentially seminal step by Congress to authorize broad import controls for foreign policy reasons in nonemergency situations.¹⁶⁵

3. *Specific Products: A Strange Mix*

The President has varying degrees of authority to limit the imports of a variety of specific products. Because nuclear items, arms, and other defense goods are so important to national security and safety, the President has sweeping authority over their import as well as their export.¹⁶⁶

Import quotas or flat prohibitions on importing other products can also provide a basis for foreign policy sanctions. Import quotas are imposed today on a wide range of commodities—from peanuts to cattle.¹⁶⁷ The purposes are primarily economic, such as to protect U.S. agriculture or industry, or to carry out trade agreements. The statutes and past history, however, indicate that the quotas for sugar and meat, among others, may be used for foreign policy purposes.¹⁶⁸

manufactured in Libya from being imported into the United States." International Security and Development Cooperation Act of 1985, § 504(a), 22 U.S.C. § 2349aa-8(a) (Supp. III 1985). Section 504(b) contains similar authority regarding exports.

164. International Security and Development Cooperation Act of 1985 § 505, 22 U.S.C. § 2349aa-9(a). The President must report the circumstances that cause him to act. He is also required to consult regularly with Congress while the authority is being used. *Id.* § 2349aa-9(c).

165. President Reagan has been quick to invoke these provisions. He cited both as bases for his 1986 embargo of Libya, but he also declared a national emergency and cited IEEPA. Exec. Order 12,543, 51 Fed. Reg. 875 (1986). He needed the additional IEEPA authority since sections 504 and 505, which deal with trade, would not have been sufficient statutory support for some of the financial controls that the President imposed.

Then, in October 1987, President Reagan relied on section 505 to cut off almost all imports of Iranian goods and services. Exec. Order 12,613, 51 Fed. Reg. 41,940 (1987).

Congress seems inclined to resort more to statutory provisions like these which allow the President to stop imports from, as well as exports to, specific countries, rather than to provisions that give the President broad authority to stop imports. For example, the 1987 trade bill passed by the Senate has such provisions aimed at Iran and at other states in the Persian Gulf if they attack U.S. vessels, facilities, or personnel in the Persian Gulf region. 1987 Senate Trade Bill, *supra* note 50, §§ 963-966. The same bill would also authorize the President to prohibit the import or export of goods to Afghanistan, except for trade with the resistance groups there. *Id.* § 958.

166. See *supra* text accompanying notes 131-50 (discussing the Atomic Energy Act and the Arms Export Control Act).

167. See *Quotas and Restraints*, Int'l Trade Rep. (BNA), U.S. Import Weekly Reference File 43:0101 (1986).

168. For sugar, see Tariff Schedules of the United States 1986, 19 U.S.C. § 1202 (Supp. III 1985) (sched. 1, pt. 10, subpt. A, headnote 2); cf. United States Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399, 402 n.5, 404 (C.C.P.A. 1982) (finding broad discretion under the statute). President Reagan used this authority in 1983 to reduce sharply the sugar quota for Nicaragua and to reallocate

A mandatory prohibition exists against imports of seven animal skins—including ermine, fox, and mink—from the Soviet Union.¹⁶⁹ This was imposed in 1951 for foreign policy reasons—to protest Moscow's role in the Korean War. The restriction is known as the one against "the seven deadly skins."

4. *Policy Issues: Emigration and Others*

The United States extends most-favored-nation (MFN) status to many countries, either through bilateral agreements or under GATT. In addition, it extends special tariff benefits to some developing countries under the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative (CBI). U.S. laws provide the President with some discretion to extend or deny these MFN, GSP, or CBI benefits to countries for various policy reasons. The following are important foreign policy areas where the President exercises discretion over benefits.

a. *Opening the Doors: Emigration*

The Trade Act of 1974 authorizes the President, under certain circumstances, to extend MFN treatment to a so-called "nonmarket economy country" that did not at the time of the Act enjoy MFN status in its trade with the United States.¹⁷⁰

it to three neighboring countries (El Salvador, Honduras, and Costa Rica). Proclamation No. 5104, 48 Fed. Reg. 44,057 (1983). A 1987 law imposed a prohibition on sugar imports from Panama, unless the President certifies that constitutional guarantees have been restored to the Panamanian people. 1988 Appropriations Act, *supra* note 90, § 571.

For meat, see 19 U.S.C. § 1202 (available when "action is required by overriding . . . national security interests"). The President apparently has not exercised this authority for foreign policy reasons.

169. Tariff Schedules of the United States 1986, 19 U.S.C. § 1202 (sched. 1, pt. 5, subpt. B, headnote 4). Why the full list includes weasel, but not sable, is a question this Article will leave for other researchers.

The 1987 trade bills passed by the House and Senate have taken diametrically opposite positions on continuation of this embargo. The House bill would end the ban. 1987 House Trade Bill, *supra* note 50, § 815. The Senate bill strongly urges the continuation of the prohibition, noting the many unsubsidized fur farms that would be injured by Soviet imports and ominously warning that the "United States fur deficit will rise." 1987 Senate Trade Bill, *supra* note 50, § 899B.

170. Trade Act of 1974, Pub. L. No. 93-618, tit. IV, 88 Stat. 1978, 2056-66 (1975) (codified in scattered sections of 19 U.S.C.).

The statute reopened the possibility of MFN treatment to communist countries. When the Cold War had been especially chilly, Congress had directed the President to deny or suspend to any country "dominated or controlled by" communism (except Yugoslavia) the benefits of lower tariffs negotiated through trade agreements. Trade Agreements Extension Act of 1951, ch. 141, § 5, 65 Stat. 72, 73. As a result, their imports became subject to the high rates set by the 1930 Smoot-Hawley Tariff.

Poland qualified specially for MFN treatment in 1960 when it entered into an agreement with GATT. President Reagan, however, suspended Poland's MFN status in 1982-87 because it outlawed the independent trade union Solidarity. The President's rationale was unique. He cited Poland's 1967 protocol of accession to GATT, which required that it increase the total value of its

A key statutory provision is that no nonmarket country is eligible to receive MFN treatment (or certain other benefits) under the Act if the President determines that the country denies its "citizens the right or opportunity to emigrate" or imposes more than a nominal tax on emigration. The President can waive these conditions if he determines that the waiver will substantially promote free emigration, and if he has received assurances to that effect. The waiver extends for twelve months, and must then be renewed.¹⁷¹ Such waivers, and thus eligibility for MFN treatment, have been accorded Romania, Hungary, and the People's Republic of China.¹⁷²

Notwithstanding the power to grant waivers, the President's discretion is effectively limited. He must report his decision to Congress, and much of the data on emigration involves relatively public, objective facts.¹⁷³

b. Limiting the GSP and CBI

Subject to several absolute and conditional limits, the laws grant the President considerable discretion to grant or withdraw, for foreign policy reasons, extensive tariff benefits to less developed countries under the GSP and CBI.¹⁷⁴

For example, the GSP program includes a prohibition against designating certain developed or communist countries—such as EEC members, the Soviet Union, and Poland—as eligible for benefits. Conditional limitations include foreign-policy-based restrictions against coun-

imports from GATT Contracting Parties by 7% a year. Reagan claimed that Poland had been in violation of this GATT agreement since 1978 by failing to meet this commitment. Proclamation No. 4991, 3 C.F.R. 100 (1982); see 7 U.S. Import Weekly (BNA) 161 (Nov. 3, 1982). Reagan revoked the suspension in February 1987. Proclamation No. 5610, 52 Fed. Reg. 5425 (1987) (to be codified at 3 C.F.R. 5425). The President said the reinstatement to MFN status was a reward for Poland's release of political prisoners and other steps toward reconciliation with Solidarity members and the Catholic Church. N.Y. Times, Feb. 20, 1987, at 1, col. 3.

171. Trade Act of 1974, § 402, 19 U.S.C. § 2432 (1982).

172. Exec. Order No. 11,854, 3 C.F.R. 987 (1971-1975) (Romania); Exec. Order No. 12,051, 3 C.F.R. 173 (1979) (Hungary); Exec. Order No. 12,167, 3 C.F.R. 453 (1980) (China).

These waivers have been renewed regularly, though not without occasional controversy. The renewal of Romania's waiver in June 1987 was termed "exceptionally difficult" by a White House handout. See 4 Int'l Trade Rep. (BNA) 763 (June 10, 1987); see also 1987 Senate Trade Bill, *supra* note 50, §§ 932-934; 1987 House Trade Bill, *supra* note 50, § 1501 (provisions that would increase the requirements for renewal of Romania's waiver).

173. Closely monitoring the situation are powerful political groups that have a strong interest in Jewish emigration or that are generally opposed to improved trade with communist countries.

174. For background on the GSP, see GSP Renewal Act of 1984, Pub. L. No. 98-573, tit. V, 98 Stat. 3018 (codified at 19 U.S.C. §§ 2461-2465 (Supp. III 1985)); Dep't of State Bureau of Public Affairs, *Generalized System of Preferences*, GIST (Feb. 1985). On CBI, see Caribbean Basin Economic Recovery Act, Pub. L. No. 98-87, 97 Stat. 384 (1983) (codified at 19 U.S.C. §§ 2701-2706 (Supp. III 1985)); Farusworth, *The "Good Neighbor" Offers Little Aid, Less Trade*, N.Y. Times, Feb. 1, 1987, at F6, col. 1.

tries that expropriate or grant sanctuary to international terrorists.¹⁷⁵ Once a country is designated, the President has almost unlimited authority to withdraw, suspend, or limit the designation. The GSP law requires him only to "consider" certain factors, which are essentially economic ones, and to report his decision to Congress.¹⁷⁶ Although the purpose of the statute is primarily economic, Presidents have used their discretion under the GSP to advance foreign policy goals.¹⁷⁷

5. *Possible End Runs with Other Economic-Based Statutes: A Whiff of Ammonia*

Numerous other laws allow the President to restrict imports for economic reasons—such as injury to domestic industries, the sale of merchandise for less than fair value, or illegal subsidies. None of these economic-based statutes, however, provides the President with any notable authority to impose import sanctions for foreign policy reasons.

These statutes vary widely according to the type of economic criteria that allows presidential action, the precision of the criteria, and the administrative restrictions on the President. These criteria usually make it difficult to utilize these import sanctions for foreign policy purposes. For the present analysis, the statutes can be grouped roughly into two categories—those where the International Trade Commission (ITC) has some jurisdiction, and those where it does not. The latter category allows more presidential discretion.

ITC participation is important because the ITC is an independent agency that has often differed from the President on trade matters. Helping to ensure the ITC's independence are the staggered, long terms of the Commissioners and a requirement of political diversity.¹⁷⁸

a. *Where the ITC Has Jurisdiction*

Most of the economic-based statutes give the ITC at least some

175. 19 U.S.C. § 2462(b) (1982).

176. *Id.* § 2464(a), (c).

177. For example, in 1980, President Carter withdrew GSP status from Ethiopia because it expropriated U.S. investments. H.R. DOC. NO. 197, 96th Cong., 1st Sess. 1-2 (1979). Carter also designated Uganda as a beneficiary country, Exec. Order No. 12,204, 3 C.F.R. 245 (1981), a status that it had been denied in 1975 because of Idi Amin's human rights policies. H.R. REP. NO. 395, 96th Cong., 1st Sess. 1-4 (1979); Exec. Order No. 11,888, 3 C.F.R. 1038 (1971-1975).

In January 1987, President Reagan withdrew or suspended the GSP eligibility of Romania, Nicaragua, and Paraguay because they were not taking steps to afford internationally recognized rights to workers there. Chile's GSP eligibility was suspended indefinitely on the same grounds in December 1987. 52 Fed. Reg. 49,137 (1987).

178. Established in 1916 as the U.S. Tariff Commission, the present ITC has six commissioners, who are appointed for staggered nine-year terms. The chairperson, who is generally responsible for administering the Commission, and the vice-chairperson are designated by the President for two-year terms. No more than three commissioners may be members of the same political party. 19 U.S.C. §§ 1330-1331, 2231-2232 (1982).

jurisdiction. These include the often-used statutes governing dumping and countervailing duties,¹⁷⁹ laws allowing import controls against "unfair method of competition" or interference with U.S. agricultural programs,¹⁸⁰ the section 201 escape clause,¹⁸¹ and section 406 of the 1974 Trade Act.¹⁸²

The effective use of these statutes for foreign policy sanctions is very unlikely, and very chancy. This was illustrated by President Carter's unsuccessful attempt to limit imports of ammonia. It was brought under section 406, the least stringent of these statutes because the criteria for obtaining relief under it are relatively relaxed.¹⁸³

In 1979, the ITC had investigated the possibility of "market disruption" caused by large imports of Soviet ammonia. By a 3-2 vote, the Commission found market disruption and recommended a three-year quota to President Carter.¹⁸⁴ The President, however, was not persuaded, and denied relief in early December because it was not in the "national economic interest" of the United States.¹⁸⁵ Carter was also apparently influenced by his desire to keep detente alive and to obtain the Senate's advice and consent to the SALT II Treaty.¹⁸⁶

179. "Dumping" is a form of international price discrimination. It is defined under U.S. law as selling of foreign merchandise in the United States "at less than its fair value," usually measured by comparing (with adjustments) the price in the United States with that in the home market, at the same stage of the production process. 19 U.S.C. §§ 1677-1677b (1982). Such sales must cause or threaten "material injury" to a U.S. industry, or materially retard the establishment of an industry. *Id.* § 1673. The ITC is charged with making the essential determination regarding injury. *Id.* §§ 1673b, 1673d.

"Countervailing duties" can be imposed on foreign merchandise if the foreign manufacture, production, or export of that merchandise is being subsidized, directly or indirectly. These duties, which attempt to offset the net subsidy, are in addition to any other duties imposed. *Id.* §§ 1303, 1671. For most cases, there is a requirement of real or threatened injury similar to that under the dumping laws, and the ITC is again charged with making this determination.

180. For "unfair methods of competition," see *id.* § 1337. The principal statute on interference with agricultural programs is section 22 of the Agricultural Adjustment Act, as amended, 7 U.S.C. § 624 (1982).

181. The section 201 "escape clause" allows temporary relief from imports if the ITC determines that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2251(b)(1) (1982).

182. *Id.* § 2436.

183. See *id.* This provision authorizes the President to impose import controls if the ITC determines that imports from a communist country are causing "market disruption." Market disruption occurs whenever imports of an article, "like or directly competitive" with a domestic article, are "increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry." *Id.* § 2436(c)(2).

184. 44 Fed. Reg. 61,270 (1979).

185. Letter to the Speaker of the House and the President of the Senate Transmitting a Report, 15 WEEKLY COMP. PRES. DOC. 2221 (Dec. 11, 1979).

186. Cf. J. CARTER, KEEPING THE FAITH: MEMOIRS OF A PRESIDENT 264-65 (1982) (President Carter worked hard to obtain Senate advice and consent to the SALT II Treaty, until the Soviet invasion of Afghanistan caused him to ask the Senate to postpone action on the Treaty).

Then, in late December, the Soviet Union invaded Afghanistan and installed a client government. The President and the American public were understandably outraged. Carter responded with a partial embargo on agricultural and other exports.¹⁸⁷ He also decided that it was then appropriate to limit Soviet ammonia imports. In January 1980, Carter requested a new section 406 investigation. To the administration's chagrin, the ITC determined in April that there was no market disruption. The 3-2 ITC decision ostensibly turned on the economic injury criteria, but the change seemed more likely the result of the change of one Commissioner.¹⁸⁸ Thus the President was left in the strange situation created by the U.S. statutes—he was able to stop U.S. exports, but unable to prevent most imports without invoking emergency powers.

b. Where the ITC Lacks Jurisdiction

Section 301 of the Trade Act of 1974, as amended,¹⁸⁹ is probably the most open-ended of those import statutes that are tied to economic criteria but do not provide some jurisdiction to the ITC. It authorizes the President to "take all appropriate and feasible actions within his power" to: (1) enforce U.S. rights under any trade agreement; or (2) respond to any act by a foreign country that is inconsistent with a trade agreement, or that is "unjustifiable, unreasonable, or discriminatory."¹⁹⁰

In spite of section 301's broad charter for retaliation, it would be difficult to justify most uses of this statute for foreign policy purposes. First, the triggering criteria turn on the trade or investment practices of foreign countries, not on their military or other foreign policy activities. Second, use of section 301 has been limited in the past to trade and investment issues.¹⁹¹

6. Running Afoul of GATT

Even though the General Agreement on Tariffs and Trade (GATT)¹⁹² primarily focuses on imports, U.S. obligations under GATT

187. See *supra* text accompanying notes 105-08.

188. Anhydrous Ammonia From the U.S.S.R., 45 Fed. Reg. 27,570 (1980) (ITC report to the President).

189. 19 U.S.C. § 2411 (Supp. III 1985).

190. *Id.* § 2411(a). See also *id.* §§ 2411-2416. It is section 301 which President Reagan invoked in April 1987 to raise tariffs on a variety of Japanese goods as a result of Japanese violation of its trade agreement regarding semiconductor chips. Exec. Order No. 5631, 52 Fed. Reg. 13,412 (1987). Some of these sanctions have since been suspended. 52 Fed. Reg. 43,146 (1987).

191. See *Presidential Retaliation*, Int'l Trade Rep. (BNA) 49:0101, 0104-05 (1986); Int'l Trade Rep. (BNA) 49:0801-4C (1986). One use of section 301 for the foreign policy purposes discussed in this Article is possible. The statutory standards, expanded in 1984 to include foreign practices affecting investment as well as goods and services, allow retaliation for expropriation of U.S. businesses. *Id.*; see also 19 U.S.C. § 2411(e).

192. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No.

have not been a serious obstacle to imposing import controls for foreign policy purposes.¹⁹³

First, many of the present or likely target countries for economic sanctions are not contracting parties¹⁹⁴ to GATT. For example, the Soviet Union, East Germany, Iran, and Libya are not members.¹⁹⁵ Even some GATT members that are likely targets for U.S. sanctions have a trade relationship with the United States that is a special combination of the GATT framework and bilateral agreements.¹⁹⁶ Therefore, U.S. sanctions against countries such as Czechoslovakia, Hungary, Romania, and Poland would not necessarily violate GATT.

Second, even for those countries that the United States trades with on a regular basis under GATT, the General Agreement includes broad exceptions that can often be invoked to justify the use of import controls for foreign policy purposes.¹⁹⁷ The most readily available justifications are articles XXI and XXV,¹⁹⁸ and what might be termed "tacit excep-

1700, at 639, 55 U.N.T.S. 194 (1950) (original text). For the current version, see CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, 4 BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969). GATT has never come formally into force, since the requisite minimum number of nations has never accepted it "definitively." All nations that apply GATT do so provisionally under various protocols. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 60-61 (1969).

193. Although GATT focuses on imports, exports are mentioned in at least 13 GATT clauses, and are related to obligations in several others. J. JACKSON, *supra* note 192, at 498. The most significant provisions regarding exports are the MFN treatment obligation in article I and the ban on quantitative restrictions in article XI.

U.S. export controls on goods and technology for foreign policy purposes obviously discriminate among nations and could potentially create problems under GATT. A careful reading of the GATT provisions and decisions, however, suggests that U.S. export controls either do not violate GATT or might be classified as technical violations. *See id.* at 497-506; Abbott, *supra* note 13, at 849-57. This is primarily because "the GATT exceptions are so broad and vague as to almost render [the GATT export] obligations meaningless." J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 888 (1986). Most relevant are the security exceptions of article XXI. *See infra* text accompanying notes 201-02.

194. "Contracting Parties" (with capitalization) is used in this Article to refer to the parties to GATT acting formally as a body. References to individual or several contracting parties, or members, are uncapitalized.

195. *See* GATT, GATT ACTIVITIES IN 1984 72 (1985).

196. *See, e.g.,* GATT, 31st Supp. BISD 180 (1985) (protocol of accession of Hungary to GATT); Pres. Proc. No. 4560, 43 Fed. Reg. 15,125 (1978) (United States enters into a trade agreement with Hungary); GATT, 30th Supp. BISD 194 (1984) (protocol of accession of Romania to GATT); Pres. Proc. No. 4369, 40 Fed. Reg. 18,389 (1975) (United States enters into trade agreement with Romania). *See generally* J. JACKSON & W. DAVEY, *supra* note 193, at 1183-87.

197. A third reason is that the target countries for a variety of reasons sometimes choose not to challenge the sanctions in GATT. For example, South Africa has apparently not challenged the various U.S. export controls against it nor the recent U.S. ban on several imported goods, possibly because it realizes the weakness of its position in the international community.

198. Paragraph 5 of article XXV allows the Contracting Parties in "exceptional circumstances not elsewhere provided in this Agreement" to "waive an obligation" imposed on an individual contracting party. 55 U.N.T.S. at 272. This waiver requires a two-thirds vote to pass. The Contracting Parties have not always specified the basis for some actions that might be viewed as

tions.”¹⁹⁹ The justifications should also be viewed in the context of the problems with the GATT dispute settlement process.

Article XXI contains security exceptions that are very broad. For example, no contracting party may be prevented from any action “which it considers necessary for the protection of its essential security interests,” if that action relates to fissionable materials, traffic in arms or other goods “as is carried on directly or indirectly for the purpose of supplying a military establishment,” or “time of war or other emergency in international relations.”²⁰⁰

Article XXI has rarely been invoked to justify economic sanctions for foreign policy purposes.²⁰¹ Nevertheless, the use of the article has

falling under this waiver. For example, article XXV may have been the unstated basis for their approval of the U.S. suspension of MFN status to Czechoslovakia in 1952, GATT Press Release 46 (1951), at 1, although no explicit GATT article was cited in the declaration. See J. JACKSON, *supra* note 192, at 750.

199. A “tacit exception” is one that cites no specific exception, but allows a situation to continue because it involves broader political questions. For example, GATT’s acceptance of the U.S. suspension of MFN status to Czechoslovakia, discussed *supra* note 198, could be viewed as such a declaration, rather than as a waiver under article XXV. One contracting party’s delegate favored a nonspecific declaration because it only acknowledged the state of affairs and would not provide a precedent under the General Agreement, which “‘was a technical instrument to deal with technical trade problems.’” J. JACKSON, *supra* note 192, at 750 (quoting GATT Doc. CP.6/SR.13, at 4 (1951)); see Abbott, *supra* note 13, at 853.

The United States apparently tried to use this approach when it explicitly declined to rely on any specific GATT clause to justify its drastic reduction of the Nicaraguan sugar quota in 1983. A GATT panel report, however, concluded that the U.S. action was not consistent with the obligations of nondiscrimination set forth in article XIII:2. GATT Doc. L/5607, at 6-7 (1984). The GATT Council adopted the report in March 1984. GATT, GATT ACTIVITIES IN 1984 39 (1985).

The United States did not object to Nicaragua’s resort to the GATT dispute process, and even recognized that Nicaragua had certain rights under article XXIII. GATT Doc. C/M/178, at 27 (June 13, 1984). However, the United States presumably realized that the worst sanction that the Contracting Parties could impose would be to authorize Nicaragua to suspend concessions that it had made to the United States or to suspend other obligations. See *infra* text accompanying notes 203-05 (discussing the GATT dispute resolution process). The United States was clearly willing to absorb any such retaliatory action.

Nevertheless, the United States would have been wise to cite article XXI, as it later did (possibly having learned from experience) with the 1985 trade embargo against Nicaragua, discussed below. See *infra* note 201. Because the United States did not cite any of the specific exceptions, such as in article XXI, the GATT panel in this case found that it could not consider possible justifications and thus concluded that a violation of a GATT article was unjustified. See GATT Doc. L/5607, at 6-7.

200. GATT, art. XXI, 55 U.N.T.S. at 266.

201. The first use of article XXI to justify foreign policy sanctions was in response to Czechoslovakia’s challenge to the U.S. use of its export controls in 1949. The Contracting Parties decisively rejected that challenge. GATT Doc. CP.3/SR.22, at 4-10 (June 8, 1949).

Through 1982, only three other cases arose, none involving the United States as a party, and none resulted in the Contracting Parties authorizing any relief. J. JACKSON, *supra* note 192, at 750; GATT, GATT ACTIVITIES IN 1982 72-73 (1983).

Most recently, article XXI was cited by the United States as a justification for its May 1985 trade embargo against Nicaragua. After considerable discussion in the GATT Council (which meets monthly and has broad jurisdiction), a panel was established to investigate the matter. At the insistence of the United States, the panel’s terms of reference were limited—it could not examine or

come under increasing scrutiny. For example, at their annual meeting in November 1982, GATT member states voted to increase the procedural requirements for invoking article XXI, and recognized that the target country retains its full rights under the General Agreement, including recourse to the complaint procedures.²⁰²

The effectiveness of any complaints in GATT against import (or export) sanctions is considerably affected by the GATT dispute resolution machinery, which is complicated, sometimes cumbersome, and often inadequate.²⁰³ Central to the process, especially for claims against foreign policy sanctions, is article XXIII. It provides for mediation by the Contracting Parties and, if they authorize it, retaliation by the target country. That country can then suspend the concessions it has granted the sender country or suspend other obligations owed to it.

For a target country, the limited relief available under article XXIII is a serious problem, particularly where the country imposing the sanctions is willing to absorb some costs to carry out its foreign policy.²⁰⁴ The fact that the process is exceedingly slow compounds the problem. In practice, only one dispute has resulted in suspension of the target country's concessions under article XXIII—a complaint by the Netherlands against the United States in the 1950's. There has been no suspension of "other obligations" under GATT.²⁰⁵

On balance, the infrequent use of import sanctions for foreign policy

judge the validity of, or the motivation for, the U.S. use of article XXI. GATT Doc. C/M/196, at 7 (March 12, 1986).

The panel reported its results to the Council in October 1986. The panel concluded, among other things, that since its terms of reference did not authorize it to examine the U.S. use of article XXI, "it could not find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement." The panel further noted, however, that "embargoes such as the one imposed by the United States . . . ran counter to the basic aims of the GATT." GATT, GATT ACTIVITIES 1986 58 (1987). The panel's report should lead to further discussion in GATT about use of article XXI. *Id.* at 59; see 3 Int'l Trade Rep. (BNA) 1368 (1986).

202. GATT Doc. L/5426 (Dec. 2, 1982); GATT Doc. SR 38/10, at 2-3 (Dec. 16, 1982).

203. The GATT articles contain over 30 provisions relating to dispute settlement procedures. INTERNATIONAL TRADE COMM'N, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS I, ITC Pub. 1793 (Dec. 1985).

204. The situation is especially unsatisfactory when the target country is much smaller than the country imposing the sanctions, because the small country's retaliation is unlikely to have a significant effect on the large country.

205. J. JACKSON, *supra* note 192, at 185. Nevertheless, Professor Jackson notes:

[T]he language of . . . article [XXIII] is broad and sweeping. The language itself is not limited just to "compensating" redress but is broad enough to be used as the basis for serious sanctions. For instance, all concessions of all other contracting parties could be suspended vis-a-vis a notoriously offending contracting party—in effect, driving it out of GATT—if the CONTRACTING PARTIES determined this to be "appropriate." Likewise, lesser penalties, but still stronger than compensating redress, could be authorized for application by groups of contracting parties.

Id. at 186-87.

reasons has occasioned only rare disruptions of the GATT trading system. Nevertheless, unless carefully controlled, more frequent U.S. resort to import sanctions could have a much more significant impact.²⁰⁶ If other countries followed suit, the commendable effort to move toward an open, nondiscriminatory trading system that benefits the United States and other countries would be weakened.

Increased use of import sanctions, however, is difficult under existing U.S. laws. The President has no general statutory authority to restrict imports for foreign policy reasons, as he does for exports. The hodgepodge of existing laws restricts his discretion significantly and skews his decisions.

D. *Private Financial Transactions*

Regulation of the financial transactions that U.S. banks or other private entities can have with foreigners is a potentially important sanction. Indeed, financial sanctions are a major component of the U.S. measures against South Africa, and extensive financial controls were imposed against Iran in 1980 and Libya in 1986.

At present, however, the President has very limited statutory authority over these private financial transactions. For instance, if New York-based Citibank wants to loan money to the government or private entities in Chile, or Iraq, or Poland, the President cannot prevent that loan for foreign policy reasons, at least in the absence of a declared national emergency.

This lack of authority is especially important today, since international financial activity is growing dramatically and increasingly intersects with foreign policy.²⁰⁷ And, while the premier role that U.S. banks enjoyed in the 1960's and early 1970's has eroded as Japanese and European banks have grown and become more active internationally,²⁰⁸ U.S.

206. See *infra* text accompanying notes 416-29.

207. For example, about \$12 billion in Iranian assets was in the possession of U.S. banks and other entities here and abroad when the President froze these assets during the 1979-80 hostage crisis. Similarly, when Chase Manhattan and other U.S. banks decided, for a variety of reasons, not to roll over short-term loans to South Africa in mid-1985, it helped force South Africa to close its stock exchange temporarily and to declare a four-month moratorium on repayments of most foreign debts. Madison, *Breaking the Engagement*, 18 NAT'L J. 1820, 1822 (1986); *The Bankers Challenge Botha*, NEWSWEEK, Jan. 27, 1986, at 36. It was not until early 1987 that South Africa managed to reach an agreement with its foreign creditors on rescheduling about \$13 billion of its foreign debt. N.Y. Times, March 25, 1987, at D1, col. 1.

208. A 1988 report indicated that Tokyo has overtaken New York as a center for international lending and that Japanese banks had maintained their lead over U.S. banks in international assets. Japanese banks were estimated to have over twice the international assets of U.S. banks as of September 1987, having passed the American banks in late 1985. French banks were third, West German banks were fourth, and British banks were fifth. Wash. Post, Feb. 10, 1988, at F1, col. 1, citing a February 1988 report by the Bank for International Settlements (BIS). This situation contrasts with that at the end of 1984, when the BIS estimated that U.S. banks accounted for the

banks continue to be a major force in private international banking.²⁰⁹

U.S. credit is particularly important in certain regions and countries. For example, U.S. banks, traders, and other entities provide large amounts of credit to noncommunist countries in Latin America and Asia. In mid-1986, U.S. banks' claims as a percentage of total foreign bank claims were 47% for Chile, 43% for Mexico, 40% for Guatemala, 26% for South Korea, 31% for Taiwan, and 17% for the Philippines.²¹⁰ Regulation of private financial transactions is thus a potentially effective foreign policy tool in such cases.²¹¹

For purposes of analysis, private financial transactions in which foreigners have an interest may be categorized into three types: (1) deposits in U.S. banks; (2) financing for trade; and (3) loans for investment or other purposes.

At present, no U.S. laws exist for controlling foreigners' deposits for foreign policy reasons in nonemergency situations, except for the special case of South Africa. As for trade financing, section 15 of the Export Administration Act provides the President with authority to restrict export financing, but not import financing or other financial transactions. Finally, the only example of U.S. regulation of foreign investment or other credit activities for foreign policy purposes are the 1986 sanctions against South Africa. Otherwise, the Johnson Act of 1934 and certain lending limits on individual borrowers provide the President with only a modicum of authority. He also has some informal, though modest, influence arising from the Executive Branch's general regulation of banks.

1. Section 15 of the EAA: Stop Financing Those Exports

The President's primary statutory authority to control U.S. private credit is contained in section 15 of the Export Administration Act:

The President and the Secretary [of Commerce] may issue such regulations as are necessary to carry out the provisions of this Act. Any

largest share (28%) of the assets in the international banking system, followed by the Japanese (23.5%), French (9%), British (7%), and West German banks (6.5%). BANK FOR INTERNATIONAL SETTLEMENTS, *THE NATIONALITY STRUCTURE OF THE INTERNATIONAL BANKING MARKET AND THE ROLE OF INTERBANK OPERATIONS* 4 (1985); see J. SPINDLER, *THE POLITICS OF INTERNATIONAL CREDIT* 5 (1984).

209. As noted in footnote 209 *supra*, U.S. banks are behind only the Japanese banks in international assets. Also, at the end of 1985, seven of the 50 largest commercial were U.S. banks. *World's Top 500 Banks*, Am. Banker, July 30, 1986, at 36.

210. See Figure 1 in Section II.B.2. at 1178, and sources cited there. In contrast, in mid-1985, U.S. banks held only about 6-7% of the total debt owed by the Soviet Union and other Comecon countries to foreign banks. *Controls on the Export of Capital from the United States: Hearings on S. 812 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 1st Sess. 139 (1985) (statement of David C. Mulford, asst. secretary of the Treasury) [hereinafter *1985 Hearings on S. 812*].

211. See *infra* text accompanying notes 430-49 (presenting recommendations in this area).

such regulations issued to carry out the provisions of [this Act] may apply to the *financing*, transporting, or other servicing of exports and the participation therein by any person.²¹²

Section 15's language strongly suggests that it was designed to help implement EAA export controls, and not to be an independent authority to control international financial transactions. In other words, the President is not authorized to impose a few export controls on goods and technology to Chile, and then prohibit all financing to that country under Section 15. Moreover, none of the other EAA provisions envision general controls on financing.

The legislative history of section 15 similarly indicates the intent only to help implement the EAA through regulation of financing and other ancillary activities.²¹³

Section 15 was arguably invoked once for foreign policy purposes to justify regulation of financial transactions not directly related to exports.²¹⁴ The section's clear statutory language and legislative history, however, make difficult any attempts to use it to restrict private credit that is not connected with export controls on goods and technology.

2. *The Johnson Debt Default Act*

The Johnson Act of 1934,²¹⁵ which provides criminal penalties for whoever in the United States buys or sells the securities of certain foreign governments, could be a possible obstacle for extending private credit to

212. 50 U.S.C. app. § 2414 (1982) (emphasis added).

213. See Moyer & Mabry, *supra* note 127, at 107-08.

214. In a controversial move, President Carter invoked section 15 to help limit U.S. participation in the 1980 Moscow Olympics. The President prohibited the export of virtually all goods and technology associated with the Olympics, including souvenirs. He also directed the prohibition of "payments or transactions which are in any way related to arrangements involving or requiring . . . exports, where such payments or transactions could provide financial support for [the] Games." 16 WEEKLY COMP. PRES. DOC. 559-60 (Mar. 28, 1980); 45 Fed. Reg. 21,612 (1980).

The financial controls were primarily designed to prohibit NBC from making further payments under its \$87 million contract to broadcast the Olympics. NBC had already shipped most of its equipment, but still had three remaining payments totaling \$20-26 million. HOUSE AFGHANISTAN REPORT, *supra* note 69, at 92-93.

The President's directive and the resulting regulations on financial transactions were explicitly tied to "involving or requiring . . . exports," and NBC still had to export some equipment. Thus the company was in danger of violating the language of the directive. Two experts argue, however, that "the NBC payments were not directly related to U.S. exports. Rather, the monies . . . were partial consideration for the contractual right to broadcast, a transaction that was clearly not a U.S. export within the meaning of the EAA." Moyer & Mabry, *supra* note 127, at 108 (footnote omitted). (Moyer was General Counsel, Counsellor to the Secretary, and Deputy General Counsel of the U.S. Department of Commerce during the Carter administration.)

NBC did not, however, challenge the controls, probably because the network was insured for about 90% of the costs. HOUSE AFGHANISTAN REPORT, *supra* note 69, at 91. Also, there would have been a much smaller U.S. viewing audience given the absence of a U.S. team and a challenge by NBC probably would not have been good public relations.

215. 18 U.S.C. § 955 (1982) (as revised in 1948).

some foreign governments. The scope of the Act, however, is quite narrow. To begin with, it only applies to those foreign governments that are in default on debts owed to the U.S. government. The Act has also been riddled with several major exceptions.²¹⁶ As a result, the statute is now mainly a trap for the unwary. In those few cases where it might apply, its terms give no discretion to the President beyond deciding whether to enforce the statute or not.

3. *Federal Lending Limits*

Lending limits have been characteristic of U.S. banking for over 100 years.²¹⁷ They are not helpful, however, as a vehicle for restricting foreign lending for foreign policy reasons.

The limits still allow large amounts of lending to a single borrower. They provide, for national banks, that the total amount of loans and extensions of credit to a single person shall not exceed 15% of the bank's "unimpaired capital and unimpaired surplus." This limit can rise to 25% if the portion above 15% is fully secured.²¹⁸ The percentage limits are also fixed. Consequently, the President has no discretion to alter them; he can only determine whether there have been violations.

4. *Twisting Arms*

The U.S. system for regulating and supervising banks and other entities that provide private credit to foreigners is labyrinthine—involving numerous federal as well as state agencies.²¹⁹ Nevertheless, the

216. First, any countries which are members of both the World Bank and the International Monetary Fund are exempted from the Act. *Id.* Second, the U.S. Attorney General, presuming that corporate branches function independently, concluded that the Act does not apply to loans from foreign branches of U.S. banks, a large loophole today since many U.S. banks have overseas branches. 39 Op. Att'y Gen. 398, 401-402 (1939). Third, the statute has also been interpreted as not prohibiting trade financing (such as for exports), as distinguished from general purpose loans. 42 Op. Att'y Gen. 357, 362 (1967).

217. Corse & Nichols, *United States Government Regulation of International Lending by American Banks* in *INTERNATIONAL FINANCIAL LAW* 105 (R. Rendell ed. 1980). See generally Note, *The Policies Behind Lending Limits: An Argument for a Uniform Country Exposure Ceiling*, 99 HARV. L. REV. 430 (1985) (reviewing lending limits for U.S. banks).

218. 12 U.S.C. § 84(a)(1), (2) (1982). Research failed to unearth any careful, published calculations of what these lending limits mean in practice. The legislative history of the 1983 amendments to the statute, however, provide some data. A House Report provided several banks' capital figures in June 1982, based on a definition close to the regulatory one in 12 C.F.R. §§ 32.2(c), 3.100 (1987). Based on these figures, a 15% lending limit would have allowed Citibank to lend \$771 million to a single borrower and Chase Manhattan to lend \$478 million. H.R. REP. NO. 175, 98th Cong., 1st Sess. 36 n.2 (statistics drawn from Federal Reserve Board, June 1982, Consolidated Reports of Condition), reprinted in 1983 U.S. CODE CONG. & ADMIN. NEWS 1898, 1919. Moreover, it appears that many banks have significantly increased their capital since 1982. See CHASE MANHATTAN CORP., 1985 ANNUAL REPORT (1986).

219. See generally TASK GROUP ON REGULATION OF FINANCIAL SERVICES, BLUEPRINT FOR REFORM 18 (July 2, 1984). This is the report of an Executive Branch interagency group.

extensive and intensive federal regulation provides only rare opportunities for the President to influence the flow of private credit for foreign policy reasons.

In the past, U.S. banking regulators were primarily concerned with the management of domestic savings and credit flows, the growth of the money supply, and the protection of domestic depositors, borrowers, and investors. The foreign operations of U.S. banks were considered largely irrelevant to these concerns.²²⁰

Under pressure from Congress, the three federal agencies supervising foreign lending—the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation—began to take a more aggressive role. In 1979, the agencies established the Interagency Country Evaluation Review Committee (ICERC) to evaluate and classify the riskiness of U.S. banks' outstanding loans. Bank examiners are required to use the ICERC ratings in examining the soundness of a bank's international operations.²²¹ Growing concern over the international debt crisis then spurred passage of the International Lending Supervision Act of 1983.²²² Among its many important provisions, the Act authorized the regulators to require beefed-up capital and loan-loss reserves to strengthen banks against potential losses on foreign loans. These changes have made federal regulation of foreign lending more intensive and more uniform.

The present U.S. regulatory system, however, provides the President with only very limited influence to control private credit to a foreign country for foreign policy reasons. The President could try to operate in either of two ways: (1) by attempting to influence the ICERC's categorization of a country so that banks would be more hesitant to make loans to it; or, more directly, (2) by pressuring banks to restrict lending to a country regardless of its credit rating.

Reclassification could be a potent sanction in discouraging new lending to a targeted country. If, for example, the ICERC rates loans to a country as "value-impaired," banks with such loans are required to set up special reserves, called Allocated Transfer Risk Reserves.²²³ The money that banks set aside must come out of their current earnings, which hurts their quarterly reports and could reduce the price of their stock.

220. Lissakers, *Bank Regulation and International Debt*, in *UNCERTAIN FUTURE: COMMERCIAL BANKS AND THE THIRD WORLD* 48-49 (R. Feinberg and V. Kallab eds. 1984).

221. Stokes, *Mystery Surrounds Agenda, Decisions of Foreign Loan Review Committee*, 17 *NAT'L J.* 2136, 2136-37 (1985); Lissakers, *supra* note 220, at 54, 59.

222. Pub. L. No. 98-181, tit. IX, 97 Stat. 1278 (1983) (codified at 12 U.S.C. §§ 3901-12 (Supp. IV 1986)).

223. 12 C.F.R. §§ 20.8(b)(2), 211.43(b)(2), 351.1(b)(2)(ii) (1987); *see* Stokes, *supra* note 221, at 2137.

Because the ICERC's members are bank examiners from the Office of the Comptroller, the Federal Reserve Board, and the Federal Deposit Insurance Corporation, there is some concern in the banking community that the White House can influence the review committee's decisions through the Treasury or State Department.²²⁴

The President's power to influence country classifications, however, seems very limited. First, the target country must in fact be near the substandard or value-impaired situation. A country that is regularly making payments on its debts seems relatively invulnerable to this tactic. Second, the discretion of the review committee and the regulatory agencies is generally confined by the detailed criteria for the various categories.²²⁵

The President might also try, directly or indirectly, to pressure banks not to extend credit to a target country. For example, a bank that continued to make loans to target countries might encounter regulatory obstacles to opening new branches or getting access to discount loans, or its loan portfolios might be more closely supervised.²²⁶

Such presidential pressure would probably encounter serious opposition and would, at best, be only partially successful. First, given the lack of clear statutory authority, the President would have to expend considerable political capital to ensure cooperation.²²⁷ Second, the banks would have a commercial interest in continuing to lend to a target country that was a good credit risk. Bank officers have a duty to act in the best interests of their shareholders, and would thus be reluctant to make decisions for foreign policy reasons that would be contrary to the shareholders' interest in making profits. Finally, the President would be operating against a long-standing tradition of an arm's-length relationship between banks and the U.S. government.²²⁸

224. Stokes, *supra* note 221, at 2138. Critics have charged that the ICERC's handling of Peru's debts in June 1985 is an example of bending to political pressure. *See id.* at 2138-39.

225. *See, e.g.*, 12 U.S.C. § 3904 (Supp. IV 1986). *But cf.* Stokes, *supra* note 221, at 2138-39.

226. During the Polish debt crisis in early 1982, for instance, some U.S. officials wanted to pressure U.S. banks to declare Poland in default. After considerable debate and confusion, the Reagan administration took no such action. J. SPINDLER, *supra* note 208, at 198. In an analogous situation, the Executive Branch apparently tried to influence U.S. banks to refinance and expand their loans to financially troubled developing countries in late 1982 and early 1983, in order to maintain international financial stability. For example, the Federal Reserve informed commercial banks that they would not be criticized if they renewed or even increased by seven percent their loans to Mexico. On the other hand, banks failing to do this would find their Mexican loans coming under closer scrutiny by bank examiners. *Id.* at 197 n.38; Heinemann, *A Fed Push on Foreign Loans Seen*, N.Y. Times, Jan. 15, 1983, at 29, col. 1.

227. *See* Koschik, *Foreign Policy Motivated Credit Restrictions: Potential Bases of Authority and a Practical Analysis*, 16 L. & POL'Y INT'L BUS. 539, 553 n.68 (1984).

228. During interviews conducted by one expert in late 1982, senior executives at several of the largest banks "indicated a general unwillingness to cooperate with *any* attempt by the U.S. Government to instruct them on where and when to lend interuationally." J. SPINDLER, *supra* note

E. International Financial Institutions

The international financial institutions (IFI's), such as the International Monetary Fund and the World Bank, control billions of dollars. Their decisions are often critical to the survival or health of a country's government. Thus, on first impression, the IFI's appear to be attractive vehicles for the United States to advance its foreign policy goals.

The United States, however, has only a limited ability to influence the IFI's, because of their apolitical purposes and their multilateral decisionmaking. The small influence that the U.S. government has in the IFI's usually arises from building alliances with other countries and from informal persuasion, and not from formal voting power.

The IFI's include the International Monetary Fund (IMF) and the four multilateral development banks (MDB's): the World Bank Group,²²⁹ the Inter-American Development Bank (IDB), the Asian Development Bank (ADB), and the African Development Bank (AFDB). While the purposes of the IMF and the MDB's differ, all have nonpolitical objectives.

The IMF is designed to promote international monetary cooperation and stability in foreign exchange. The IMF provides its 149 member countries with assistance only on balance of payment problems, and does not extend development assistance.²³⁰ In contrast, the MDB's seek to assist in the economic and social development of developing countries. The World Bank makes loans to assist developing countries around the world, and the other banks help countries in particular regions. Each bank provides ordinary loans (at near-market rates of interest) and concessional loans (at reduced interest rates).²³¹

208, at 200-01. To be sure, some U.S. banks are sensitive to U.S. foreign policy, but for purely commercial reasons. For example, if the United States is strongly committed to supporting a foreign government, the banks are more comfortable lending to that country because of the likelihood that the United States would devote additional resources to protect that government if troubles arise. *Id.* at 201.

229. The World Bank Group consists of three institutions: the International Bank for Reconstruction and Development (IBRD or, more commonly, the World Bank), the International Development Association (IDA), and the International Finance Corporation (IFC).

230. A. CHANDAVARKAR, *THE INTERNATIONAL MONETARY FUND: ITS FINANCIAL ORGANIZATION AND ACTIVITIES I* (IMF Pamphlet Series No. 42, 1984). Gross drawings on IMF resources during fiscal year 1984, by 86 member countries, amounted to about \$11.4 billion. NATIONAL ADVISORY COUNCIL ON INTERNATIONAL MONETARY AND FINANCIAL POLICIES, *INTERNATIONAL FINANCE 3* (1985) (annual report to the President and Congress for fiscal year 1984) [hereinafter *INT'L FINANCE*].

231. Concessional loans are reserved for the poorest countries and sometimes for special types of projects. The MDB's are the largest source of governmental development assistance to the developing nations. In U.S. fiscal year 1986, the banks made loans and other financial commitments totalling about \$23.1 billion—\$17.5 billion from the World Bank Group, \$2.3 billion from the IDB, \$1.9 billion from the ADB, and \$1.3 billion from the AFDB. FY 1986 *INT'L FINANCE*, *supra* note 230, at 15-20.

The charters of the IFI's specify their nonpolitical objectives. The World Bank Charter, for

These objectives of the IMF and the development banks are generally consistent with U.S. policies of encouraging international monetary stability and the development of less-developed countries. Problems arise, however, when the United States seeks to use the IFI's for its own foreign policy purposes. For example, the United States has tried to cut off IFI assistance to leftist governments and to governments that engage in gross violations of human rights.²³² It has attempted to inject these foreign policy goals into IFI decisionmaking either as a result of an independent Executive Branch decision (as with Chile in 1970-73 and Nicaragua currently), or as a result of congressionally initiated legislation.²³³

U.S. laws address a wide range of activities by a recipient country. The strictest statutes instruct the U.S. director at an IFI to oppose loans to an offending country. For example, certain laws instruct U.S. directors at the MDB's to oppose assistance to a country if its government expropriates U.S. property without paying prompt, adequate, and effective compensation;²³⁴ provides refuge to airplane hijackers; or engages in a pattern of gross violations of internationally recognized human rights.²³⁵ U.S. directors have frequently opposed loans on these grounds, though some critics argue that the laws should be invoked more often.²³⁶

The United States can raise these foreign policy considerations through its formal votes and by lobbying other member countries and the institutions' staffs. Since decisionmaking structures at the IMF, World

example, provides that "the Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions . . ." IBRD ARTICLES OF AGREEMENT, art. IV, § 10. In addition, some IFI charters prohibit the institution from accepting contributions with strings attached. *E.g.*, ADB CHARTER, art. 36, § 2.

232. See *infra* text accompanying notes 235-36, 241, 243.

233. As concluded in Part VI below, further U.S. efforts to politicize the IFI's seem unwise—not only are these efforts likely to fail, but they could weaken the effectiveness of the IFI's at a time when these institutions are playing a critical role in dealing with problems of Third World debt and international financial stability.

234. See, *e.g.*, 22 U.S.C. §§ 283r (IDB), 284j (IDA), 285o (ADB) (1982). The President may waive these provisions if the parties have submitted the dispute to international arbitration or if good-faith negotiations are underway. *Id.*

235. 22 U.S.C. § 262d (1982 & Supp. III 1985). There is an exception in the last two cases if the assistance is for programs which serve the basic human needs of the country's citizens. 22 U.S.C. § 262d(f) (1982). Although the U.S. director at the IMF is not under such constraints with respect to expropriation or human rights issues, the law does require him to oppose IMF assistance to countries harboring terrorists, to communist dictatorships, and to countries practicing apartheid. 22 U.S.C. §§ 286e-11 (terrorists), 286aa (1982 & Supp. III 1985) (communist dictatorships and apartheid systems).

236. Curry & Royce, *Enforcing Human Rights: Congress and the Multilateral Banks*, INT'L POL'Y REP. 12-18 (Feb. 1985). See also *infra* note 243 and accompanying text (discussion of Chile). The dispute illustrates the difficulty with attempting to force the Executive Branch to act against its wishes on the basis of general criteria.

Bank, and regional banks are similar,²³⁷ these institutions are treated collectively here.

1. *Voting Systems*

Voting power in the IMF and World Bank is primarily a function of the relative economic strength of member countries. Each member receives an equal, small allocation of basic votes, and the remaining votes are distributed according to levels of contributions (or quotas). Generally, a simple majority of the votes cast is sufficient to resolve a member's financial request.²³⁸

The IMF/World Bank model strongly influenced the voting systems adopted by the regional development banks. While there are some important differences, all the banks employ the approach of a basic vote plus weighted votes, with the latter allocated according to the member's subscription.²³⁹ Formal votes on loan decisions generally require a majority vote.

One exception to the usual simple majority is the two-thirds vote required by the IDB's Fund for Special Operations (FSO)—its concessional loan window. IDB rules also provide that the voting power of the member with the largest number of shares cannot be less than 34.5%.²⁴⁰ Thus, as the largest shareholder, the United States effectively exercises veto power over all FSO loans.

Otherwise, the United States lacks the unilateral voting clout to block assistance from the regular fund of the IDB or from the other IFI's. The U.S. voting percentages are far less than a majority in each case. They are approximately 19% in the IMF, from 18.4 to 27.6% in the World Bank Group, 34.5% in the IDB, 13.9% in the ADB, and 5.5% in the AFDB.²⁴¹ Moreover, these percentages have generally

237. Each institution has a Board of Executive Directors that votes on requests for financial assistance and oversees other operations. See Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566, 577 (1980).

238. *Id.* at 576-77, 595.

239. *Id.* at 577-78.

240. IDB ARTICLES OF AGREEMENT, art. IV, § 9(b), art. VIII, § 4(b). The United States has sought since 1986 to increase its voting power in order to have a near-unilateral veto over *all* loans the IDB makes. This effort was rebuffed in March 1987. See N.Y. Times, Mar. 24, 1987, at D1, col. 1; see also N.Y. Times, Mar. 26, 1986, at D2, col. 4. U.S. efforts continue, however. N.Y. Times, Jan. 12, 1988, at D3, col. 4.

241. See respectively: INTERNATIONAL MONETARY FUND, ANNUAL REPORT 1986 at 120; WORLD BANK, THE WORLD BANK ANNUAL REPORT 1987 at 179 (IBRD), 195 (IDA); INTERNATIONAL FINANCE CORP., ANNUAL REPORT 1986 at 59 (IFC); INTER-AMERICAN DEVELOPMENT BANK ANNUAL REPORT 1986 at 126 (1987); ASIAN DEVELOPMENT BANK, ANNUAL REPORT 1984 at 78 (1985); FY 1986 INT'L FINANCE, *supra* note 230, at 294 (AFDB).

Ethiopia and human rights provide two case studies of the limited ability of the United States to influence IFI decisionmaking through formal voting. The United States consistently opposed IFI loans to Ethiopia's Soviet-oriented Mengistu regime between 1977-85, primarily because of an

declined over time as other countries' contributions have grown, and U.S. subscriptions have become a relatively smaller proportion of the total.

2. *Alliances and Informal Persuasion*

Most decisions on loan requests are decided not by formal vote, but by the IFI executive boards through informal consensus.²⁴² Thus, it is often difficult to determine when pressure by one country is instrumental in a loan request being approved, rejected, or never even receiving formal consideration. U.S. officials have emphasized this to discount the relevance of the United States' limited voting power and the poor U.S. record in winning formal votes.²⁴³

expropriation dispute. Nevertheless, the United States lost on all 35 votes it either cast against Ethiopia or abstained on during this period. This conclusion is based on an analysis of the relevant annual reports by the National Advisory Council on International Monetary and Financial Policies. See *supra* note 230.

Compare negative U.S. votes and abstentions with IFI loan approvals as reported in FY 1985 INT'L FINANCE, *supra* note 230, at 196; FY 1984 *id.* at 69; FY 1983 *id.* at 85-86, 102, 178-79; FY 1982 *id.* at 89, 107-08, 200-01; FY 1981 *id.* at 93, 113-14; FY 1980 *id.* at 107; FY 1979 *id.* at 103, 228; FY 1978 *id.* at 109, 135, 252; FY 1977 *id.* at 124, 145. Of the 35 votes, three U.S. abstentions were on human rights grounds. See FY 1978 *id.* at 109 (IDA loan vote in April 1978); FY 1977 *id.* at 124 (IDA loan votes in May 1977).

On human rights generally, since the 1977 enactment of the Harkin Amendment, Pub. L. No. 95-118, § 701, 91 Stat. 1069 (1977) (codified at 22 U.S.C. § 262d (Supp. III 1985)), the United States has frequently voted in the MDB's against loans to countries with poor records on human rights. For example, from 1977 through September 1981, the United States voted "no" or abstained 118 times on human rights grounds. However, all 118 loans were approved, and U.S. opposition apparently did not cause any significant diminution in lending to countries that allegedly violated human rights. J. SANFORD, U.S. FOREIGN POLICY AND MULTILATERAL DEVELOPMENT BANKS 203-04 (1982). Another scholar concludes, however, that "the Carter administration policy served to deter loan application [sic] [to MDB's] by Latin America's most repressive governments." L. SCHOULTZ, HUMAN RIGHTS AND UNITED STATES POLICY TOWARD LATIN AMERICA 299 (1981).

242. J. SANFORD, *supra* note 241, at 8.

243. See *id.* at 185. The case studies of Nicaragua and Chile illustrate the U.S. influence—and its limits—through informal methods versus formal voting.

During fiscal years 1977-85, the U.S. voted against seven loans to Nicaragua, but succeeded in blocking only one. Of the seven loan requests, two were from the World Bank and five from the IDB. See FY 1985 INT'L FINANCE, *supra* note 230, at 183-97; FY 1984 *id.* at 69; FY 1983 *id.* at 85-86; FY 1982 *id.* at 89; FY 1981 *id.* at 93; FY 1980 *id.* at 107; FY 1979 *id.* at 103; FY 1978 *id.* at 109; FY 1977 *id.* at 124. See also U.S. Dep't of Treasury, U.S. Negative Votes and Abstentions in the MDBs for Economic and/or Financial Reasons (May 6, 1985) (internal memorandum) (on file with author) [hereinafter Treasury Dep't Memorandum]. The isolated success came when Nicaragua requested a concessional loan from the IDB's Fund for Special Operations, where the United States has a veto power. Reportedly, all other 42 members of the IDB voted for the loan, and the U.S. position generated severe criticism from other board members, including Britain and West Germany. Wash. Post, July 30, 1983, at D8, col. 1. (Strangely, no record of this vote appears in either FY 1983 INT'L FINANCE, *supra* note 230, at 86, or in Treasury Dep't Memorandum, *supra*, at 4, listing all U.S. negative votes and abstentions in the MDB's from fiscal year 1975 through the spring of 1985.)

The United States has had more success in stopping loans by applying informal pressure. Apparently in part because of U.S. pressure, there has been a sharp decrease in IDB lending to

Overall, the United States has only limited ability to use the IFI's to impose economic sanctions for its own foreign policy reasons. Moreover, the prospects for the U.S. increasing its use of the IFI's are poor. First, in a period of domestic budgetary restraint, U.S. contributions to the

Nicaragua in recent years. After receiving loans for \$34.4 million in 1982 and \$30.7 million in 1983, Nicaragua received no new loans from 1984 through January 1988. See N.Y. Times, Jan. 12, 1988, at D3, col. 1; telephone interview with Joseph U. Hinshaw, Assoc. Deputy for External Relations Advisor, IDB (June 23, 1987); see N.Y. Times, Apr. 13, 1986, at A8, col. 1; see also INTER-AMERICAN DEVELOPMENT BANK, 1986 ANNUAL REPORT 88, 105-09 (1987) (for calendar year 1986); FY 1985 INT'L FINANCE, *supra* note 230, at 144; FY 1984 *id.* at 142; FY 1983 *id.* at 159; FY 1982 *id.* at 175-76. U.S. pressure has been considerable, and not always quiet. For example, Secretary of State George Shultz sent an unprecedented private letter to IDB President Mena urging the IDB not to approve a particular loan to Nicaragua. Wash. Post, Mar. 8, 1985, at 1, col. 1. See also *Treasury News*, May 16, 1985, at 4; N.Y. Times, Apr. 13, 1986, at A8, col. 1; Wash. Post, Feb. 19, 1988, at F3, col. 3.

Nicaragua has also experienced a drought in assistance from the World Bank Group, receiving no aid since a \$16 million IBRD loan in January 1982. Telephone interview with Antonio Pimenta-Neva, Public Affairs Office, World Bank (June 23, 1987); see FY 1985 INT'L FINANCE, *supra* note 230, at 285, 293; FY 1984 *id.* at 111; FY 1983 *id.* at 123; FY 1982 *id.* at 134 (together indicating no loans through Sept. 30, 1985). The reasons for the World Bank situation are not entirely clear. However, recently Nicaragua has been in arrears on loan repayments to the World Bank, which automatically disqualifies it from receiving new lending. Telephonic interview with Antonio Pimenta-Neva, *supra*.

In the case of Chile, the U.S. effort to apply economic pressure on the leftist Allende government during the early 1970s constitutes one of the most controversial, and possibly most effective, examples of targeting a country within the IFI's. In 1970, when Salvadore Allende was elected President of Chile, President Nixon privately called for U.S. actions to "make the [Chilean] economy scream." *Intelligence Activities, Senate Resolution 21: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess., vol. 7, at 96 (1975) (handwritten notes by CIA Director Helms). Nixon issued a secret National Security Memorandum that called for pressure on IFI's to limit assistance to Chile. S. HERSH, *THE PRICE OF POWER* 294-96 (1983).

Chile experienced a substantial decline in MDB lending during the Allende period. There is general agreement that U.S. pressure did influence the IDB to reduce sharply its lending. See, e.g., J. SANFORD, *supra* note 241, at 212; Sigmund, *The "Invisible Blockade" and the Overthrow of Allende*, 52 FOREIGN AFF. 322, 327 (1974). The evidence is less clear on U.S. success in blocking new World Bank loans to Chile. Compare Sigmund, *supra*, at 326-28, 338 (U.S. pressure instrumental) with J. SANFORD, *supra* note 241, at 211 (World Bank acted on unrelated macroeconomic considerations). But cf. H. KISSINGER, *WHITE HOUSE YEARS 680-83* (1979) (while acknowledging U.S. pressures, Kissinger concludes that Allende's own policies caused his downfall).

A second chapter in the Chilean case has begun. Elliott Abrams, the Assistant Secretary of State for Inter-American Affairs, disclosed in July 1986 that the Reagan administration was giving serious consideration to voting "no" on IFI loans to Chile unless Chile significantly improved its human rights record. The signal of possible U.S. opposition in July apparently led Chile in August to ask the World Bank and IDB to postpone final consideration of its pending loans. The loan requests, which were expected to be voted on in September or October, were delayed until November. The United States then abstained on the World Bank vote approving a \$250 million loan to Chile. N.Y. Times, Nov. 21, 1986, at A3, col. 4; *id.*, July 31, 1986, at A1, col. 1. The continuing resoution for most FY 1988 funding for the U.S. government includes a provision that the United States should oppose all loans to Chile from MDB's, except for those loans for basic needs, until the government of Chile ends its gross abuse of internationally recognized human rights and takes significant steps to restore democracy. 1988 Appropriations Act, *supra* note 90, § 551; see also *id.* § 577 (general statement of U.S. policy toward Chile, with an emphasis on the need for the Chilean government to return to democracy).

IFI's are likely to decline, rather than increase, relative to other countries. As a result, U.S. voting power is likely to decline slightly. Second, given the apolitical nature of the IFI's, there is no reason to expect that countries that are otherwise friendly to the United States are any more likely to go along with special U.S. foreign policy interests now than in the past. This does not rule out, of course, the possibility of cooperation among countries in more extreme situations.

F. Other Relevant U.S. Laws

Besides the U.S. laws that deal primarily with one type of economic activity, such as exports or private financial transactions, there are laws that span several types of economic activity, and that give the President some power to impose economic sanctions for foreign policy purposes. The two principal examples are the antiboycott laws and the U.N. Participation Act.²⁴⁴

1. The Antiboycott Laws: The United States Strikes Back

In reaction to the continuing Arab boycott of Israel, the United States has imposed major limits on U.S. business activities that comply with or support any boycott that is not approved by the United States and that is directed against a friendly country.²⁴⁵ The U.S. antiboycott

244. Another statute broadly applicable on its face is 22 U.S.C. § 1732 (1982). Passed in 1868, it was dubbed the "Hostage Act" during the Iranian hostage litigation. It provides that when a U.S. citizen has been unjustly deprived of his liberty by a foreign government, "the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release . . ." *Id.*

In *Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981), the Court grouped the Hostage Act with IEEPA as "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case." Nevertheless, the statute's age, legislative history, and rare use suggest that section 1732 should have little life left in it. See Mikva & Neuman, *The Hostage Crisis and the "Hostage Act,"* 49 U. CHI. L. REV. 292, 353-54 (1982).

A new law that does not fit in the categories discussed above (such as exports and imports) is the 1987 provision that denies tax credits to U.S. companies for the taxes paid by their subsidiaries in South Africa. See *infra* discussion at note 255. Using the tax laws to impose sanctions for foreign policy purposes is relatively rare. Previously, the major use of the tax laws for such purposes is the provisions against the Arab boycott. See *infra* note 245.

245. The principal antiboycott law is section 8 of the EAA. EAA Amendments of 1977, Pub. L. No. 95-52, tit. II, 91 Stat. 235 (codified in scattered sections of 50 U.S.C. app. (1982)). See, especially, § 2407.

Prior to the passage of the 1977 EAA amendments, opponents of the Arab boycott added provisions to the tax laws in 1976. Tax Reform Act of 1976, Pub. L. No. 94-445, §§ 1061-1064, 1066-1067, 90 Stat. 1525, 1649-50, 1654 (codified in scattered sections of the I.R.C.). The provisions, popularly known as the "Ribicoff Amendment" after their Senate sponsor, were designed to discourage "participat[ing] in or cooperat[ing] with" an international boycott. I.R.C. § 908 (1982).

Although the U.S. government has apparently brought no new antitrust suits based on boycott activities since 1977, it could do so in the future. See *United States v. Bechtel Corp.*, 1979 Trade

laws further a number of American foreign policy interests—maintaining close ties to Israel, opposing discrimination against ethnic groups, and protecting U.S. sovereignty against unreasonable efforts by foreign states to regulate U.S. business.

The antiboycott laws are not an affirmative, but rather a reactive, weapon. Other countries must act before the laws are triggered. Given the reactive nature of the laws and their focus on only the Arab boycott,²⁴⁶ a detailed examination of their complicated, often subtle, provisions is beyond the scope of this Article.

2. *The U.N. Participation Act: But for the Veto*

Section 287c of the U.N. Participation Act of 1945²⁴⁷ gives the President sweeping powers to impose the full range of economic sanctions when they are mandated by the U.N. Security Council. The President is authorized to "regulate, or prohibit, in whole or in part, economic relations or . . . communication" between any foreign country or national and any one subject to U.S. jurisdiction.²⁴⁸

The Security Council has broad powers under article 41 of the U.N. Charter to call for the "complete or partial interruption of economic relations and . . . communication."²⁴⁹ The Security Council has acted, however, in only two situations where the President then used his authority under section 287c to impose economic sanctions—against Rhodesia²⁵⁰ and South Africa.²⁵¹

Cas. (CCH), ¶ 62,429 (N.D. Cal. 1979), *aff'd*, 648 F.2d 660, 665 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981). The 1977 amendments to the EAA were generally perceived to supplant future uses of the antitrust laws, even though the statute specified that it did not "supersede or limit the operation of the antitrust . . . laws." 50 U.S.C. app. § 2407(a)(4) (1982).

For excellent discussions of the Arab boycott and the resulting U.S. legislation, see both 3 A. LOWENFELD, *INTERNATIONAL ECONOMIC LAW: TRADE CONTROLS FOR POLITICAL ENDS* 307-423 (1983); Fenton, *United States Antiboycott Laws: An Assessment of Their Impact Ten Years After Adoption*, 10 HASTINGS INT'L & COMP. L. REV. 211 (1987).

246. See 52 Fed. Reg. 17,284 (May 7, 1987) (announcement by the Department of Commerce that the antiboycott regulations at 15 C.F.R. pt. 369 do not apply to foreign boycotts against South Africa).

247. 22 U.S.C. § 287c (1982).

248. *Id.*

249. U.N. CHARTER art. 41. The Security Council may call for economic sanctions after determining the existence of a threat to the peace, a breach of the peace, or an act of aggression. *Id.* at art. 39. Before recommending action under article 41, the Security Council may ask the parties concerned to comply with any "provisional measures as it deems necessary or desirable." *Id.* at art. 40.

250. The Security Council first explicitly used its article 41 authority against Rhodesia. The Security Council called for selective mandatory sanctions in 1966 and for comprehensive sanctions in 1968. Relying on section 287c, President Johnson issued Executive Orders, implementing the U.N. resolutions and controlling transactions with Rhodesia. *E.g.* Exec. Order No. 11,419, 33 Fed. Reg. 10,837 (1968) (implementing S.C. Res. 253, 23 U.N. SCOR (Resolutions and Decisions) at 5-7 (1968) (comprehensive sanctions)); Exec. Order No. 11,322, 32 Fed. Reg. 119 (1967) (implementing

In recent decades, the Security Council has had trouble mandating any action, usually because of a veto by one or more of its five permanent members.²⁵² In particular, the conflicting interests of the United States and the Soviet Union generally make it difficult for the Council to agree on unified action in any international crises.²⁵³

G. *The Comprehensive Anti-Apartheid Act of 1986*

The Comprehensive Anti-Apartheid Act of 1986, passed by Con-

S.C. Res. 232, 21(2) U.N. SCOR Supp. (Resolutions and Decisions) at 7-9 (1966) (selective sanctions)).

In 1971, Congress cut a hole in these U.S. sanctions by passing the so-called Byrd Amendment, which allowed the importation of some strategic materials from Rhodesia. 50 U.S.C. § 98-98h (1976). The statute was upheld in *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). The Amendment was repealed in 1977. United Nations Participation Act Amendment, Pub. L. No. 95-12, 91 Stat. 22 (1977). For an excellent account of this period, see 3 A. LOWENFELD, *supra* note 245, at 452-535.

The U.S. sanctions were terminated in December 1979 when an arrangement was reached for majority rule in Rhodesia, soon to be called Zimbabwe. Exec. Order 12,183, 44 Fed. Reg. 74,787 (1979). The U.N. also ended its call for sanctions at that time. N.Y. Times, Dec. 27, 1979, at 8, col. 4.

251. In 1977, the Security Council called for an embargo on shipments of arms, munitions, and military equipment to or from South Africa. S.C. Res. 418, 32 U.N. SCOR at 5, U.N. Doc. S/INF/33 (1977). Later Council resolutions against South Africa include S.C. Res. 569 of July 1985. Pursuant to the arms export acts, the United States had limited such exports before the 1977 resolution.

Indeed, U.S. sanctions against South Africa have been more thoroughgoing than those mandated by the Security Council resolutions, and are based on other U.S. laws as well as section 287c. For example, when President Reagan imposed new sanctions against South Africa in September 1986, he cited section 287c as but one of the bases for his actions. See Exec. Order No. 12,232, 50 Fed. Reg. 36,861 (1985).

252. For example, in February 1987, the United States and Great Britain both vetoed a resolution that would have imposed further mandatory sanctions on South Africa. N.Y. Times, Feb. 21, 1987, at 3, col. 1. These were similar to those approved by Congress over President Reagan's veto in the Comprehensive Anti-Apartheid Act of 1986, discussed *infra* text accompanying notes 254-71.

Of the Security Council's 15 members, the permanent ones are China, France, the Soviet Union, Great Britain, and the United States. U.N. CHARTER art. 23, para. 1.

253. In the 1979-80 Iranian hostage situation, the United States had hoped to use the U.N. Security Council to develop and generate support for multilateral sanctions. A proposed ban on most exports to Iran was negotiated with U.S. allies and Third World countries, but the proposal was stymied by a Soviet veto in January 1980. While some U.S. allies later imposed sanctions unilaterally against Iran, there was greater wariness to do so because of the lack of "the protective shield of a U.N. vote." Carswell & Davis, *The Economic and Financial Pressures: Freeze and Sanctions*, in AMERICAN HOSTAGES IN IRAN, *supra* note 39, at 173, 196-98.

As of February 1988, there was some hope for a Security Council resolution imposing an arms embargo against Iran because of Iran's refusal to accept a July 1987 Council resolution calling for a cease-fire in the seven-year-old war with Iraq. In December 1987, the 15 Security Council members announced that they were ready to proceed with an embargo. Efforts to draft a resolution, however, reportedly were slowed by Soviet hesitation to support it. The Soviets apparently wanted further efforts at diplomacy and were chary of offending the Iranians. N.Y. Times, Feb. 21, 1988, at 4, col. 1.

gress over President Reagan's veto,²⁵⁴ provides a contrast to the haphazard statutory scheme governing most uses of economic sanctions by the United States in the absence of a declared national emergency. Focused on South Africa, the Anti-Apartheid Act provides for a variety of controls on bilateral government programs, exports, imports, and private financial transactions.²⁵⁵ While the Act suggests approaches to restructuring the U.S. framework for imposing sanctions, it is geographically limited, provides very little discretion to the President, and required years of effort in Congress to become law.

The United States first imposed sanctions against South Africa in 1963, by limiting arms sales, partly at the urging of the United Nations. Despite occasional backsliding, the United States gradually increased the type and severity of its sanctions through 1985. President Reagan preempted new congressional action in September 1985 by declaring a national emergency and invoking his powers under IEEPA. He then ordered by regulation most of the sanctions that Congress had been about to pass.²⁵⁶

Congress returned to the subject with the Anti-Apartheid Act. It includes several important new measures, and writes into law most of the sanctions that Reagan had imposed the preceding year. By and large, the Act's provisions are mandatory and precise. The President's discretion is thus considerably confined, though he is given some flexibility on the details of implementation.

As for U.S. government programs, the principal provision prohibits the airlines of either South Africa or the United States from taking off or landing in the other country.²⁵⁷ The Act also codifies a 1985 regulation requiring any U.S. national in South Africa (including U.S.-controlled corporations) to observe the Sullivan Principles, a set of fair employment

254. Pub. L. No. 99-440, 100 Stat. 1086 (codified at 22 U.S.C.A. §§ 5001-5116 (West Supp. 1987)) [hereinafter the Anti-Apartheid Act]. The House of Representatives voted on September 29 to override the veto by 313-83, and then the Senate voted 78-21 on October 2.

255. The Act did not contain any provisions regarding international financial institutions. However, a separate 1983 law instructed the U.S. Executive Director of the IMF actively to oppose IMF funding for any country that practiced apartheid. 22 U.S.C. § 286aa(b) (Supp. III 1985).

In the continuing resolution for FY 1988, Congress included a new sanction against South Africa—the denial of tax credits to U.S. companies for taxes paid by their subsidiaries in South Africa. The new law prevented the U.S. companies from crediting the taxes paid in South Africa against the companies' tax bills in the United States on a dollar-for-dollar basis, as is generally allowed for taxes paid to other countries. The full impact of this provision is still not clear. N.Y. Times, Dec. 25, 1987, at D1, col. 3.

256. For a discussion of the use of IEEPA, see *infra* text accompanying notes 272-336. For an earlier history of U.S. sanctions, see *supra* note 251 and any of a number of histories on the South African sanctions, such as K. DANAHER, *THE POLITICAL ECONOMY OF U.S. POLICY TOWARD SOUTH AFRICA* (1985).

257. 22 U.S.C.A. § 5056. See Wash. Post, Nov. 15, 1986, at D9, col. 4.

practices.²⁵⁸

The new law also adds export controls. Subject to certain exceptions, it prohibits the export of crude oil and petroleum products to all customers in South Africa, and essentially codifies existing regulations against exporting most nuclear goods or technology, computers, and arms to South African government agencies.²⁵⁹ The limits on petroleum will have little economic impact, since U.S. oil exports to South Africa totaled only about \$33 million in 1985, and South Africa has many alternative sources.²⁶⁰ Nevertheless, after the unhappy lessons learned from the imposition of only partial sanctions against Italy by the League of Nations and against Rhodesia by the United Nations, there is considerable symbolic value in cutting off petroleum exports.²⁶¹ Overall, however, the export controls will not reduce substantially the recent level of U.S. exports to South Africa (which totaled about \$1.2 billion in 1985)²⁶² because the controls over items other than petroleum were already in place under existing regulations.

The import controls are more extensive. The Act codifies President Reagan's import restrictions on gold coins, nuclear goods and technology, and arms. Moreover, it adds new prohibitions against imports of uranium, coal, iron, steel, textiles, sugar, and other agricultural products, as well as against most items from any South African entity that is owned, controlled, or subsidized by the South African government.²⁶³

The continued ban against the kruggerand will probably have the greatest impact of all the import controls. U.S. imports of the gold coin had reached about \$600 million in 1984, accounting for about 50% of South Africa's kruggerand exports.²⁶⁴ The prohibitions on the new items seem to be a pragmatic mixture of controls designed to hurt South Africa's economy and those designed to improve the chances of the bill's

258. Failure to adhere to the principles means that the U.S. government will not intercede on behalf of that national "with any foreign government or foreign national regarding the export marketing activities [by the U.S. national] in any country." 22 U.S.C.A. § 5034.

259. *Id.* §§ 5071 (oil), 5057 (nuclear items), 5054 (computers), 5067-5068 (arms). See generally Paretzky, *The United States Arms Embargo Against South Africa: An Analysis of the Laws, Regulations, and Loopholes*, 12 YALE J. INT'L L. 133 (1987).

260. 2 U.S. DEP'T OF COMMERCE, U.S. EXPORTS 1091 (Pub. FT455/1985 Dec. and Annual 1986).

261. The failure of the League's sanctions against Italy in 1935-36 for its invasion of Ethiopia was partly attributed to the omission of petroleum from the commodities embargoed. See *supra* note 20. Although the U.N. sanctions against Rhodesia sought to stop petroleum shipments, Rhodesia was easily able to circumvent this attempted barrier. 3 A. LOWENFELD, *supra* note 245, at 458-59; see also *supra* text accompanying notes 247-53 (discussing U.N. sanctions in detail).

262. 2 U.S. DEP'T OF COMMERCE, *supra* note 260, at 1090.

263. 22 U.S.C.A. §§ 5051 (gold coins), 5052 (military articles), 5053 (parastatal organizations), 5057 (nuclear items), 5059 (uranium, coal, and textiles), 5069 (agricultural products), 5070 (iron and steel), 5059 (sugar).

264. Wash. Post, Aug. 7, 1985, at A14, col. 3.

passage in Congress. Overall, it is estimated that these new prohibitions account for about \$300-350 million of the \$2.2 billion worth of U.S. imports from South Africa.²⁶⁵ At least as important as their economic impact, the bans against steel, textiles, and agricultural products also appealed to powerful producer constituencies in the United States. These provisions were added during the Senate floor debate in August 1986.²⁶⁶

The Act's most path-breaking provisions are probably its three major restrictions on private financial transactions, since Congress had not often relied on such measures before. First, the Act prohibits almost all loans by U.S. nationals to the South African government or to any entity owned or controlled by it.²⁶⁷ This ban is important, but not novel, since it essentially extends the 1985 regulation, and banks had been voluntarily reducing their loans even before then.²⁶⁸ The Act's second restriction is new, but less important. It prohibits U.S. banks from holding a deposit account for any South African government entity.²⁶⁹ This limit on deposits and the loan restriction are apparently designed to make it difficult for the South African government to do business in the United States.

The third provision is both new and important. It prohibits U.S. nationals from making "any new investment" in South Africa, except in firms owned by black South Africans.²⁷⁰ This marks the first time in recent years that Congress has specifically prohibited investment in a particular country. Of course, in the two years prior to the law, many U.S. businesses had apparently stopped making new investments in South Africa, and some had even begun to divest.²⁷¹ Nevertheless, if South Africa somehow regained its financial stability and became attrac-

265. *Id.*, Oct. 3, 1986, at A1, col. 4.

266. Compare the Act as passed with S. 2701, 99th Cong., 2d Sess., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2334, as reported to the Senate on August 6. 132 CONG. REC. 510613 (daily ed. Aug. 6, 1986).

267. 22 U.S.C.A. § 5055. "Loan" is defined broadly to include, among other things, "any transfer or extension of funds or credit on the basis of an obligation to repay." It did not include, however, "normal short-term trade financing, as by letters of credit" or "rescheduling of existing loans, if no new . . . funds are thereby extended." *Id.* § 5001(3).

268. According to one estimate, loans from U.S. banks dropped from nearly \$5 billion in September 1984 to \$3.4 billion in September 1985. See Madison, *supra* note 207, at 1822.

269. 22 U.S.C.A. § 5058. There is an exception for accounts which are authorized by the U.S. President for diplomatic or consular purposes. *Id.*

270. *Id.* § 5060. New investment is defined broadly to include "contributions of funds or other assets" and "extension[s] of credit." It does not encompass, however, "the reinvestment of profits generated by a controlled South African entity" into a South African entity, or situations where funds are needed to allow a controlled South African entity to operate "in an economically sound manner, without expanding its operations." *Id.* § 5001(4)(B). See also 51 Fed. Reg. 46,853 (1986) (to be codified at 31 C.F.R. § 545) (implementing regulations).

271. According to Department of Commerce figures, direct U.S. investment in South Africa was about \$1.3 billion in 1985, down from \$2.3 billion in 1982. The data, however, are confounded by the sharp drop in the value of the South African rand against the dollar, which reduces on paper

tive again to foreign investors, the statute would act as a bar to new investment.

The special case of sanctions against South Africa suggests possible approaches to creating a comprehensive framework to govern the use of economic sanctions in nonemergency situations. However, present U.S. laws other than the Anti-Apartheid Act fall decidedly short of a comprehensive approach. Instead, the present haphazard statutory structure provides the President with greatly varying authority for imposing different types of sanctions. These laws can skew the President's decisionmaking so that he will choose less effective sanctions, or those with greater domestic costs, because they are more easily implemented.

IV

THE EMERGENCY LAWS

Faced with the great variation in his authority for imposing different types of economic sanctions under the nonemergency statutes, the President can alternatively declare a national emergency and invoke his sweeping emergency powers. Indeed, the present nonemergency laws encourage the President to resort to declaring dubious national emergencies, which open the door to nearly unlimited economic power that Congress cannot effectively review or terminate. Consequently, any careful analysis of the U.S. laws for economic sanctions must examine the emergency as well as the nonemergency laws. This comprehensive analysis provides the basis for recommending major changes in both sets of laws.

If the President is going to impose economic sanctions during a declared emergency, the statutory vehicle will almost certainly be the International Emergency Economic Powers Act (IEEPA).²⁷² It is designed to deal with "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."²⁷³ If the President determines that such a threat exists, he may declare a national emergency under the National Emergencies Act (NEA).²⁷⁴ IEEPA then authorizes him to employ a wide range of economic sanctions, such as cutting off exports or imports, or restricting private financial transactions.²⁷⁵

the value of U.S. investments. Even after correcting for changes in the exchange rate, though, the data suggest that U.S. investment had declined. See Madison, *supra* note 207, at 1822.

272. 50 U.S.C. §§ 1701-1706 (1982).

273. *Id.* § 1701(a).

274. *Id.* The National Emergencies Act is codified at 50 U.S.C. §§ 1601-1651 (1982 & Supp. III 1985)). As discussed below, the termination provisions were amended in 1985.

275. 50 U.S.C. §§ 1701-1702 (1982). The key statutory language is as follows:

[T]he President may . . .

(A) investigate, regulate, or prohibit—

IEEPA was passed in 1977 to replace the Trading with the Enemy Act (TWEA),²⁷⁶ which had become "essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review."²⁷⁷ TWEA is still applicable in wartime, and a grandfather provision preserves it as the statutory basis for peacetime controls against certain countries such as Cuba.

A. *The Evolution of IEEPA*

IEEPA was, by all accounts, designed to allow the President limited emergency powers in peacetime. The principal concerns with TWEA were that it had granted such broad powers, that Presidents had used these powers for actions unrelated to the declared national emergency, and that there was no congressional review of the President's actions.²⁷⁸

TWEA was passed in 1917, when the United States entered World War I, in order to "define, regulate, and punish trading with the enemy." Section 5(b) gave the President broad powers over international financial transactions in wartime. It exempted "transactions to be executed wholly within the United States" and did not include a provision allowing use during national emergencies.²⁷⁹

Nevertheless, confronted with a financial crisis in 1933, Franklin Roosevelt in his first official act as President cited section 5(b) to declare

-
- (i) any transactions in foreign exchange,
 - (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
 - (iii) the importing or exporting of currency or securities; and
 - (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;
- by any person, or with respect to any property, subject to the jurisdiction of the United States.

Id. § 1702(a)(1).

Before exercising these authorities, the President is directed "in every possible instance" to consult with Congress. *Id.* § 1703(a). Moreover, if he does use IEEPA, he must immediately report to Congress. *Id.* § 1703(b). The President can continue IEEPA sanctions until he decides to terminate the emergency, unless Congress acts to terminate it by joint resolution. Nat'l Emergencies Act, 50 U.S.C. § 1622(a), (c), (d) (1982 & Supp. III 1985).

276. 50 U.S.C. app. §§ 1-44 (1982).

277. HOUSE COMM. ON INTERNATIONAL RELATIONS, TRADING WITH THE ENEMY ACT REFORM LEGISLATION, H.R. REP. NO. 459, 95th Cong. 1st Sess. 7 (1977) [hereinafter HOUSE IEEPA REPORT]; SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, INTERNATIONAL EMERGENCY ECONOMIC POWERS LEGISLATION, S. REP. NO. 466, 95th Cong., 1st Sess. 2 (1977) [hereinafter SENATE IEEPA REPORT].

278. *E.g.* HOUSE IEEPA REPORT, *supra* note 277, at 9-11.

279. TWEA, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-19 (1982)).

a national emergency, and then ordered a bank holiday. When Congress convened, it "approved and confirmed" the President's actions retroactively,²⁸⁰ and amended section 5(b) to provide that its authorities could be used by the President when he declared a national emergency.²⁸¹

The period after World War II witnessed several important uses of TWEA. For example, concerned with a balance of payments deficit, President Nixon imposed a 10% surcharge on imports in August 1971. In his proclamation, Nixon declared a national emergency, but did not cite section 5(b) among his statutory authorities.²⁸² The surcharge was terminated four months later, but importers of Japanese zippers challenged it in *Yoshida International, Inc. v. United States*.²⁸³

A three-judge panel of the Customs Court found the surcharge invalid because it was not within the President's authority under the existing trade laws. Section 5(b)'s authority to "regulate . . . importation" was interpreted restrictively, so as not to include supplemental customs duties.²⁸⁴ The U.S. Court of Customs and Patent Appeals reversed. While agreeing that the nonemergency trade laws did not authorize the President's acts, the court found that Nixon had declared a national emergency; that the surcharge was reasonably related to the broad authorities of section 5(b); and that the surcharge was reasonably related to the emergency.²⁸⁵

TWEA was also used to prohibit all, or most, trade and other financial transactions with several countries that were viewed as unfriendly. Always relying on the 1950 national emergency declared for the Korean War, Presidents imposed controls on China, North Korea, Cuba, Vietnam, and Cambodia from the 1950's through the 1970's. The extraterritorial scope of some of these controls gave rise on occasion to vehement disagreements between the United States and its allies, presaging the 1982 pipeline dispute under the EAA.²⁸⁶

By the early 1970's, the questionable uses of TWEA had begun to trouble many people. Moreover, the increasingly imperial Presidency came under heavy congressional fire in the wake of Vietnam and Watergate. During 1972-77, Congress reasserted itself on a number of fronts, sparking a renaissance of congressional influence in the making of U.S. foreign policy.

280. Emergency Banking and Bank Conservation Act of 1933, ch. 1, § 1, 48 Stat. 1, 1 (codified at 12 U.S.C. § 95b (1982)).

281. *Id.* § 2, 48 Stat. 1-2 (codified as amended at 50 U.S.C. app. § 5(b) (1982)).

282. Proclamation No. 4074, 3 C.F.R. 80 (1972).

283. 378 F. Supp. 1155 (Cust. Ct. 1974), *rev'd*, 526 F.2d 560 (C.C.P.A. 1975).

284. *Yoshida*, 378 F. Supp. at 1173-76.

285. *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 572, 578-80 (C.C.P.A. 1975).

286. See 3 A. LOWENFELD, *supra* note 245, at 91-105; see *supra* text accompanying notes 123-30 (regarding the pipeline controls).

One product of the renaissance was the 1976 passage of the National Emergencies Act,²⁸⁷ which terminated all authorities possessed by the President as a result of any past declaration of a national emergency. Congress exempted, however, certain emergency statutes then in use (including TWEA) because of their importance to the continued functioning of the government.

Congress then proceeded the next year to amend TWEA to apply only "[d]uring the time of war" and to existing declared emergencies.²⁸⁸ Consequently, economic sanctions against Cuba, North Korea, Vietnam, and Cambodia continue today under TWEA.²⁸⁹

Except for countries still covered by TWEA, IEEPA is now the statutory basis for economic sanctions for foreign policy purposes during a declared national emergency. Congress tried to apply the lessons of the TWEA experience to IEEPA by making the President's authority more limited in scope and subject to strict procedural limitations. At the same time, Congress recognized that the President's powers "should be sufficiently broad and flexible to enable [him] to respond as appropriate and necessary to unforeseen contingencies."²⁹⁰

B. Current Issues Surrounding IEEPA

After ten years, IEEPA is alive and robust. Presidents have resorted to it six times for five distinct purposes. It was first used in the Iranian hostage crisis in 1979 to freeze about \$12 billion in Iranian funds, to cut off U.S. trade with Iran, and to limit U.S. travelers to Iran.²⁹¹ It

287. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601-1651 (1982 & Supp. III 1985)).

288. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 101, 91 Stat. 1625 (1977) (codified at 50 U.S.C. app. § 5 (1982)). The grandfather provision allowed the President to continue to exercise "the authorities conferred upon [him] by section 5(b) of the Trading with the Enemy Act which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date." *Id.*

289. See 31 C.F.R. pts. 500, 515, 520 (1986); see also Fed. Reg. 33,397 (1987) (one-year extension of certain TWEA authorities). A question did arise whether the President could, under TWEA, expand the controls existing in 1977 against one of these countries, or whether resort to IEEPA was needed. In *Regan v. Wald*, 468 U.S. 222 (1984), the Supreme Court, by a five to four vote, effectively decided that reliance on TWEA was sufficient basis to expand controls against the countries subject to the grandfathered controls. See generally *Are the U.S. Treasury's Assets Control Regulations a Fair and Effective Tool of U.S. Foreign Policy? The Case of Cuba*, 1985 AM. SOC'Y INT'L L. 169 (an informative discussion of the TWEA regulations against Cuba).

290. HOUSE IEEPA REPORT, *supra* note 277, at 10; see also Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1106 (1983) (IEEPA gives President broad power to impose controls).

291. Receiving reports that the government of Iran was about to withdraw its deposits from U.S. banks, President Carter declared a national emergency on November 14, 1979, and, pursuant to IEEPA, blocked the transfer of all property of the Iranian government. 15 WEEKLY COMP. PRES. DOC. 2117 (Nov. 14, 1979). The order immediately froze about \$12 billion of Iranian funds in U.S. banks or in the possession of U.S. corporations, whether located in the United States or abroad. The

was next employed to continue the Export Administration Act regulations when that statute twice lapsed because of deadlocks within Congress.²⁹² The uses of IEEPA have recently multiplied. President Reagan has invoked IEEPA and imposed major sanctions three times since April 1985—against Nicaragua,²⁹³ South Africa,²⁹⁴ and Libya.²⁹⁵

IEEPA controls were later expanded to cut off almost all trade with Iran. And, except for journalists, travel was restricted by prohibiting financial transactions within Iran by U.S. citizens. See, e.g., Exec. Order No. 12,205, 3 C.F.R. 248 (1981) (prohibiting exports or new loans to Iran); Exec. Order No. 12,211, 3 C.F.R. 253 (1981) (prohibiting imports from Iran and financial transactions with Iran, and restricting travel to Iran). A detailed account of the events is chronicled in *AMERICAN HOSTAGES IN IRAN* (P. Kreisberg ed. 1985) and G. SICK, *ALL FALL DOWN* (1985).

In 1981, President Carter and later President Reagan took a number of steps to implement the so-called Algiers Agreements, which resulted in release of the hostages and the termination of the U.S. sanctions. These included ordering the transfer of billions of dollars back to Iran or to trust funds, e.g., Exec. Order No. 12,277, 3 C.F.R. 105 (1982), as well as suspending claims against Iran that were pending in U.S. courts. E.g., Exec. Order No. 12,294, 3 C.F.R. 139 (1982).

All the Iranian sanctions and the actions to end them were upheld by U.S. courts under IEEPA, except that the Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654, 675-90 (1981), looked to additional authority to uphold the suspension of claims then pending in U.S. courts. See *infra* text accompanying notes 324-36.

292. When the EAA expired on October 14, 1983, President Reagan declared the first of two national emergencies to continue the existing EAA regulations. The EAA now is not due to expire next until September 30, 1989. 50 U.S.C. app. § 2419 (Supp. III 1985). See Harris & Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT'L L. 71, 74-75 (1985); see also *Nuclear Pacific, Inc. v. United States*, No. C84-49R (W.D. Wash. June 8, 1984) (EAA regulations upheld under IEEPA, though court allowed judicial review) (copy on file with California Law Review).

293. On May 1, 1985, President Reagan declared a national emergency and ordered a number of sanctions against Nicaragua. These included: a ban on importation of Nicaraguan goods; a ban on exports to Nicaragua, unless destined for the U.S.-backed contras; a prohibition on Nicaraguan air carriers flying to or from points in the United States; and a prohibition on Nicaraguan vessels entering U.S. ports. Exec. Order 12,513, 3 C.F.R. 342 (1986). Reagan's order relied primarily on IEEPA.

294. IEEPA sanctions against South Africa followed shortly after those against Nicaragua. On September 9, 1985, Reagan declared a national emergency and imposed the new sanctions in response to both a growing public outcry and imminent passage of sanctions by Congress. Exec. Order No. 12,532, 3 C.F.R. 387 (1986); see also President's Remarks, Sept. 9, 1985, reprinted in 85 DEP'T ST. BULL. 1 (Oct. 1985).

While not comprehensive, the sanctions were many and varied, affecting U.S. government programs, exports, imports, and private financial transactions. They reflected the fact that partial sanctions were already in place against South Africa, as well as the provisions of the pending congressional bill.

As for government programs, the President proclaimed that all U.S. firms in South Africa should adhere to the Sullivan Principles for fair labor practices. Existing export restrictions were expanded to include: (1) a ban on exports of computers and related items to any South African governmental entity enforcing apartheid; and (2) a ban on most nuclear exports. Exec. Order No. 12,532, 3 C.F.R. 387 (1986).

The major import control was the prohibition on imports of South African krugerrands. Exec. Order No. 12,535, 3 C.F.R. 393 (1986). Also prohibited were imports of arms, ammunition, or military vehicles produced in South Africa. Finally, U.S. financial institutions were forbidden from extending loans to the South African government or related entities. Exec. Order No. 12,532, 3 C.F.R. 387 (1986).

These sanctions were effectively superseded by the more comprehensive sanctions passed by Congress in October 1986 over President Reagan's veto. See *supra* text accompanying notes 254-71.

While IEEPA's procedural requirements are an improvement over TWEA, recent experience suggests that IEEPA is also flawed. The criteria for invoking it are vague, Congress has very little to say about its use, and there is no effective way to terminate a use that becomes inappropriate as time passes.

1. *Are We Falling Victim to Dubious "National Emergencies"?*

"[E]mergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems. . . . A state of national emergency should not be a normal state of affairs."²⁹⁶ Consistent with this viewpoint, IEEPA contains several provisions designed in part to limit the President's use of the statute.

First, in contrast to TWEA's failure to define "national emergency," IEEPA provides that its authorities are to be exercised in the event of an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."²⁹⁷ Second, the President must declare a national emergency for that threat before using IEEPA's powers.²⁹⁸ Third, he is directed to consult "in every possible instance" with

295. Libya was the target of the most recent invocation of IEEPA. In January 1986, acting in the wake of terrorist attacks at the Rome and Vienna airports, Reagan declared a national emergency and proceeded to impose very comprehensive economic sanctions. These sanctions include: a ban on almost all imports from and exports to Libya; a prohibition on any new loans or other credits to Libya; financial controls that effectively prohibit most travel to Libya or residency there; and a freeze on all Libyan property interests in the United States or under the control of any U.S. person, including overseas branches of U.S. entities. Exec. Orders Nos. 12,543, 12,544, 3 C.F.R. 181, 183 (1987).

These sanctions are similar in scope to the 1979-81 sanctions against Iran, and the continuing TWEA sanctions against Cuba, except for considerably narrower claims of extraterritorial jurisdiction. See generally U.S. GENERAL ACCOUNTING OFFICE, INTERNATIONAL TRADE: LIBYAN SANCTIONS (1987) (an evaluation of the effectiveness of the controls); Bialos & Juster, *The Libyan Sanctions: A Rational Response to State-Sponsored Terrorism?*, 4 VA. J. INT'L L. 799 (1986) (a detailed analysis of the sanctions).

The extraterritorial reach of the U.S. sanctions encountered a considerable challenge in fall 1987 when a U.K. trial court ruled that Bankers Trust Company was obligated to pay the Libyan Arab Foreign Bank \$292.5 million in funds that the Libyan bank had deposited with Bankers Trust and that the U.S. bank claimed had been frozen by President Reagan's order in January 1986. About half of the money had been in the London branch of Bankers Trust and the other half was money the U.S. bank had failed to transfer, as directed by the Libyan bank, to its London branch prior to the freeze. In reaching its decision, the trial court concluded that law of the place (i.e., U.K. law) applied to accounts in the United Kingdom, even in the branch of a U.S. bank. *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 26 I.L.M. 1600 (Q.B. Comm'l Ct. Sept. 2, 1987). Rather than appeal this unfavorable opinion, Bankers Trust paid the Libyan bank the \$292.5 million, plus \$28 million in interest. The U.S. Treasury Department granted the necessary license for Bankers Trust to make the payment to a Libyan entity. Marcom, *Bankers Trust Cleared by U.S. To Repay Libya*, Wall. St. J., Oct. 13, 1987, at 31, col. 1.

296. HOUSE IEEPA REPORT, *supra* note 277, at 10.

297. 50 U.S.C. § 1701(a) (1982).

298. *Id.* § 1701(b).

Congress.²⁹⁹ Finally, he must immediately report to Congress any actions taken under the statute.³⁰⁰

In practice, however, these provisions create few roadblocks to presidential action. If the President wants to use IEEPA even in minor disputes or to avoid a legislative airing of issues in Congress, there is little in the statute to stop him.

The criteria for an "unusual and extraordinary threat" are broad and subject to many interpretations. Indeed, another section of the statute authorizes the President to issue regulations "prescribing definitions" under the statute!³⁰¹ Moreover, declaring an emergency requires only a brief executive order, which often does little more than recite the statutory criteria as a litany.

Consultation with Congress is only encouraged, not mandatory. It does not have to be extensive or designed to influence policy. Although the report required for IEEPA's use does ensure that some presidential rationale for the actions will be advanced, the report may not be more substantial than the statements and reports issued routinely by the White House. The reporting requirement thus is probably not an important deterrent to the President.

In reviewing the past uses of IEEPA, the early experience seems consistent with the Act's purposes. The Iranian crisis was developing rapidly and had significant impact on U.S. foreign policy. Quick action was needed to block Iran's plans to withdraw its deposits from U.S. banks and to impose other sanctions.³⁰² Reagan's first use of IEEPA—to continue the export regulations when the Export Administration Act lapsed—also seems appropriate.³⁰³

Resorting to IEEPA against Nicaragua, South Africa, and Libya, however, seems questionable. These uses suggest that the statute can and will be invoked whenever the President desires to draw on its broad powers, whether or not there is a genuine emergency.

Invoking IEEPA against *Nicaragua* looks more like an attempt by the President to avoid a protracted and difficult struggle with Congress than a response to an "unusual and extraordinary threat." To be sure, President Reagan's message to Congress and other administration statements did list some contemporary events, such as the visit of Nicaraguan President Ortega to Moscow, but none demonstrated a sudden deterioration in the Reagan administration's long-festering relationship with the

299. *Id.* § 1703.

300. *Id.*

301. *Id.* § 1704.

302. *See supra* note 291.

303. *See Harris & Bialos, supra* note 292, at 73-75, 77-82.

Sandinista government.³⁰⁴

The more obvious triggering event was the rejection by the House of Representatives of Reagan's proposal for assistance to the contras. Resort to IEEPA was part of a prolonged struggle between Congress (especially the House) and the administration over U.S. policy in Central America. The administration apparently decided to circumvent the normal legislative process by using IEEPA to impose a trade embargo. Although the President's action was an apparent perversion of the statute's purpose, it was questioned only sporadically in Congress and elsewhere.³⁰⁵ (Probably the most visible criticism came from Garry Trudeau in his popular comic strip *Doonesbury*, as illustrated on the next page.)

The use of IEEPA sanctions against *South Africa*³⁰⁶ was at least as questionable as the Nicaraguan case, though for different reasons. While the turmoil was growing in South Africa, it is not clear that the situation required the President to declare a national emergency,³⁰⁷ especially since sanctions legislation was already far along in Congress. A conference bill had passed the House by an overwhelming margin and was expected to pass the Senate.

Even the Reagan administration's public statements suggest that its chief aim in employing IEEPA was to preempt congressional action. Reagan was motivated in part by his belief that the congressional sanctions went too far and might "damage the economic well-being of millions of people in South and southern Africa."³⁰⁸ But he must also have hoped to garner political credit for acting against apartheid.³⁰⁹ The political posturing becomes evident when one compares the Reagan sanctions with those then pending in Congress. The similarities far outnumbered the differences.³¹⁰

304. See President Reagan's Message to the Congress and White House Statement (May 1, 1985), reprinted in 85 DEP'T ST. BULL. 74 (July 1985).

305. See, e.g., 131 CONG. REC. H2751 (daily ed. May 1, 1985) (statement of Rep. Bonker); see also N.Y. Times, May 8, 1985, at A7, col. 1 (noting Democratic criticism of Reagan's failure to consult Congress).

306. See Exec. Order No. 12,532, 3 C.F.R. 387 (1986); see also President's Message to Congress, 21 WEEKLY COMP. PRES. DOC. 1054 (Sept. 9, 1985) (announcing imposition of sanctions).

307. Note that the U.S. sanctions, such as the ban on U.S. bank loans to the South African government, were not going to help the South African financial crisis, and possibly would have aggravated it.

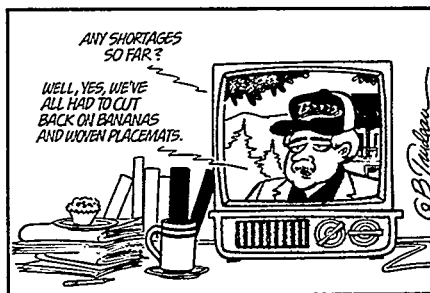
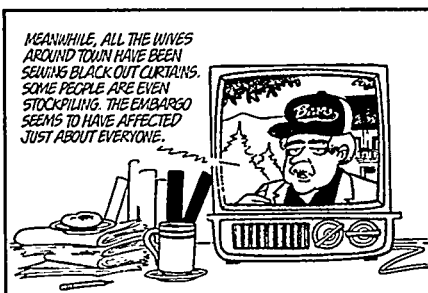
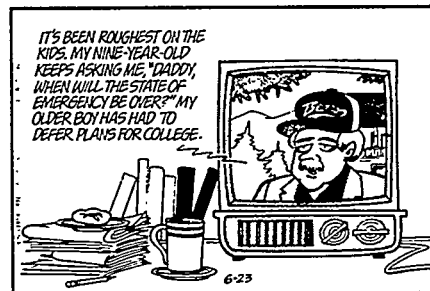
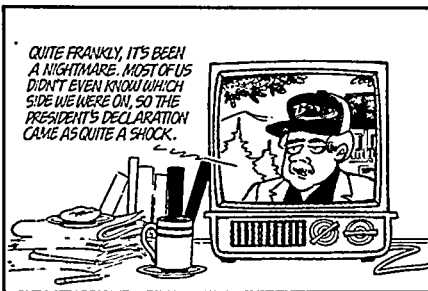
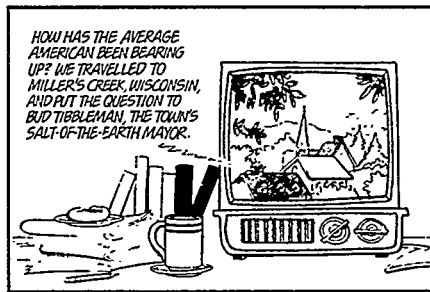
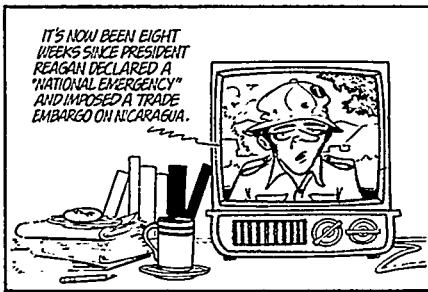
308. President's Remarks, Sept. 9, 1985, 21 WEEKLY COMP. PRES. DOC. 1048-49 (Sept. 16, 1985).

309. It also appeared unlikely that Reagan could have stopped the legislation simply by opposing it. See Wash. Post, Sept. 10, 1985, at A11, col. 1.

310. Compare the Reagan sanctions, *supra* note 294, with the proposed Anti-Apartheid Act of 1985, found in H.R. CONF. REP. NO. 242, 99th Cong., 1st Sess. (1985); see also Wash. Post, Sept. 10, 1985, at A10, col. 3 (presenting a chart comparing Reagan's sanctions with the proposed congressional action).

The conference bill had only one major additional provision. If the President determined that South Africa had not made significant progress over the next 12 months, then he was to recommend

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The use of IEEPA against *Libya* in January 1986 also raises questions. As with Nicaragua, U.S. relations with Libya had been fractious for years, and the United States had already imposed import limits on oil and passport restrictions under nonemergency statutes.³¹¹

which additional, designated sanctions should be imposed. H.R. CONF. REP. NO. 242, § 16(c). While some of the designated alternatives were major, there was also a catch-all of "[o]ther economic or political sanctions." *Id.* § 16(c)(3)(D). Consequently, despite considerable rhetoric on all sides about how this provision strengthened the conference bill, the difference was more apparent than real. Reagan would have had discretion to make the determination about progress after only a one-year period. Moreover, the residual clause would have allowed him to recommend a very minor next step, if he so desired.

311. See *supra* notes 157 (oil import limits), 84 (passport restrictions).

The event triggering comprehensive IEEPA sanctions was Colonel Qaddafi's apparent support of the cold-blooded attacks at the Rome and Vienna airports in December 1985, which killed nineteen people, including five Americans.³¹² Outrageous as the attacks were, it is not clear that declaration of a national emergency was justified.

President Reagan already had available particularly broad nonemergency authorities. Congress had added provisions in 1985 authorizing the President to cut off all imports as well as exports from Libya. On the other hand, IEEPA uniquely provided the power to freeze Libyan assets and to ban travel to or in Libya. The United States had earlier tried to limit travel to Libya by prohibiting the use of U.S. passports, but Americans travelled there without them. Under IEEPA, all financial transactions related to travel could be and were prohibited, including purchases of transportation, lodging, and meals. This inhibited travel much more effectively than passport restrictions.³¹³

Given the American public's outrage toward Libya, the President could have gone to Congress and obtained special nonemergency laws authorizing the asset freeze and travel ban. The joint effort would have highlighted the national attitude toward Libya. On the other hand, the normal legislative process might have taken more time and would have required the President to share center stage.

In sum, recent experience with IEEPA raises concerns that it may be used casually for spurious national emergencies.

It is unlikely that the courts will step in to limit resort to IEEPA. Courts will analyze the specific measures taken in a national emergency to see if they are authorized under IEEPA. There is, however, nearly complete judicial deference to a President's determination that a national emergency exists. Considering President Nixon's import surcharge, the court in *United States v. Yoshida International, Inc.* said that "courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency."³¹⁴

It therefore falls to Congress to limit the President's resort to IEEPA's broad powers. Alternatively, one must ignore the omens in recent history and rely on the future self-discipline of Presidents.

312. See State Department Report on Libya Under Qaddafi, *reprinted in* N.Y. Times, Jan. 9, 1986, at A6, col. 1 (detailing various terrorist acts by Libya).

313. N.Y. Times, Jan. 31, 1986, at A8, col. 3; *id.*, Jan. 9, 1986, at A8, col. 1.

314. 526 F.2d at 579, 581 n.32 (C.C.P.A. 1975); see also *Sardino v. Federal Reserve Bank*, 361 F.2d 106, 109 (2d Cir.) (court will not review an executive determination of a national emergency in Korea), *cert. denied*, 385 U.S. 898 (1966); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1194-95 (D. Mass. 1986) (court lacks resources and expertise to decide whether Nicaragua poses an unusual and extraordinary threat to the U.S. and such questions cannot be answered without political policy judgments; thus the question is nonjusticiable), *aff'd*, 814 F.2d 1 (1st Cir. 1987).

2. *Will It Ever End?*

IEEPA's drafters envisioned the statute's use for national emergencies that were "rare and brief," and not for "normal, ongoing problems."³¹⁵ IEEPA and the National Emergencies Act include three methods to terminate a declared national emergency and thereby limit the duration of the emergency powers.

Two are housekeeping provisions to ensure that the national emergency does not continue needlessly. First, the President can unilaterally terminate the emergency. Second, the emergency will automatically terminate in one year unless the President renews it. Renewal is easy, however, because the President need only publish a notice in the Federal Register and notify Congress.³¹⁶

The third and critical provision would have terminated the national emergency when Congress passed a concurrent resolution.³¹⁷ While Congress was unlikely to so challenge the President, particularly in the heat of a crisis, having the option to terminate the emergency might have provided Congress with substantial leverage to influence Executive Branch policymaking. This would have been especially true in cases where the crisis had cooled, but the use of emergency powers had continued.

In 1983, however, the Supreme Court in *Immigration and Naturalization Service v. Chadha*³¹⁸ invalidated a similar provision that allowed either House of Congress to "veto" INS decisions and compel the Executive Branch to reinstitute deportation proceedings. The reasoning of the six-Justice majority, echoed in later rulings, suggested strongly that IEEPA's provision for a two-house concurrent resolution is also invalid.³¹⁹

Congress consequently amended the provision to provide instead for termination by a joint resolution.³²⁰ But since the President can veto a

315. HOUSE IEEPA REPORT, *supra* note 277, at 10.

316. 50 U.S.C. § 1622(a), (d) (1982 & Supp. III 1985).

317. *Id.* § 1622(a), (c).

318. 462 U.S. 919 (1983).

319. *See id.* at 944-59 (veto has a legislative character, therefore it is unconstitutional unless implemented by following constitutional procedures for legislative action); *see also* Consumers Union of U.S., Inc. v. Federal Trade Comm'n, 691 F.2d 575 (D.C. Cir. 1982) (striking down two-house veto), *aff'd sub nom.* Pacific Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983); Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 470-78 (D.C. Cir. 1982) (striking down one-house veto), *aff'd sub nom. Process Gas*, 463 U.S. at 1216; *cf.* Alaska Airlines, Inc. v. Brock, 107 S. Ct. 1476 (1987) (invalid legislative veto provision is severable where statute is capable of functioning independently, absent indication of contrary legislative intent). The literature on *Chadha* is extensive. *See, e.g.*, Franck & Bob, *supra* note 140.

320. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, tit. VIII, § 801, 99 Stat. 407, 448 (1985) (codified at 50 U.S.C. § 1622 (Supp. III 1985)).

joint resolution, the practical effect of this amendment is that a declared national emergency may now continue at the President's pleasure. (It is unlikely that Congress could muster the two-thirds vote of both Houses necessary to override the President's veto.)

Unending national emergencies have not yet become a serious problem under IEEPA. There are, however, tell-tale warning signs: the national emergencies against Nicaragua and Libya threaten to become "a normal state of affairs."³²¹ Both national emergencies were routinely extended in 1987 for another year.³²² Even though the Reagan administration had obtained \$100 million in assistance for the Nicaraguan contras in 1986, the administration made no effort then (or since) to obtain statutory authority to impose nonemergency import controls. Similarly, in the case of Libya, the administration is not seeking nonemergency powers to freeze assets or limit travel.

It is not only the Reagan administration that has been contributing to the problem. No sustained opposition has arisen in Congress calling on the Executive Branch to seek nonemergency authority for the continuing sanctions. The long-term danger of these national emergencies is that this country will "grow used to them as the fittings of ordinary existence."³²³

3. *What Can't the President Do?*

There is very little that the President is clearly prohibited from doing when imposing economic sanctions under IEEPA. Explicitly included among IEEPA's sweeping powers is the authority to "regulate . . . or prohibit, any . . . importation or exportation . . . in which any foreign country or a national thereof has any interest."³²⁴ The President

321. Cf. HOUSE IEEPA REPORT, *supra* note 277, at 10. In addition, it is somewhat discouraging that the emergency against Iran continues after more than eight years, though the sanctions have been cut back sharply to encompass mainly the continuing efforts to resolve disputed claims before the U.S.-Iranian Claims Tribunal at the Hague. The emergency was renewed again on Nov. 10, 1987. 52 Fed. Reg. 43,549 (1987).

Two slim rays of hope have recently appeared that suggest the Reagan administration might be beginning to use IEEPA more cautiously. First, in October 1987 President Reagan relied on new nonemergency powers, rather than IEEPA, to impose a new embargo on imports from Iran. See *supra* text accompanying notes 164-65. The resort to new legislation was easy since the statute only imposed lenient requirements for consultation and reporting. See *supra* note 164.

Second, the administration allowed the national emergency against South Africa to lapse in September 1987 when it did not renew the one-year emergency. The steps that Reagan had ordered pursuant to this emergency, however, had essentially been duplicated, and even broadened, by the nonemergency Comprehensive Anti-Apartheid Act of 1986. See *supra* text accompanying notes 254-71. Reagan's regulations had effectively become redundant.

322. 52 Fed. Reg. 13,425 (Apr. 1987) (Nicaragua); 52 Fed. Reg. 47,891 (Dec. 1987) (Libya).

323. *Bauer v. United States*, 244 F.2d 794, 797 (9th Cir. 1957) (*dicta*). This quote was described as "prophetic" in *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 581 n.32 (C.C.P.A. 1975).

324. 50 U.S.C. § 1702(a)(1)(B) (1982).

also has the power to freeze foreign-owned assets and to prohibit new financial transactions, such as loans, to the foreign country or its nationals.³²⁵ Further, through these comprehensive restrictions on financial transactions, the President can very effectively ban travel to or in another country.

The President's broad powers exist in spite of efforts by IEEPA's authors to limit them relative to the TWEA powers. In contrast to TWEA, IEEPA was understood not to include: "(1) the power to vest, i.e., to take title to foreign property; (2) the power to regulate purely domestic transaction[s]; (3) the power to regulate gold or bullion; and (4) the power to seize records."³²⁶ Moreover, IEEPA explicitly does *not* authorize the President to interfere with the international flow of mail or other communications (where they do not involve the transfer of something of value)³²⁷ None of these omitted powers, however, seems vital for imposing economic sanctions.³²⁸

Omission of the vesting power does not seem significant in light of the President's other powers over foreign-owned property, including the power to "direct and compel" its "transfer, withdrawal . . . or exportation."³²⁹ In *Dames & Moore v. Regan*,³³⁰ the Supreme Court found these provisions sufficient to uphold President Carter's order nullifying certain attachments against the \$12 billion in frozen Iranian assets, and transferring the assets back to Iran and other parties.³³¹

The Court did conclude, however, that IEEPA did not specifically give the President authority to suspend lawsuits of U.S. citizens pending

325. See *id.* § 1702(a)(1)(A).

326. HOUSE IEEPA REPORT, *supra* note 277, at 15.

327. 50 U.S.C. § 1702(b) (1982).

328. In the area of domestic transactions, IEEPA limits most of its authority "to the extent that such transfers or payments involve any interest of any foreign country or a national thereof." *Id.* § 1702(a). This qualification was intended to withhold from the President the use of emergency powers to regulate "purely domestic" transactions during peacetime. HOUSE IEEPA REPORT, *supra* note 277, at 15. It is unlikely, however, that economic sanctions against a foreign country would require any such regulation of domestic transactions, such as consumer credit. Moreover, the President would still have considerable latitude given the potential broad scope of the phrase "any interest" in IEEPA and the existence of various banking statutes for emergencies. See Note, *supra* note 290, at 1110-11.

Omitting the President's power to seize records appears to be a limitation without substance. The Act still authorizes the President to require any person to keep and produce records. 50 U.S.C. § 1702(a)(2) (1982).

329. 50 U.S.C. § 1702(a)(1)(B) (1982).

330. 453 U.S. 654 (1981).

331. *Id.* at 672 n.5. Some have argued that the Court's decision effectively gives the President the power to vest. *E.g.*, Marks & Grabow, *The President's Foreign Economic Powers after Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 78-80 (1982). The transfer of assets, however, was performed in accordance with agreements with Iran. Indeed, during the crisis, U.S. policymakers had operated under the assumption that IEEPA did not give the President authority to take title to Iranian property. See Carswell & Davis, *supra* note 253, at 199-200.

in American courts.³³² But, since the Court found that Congress had acquiesced in the President's action, the Court upheld the suspension.³³³ In any event, except in the Iranian case and other claims settlement situations, the power to suspend lawsuits has not been important.

With the possible exceptions of vesting title or suspending lawsuits, the powers that IEEPA does *not* provide the President are few and marginal. Given the authorities that the Act does provide, the President need not be concerned with inadequate statutory power for imposing economic sanctions in an emergency. Indeed, the consensus of many foreign policy experts is that the existing legal authorities are adequate and proper.³³⁴ And, there is no persuasive evidence that the President's authorities in real emergencies are excessive.

The real concern is the danger that the President will resort casually to these sweeping emergency powers in order to circumvent the hodgepodge of nonemergency laws for imposing economic sanctions. Today, there are no effective limits on the President's invoking IEEPA for dubious national emergencies, and no effective way to terminate the statute's use when it becomes inappropriate with the passing of time. As Justice Jackson warned in his famous opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,³³⁵ "We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."³³⁶

V

POSSIBLE POWERS OF THE PRESIDENT BEYOND THE STATUTES

Can the President impose economic sanctions with steps that exceed the authorities granted him in U.S. statutes? The discussion thus far has intentionally not addressed this issue. With the exception of President Carter's suspension of lawsuits in the Iranian hostage case, almost every recent use of economic sanctions appears clearly based on the President's nonemergency or emergency powers under the statutes.

Indeed, during a crisis, U.S. policymakers are very aware of what authorities the President does and does not have. They will try to avoid

332. 453 U.S. at 675.

333. *Id.* at 680-82; see *infra* text accompanying notes 351-57.

334. "Those involved in making and implementing the Carter Administration's policies [in the Iranian hostage crisis] felt that in general the legal authorities in existence during the crisis were adequate and proper." Ribicoff, *Lessons and Conclusions*, in *AMERICAN HOSTAGES IN IRAN*, *supra* note 39, at 374, 380. A footnote added: "This view was also shared by the diverse participants in the Council [on Foreign Relations] study group, who considered this issue at length." *Id.* at 380 n.5.

335. 343 U.S. 579 (1952).

336. *Id.* at 654 (Jackson, J., concurring). Jackson also noted that our forefathers "suspected that emergency powers would tend to kindle emergencies." *Id.* at 650.

using sanctions that might lead to unnecessary litigation or embarrassment in the courts. For example, in the Iran hostage case, officials were aware that IEEPA did not authorize vesting title of the frozen assets, and the President did not attempt to take title.³³⁷ The serious problems recently encountered by Executive Branch officials who tried to evade the law in arms sales to Iran will presumably reinforce the caution of future policymakers.

Nevertheless, the question of the President's extrastatutory powers can arise, and thus a brief analysis is appropriate. The central conclusion is that the President should tread cautiously and follow the statutes. Otherwise, he risks successful challenge to any steps taken beyond his statutory powers, though the outcome will depend on the circumstances involved.

The Constitution gives both the President and Congress major powers in foreign affairs. Article II provides the President with "executive Power," designates him the "Commander in Chief," gives him the "Power, by and with the Advice and Consent of the Senate, to make Treaties," and authorizes him to appoint and receive ambassadors.³³⁸ Especially during the first seventy years of this century, with two World Wars, the Depression, and the Cold War, Presidents came to play an increasingly important role in U.S. foreign affairs.

Even with the recent renaissance of congressional involvement in foreign policy, the substantial role that the Constitution assigns to Congress is often forgotten. The Constitution provides Congress plenary authority over foreign commerce and over the government purse—including the power to "regulate Commerce with foreign Nations" and to "lay and collect Taxes, Duties, Imposts,"³³⁹ along with the stricture that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."³⁴⁰ These provisions give Congress the dominant role in international economic affairs. Congress has since delegated much of this authority to the President through various laws, many of which are discussed above in Parts III and IV.

Listing these congressional and presidential powers leaves unanswered the question of whether the President's explicit constitutional powers or other inherent powers authorize him to impose economic sanctions on his own. The question was muddled in 1936 by *United States v. Curtiss-Wright Export Corp.*³⁴¹ There, the Supreme Court upheld a con-

337. See Carswell & Davis, *supra* note 39, at 185-88; Christopher, *supra* note 65, at 5; Ribicoff, *supra* note 334, at 380-81.

338. U.S. CONST. art. II, § 2.

339. *Id.* art. I, § 8.

340. *Id.* § 9.

341. 299 U.S. 304 (1936).

gressional delegation of power authorizing the President to declare illegal certain arms exports. Although the decision can be interpreted on the relatively narrow ground of a valid congressional delegation of power, the opinion included sweeping dicta that the President has a foreign affairs power that "does not require as a basis for its exercise an act of Congress,"³⁴² and that might even arise from outside the Constitution.³⁴³

Curtiss-Wright's dicta was substantially trimmed by the 1952 decision in *Youngstown Sheet & Tube Co. v. Sawyer*.³⁴⁴ There, the Court rejected the President's sweeping claims of power to seize and operate most of the nation's steel mills during a strike in the midst of the Korean War.³⁴⁵ In an often-cited concurring opinion, Justice Jackson provided a three-pronged test to assess the President's authority to act. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."³⁴⁶ In this case, the President's act is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."³⁴⁷

Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers." He enters a "zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."³⁴⁸

Finally, when the President acts contrary to the will of Congress, "his power is at its lowest ebb." The Court can sustain his actions "only by disabling the Congress from acting upon the subject."³⁴⁹

The Court in *Dames & Moore v. Regan*³⁵⁰ in 1981 found Jackson's categories "analytically useful."³⁵¹ In examining the President's suspen-

342. *Id.* at 320.

343. *Id.* at 315-18. There is an extensive body of literature on the *Curtiss-Wright* decision, often critical of the sweep of the majority opinion. See, e.g., L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 19-26 (1972).

344. 343 U.S. 579 (1952).

345. *Id.* at 583-84, 589. The President's order was not based upon any specific statutory authority, but rather upon the general powers vested in the President by the Constitution and U.S. laws. *Id.* at 582-85.

346. *Id.* at 635 (Jackson, J., concurring) (footnote omitted). Justice Jackson put the *Curtiss-Wright* situation in this category. *Id.* at n.2.

347. *Id.* at 637.

348. *Id.* In this situation, the Court noted twenty-five years later in *Dames & Moore v. Regan*: "[T]he analysis becomes more complicated, and the validity of the President's action . . . hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.'" 453 U.S. 654, 668-69 (1981) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

349. *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

350. 453 U.S. 654 (1981).

351. *Id.* at 669. Writing for the Court, Justice Rehnquist noted, however, that "Justice Jackson

sion of certain claims pending in U.S. courts, the Court concluded that this action was not specifically authorized by IEEPA.³⁵² The Court went on to determine, however, that IEEPA and the so-called Hostage Act³⁵³ indicated congressional acceptance of a broad range of presidential action in circumstances such as the Iranian crisis. Moreover, the Court cited a history of congressional acquiescence toward Presidents entering international agreements to settle outstanding claims with another country.³⁵⁴ Justice Rehnquist concluded:

Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent." Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.³⁵⁵

Some commentators have criticized *Dames & Moore* for its finding of congressional acquiescence, which pushes the President's suspension of claims toward Jackson's easy-to-uphold first category.³⁵⁶ The Court has been accused of implicitly creating "a presumption of legislative acquiescence in executive agreements, absent specific congressional disapproval."³⁵⁷

Whether or not *Dames & Moore* requires more evidence of congressional acquiescence beyond simply a lack of specific disapproval is not, however, a critical question for most of the steps that a President might take to impose economic sanctions. Congress has expressed its views fairly clearly about almost all the major types of controls a President might employ.

Looking first at nonemergencies, import controls provide a useful illustration. Congress has passed many statutes which define when the President may impose these controls. The laws are both comprehensive and specific, and are grounded on Congress's plenary power over foreign commerce. If the President were to act contrary to one of the limits on his discretion or if he were to operate outside the statutory procedures,

himself recognized that his three categories represented 'a somewhat oversimplified grouping.' " *Id.* (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

352. *Id.* at 675.

353. 22 U.S.C. § 1732 (1982). See discussion *supra* note 244.

354. 453 U.S. at 677-88.

355. *Id.* at 686 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)) (citation omitted).

356. Despite discussing Jackson's categories, the Court never specifically placed Reagan's actions in a specific category. 453 U.S. at 669. Indeed, in its conclusions, the Court also drew upon Justice Frankfurter's concurring opinion in *Youngstown*. *Id.* at 678.

357. Marks & Grabow, *supra* note 331, at 103; see also Note, *supra* note 290, at 1113.

his power would be at "its lowest ebb," and a court might refuse to uphold his act.

The sparse case law provides some support for this conclusion. In *Yoshida*, the court concluded that the import surcharge would have been invalid, but for the national emergency and the President's TWEA powers.³⁵⁸ Similarly, in *United States v. Guy W. Capps, Inc.*,³⁵⁹ the Fourth Circuit held that the President did not have the authority to enter into an executive agreement with Canada which limited imports of certain types of potatoes, because the agreement did not comply with the procedures Congress had specified by statute. Congress had occupied the field.³⁶⁰

The courts, however, are chary of restricting the President in the international economic area, including his actions regulating imports.³⁶¹ In *Guy Capps*, for example, the Supreme Court affirmed on nonconstitutional grounds, and the majority of the Court consciously avoided the constitutional issue.³⁶² Indeed, the courts might resort to a variety of approaches to uphold the President's action. For example, they might find that the action is not so mandatory or formal that it conflicts with legislatively defined limits.³⁶³ Or, they might interpret a statute narrowly so that the actions of the President or his appointees are held not to conflict.³⁶⁴ Alternatively, the courts could interpret a statute broadly to find the necessary authorization for the President's actions.³⁶⁵ Finally, as discussed below, the courts might avoid the substantive issues by deciding that the case is not justiciable.³⁶⁶

Where there is a declared national emergency, the existence of an emergency is not by itself decisive in assessing the validity of a President's action. The Court in *Dames & Moore* considered the emergency as one of the "circumstances" to be used in determining whether Con-

358. *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 578-80 (C.C.P.A. 1975); see *supra* text accompanying notes 282-85.

359. 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

360. *Id.* at 661.

361. See generally J. JACKSON & W. DAVEY, *supra* note 193, at 132-33.

The analysis for controls on exports and private financial transactions would be similar to that for import controls. The legislation in both areas is comprehensive, specific, and within Congress's powers under the commerce clause. An analysis of controls over bilateral government programs and U.S. activities with international financial institutions (though not the focus of this Article) should recognize Congress's additional power over the federal purse.

362. 348 U.S. at 305; see B. SCHWARTZ, *SUPREME CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 165-66 (1983).

363. See, e.g., *Consumers Union of the United States v. Kissinger*, 506 F.2d 136, 142-44 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

364. See, e.g., *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860 (1986) (the five-Justice majority arguably gave an artificially narrow reading to the statute and the legislative history).

365. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

366. See *infra* text accompanying notes 368-73.

gress had acquiesced in the President's need to act.³⁶⁷ IEEPA, however, may provide a statutory basis for the President's actions in a declared national emergency. IEEPA's sweeping powers far exceed the President's authority in the absence of an emergency. For example, the availability of TWEA, the predecessor of IEEPA, as a statutory basis for sanctions was decisive in *Yoshida*. And, IEEPA's powers were clearly important in *Dames & Moore*.

In either nonemergency or emergency situations, then, the President should follow the existing statutory framework or step very cautiously. Given the extensive congressional activity in the international economic area and Congress's constitutional powers over foreign commerce and the purse, it is difficult to identify any significant extrastatutory steps that the President could take that would not potentially run afoul of the courts.

Problems of justiciability. There is the related question of whether the courts will review the President's actions. The courts often decline to decide matters of foreign policy, especially those which might involve separation of powers issues between the President and Congress. Courts will avoid the substantive issues by ruling, for example, that the case raises a political question³⁶⁸ or is otherwise not justiciable.³⁶⁹

Although obtaining judicial review can be a problem, it is often not insurmountable. Some statutes, particularly in the import area, specifically provide for judicial review of the President's actions.³⁷⁰ Courts have also reviewed presidential decisions under other statutes, such as TWEA and IEEPA.³⁷¹ There are even possibilities for review under the EAA, though it is sharply limited. In addition, a defendant in a criminal prosecution under EAA can raise statutory questions.³⁷² Courts will also entertain claims that the Executive Branch is operating outside the scope

367. 453 U.S. at 677. One view maintains that emergencies do not create extraconstitutional powers. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425-26 (1934); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866). But cf. *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (upholding wartime exclusion of all persons of Japanese ancestry from selected West Coast areas).

368. See *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (concurring opinion by Rehnquist, J., joined by three other Justices, viewing President Carter's termination of a treaty with Taiwan as a political question); cf. *Baker v. Carr*, 369 U.S. 186 (1962) (delineating what does and does not constitute a political question).

369. See *Goldwater*, 444 U.S. at 997-98 (opinion by Powell, J., finding issue not yet ripe for judicial review); see also Franck & Bob, *supra* note 140, at 952-57.

370. E.g. statutes cited *supra* notes 179-82.

371. See, e.g., *Dames & Moore*, 453 U.S. at 654-90 (IEEPA); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.P.A. 1975) (TWEA); *Nuclear Pacific, Inc. v. United States Dep't of Commerce*, No. C84-49R (W.D. Wash. June 8, 1984) (order denying defendant's motion to dismiss for lack of jurisdiction and failure to exhaust administrative remedies in IEEPA challenge) (copy on file with California Law Review).

372. See, e.g., *United States v. Edler Indus. Inc.*, 579 F.2d 516 (9th Cir. 1978); *United States v. Van Hee*, 531 F.2d 352 (6th Cir. 1976).

of the statute.³⁷³

In short, a President is well advised to stay within the statutory framework when he imposes economic sanctions. This conclusion reemphasizes the need to take a hard look at the U.S. laws, and to make necessary changes.

VI

PLANNING FOR THE FUTURE

"If it ain't broke, don't fix it," goes one down-home aphorism. Serious defects, however, do exist in the U.S. legal regime for imposing economic sanctions for foreign policy reasons, and these problems should be "fixed." The analysis in the previous Parts provides the foundations for recommending what should be done. Several important conclusions emerge from that analysis. Among them:

(1) While measuring effectiveness is fraught with difficulty and controversy, there is persuasive historical evidence that sanctions can sometimes be an effective tool for achieving foreign policy objectives. In over sixty cases since 1945 where the United States has resorted to economic sanctions, they have arguably been successful over one-third of the time.

This success rate has varied with the objective sought. Especially effective have been sanctions designed to destabilize a government, which have succeeded in an estimated ten out of fourteen efforts, with two cases continuing to the present. U.S. sanctions for more narrow policy goals have been effective about 40% of the time, with measures against expropriation being especially successful.

Indeed, even if sanctions might not be effective in accomplishing a foreign policy objective, they still might be used to give the appearance of "doing something." Faced with immediate political and diplomatic pressures to act, a President will often find that sanctions represent more concrete action than diplomatic measures, and are more acceptable to many constituencies and less costly than the use of force.

(2) The range of choices among possible types of economic sanctions should not encompass only cutbacks in bilateral government programs or controls on exports. Rather, each use of sanctions should be based on a careful analysis of the vulnerabilities of the target country and the relative costs to the United States of alternative sanctions.

373. See, e.g., *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860 (1986); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.P.A. 1975).

One approach for increasing the possibility of judicial review is for Congress by statute to compel justiciability in certain circumstances. See *Franck & Bob*, *supra* note 140 at 957-59. For example, the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1982), specifically directs the courts to decide suits about foreign expropriation of U.S. assets "on the merits giving effect to the principles of international law."

Controls on imports or private financial transactions might sometimes be advisable as part of a sanctions package, and might even be the most effective and least costly measures. Indeed, one comprehensive study concluded that import controls have been the most successful sanctions, and that various types of financial controls have also been effective at times.³⁷⁴

A preliminary analysis of the trade and credit situation of potential target countries indicates several cases where a country would be at least as vulnerable to U.S. import and possibly credit controls as it would be to U.S. export controls. For example, the United States imports about 39% of all of South Korea's foreign sales, while its exports total only about 20% of South Korea's foreign purchases. U.S. banks also provide about 26% of that country's private foreign credit. Other examples include Chile, Guatemala, Honduras, the Philippines, and Taiwan.³⁷⁵

Moreover, while calculating the domestic costs of various sanctions is difficult and inexact, import and financial controls might cost the United States less than export controls. For example, export sanctions directly cause lost sales for U.S. business and lost jobs for U.S. workers, and raise longer-term questions about the reliability of U.S. suppliers. In contrast, import controls generally mean few, if any, lost jobs or sales in the United States in the short term, though there can be higher costs to purchasers and harmful long-term effects on productivity.

(3) The present laws for imposing economic sanctions for foreign policy reasons are haphazard. Most were passed primarily for other purposes and without any serious consideration of the best legal regime for the use of economic sanctions. Accordingly, there are dramatic variations in the amount of presidential authority in the five types of activity that sanctions restrict—bilateral government programs, exports, imports, private financial transactions, and lending by international financial institutions.

Passing new, specific legislation in a timely fashion when a dispute or minor crisis arises is often difficult or even impossible. Consequently, *the existing legal regime can lead to two undesirable results. First, it can skew the President's decisions in a nonemergency situation toward sanctions that may not be as effective, or that may have more negative repercussions on the U.S. economy than other options. Second, it encourages the President to resort to declarations of dubious national emergencies, which open the door to nearly unlimited economic power that Congress cannot effectively review or terminate.*

As for the first result, existing legal options can strongly influence

374. G. HUFBAUER & J. SCHOTT, *supra* note 13, at 89.

375. See *supra* Figure 1 at 1178; see also *supra* text accompanying notes 55-67.

the President's choice of which sanctions to employ when there is no declared national emergency—whether he wants to protest Soviet actions, to try to destabilize an unfriendly government, or to express displeasure with a country's policies toward human rights or terrorism. These laws help explain why the United States frequently resorts to easy-to-impose measures such as cutbacks in government programs or new export controls,³⁷⁶ and why it less frequently employs limits on imports or private financial transactions.

A classic example is the U.S. reaction to the Soviet invasion of Afghanistan. The United States curtailed several government programs, such as Soviet fishing rights in U.S. waters and Aeroflot airline service to this country. Exports were sharply limited, with a cutback in agricultural exports and new controls on high technology goods. The only effort to limit imports, however, was President Carter's abortive attempt to restrict imports of Soviet ammonia—an attempt that ran afoul of the ITC.³⁷⁷ Private financial transactions were untouched, except for those related to exports.

As the second undesirable result, the haphazard legal regime for economic sanctions creates incentives for the President to declare a national emergency in order to employ the sweeping powers of IEEPA in dubious circumstances, or to continue their use after the crisis has passed. For example, President Reagan's resort to IEEPA against Nicaragua, South Africa, and Libya are all questionable in light of the statute's purposes. Even if one believes that the President legitimately needed to use IEEPA powers to react quickly to each of these "unusual or extraordinary" threats, it is still unclear why he should continue to use IEEPA month after month against Nicaragua and Libya, rather than seeking the appropriate nonemergency powers from Congress. Should the United States really come to accept national emergencies "as the fittings of ordinary existence"?³⁷⁸

The present U.S. legal system for economic sanctions is obviously not the only possible legal framework. The recent amendments in the laws, such as the export laws, suggest further useful steps.

A. Threshold Considerations

To develop a better legal regime for imposing economic sanctions, two important threshold considerations must be addressed. First, because the variety of possible sanctions involves myriad laws, there is no

376. See, e.g., the list of sanctions in G. HUFBAUER & J. SCHOTT, *supra* note 13, at 70-77.

377. See *supra* text accompanying notes 183-88.

378. *Bauer v. United States*, 244 F.2d 794, 797 (9th Cir. 1957) (dicta), *quoted in* *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 581 n.32 (C.C.P.A. 1975). See *supra* text accompanying notes 321-23.

quick fix. Rather, having identified the principal problems with the present system, the next step is to flesh out alternatives to improve the system.

In doing so, *it is most productive to concentrate on three of the five broad activities for economic sanctions—exports, imports, and private financial transactions.* Changes in the remaining two categories—bilateral government programs and the U.S. role in the international financial institutions—are either less needed or much more difficult to achieve.

In the area of government programs, the President now has nearly complete discretion to act. Giving him more discretion would add little to his authority. And taking some discretion away does not seem advisable. These government programs are arguably the activity that the President, as Chief Executive, should most control. Also, it is not clear how reducing the President's discretion would contribute much, if anything, toward improving the use of sanctions or toward realizing other worthwhile objectives. Finally, as Congress has already discovered with its attempts to condition foreign aid, limiting the President's discretion here is a very difficult task.³⁷⁹

As for the international financial institutions (IFI's), asserting more U.S. control would be very difficult, given their charters and international character. The IMF is designed to promote international monetary cooperation and stability in foreign exchange, while the World Bank and the regional development banks seek to assist the economic and social development of developing countries. Their charters specify the IFI's nonpolitical nature and often contain prohibitions against weighing political considerations.

U.S. efforts to politicize the IFI's further would probably not only fail, but also weaken their effectiveness. Given the ongoing serious problems of Third World debt and international financial stability, now does not seem the time to create further difficulties for these institutions.

A second threshold consideration is that the many laws regulating exports, imports, and private financial transactions almost always have purposes other than imposing sanctions for foreign policy reasons. Indeed, while the export laws are created primarily for these foreign policy purposes (in the broad sense that includes national security), nearly all the laws regulating imports and private financial transactions have other important purposes.

The import laws are designed, among other reasons, to protect American businesses and workers, and to provide a negotiating basis to persuade other countries to reduce their trade barriers. Likewise, the laws regulating private financial transactions with foreigners are designed

379. See *supra* text accompanying notes 78-92.

to help ensure the solvency of banks and other financial entities, to protect depositors and borrowers, and to provide for the safe and efficient functioning of both the U.S. and the international financial systems.

Thoroughly analyzing all these other purposes and priorities of the laws is well beyond the scope of this study. The most reasonable and efficient approach must therefore be a carefully tailored one—to consider alternatives that seek to affect only the President's authority to impose economic sanctions for foreign policy purposes. In essence, this requires considering how to give the President the authority to impose a sanction, such as an import control, while specifically limiting that authority to use for foreign policy purposes.

B. A Major Restructuring

Given the problems of the present system and the two preceding considerations, what might a better U.S. legal regime entail?³⁸⁰

In broad terms, the *wisest course* would be to narrow the disparity between the President's sweeping authority over exports vis-a-vis his limited discretion over imports and private financial transactions. This could best be done by *substantially increasing the President's authority over imports and financial transactions, while reducing his control over exports*.³⁸¹

380. Given the present haphazard U.S. laws for imposing economic sanctions, the recommendations below do not require a precise overall model of the relationship between the President and Congress. Instead, these recommendations, which impose more rationality on the presently great disparities in the President's authority, can be supported by people with widely varying conceptions of the role of Congress in foreign affairs.

Nevertheless, I will note my belief that Congress should be in a constructive partnership with the President on foreign affairs, with the President taking the lead role (i.e., the general partner) and Congress playing an important supporting role. See generally Christopher, *supra* note 87, at 998 (calling for a new "compact" between the two branches "based on mutually reinforcing commitments and mutually accepted restraints"); T. FRANCK & E. WEISBAND, *supra* note 86, at 61 (supporting a "system of policy codetermination"). This partnership approach is fully consistent with the Constitution. See *supra* text accompanying notes 337-73.

381. Another approach would be to reduce sharply the President's power over exports, and leave his authority over imports and financial transactions unchanged. The resulting limited presidential authority in all three areas might, on first impression, be very attractive to those who believe in removing Executive Branch obstacles to U.S. sales abroad. A glaring problem, however, is that it would aggravate the present problems with casual declarations of national emergencies and use of IEEPA's sweeping powers. Amending IEEPA in an effort to eliminate these problems is a possibility. Given the effectiveness and political usefulness of economic sanctions, however, there should be limits on how much restraint Congress should place on all the President's nonemergency and emergency authorities to use economic sanctions. Moreover, political realities circumscribe how much restraint Congress would be willing and able to enact.

Yet another approach would be to increase substantially the President's authority over imports and private financial transactions (like the proposal in the text), but not reduce his power over exports. This approach, however, fails to reflect either that export controls would not be as necessary since other sanctions would now be available, or the need to reduce use of export controls to improve the U.S. trade balance. See discussion below, note 382 and accompanying text.

This approach would give the President great flexibility in selecting among possible controls over exports, imports, or private financial transactions. Since he would have considerable authority in each area, and could impose a wide range of possible sanctions, his decision would not be biased by the laws.

At the same time, since the President would then have other weapons in his arsenal, his nearly unlimited control over exports would be trimmed. This might help reduce excessive use of export controls, and help signal a U.S. commitment to becoming a more reliable supplier. There is a pressing need to encourage export trade.³⁸²

This approach would also strengthen the case for amending IEEPA to reduce the President's powers there. If the President has a better package of authorities for imposing sanctions without having to declare a national emergency, then there is less need to use IEEPA. Moreover, unless IEEPA is amended to discourage its casual use, the President can nullify any qualifications on new nonemergency powers by continuing to resort to IEEPA.

The proposal does have potential problems. First, making changes in the import and financial laws that affect only the President's authority to impose sanctions for foreign policy purposes is difficult. There is always room for some abuse of the legislative intent. For example, a President could use his new authority over imports for blatantly political purposes—deciding in an election year to restrict imports of television sets from Taiwan because of its alleged violations of human rights, or even shoes from Italy because it allegedly is not tough enough on terrorists.

Second, even assuming that the new laws are written as tightly as possible, the President's new authority may make the use of economic sanctions so easy that their use becomes excessive. All economic sanctions have costs—whether to exporters, importers and consumers, bankers, or the international economic system. The full costs often take time to appear—such as lost markets for agricultural products or foreigners moving their bank deposits elsewhere to avoid a future freeze order. If economic sanctions can be imposed more easily, then short-term political or foreign policy benefits might greatly increase the frequency of their use, even though a long-term assessment of the full costs would argue against many uses.

The next section elaborates more detailed recommendations for

382. The U.S. merchandise trade deficit (i.e., the excess of imports over exports) was a record \$171.2 billion in 1987, nearly 10% larger than the \$156.2 billion gap in 1986, according to the Department of Commerce. 5 Int'l Trade Rep. (BNA) 198 (Feb. 17, 1988). The 1987 deficit did begin to show some improvement in November and December 1987, largely because of the decline in the value of the dollar. *Id.* at 198-95.

changes in the President's authority to impose economic sanctions under both nonemergency laws and IEEPA. These proposals are designed to minimize the potential problems noted above, and are briefly sketched in Figure 3.

FIGURE 3

A NEW REGIME

I. PRESIDENT'S NONEMERGENCY POWERS

- A. Exports: *Broad powers retained, with some trimming.*
 - 1. *Criteria, consultation, and reporting requirements retained.*
 - 2. *Contract sanctity expanded, with compensation for existing contracts and licenses.*
 - 3. *Sunset provision expanded.*
 - 4. *Use of extraterritorial jurisdiction discouraged.*
- B. Imports: *Broad powers granted.*
 - 1. *Criteria, consultation, and reporting requirements enacted.*
 - 2. *Sunset provision included.*
 - 3. *Contract sanctity respected, with compensation for existing contracts.*
 - 4. *(Possibly) linkage provisions:*
 - a. *To controls on most imports;*
 - b. *To controls on government programs or other sanctions.*
 - 5. *Adherence to GATT encouraged.*
- C. Private Financial Transactions:
 - 1. Trade Financing: *Broad authority granted, same as for "Exports" and "Imports" above.*
 - 2. General Lending: *Power to stop lending granted (probably limited to foreign governments).*
 - a. *Criteria, consultation, and reporting requirements enacted.*
 - b. *Contract sanctity respected, with compensation if old loans terminated.*
 - c. *Sunset provisions included.*
 - d. *Extraterritorial jurisdiction discouraged, and jurisdiction over U.S. persons only.*
 - 3. Foreigners' Bank Deposits and Other Assets: *(Possibly) power to freeze. Same provisions as for "General Lending" above.*

II. PRESIDENT'S EMERGENCY POWERS

Applies to Exports, Imports, and Private Financial Transactions: *Sweeping authority retained, but ability to declare and continue emergency trimmed.*

- 1. *Tougher criteria and mandatory consultation requirements enacted; reporting requirements retained.*
- 2. *Sunset provision included.*
- 3. *Contract sanctity provisions the same as for nonemergency powers.*
- 4. *Use of extraterritorial jurisdiction discouraged.*

C. Specific Recommendations

The loss of the legislative veto was a blow to congressional efforts to control presidential discretion in a carefully tailored way.³⁸³ Nevertheless, a wide variety of legislative tools are still available for trimming the

383. See *supra* discussion of *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), text accompanying notes 318-20.

President's authority over exports and for expanding it over imports and private financial transactions, as well as for improving IEEPA.

A list of these tools includes, among others, provisions that: specify what type of consultation would be required and when; flatly prohibit certain actions; redefine the criteria for imposing controls; provide for administrative and judicial review; and establish time limits tying the date when controls will become effective or when they will lapse to congressional approval by joint resolution.³⁸⁴ The legislative reaction to the 1980 Soviet grain embargo suggests two additional tools—provisions for contract sanctity and compensation to the injured business. Finally, as discussed below for imports and financial credit, “linkages” of various types might be required. For example, an import control could not be imposed unless other controls—on different products or even of a different type (such as an export control)—were also imposed.

Making lists is easy. It is more demanding to develop the most appropriate and effective measures for providing the President with the desired authority to impose sanctions for foreign policy reasons, while limiting the possibilities for misuse of that authority.

1. *Trimming the President's Authority over Exports*

Changes in the export laws should be at most evolutionary, rather than revolutionary. Recent amendments to the Export Administration Act provide an excellent starting point.

a. *Expanding the Contract Sanctity Provision*

The contract sanctity provision of the EAA now prohibits the President from imposing foreign policy controls on exports for which there are existing contracts or validated licenses. The President may waive this prohibition, however, if he certifies that there is a serious “breach of peace,” and that prohibiting or curtailing the contracts or licenses would help remedy it.³⁸⁵

This contract sanctity provision should be expanded to apply to national security controls as well as foreign policy controls.³⁸⁶ Extending the coverage closes an obvious loophole. As illustrated by President Carter's questionable declaration that the Soviet grain embargo was

384. For a thorough, excellent study of many possible legislative approaches, see Franck & Bob, *supra* note 140, at 933-59.

385. See *supra* text accompanying notes 116-22. As discussed there, the phrase “breach of peace” is vague and subject to conflicting interpretations. For purposes of the recommendations here, however, the critical issue is simply whether the President uses the waiver to terminate existing contracts or licenses.

386. As indicated *supra* note 9, the EAA distinguishes between “national security” and “foreign policy” controls. However, unless this Article is specifically addressing those EAA controls, the phrase “foreign policy” is used broadly to include national security considerations.

imposed for national security as well as foreign policy reasons, the dividing line between these two types of EAA controls can easily be bridged. On the other hand, broader coverage will not tie the President's hands in dealing with sensitive national security matters, since he can determine when a waiver is necessary.

Retaining a waiver provision would allow the President to act decisively, rather than to have the controls' impact be diluted by numerous exceptions for continuing business relationships under existing contracts and licenses.

Nevertheless, the injured exporter should be compensated when the President invokes the waiver provision to terminate existing contracts and licenses. And adding a cost to the President's action might also help to deter casual resort to the waiver provision.

This cost would usually be small, though. First, it would only be incurred where the President's new export controls actually impaired or terminated existing contracts and licenses. Injury to potential contracts or pending license applications would not be compensated. Second, most cases of export controls for foreign policy purposes are against countries to which the United States does not export a great amount—such as Nicaragua and Libya. Even U.S. exports to the Soviet Union are relatively small, generally less than \$3 billion per year.³⁸⁷ Moreover, only part of a year's total exports would be covered at any given time by existing contracts or licenses. Finally, consistent with accepted measures of damages, the exporter would be under an obligation to mitigate its damages by, for example, attempting to sell the goods elsewhere.

While the costs would likely be small, compensation may be a useful deterrent, since it seems difficult to provide other significant safeguards against dubious use of the waiver provision. (Other legislative steps that could be useful include drafting the criteria for waiver as strictly as possible and requiring consultation with Congress and with exporters, but these measures would probably not be as helpful as the compensation provision.)³⁸⁸

387. In 1981 (before the sanctions), U.S. exports were \$184 million to Nicaragua and \$813 million to Libya. Exports to the Soviet Union totaled \$3.6 billion in 1979 (before the grain embargo) and were still \$2.6 billion in 1982 and \$1.2 billion in 1986. U.S. exports to South Africa totaled \$2.3 billion in 1984 and \$1.2 billion in 1986. In contrast, U.S. exports in 1986 were \$45 billion to Canada, \$27 billion to Japan, and \$11 billion to the United Kingdom. Total U.S. exports in 1986 were \$217 billion. INTERNATIONAL MONETARY FUND, DIRECTION OF TRADE STATISTICS: YEARBOOK 1987, at 404-06 (1987).

388. See the earlier analyses of the limited utility of consultation and reporting provisions, *supra* text accompanying notes 112-15, and of judicial review, *supra* text accompanying notes 368-73. The mandatory consultation requirements, however, do raise a question about whether compensation should be required for curtailing contracts that were entered into during the consultation period. (A similar question would arise for revoking licenses that were issued during the consultations, though the U.S. government would presumably defer decisions on licenses during this period.) The

Compensation would also reimburse exporters caught in the vagaries of international politics. Today, exporters themselves can assume the risk, and try to pass the costs on to their other customers or absorb the loss, with resulting lower profits.³⁸⁹ Exporters can also purchase insurance, which covers cancellation of existing export licenses, from the Foreign Credit Insurance Association or from other private insurers. This insurance, however, can be expensive and sometimes difficult to obtain, especially when the exporter is shipping to likely target countries such as the Soviet Union, South Africa, or Chile. The insurance companies are also aware of the risks.³⁹⁰

Whether the exporter insures or not, it faces the higher costs arising from the risk that the President will terminate or curtail its contracts for U.S. foreign policy reasons. This arguably is not a risk that the exporter should have to bear, particularly since this country is trying to encourage companies to increase exports. The U.S. government is taking action against the target country, and the exporter is caught in the fray.

Admittedly, private parties often bear the costs of government actions that adversely affect them, whether the actions are changes in trade policies, tax laws, or zoning laws. Only in limited areas do the parties have a claim to just compensation under the takings clause of the

President should be able to declare at the start of consultations that if sanctions were imposed, no compensation would be allowed for new contracts and licenses after that date. This would provide fair notice to exporters and would protect the United States from last-minute efforts to create claims against it.

389. The present U.S. laws generally excuse the seller from performing under a contract when new government regulations make delivery impracticable. Hence, each party bears its own costs and loses any expected profits. U.C.C. § 2-615 & comments 4, 10 (1977); *accord*, U.N. Convention on Contracts for the International Sale of Goods, art. 79, U.N. Doc. A/Conf.97/18 (1980), *reprinted in* 19 I.L.M. 668, 689-90 (1980).

On the other hand, foreign courts have occasionally refused to allow U.S. export regulations to excuse a corporation in their country from performing under a contract when the local law was found controlling. See discussion of the *Sensor* case, *supra* note 129.

390. For example, the Foreign Credit Insurance Association (FCIA) is a private-sector group of about 50 companies which offers insurance in conjunction with the U.S. Export-Import Bank. FCIA has a wide range of programs, insuring exports worth nearly \$36 billion during fiscal years 1981-85. FOREIGN CREDIT INSURANCE ASS'N, AMERICA'S UNTAPPED RESOURCE (1986) (brochure on file with author); *see generally* Eximbank, A Map of Eximbank Programs (undated brochure on file with author presenting a chart of various FCIA and Eximbank programs).

FCIA political risk insurance, which covers losses caused by cancellation or nonrenewal of an export license (including the period prior to shipment), costs at least one percent of the value of the insured goods. Risky countries mean higher rates, higher deductible amounts, a lower percentage of value covered (e.g., 90% rather than 100%), and other conditions. Insurance is not even available for some countries because of the high risk or Eximbank's political guidelines. Telephone interview with Robert L. Chapman, FCIA Assistant Vice President (Oct. 29, 1986). The FCIA recently was not offering political risk insurance for exports to Peru, Poland, Somalia, the Soviet Union, and Zaire, among other countries. Insurance for exports to many other countries was heavily conditioned. *Id.*; *see also* FCIA, Country Limitation Schedule, March 1, 1986, and supplements through July 17, 1986 (presenting schedule of various "special conditions" pertaining to export credit insurance and the bank guarantee program) (on file with author).

fifth amendment of the U.S. Constitution.³⁹¹ Termination of export licenses and existing contracts to export are not constitutionally protected.³⁹²

Compensation provisions are not without precedent, however. The U.S. government has on occasion provided by statute for compensation to people injured by its acts or by developments in the foreign trade area. Most analogous is the 1981 law that requires the Secretary of Agriculture to compensate farmers for an agricultural embargo against a major foreign purchasing country.³⁹³

Similarly, the trade adjustment assistance program has contained various compensation provisions over the years for businesses, workers, and communities adversely affected by increased imports. The original provision in the 1962 law required a link between the injury and the tariff concessions by the U.S. government, though such a link no longer needs to be demonstrated.³⁹⁴ During its history, this program has been much broader in scope and more expensive than the recommendation for compensation advanced in this Article.

The exact details of this compensation proposal need further refinement. It would seem that the party in the United States who held the existing contract or license should be the person compensated, provided, of course, that it could demonstrate losses. While further analysis would be useful, compensation would probably not be provided to persons in the United States who are not direct parties to the license or contract, such as suppliers to the exporter. They too might well be hurt by the export controls, since the exporter will not make additional purchases from them to complete the contract. There are, however, difficult proof problems as parties are added. For example, who would the exporter

391. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

392. See *supra* text accompanying note 97 (exporting as a privilege rather than a right). See generally Trimble, *Foreign Policy Frustrated—Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317 (1984) (analysis of the proper role of U.S. courts in international claims settlements and other foreign policy actions that may raise takings issues); Brownstein, *The Takings Clause and the Iranian Claims Settlement*, 29 UCLA L. REV. 984 (1982) (examining international claims settlements under various models of the takings clause).

393. Agriculture and Food Act of 1981, 7 U.S.C. § 1378 (1982); see *supra* note 107 and accompanying text.

394. The original law was part of the Trade Expansion Act of 1962, Pub. L. No. 87-794, § 201, 76 Stat. 872. The rules governing eligibility for adjustment assistance were repealed in 1975, Pub. L. No. 93-618, § 602(e), 88 Stat. 2072. Eligibility is now determined according to the provisions of the Trade Adjustment Assistance Reform and Extension Act of 1986, Pub. L. No. 99-272, 110 Stat. 300, 304 (to be codified at 19 U.S.C. §§ 2291, 2297-2298, 2345) (further extending the adjustment assistance for workers and firms until Sept. 30, 1991). See generally *Adjustment Assistance*, Int'l Trade Rep. (BNA), U.S. Import Weekly Reference File 61:0101 (1986); R. LAWRENCE & R. LITAN, *SAVING FREE TRADE: A PRAGMATIC APPROACH* 51-62, 112-22 (1986).

actually have bought from, and at what price?³⁹⁵

Even if the proposal does not cover these other parties, the U.S. government could still compensate them in special cases. For example, when President Carter cut back sharply on grain exports to the Soviet Union in 1980, his administration took several steps to prop up agricultural prices beyond purchasing existing export contracts. These steps included: financial incentives to encourage larger grain reserves by farmers; increased government purchases of certain commodities; and diplomatic efforts and financial incentives to promote exports to other countries.³⁹⁶

Compensation almost certainly should not be provided to the foreign purchaser. This would be contrary to the purpose of the sanction and the invocation of the waiver clause, which is to put economic pressure on the target country.³⁹⁷

b. Enlarging the Sunset Provision

If the President imposes a major export embargo against a country, he should be required to obtain congressional approval to continue the embargo beyond a short statutory period. The 1985 Export Administration Amendments Act already prohibits the President from imposing export controls on any agricultural commodity for more than sixty days, unless Congress enacts a joint resolution authorizing the action.³⁹⁸

This proposed "sunset" provision could usefully apply to any major embargo against a country.³⁹⁹ Congressional review after, say, six months⁴⁰⁰ would require the President to justify the dramatic and major

395. Cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (limiting the parties able to recover in an antitrust price-fixing case).

396. HOUSE AFGHANISTAN REPORT, *supra* note 69, at 25-35.

397. It would also be politically difficult for the President to justify payments to parties in the target country. Even if the injured foreign party were an innocent middleman in a third country, compensation would also seem administratively and politically difficult.

Definitive answers on other administrative questions regarding this compensation proposal are beyond the scope of this Article. However, many useful analogies can be found in the earlier discussion of the EAA. See *supra* text accompanying notes 96-130.

398. 50 U.S.C. app. § 2406(g)(3)(A) (1982 & Supp. III 1986). An exception is provided if the controls are part of a complete cutoff of exports to that country. *Id.* § 2406(g)(3)(B)(ii); see *supra* text accompanying note 111.

399. Carefully defining "major embargo" is important. For example, it might be defined as controls over exports that amounted to, say, 80% of the total U.S. exports to that country in the preceding 12 months. Otherwise, the President could stop all exports, except for one or two minor items, and argue that the sunset provision did not apply because the embargo was not major.

400. Six months would probably give Congress adequate time to study the reasons for the embargo and initial developments under it. This was the period established for initial review (and regular follow-up reviews) by the now-invalid legislative veto under the National Emergencies Act and IEEPA. 50 U.S.C. § 1622 (1982). See *supra* text accompanying note 320.

A 60-day limit is another possibility. It is the period now prescribed for a major agricultural embargo, as well as the period (with a possible 30-day extension) permitted under the War Powers

act of a trade embargo. Given political realities, Congress would probably acquiesce, but the review provision would stimulate greater discussion of the issues and require Congress to take a position.

The sunset provision might also require Congress to renew the embargo every year or six months. This would further ensure that Congress and the President had consciously considered the need to continue the embargo.

Despite its benefits, the sunset provision should not apply to any export control, but only to major embargoes. Congress cannot be expected to act every time the President adds or modifies an export control. To do so would be a burden on Congress and would unnecessarily hamper the President.

A sunset provision has worked in a constructive way with the War Powers Resolution.⁴⁰¹ There, the President is required to "terminate any use of United States Armed Forces" under the Resolution⁴⁰² if he does not obtain congressional approval within sixty, or possibly ninety, days after introducing the forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."⁴⁰³ The deployment of U.S. Marines in Lebanon in 1982-84 illustrates the application of the Resolution.

When the Marines began suffering casualties from hostile fire in August 1983, many in Congress argued that the sixty-day period had begun running.⁴⁰⁴ Facing a congressional vote, both the Executive Branch and Congress engaged in an intense public discussion of U.S. policy in Lebanon and whether the Marines' presence was necessary. Presi-

Resolution. 50 U.S.C. §§ 1541-1548 (1982 & Supp. III 1985); *see infra* text accompanying notes 401-06. Sixty days, however, seems a very short period for Congress to evaluate an embargo, especially since an embargo will probably not be as visible, nor as urgent, as the deployment of U.S. armed forces into situations involving hostilities or where imminent involvement in hostilities is likely.

401. 50 U.S.C. §§ 1541-1548.

402. *Id.* § 1544(b).

403. *Id.* § 1543(a)(1). The President can certify that the additional 30 days are needed in certain situations. *Id.* § 1544(b).

404. The vague language of the War Powers Resolution regarding "hostilities" has led to frequent confusion over when the time period begins to run—i.e., when U.S. forces have been introduced into the requisite situation. In the case of Lebanon, the Executive Branch continued to maintain that the period had not started, even though Marines were being killed by sniper fire. President Reagan reiterated this claim when he signed the joint resolution concerning the Lebanon deployment discussed below. *N.Y. Times*, Oct. 13, 1983, at A7, col. 1; *see infra* text accompanying note 405.

Similarly, the Reagan administration has so far refused to say that the Resolution's time period has begun to run in the continuing crisis in the Persian Gulf where Iran and Iraq have been attacking ships. Madison, *A Reflagged Policy*, 19 NAT'L J. 3026 (1987); *Wash. Post*, Sept. 19, 1987, at A3, col. 1.

A sunset provision for the export laws would not have the same ambiguity over the starting point because it would commence on the specific date when the formal controls began.

dent Reagan, for example, made several major public statements. The result was a congressional joint resolution, signed by the President on October 12, in which Congress authorized the continued presence of the Marines in Lebanon for another eighteen months.⁴⁰⁵

The benefits of this process were soon demonstrated by the tragic events of October 23, when a suicide attack destroyed the Marine barracks and killed 240 men. The disaster proved less divisive than it might have been between the President and Congress, and throughout the nation. The sunset provision had led to the creation, through negotiation and public debate, of a more accepted policy and a greater national consensus.⁴⁰⁶

c. Reining in Extraterritoriality

While the need for flexibility argues for retaining the potentially sweeping extraterritorial reach of export controls, experience teaches that resort to broad claims of extraterritorial jurisdiction should be sharply circumscribed.⁴⁰⁷ Moreover, granting the President increased authority to impose other types of sanctions, such as import controls, would presumably reduce his need to rely on expansive export controls.

Judicious extraterritorial application of sanctions can be effective. In the analogous case of IEEPA financial controls against Iran, extending the freeze on Iranian assets to U.S. banks abroad accounted for nearly one half of the \$12 billion total in frozen assets⁴⁰⁸ and met only muted foreign criticism.⁴⁰⁹ On the other hand, as dramatized by President Reagan's efforts to stop construction of the Soviet gas pipeline, broad claims of extraterritoriality can be decidedly counterproductive

405. Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983) (codified at 50 U.S.C. § 1541 (Supp. III 1985)).

406. Public debate over the Lebanon disaster was also muted by the U.S. invasion of Grenada, which began two days later on October 25.

While sunset provisions have begun to appear in other statutes concerning foreign policy, none have apparently come into play in any important way in U.S. actions. The EAA provision on agricultural embargoes has not been triggered. And, the Reagan administration apparently did not consider the August 1986 amendment to the Arms Export Control Act applicable to its arms sales to Iran in October-November 1986. That amendment prohibited the sale of arms to a country designated as supporting terrorists, such as Iran, unless the President formally waived the ban. Any such waiver expires at the end of 90 days unless Congress enacts a law extending it. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 509, 100 Stat. 853, 874 (codified at 22 U.S.C.A. § 2780 (West Supp. 1987)). President Reagan never formally waived the statutory ban. The administration apparently considered that the arms sales statutes were not applicable to a covert intelligence activity. See *supra* text accompanying notes 142-49.

407. See *supra* text accompanying notes 123-30 (discussing extraterritoriality generally and the abortive pipeline sanctions specifically).

408. Carswell & Davis, *supra* note 39, at 205, 233 ("[t]hat extraterritorial reach provided the real leverage").

409. See Carswell & Davis, *supra* note 253, at 177-99 (lack of foreign criticism in large part because of the general international outrage at the seizure of diplomatic personnel).

where major U.S. allies do not share the U.S. position on the underlying issue.

Part of the problem appears to stem from a lack of institutional memory in the Presidency. For example, many decisionmakers in the Reagan administration apparently had little sense of what they were getting into with the pipeline controls. They probably were unaware of the earlier brouhahas with U.S. allies over TWEA controls regarding China and Cuba. When the administration later imposed sanctions against Nicaragua, South Africa, and Libya, the extraterritorial reach of the regulations was more limited.⁴¹⁰ Presumably the administration's experience with the pipeline had taught it a lesson.

Despite extensive discussion of the extraterritoriality issue in the cases and scholarly literature, there are no simple legislative solutions for discouraging the extraterritorial use of sanctions, while simultaneously preserving flexibility. This helps explain why Congress did not amend the jurisdictional provisions in the 1985 EAAA, even though the pipeline fiasco was still a vivid memory.

Calling for consistent application of international law principles raises as many questions as it resolves, since theories of jurisdiction in international law are hardly consistent or precise.⁴¹¹ Recommending that U.S. courts take into account certain general considerations, such as the interests of the foreign state or the likelihood of retaliation, might provide some guidance in deciding suits under the U.S. antitrust laws or other laws that involve the interests of other nations.⁴¹² However, since export controls can be so sweeping and have such immediate impact, an important objective of any recommendation must be to influence the President's initial decision on the scope of the controls, not await some long-delayed court decision.

At least one step would be an improvement: the use of extraterritorial sanctions should be discouraged, especially in their broadest applications, by requiring the President to make certain findings before he imposes these sanctions,⁴¹³ and by allowing disgruntled private parties to

410. For example, the export controls against Nicaragua and Libya were limited to exports from the United States. 31 C.F.R. §§ 540.204-.208 (Nicaragua); 550.201-.207 (Libya) (1987). The freeze of Libyan assets included those in overseas branches of U.S. banks and other entities. *Id.* § 550.206. In spite of their relatively limited scope, a U.K. court found the Libyan controls to be overreaching. *See supra* note 295.

411. *See, e.g.,* Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 446-47 (1981).

412. *See, e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (to be published April 1988); Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U. L. REV. 323, 343-44 (1981).

413. For example, the President might be required to make special findings for jurisdiction to extend beyond U.S. territory and U.S. nationals (wherever located). The President might also be directed to give due regard to the legitimate interests of foreign governments and the jurisdictional

bring administrative challenges. This approach is similar to the EAA's "foreign availability" provisions, which were toughened in the 1985 amendments to help ensure better evaluation of the potential effectiveness of export controls in light of the foreign availability of goods that the President proposes to control.⁴¹⁴

Other changes in the export laws that could impose major limits on the President's present authority are, of course, possible.⁴¹⁵ However, this Article does not recommend further limits on the President's authority because of the danger that he would simply use IEEPA more frequently.

The President's authority can be trimmed sufficiently by the changes recommended here: expanding the contract sanctity provision (including a limited right to compensation); adding a sunset provision requiring congressional approval of a comprehensive export embargo; and discouraging frequent claims of extraterritorial jurisdiction.

2. *Giving the President Broad Authority over Imports*

The *best* opportunity to improve the U.S. legal regime for imposing sanctions for foreign policy reasons is to expand substantially the President's power over imports. While the President now has only meager authority in this area, the United States already has considerable experience with other import controls, such as those for antidumping and foreign subsidies.⁴¹⁶

The most constructive way to proceed, however, is not to build on the 1985 additions to the President's authority over imports from Libya or countries supporting terrorists.⁴¹⁷ Those provisions are far too open-ended. The Libyan provision contains no limitations whatsoever on the President's authority, reflecting the low congressional regard for that country and the relatively small economic cost to the United States of imposing sanctions against it. The terrorism provision only requires the

principles of international law. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403.

414. *See* 50 U.S.C. app. §§ 2404(f), 2405(h) (Supp. III 1985); 15 C.F.R. § 391.1-6 (1987) (definitions of, and procedures for, the determination of foreign availability). Further efforts to limit use of extraterritoriality should be actively considered. For example, the Executive Branch or Congress might create a commission to develop further concrete proposals. Although commissions are often a tactic for avoiding concrete action, it is important to begin developing a consensus among policymakers about the issues and specific proposals.

415. Some of the more thoroughgoing ones include greatly expanding the right of administrative and judicial review over the imposition of controls and individual licensing decisions, and eliminating the President's power to impose foreign policy (though not national security) controls. *See* Abbott, *supra* note 13, at 873-89; Murphy & Downey, *supra* note 97, at 822.

416. *See supra* text accompanying notes 178-91 (discussing economic-based import statutes).

417. *See supra* text accompanying notes 163-64.

President to consult in advance with Congress "in every possible instance" and to report any sanctions immediately.

Expanding section 232 of the Trade Expansion Act of 1962⁴¹⁸ is also inadvisable because the statute would require a complete revision. The language regarding "national security," the legislative history, and the actual uses of the law make it too narrow to suit the purposes discussed here.

The best approach would be to draft carefully a new statute that incorporates a number of provisions designed to protect against hasty use of the new authority and against use for other than foreign policy reasons. The Export Administration Act, as amended in 1985, provides several useful analogies.

An import control act should, of course, have *detailed criteria* defining when the restrictions are to be imposed. *Mandatory prior consultation* with Congress and some consultation with affected U.S. industries, consumer groups, and other countries should be required by provisions similar to those governing foreign policy controls under the EAA. Moreover, the President should be required to *report fully* to Congress whenever he uses his new authority. Such provisions, however, are only the first step.

There should also be a provision for *contract sanctity* similar to the recommendation made earlier for the export laws. The provision should cover all import controls imposed for foreign policy reasons, and should compensate the importer when the President certifies that he must order the breach of existing contracts.

The new law should also have a *sunset provision*, under which Congress must approve any major import ban within, say, six months. Such provisions require the President to justify his actions, and will ensure that both the Executive Branch and Congress give serious consideration to the policy at issue.

The contract sanctity and sunset provisions should help put a damper on inappropriate uses of the President's new authority over import controls. A sunset provision, however, will probably check the President less effectively in the context of import controls than it would for export controls. In recent years, Congress has been more willing than the President to support import controls, while the reverse has been true of export sanctions. This can largely be explained by the short-term benefits of import restrictions for U.S. businesses and workers, in contrast to the immediate injury that export controls inflict.

Pressures to use the new law for protectionist purposes would surely arise, though. For example, the U.S. steel industry might become "very concerned" about human rights violations in Taiwan and South Korea,

418. 19 U.S.C. § 1862 (1982); see *supra* text accompanying notes 153-60.

and call for a ban on steel imports from those countries. Though it would have a tougher case to make, the shoe industry might similarly use Italy's refusal to extradite terrorists as grounds for calling for a ban on Italian shoe imports.

The potential harm of these pressures should not be overestimated. First, to the extent that there is some factual basis for the pressures (such as actual human rights violations in South Korea), they arguably help further important U.S. foreign policy interests. Second, even if the pressures lead to the imposition of import controls primarily for protectionist reasons, the restrictions are likely to apply to only one or a few countries.⁴¹⁹ Alternative foreign suppliers would usually be available to help minimize any additional costs to importers and consumers. For example, stopping steel imports from South Korea and Taiwan would reduce only slightly total U.S. steel imports, and might be offset by increased imports from countries that are not likely targets of economic sanctions.⁴²⁰

Nevertheless, additional steps might be taken to minimize the impact of protectionist pressures on decisions to impose import controls for foreign policy reasons. Two provisions which have no analogues in the export laws should be seriously considered—one requiring “linkage,” and another encouraging some consistency with GATT.⁴²¹

As for *linkage*, a proposal meriting further study would require any import control to be linked to other import controls on at least several other goods from the target country. Such linkage would ensure that the problem with the country is with its policies, and not just with its exports of steel or shoes that compete with U.S. industry. Requiring controls on several items at once is reasonable in a genuine policy dispute, and would

419. Passage of the Comprehensive Anti-Apartheid Act of 1986 apparently reflected a mix of pressures. The primary motivation was certainly opposition to apartheid. Nevertheless, some of the import provisions that presumably increased the bill's support were added on the Senate floor, partly at the urging of special interest groups seeking to help domestic industries. The import bans added were on steel, textiles, and agricultural products. *See supra* note 266 and accompanying text.

420. To the extent that there are alternative suppliers, domestic industries would have less incentive to seek the imposition of economic sanctions on a particular country or countries in the first place.

Note that the United States' relations with its principal trading partners are such that imposing economic sanctions on them for (noneconomic) foreign policy reasons is unlikely. The principal suppliers in 1986 were, in descending order of dollar value, Japan, Canada, the EEC countries, and Mexico.

Of course, the United States might be dependent on a very few countries for certain items, such as a particular mineral. There is, however, usually more than one foreign supplier, and precautionary steps such as maintaining strategic reserves are possible. *See generally* OFFICE OF TECHNOLOGY ASSESSMENT, STRATEGIC MATERIALS: TECHNOLOGIES TO REDUCE U.S. IMPORT VULNERABILITY (1985).

421. Unlike export controls, there is no recommendation here regarding extraterritoriality. Import controls pose no problems of extraterritorial applications: they limit imports into U.S. territory and hence have the strong jurisdictional basis of territoriality.

not inappropriately limit the President's new discretion. The broad controls would also give greater visibility to the President's action both in the target country and at home, thus increasing the need for a persuasive foreign policy rationale.⁴²²

A more problematic proposal for linkage would require import controls to be imposed only in conjunction with other types of economic sanctions—such as controls on government programs, exports, or private financial transactions. This requirement would also give the President's actions broader impact in both the United States and the target country, thus creating a greater need for justification.⁴²³

The purpose would again be to blunt protectionist efforts. Pressures for new import controls would be countered by pressure from other groups that opposed controls on exports or private financial transactions. On the other hand, the linkage provision would create demand for export controls from industries, such as steel and shoe manufacturing, which have previously sought only import controls, and which would not be hurt by export controls since they produce primarily for the U.S. domestic market.⁴²⁴

422. Some potential problems with this proposal require further study. For example, one problem is determining how many imported items must be affected. If the target country shipped only four major products to the United States, how does Congress prevent the President from banning one of the important products plus 12 other items that are imported in minuscule quantities or not at all? This problem could be solved by requiring the President to impose similar controls on, for example, three of the four largest imports from the target country as measured the previous year.

423. A provision authorizing import controls when linked to export controls was considered in Congress in 1983-84. In April 1983, Senators Heinz and Garn introduced a bill (S. 979) to amend the EAA, which would have allowed the President to impose import controls whenever he imposed export controls under the EAA's foreign policy section. Senate Bill 979 was reported favorably out of the Senate Committee on Banking, Housing, and Urban Affairs. The Committee report explained: "Not only will the authority to control imports . . . widen the President's options, it could also lessen the burden on American exporters, who have heretofore been asked to pay the entire price of foreign policy action in this area." S. REP. NO. 170, 98th Cong., 1st Sess. 13 (1983). The import control provision was opposed by the majority of the Senate Finance Committee and by the Reagan administration. 130 CONG. REC. S1712 (daily ed. Feb. 27, 1984) (statement of Sen. Danforth). The principal objections were that the controls would be inconsistent with GATT and that protectionist pressures would increase the use of sanctions, including the required export controls. *Id.* at S1712-13; *see also id.* at S1714-15 (statement of Sen. Dole).

The provision was amended on the Senate floor to require that the sanctions be imposed only if the President "determines and reports to the Congress, in advance of imposition of such controls, that such controls are consistent with the international obligations of the United States, including the [GATT]." *Id.* at S1715-16. In that form, it was passed by the Senate in March 1984. 130 CONG. REC. S2143 (daily ed. Mar. 1, 1984).

The House declined to include such a provision in its proposed EAA amendments in 1984. The Senate provision was dropped in conference, partly in exchange for the provision allowing the use of import sanctions against persons who violated the EAA national security controls. Telephone interview with Wayne Abernathy, Staff Economist on the Senate Committee on Banking, Housing, and Urban Affairs (Mar. 12, 1986).

424. *See* 130 CONG. REC. S1714-15 (daily ed. Feb. 27, 1984) (statements of Sens. Danforth and Dole).

A possible compromise would allow import controls only if there were also a cutback in U.S. bilateral programs, and not link the controls to new export or private credit controls. Restricting government programs suggests a genuine foreign policy dispute between the two countries. It would also avoid creating new pressures for export or credit controls.

From another standpoint, any required linkage among various types of controls reduces the President's discretion. The purpose of giving the President new authority to limit imports and private financial transactions is to provide him with greater flexibility to choose the best sanctions. Thus, the value of linkage in discouraging protectionism must be weighed against the cost in terms of flexibility.

The clash of the new import sanctions with the GATT requirements of MFN treatment and nondiscrimination is a serious potential problem. As a result, the new statute should include a provision at least *encouraging the President to ensure that any new import controls be consistent with GATT*.

While serious, the GATT problem is not insurmountable. As detailed above,⁴²⁵ many of the present (or potential) target countries for import sanctions—such as the Soviet Union, Iran, Libya, and Guatemala—are not GATT members. Moreover, some Eastern European countries that are GATT members have trade relationships with the United States that limit U.S. obligations to them under GATT. Finally, some future import controls against GATT countries could well fit within the broad security exceptions of article XXI.

Assuming that the other provisions of the new statute would encourage the judicious use of import controls, the approach of “encouraging” the President to follow GATT is preferable to “requiring adherence.” First, given the breadth of the GATT provisions, it is not always clear at the outset whether an import restriction violates GATT, and there is no mechanism available to obtain a quick declaratory judgment. Second, if the President thinks the foreign policy issue is compelling enough, he should have the discretion to take steps that might violate the General Agreement, with the understanding that the other country could pursue its claims in GATT and obtain the allowed relief.⁴²⁶

To help offset any potential negative impact of the new U.S. law, the United States should probably accompany it with efforts to strengthen

425. See *supra* text accompanying notes 194-201.

426. Accepting the principle that the other country can pursue its claims in GATT demonstrates some continued support for the entity. However, given the usually limited relief offered in GATT, this would probably not be a major economic burden on the United States, particularly if the target country is not a major U.S. trading partner. See *supra* text accompanying notes 204-06.

GATT and the international trading system generally.⁴²⁷

Finally, to help ensure presidential adherence to the letter and spirit of the proposed new import law, its provisions—such as the criteria for invoking it and the possible requirements for linkage—must be as precise as possible.⁴²⁸ Bright statutory guidelines clearly influence the presidential decisionmaking process.⁴²⁹ And, as proposed above, the law should include a congressional review in the sunset provision, and should award compensation if existing contracts or licenses are terminated.

The new import law, then, should give the President major new authority, but it should also include provisions designed to guarantee that the authority is used appropriately.

3. *Giving the President Authority over Private Financial Transactions: Exploring Virgin Territory*

The President should also be provided with considerably greater authority over private financial transactions in order to impose economic sanctions in nonemergency situations. Delegating this authority to the President in a constructive way can be difficult, however, depending on the type of financial transaction involved.

Regulating financial transactions is often hard because money is very fungible and easily transferable. Millions of dollars can be moved among several banks by wire in a few moments. Money cannot be traced as easily as, say, the export of a large computer. These problems are accentuated by the relatively limited experience of the United States in regulating private international financial transactions for foreign policy reasons. Further compounding the difficulties is the paucity of empirical research and technical analysis of potential problems.

The types of financial transactions that might be regulated can be divided roughly into three categories, which differ considerably in their susceptibility to effective controls. These categories are: (a) international trade financing; (b) general financing; and (c) foreign deposits in U.S. financial entities.

427. Probably the most important step the United States could take would be to participate constructively in GATT's new Uruguay Round of trade negotiations. The United States got off to a promising start with its major proposals at the GATT meeting in Punta del Este in September 1986.

428. The proposals for a new import law do not include specific provisions for general administrative or judicial review—and intentionally so. Since the purposes underlying the export licensing system do not apply here, it would be foolish and costly to add that licensing system to the regulation of imports. Similarly, the roles of the ITC and Department of Commerce under other import laws—making determinations of injury, unfair pricing, and the like—are not relevant for noneconomic foreign policy questions.

429. See *supra* text accompanying note 337.

a. *International Trade Financing*

This type of financial transaction is the easiest and the most appropriate for the President to control. International trade financing includes: loans by a U.S. exporter or importer to a foreign seller or buyer; a U.S. bank's letters of credit, acceptances, or similar direct financing arrangements to assist an international trade deal; and other loans by a U.S. bank that are related to the trade.

Since this financing is directly related to exports or imports, it is usually easy to identify. Moreover, unlike some other financial areas, the United States has considerable past experience with controls over export financing.⁴³⁰ The antiboycott laws have also generated extensive regulations of letters of credit and other bankers' trade documents.⁴³¹ This experience suggests that future controls over export or import financing can be effective.

In addition, it seems reasonable to apply essentially similar provisions to financing as to controls on the underlying export or import transaction. Indeed, the EAA already empowers the President to regulate export "financing."⁴³² This authority, which was used broadly to limit U.S. business participation in the 1980 Moscow Olympics, should be maintained.⁴³³ Similarly, the new import law should include a provision that authorizes the President to regulate import financing.

b. *General International Financing*

This category includes general loans from U.S. banks and other financial entities to foreign governments or foreign entities. For example, Citibank or a syndicate of U.S. banks might loan several hundred million dollars to the Chilean government to help it deal with a balance-of-payments problem, or to a private Chilean company to build an industrial complex.

Attempts to control this type of financing present serious problems of effectiveness and enforcement because of the fungibility of money and its rapid movement among banks. How effective, for example, would a prohibition on loans to Chile be? Rather than making such a loan,⁴³⁴ a U.S. bank might in good faith make an inter-bank loan to a Japanese, Swiss, or Panamanian bank. The next day that foreign bank might make

430. See *supra* text accompanying notes 212-14.

431. See 15 C.F.R. pt. 369 (1987). Implementation of the antiboycott laws and regulations has been difficult, in part because of their complexity. See, e.g., Fenton, *supra* note 245, at 257-87.

432. 50 U.S.C. app. § 2414 (1982 & Supp. III 1985); see *supra* text accompanying notes 212-14.

433. The authority should, of course, be subject to any of the changes in the export laws that were recommended above—such as strengthening contract sanctity and adding a sunset provision.

434. U.S. banks' claims account for 47% of total foreign bank claims in Chile, making it particularly vulnerable to finance sanctions. See *supra* Figure 1 at 1178.

a loan to Chile, at a slightly higher rate of interest to include that bank's costs and profit, thereby undercutting the U.S. restriction.

U.S. banks are a major force in private international banking, even though their premier role of the 1960's and 1970's has eroded considerably as Japanese and European banks have grown and expanded their international activities. Moreover, the relative importance of U.S. credit varies by region, with U.S. banks particularly important in certain countries in Latin America and Asia.⁴³⁵

Cutting off general loans from U.S. banks would force a foreign borrower to search elsewhere for loans. The borrower might encounter some delays in finding another lender and might have to pay a slightly higher interest rate. These difficulties would vary from country to country, depending on which banks were accustomed to doing business in a particular nation. However, these difficulties are probably not severe, with the possible exception of marginal borrowers who have a special relationship with U.S. banks.

The recent case of South Africa, however, provides an important example of the effective use of financial sanctions, albeit in combination with other steps. The decisions in August 1985 by some private banks in the United States and elsewhere not to roll over short-term loans to South Africa triggered a financial crisis there. The financial pressures were continued by President Reagan's 1985 ban on new bank loans to the South African government, and then by the 1986 Anti-Apartheid Act, which codified that ban and added a prohibition on new private investment in South Africa.⁴³⁶

The South African experience, together with the possibility of formal or informal cooperation with U.S. allies, suggests that the President should have the authority to prohibit new general lending for foreign policy reasons. Given lingering questions about effectiveness and enforcement, however, further analysis would be useful.⁴³⁷

If new authority is provided, it should be carefully circumscribed.⁴³⁸

435. See *supra* note 209 and Figure 1 at 1178.

436. Neither the President's action nor the Anti-Apartheid Act appear to have been preceded by careful analysis of the effectiveness of the prohibition on loans. The administration released no study, and no detailed analysis of this sanction appears in the legislative history.

437. An alternative approach is to continue with the present arrangement, where the President has authority over general international lending only through special, ad hoc legislation (such as with South Africa), or by declaring a national emergency and using his IEEPA powers.

438. It could be included either in a new law, or in an amendment to the export laws under the assumption that this would be authority over the export of capital. An amendment to the EAA was the approach taken by Senators Garn and Proxmire in 1985 when they introduced a bill (S. 812) to give the President the authority to limit financial transactions to any "controlled country." (These countries are the communist countries, including China but excluding Yugoslavia.) Under this bill, the President would be able to prohibit or regulate the export or transfer of money or other financial assets, including loans and the extension of credit, to the government of any controlled country. The

The President should be authorized to stop or regulate, for foreign policy reasons, any loans or other extensions of credit to another country. One way to confine the authority over general international lending might be to restrict regulation of lending to a foreign government and its controlled entities, rather than extending it to independent private entities as well.

There is a danger that private entities would attempt to circumvent a ban against lending to a foreign government by borrowing on behalf of that government. The size of the loans, however, would make them relatively easy to detect and thus would discourage violations.⁴³⁹ Also, restricting the President's authority to control loans to government entities will make the new law less threatening to private foreign borrowers, who would fear that the United States will limit their borrowing from U.S. banks in a foreign policy dispute.⁴⁴⁰

capital controls would not be subject to the various safeguards for other export controls—such as the criteria for using the controls, consultation, foreign availability, and the like. Moreover, it would only be applicable to controlled countries and not to, for example, South Korea or Chile. S. 812, 99th Cong., 1st Sess. (1985).

While some witnesses supported the bill or at least important aspects of it, bankers and the AFL-CIO opposed the bill as drafted. *1985 Hearings on S. 812, supra* note 210, at 93-121, 193-208. The bill apparently occasioned a sharp split in the Reagan administration. N.Y. Times, Dec. 3, 1985, at D27, col. 3. President Reagan decided to oppose the bill. *1985 Hearings on S. 812, supra* note 210, at 133-34 (statements of David C. Mulford, assistant secretary of the Treasury for International Affairs). There was no further action on the bill before the 99th Congress adjourned in 1986.

In March 1987, a nearly identical bill (S. 786) was introduced in the 100th Congress, with some additional provisions. The President's proposed new authority over exports of capital would be extended to countries supporting international terrorism as well as controlled countries. The bill would also bar controlled countries from ownership or control of federally insured U.S. banks. S. 786, 100th Cong., 1st Sess. (1987). In August 1987, a bill essentially identical to S. 786 was introduced in the House, with some added provisions requiring federally insured banks to report publicly their loans and investments in controlled countries. H.R. 3095, 100th Cong., 1st Sess. (1987); see 4 Int'l Trade Rep. (BNA) 978 (Aug. 5, 1987).

The addition of the antiterrorism provisions were obviously an effort to expand the coverage of the proposed new law, as well as an apparent means to broaden the domestic political support. Nevertheless, Congress had taken no action on either of the 1987 bills as of February 1988.

439. Authority over loans to private entities is another way to limit U.S. foreign investment in the target country. This limitation, however, would have a less direct effect on the target government than halting loans to the government itself. Also, specific legislation might be required for this control, as with the anti-apartheid law.

440. Interestingly, the IEEPA lending prohibitions against Iran, South Africa, and Libya applied only to loans to those governments, though the President could have made them broader.

Another way to limit the President's authority would be to restrict it to new lending, and not encompass existing loans. This approach was taken in sanctions against South Africa and Libya. Such prospective regulation has the advantage of avoiding contract sanctity issues. Moreover, if the loan has already been made to the foreigner, the only transaction remaining is probably repayment, which should not be discouraged.

A problem arises if the President also freezes foreign deposits. See *infra* text accompanying notes 443-49. The foreign borrower will then have trouble making payments on its loans—not only might some of its assets in the United States be frozen, but the lender will also be disinclined to send more funds here. In the 1979-81 Iran hostage case, the outstanding loans went into default.

The authority to restrict foreign borrowing should be further limited by measures similar to those suggested for the new import bill—tough criteria for resort to the authority, mandatory consultation with Congress and suggested consultation with both the U.S. banking industry and with U.S. allies, and detailed reporting provisions. Most importantly, there should be a sunset provision that requires congressional approval for major new controls.

A contract sanctity clause is also recommended to protect existing loans, unless the President certifies that a “breach of peace” requires termination. To limit abuse, the U.S. government should be required to compensate the U.S. financial institutions whose loans are terminated.⁴⁴¹

The extraterritoriality provision of the finance sanction law should surely be more limited than the one proposed for exports. The President should be allowed to claim jurisdiction only over persons and entities within U.S. territory and over U.S. nationals abroad. This jurisdiction would not cover foreign subsidiaries or independent foreign companies, even if they have a contractual relationship with a U.S. company. The authorized jurisdiction would still permit the President to control lending by U.S. banks, including their overseas branches. Such extraterritorial reach was very helpful in the 1979-81 Iranian crisis and is now being used against Libya. Authorization of broader jurisdictional claims, however, seems unnecessary. And limiting the President’s jurisdictional authority can help prevent potential abuse.⁴⁴²

c. *Foreign Deposits*

The IEEPA controls used in the Iranian crisis and against Libya demonstrate that foreign deposits in U.S. banks—here or in branches abroad—can be effectively frozen, as can foreigner’s funds held by U.S. corporations. The actions against Iran and Libya were carried out promptly, although not without some difficulties.⁴⁴³

441. If the monies for the loan have already been paid out before the control is imposed, the sanctions as applied to that loan will be meaningless. The payout might not have been completed, however, possibly because of a staggered schedule. A new control could prevent completion of the payout and thus create problems under the loan contract. If this occurs, the bank should be compensated for its damages, as an exporter or importer is compensated for damages caused by sanctions.

In any case, the drafters should be careful not to write the credit control so as to prevent foreign debtors from repaying their loans. Letting them off the hook is contrary to the purpose of the sanction.

442. Foreign countries are especially sensitive to U.S. efforts to claim jurisdiction over local banks or other financial entities in their territory, viewing it as a special challenge to their sovereignty. See Carswell & Davis, *supra* note 253, at 178; see also *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 26 I.L.M. 1600 (Q.B. Comm’l Ct. Sept. 2, 1987). For a discussion of this recent U.K. case on the Libyan sanctions, see *supra* note 295.

443. For example, there was considerable uncertainty about the amount of funds frozen and about some banks’ use of “setoffs” to pay off Iranians’ outstanding loans with the deposits of

Whether the President should be given this authority to freeze foreigner's deposits and other funds in the possession of U.S. entities in non-emergency situations is a close question. On the one hand, the asset freeze appears to have been the most important of the Iranian sanctions. Earlier freezes under TWEA also appear to have been effective. On the other hand, concern about future freezes could deter foreign governments or private foreign entities from depositing funds in U.S. banks, here or abroad. As a result, these banks will not only lose deposits, but more importantly may lose customer relationships that generate other business.

While difficult to measure precisely, there have been costs to past freezes. After a careful study, one expert concluded that "little harm seems to have come from the [Iranian freeze], owing primarily to its limited application and duration."⁴⁴⁴ He then warns, however: "Over the longer term, . . . should Washington be seen as developing an addiction to asset freezes after all . . . significant diversification into other countries' institutions and currencies could yet occur, and that could indeed be costly for the competitiveness of American banks."⁴⁴⁵

If the President is given new authority to freeze assets, its use should be restricted in a manner similar to how the new authority over general international lending is restricted⁴⁴⁶—including tough criteria for invoking the authority, consultation and reporting requirements, a sunset provision, limits on extraterritorial jurisdiction, and a contract sanctity provision.

As for contract sanctity, the President would presumably invoke the waiver clause and regulate existing deposits.⁴⁴⁷ Just as U.S. exporters or importers would be covered by contract sanctity provisions discussed earlier,⁴⁴⁸ U.S. banks should be allowed compensation for provable dam-

Iranians. See Carswell & Davis, *supra* note 253 177-92; Carswell & Davis, *supra* note 39, at 201-07; see also *supra* Part IV.

As for Libya, the extraterritorial reach of the controls was successfully challenged in the United Kingdom. See *supra* note 295.

444. B. COHEN, IN WHOSE INTEREST? INTERNATIONAL BANKING AND AMERICAN FOREIGN POLICY 169 (1986). Arab countries moved some of their deposits out of American banks during 1980-81, but they increased their holdings of U.S. government and corporate securities. And in 1982-83, the growth of Arab deposits resumed. *Id.* at 170. See Carswell, *Economic Sanctions and the Iran Experience*, 60 FOREIGN AFF. 247, 263 (Winter 1981/82) (discussing effect of Iranian blocking of OPEC deposits).

445. B. COHEN, *supra* note 444, at 171.

446. As with the discussion of possible controls on general lending, the alternative to broad presidential discretion under a new law might be to require that there be special, ad hoc legislation or resort to IEEPA.

447. Existing deposits would obviously be the principal funds frozen. It is unlikely that foreigners who are the target of a freeze will deposit additional assets in U.S. banks once there is a freeze.

448. See *supra* text accompanying notes 385-97.

ages that a freeze causes to existing business relationships. These damages would presumably be very small, since they would only be incidental to the freeze on deposits. The actual deposits would be those of foreign entities who would not be compensated because that would be contrary to the purpose of the sanction and the use of the waiver clause, which is to put economic pressure on the target country.⁴⁴⁹

In short, in the absence of a declared national emergency, the President should receive new authority to limit import financing as well as export financing. In addition, there are arguments for Congress providing him with carefully crafted new authority to regulate general international lending by U.S. financial institutions, and possibly to freeze foreigner's assets in the possession of U.S. entities.

4. *Making IEEPA Less than an Everyday Occurrence*

If the changes recommended above for nonemergency statutes are adopted in any substantial way, then the already strong case for amending IEEPA becomes even more compelling. Expanding the President's authority and making it more balanced for nonemergency situations will give the President less genuine need to resort to IEEPA's sweeping emergency powers. On the other hand, the President might be tempted to use the IEEPA powers to avoid some of the restrictions proposed to limit the abuse of nonemergency powers—such as contract sanctity and the sunset provision.

The key problems are to limit the ease of initial resort to IEEPA in minor foreign policy disputes, and to prevent its continued use after a crisis has passed.

The most important recommendation is to add a *sunset provision* to IEEPA. Congress should have to approve, by joint resolution, the declaration of a national emergency and the use of emergency powers after a certain period of time, and then at regular intervals. As the Lebanon experience under the War Powers Resolution demonstrates, a sunset provision can play a constructive role in building consensus in U.S. policy and in ensuring a congressional voice in the policymaking process. The sunset provision can be viewed as a substitute, albeit an imperfect one,⁴⁵⁰

449. See *supra* text accompanying note 397.

450. From the viewpoint of Congress, the legislative veto was a better tool because it left discretion in Congress as to whether there would be an actual vote on the concurrent resolution challenging the President's decision. Congress could avoid voting and simply allow the emergency to continue. Note that Congress generally prefers procedural devices that allow it to avoid yes-or-no substantive votes. See Aspin, *Congress versus the Defense Department*, in *THE TETHERED PRESIDENCY* 252-63 (T. Franck ed. 1981).

The sunset provision, on the other hand, requires Congress to vote if it wants to approve the President's action, thus going on record. Congress could end the emergency by not voting (as well as

for the now-defunct legislative veto provision in the National Emergencies Act and IEEPA.

The initial time period for the sunset provision could be six months—the initial period prescribed by the legislative veto provision. This should give Congress ample time to observe how the President is handling a crisis and whether he is appropriately consulting with Congress and seeking legislative action. Alternatively, the time period could be sixty to ninety days, similar to the War Powers Resolution and the agricultural embargo provision of the amended Export Administration Act. This shorter period, however, might place unreasonable demands on the decisionmaking processes of Congress.

The regular renewal periods should probably be six months or one year in duration. The National Emergencies Act and IEEPA had provided for votes on concurrent resolutions at six-month intervals.

The exact lengths of the initial period and the renewal periods will obviously influence how quickly and how often Congress reviews the President's decision, and could well affect the pace of the President's actions. More important than the exact time periods, however, is that the President will recognize that his authority is subject to congressional review in all but the shortest emergencies. Consequently, the President will presumably be more careful to consult with Congress from the beginning, and to develop policies that reflect a national consensus.

Further amendments to IEEPA are advisable, though they are less important than a sunset provision. The second most important step is adding *contract sanctity provisions*. As with export or import controls in a nonemergency situation, existing trade contracts and export licenses should be honored unless there is a "breach of the peace" that requires their immediate termination. In that case, the U.S. government should compensate the injured U.S. exporter or importer.

There should also be a contract sanctity provision regarding private financial transactions. IEEPA's present authorities allow the President to prohibit trade financing and general lending agreements, and to freeze foreigner's deposits. For such financial controls, the same contract sanctity provisions proposed for the nonemergency laws should apply. Contract sanctity provisions are not inappropriate for emergencies. All other considerations should not be discarded just because the President declares a national emergency. The rationales supporting the contract sanctity clause in the export laws—trying to improve the reputation of Americans as reliable business partners, and protecting U.S. entities from sudden losses—are also valid in the emergency context. Furthermore,

by voting no on the resolution), but the effect of ending the President's emergency would be a very visible challenge by Congress, even if there were no vote.

providing compensation when the President curtails or terminates existing contracts or licenses pursuant to the waiver clause should help deter casual resort to waivers.⁴⁵¹

A final rationale for the contract sanctity provision is unique to the IEEPA situation. If the provision is excluded, the President may be encouraged to resort to the IEEPA powers to avoid the clause in the nonemergency laws. IEEPA should not be an easy way out.

Also, rather than simply directing the President to consult with Congress "in every possible instance," IEEPA should be amended to make *consultation mandatory* and to detail its scope. Of course, consultation, particularly of an extensive sort, might be difficult in a fast-breaking crisis. However, IEEPA deals with economic powers, not with use of the military. The President should at least be able to get the advice of a few congressional leaders before he uses these powers.⁴⁵²

Moreover, the vague *criteria* for invoking IEEPA—"any unusual and extraordinary threat"—could be made more precise. The criteria could explicitly define emergencies as "rare and brief," and state that use of IEEPA should be "terminated as soon as the threat has receded or as soon as necessary special legislation can be passed by Congress." Such statutory language would put the President on notice not to use IEEPA casually. Precise language, however, may be difficult to draft, since the statute was intended to cover a wide range of genuine emergencies, and to afford the President considerable latitude in dealing with them.

Even if more precise language *could* be added, enforcement remains a problem. As noted earlier, courts are very hesitant to question a presidential decision that a national emergency exists.⁴⁵³ The real constraint on the President is Congress. If there is a sunset provision that requires a congressional vote for the controls to continue, the precise statutory language could be important in the debate over whether to extend the President's emergency powers.

451. See *supra* text accompanying notes 385-97.

452. For example, in the Iranian situation when Iran tried surreptitiously to withdraw its deposits from U.S. banks and a speedy U.S. response was needed, President Carter nevertheless consulted with congressional leaders before he declared a national emergency and froze Iranian assets. Carswell & Davis, *supra* note 253, at 176; see also Ribicoff, *supra* note 334, at 382-84.

The principal purpose behind any consultation requirement is to ensure that the President has carefully considered his actions and that he realizes the long-term benefits of obtaining the advice of congressional leaders. See T. FRANCK & E. WEISBAND, *supra* note 86, at 75-76. However, consultation provisions, such as in the War Powers Resolution, have proven to be of only limited usefulness. *Id.* at 71-76. The recent failures by Reagan administration officials to abide by various consultation provisions during the 1985-86 arms sales to Iran raise further questions about the provisions. As discussed above, a sunset provision should increase considerably the President's incentives to consult with Congress. See *supra* text accompanying notes 398-406.

453. See *supra* text accompanying notes 296-314. But see also *supra* text accompanying notes 370-73 (discussing how to improve the possibility of judicial review).

These recommendations are designed to deal with IEEPA's principal defects by reducing the chances that the President will casually resort to the Act's powers or continue to rely on them after a crisis has passed. Steps should also be taken to deal with excessive and counterproductive claims of *extraterritorial jurisdiction* under IEEPA. The measures discussed for nonemergency laws should also be adopted here—such as actual limits on the President's jurisdictional authority over general international lending and freezing assets. These measures are not only reasonable, but their application to IEEPA would also discourage use of the statute to evade the restrictions contained in the nonemergency laws.⁴⁵⁴

In short, the need to amend IEEPA cannot be ignored. Addition of a sunset provision is the most important first step.

D. Conclusion

Economic sanctions for foreign policy purposes are here to stay. Indeed, various reasons—many good—have led to increased use of these sanctions, with no slackening in sight.

It is important to begin considering possible sanctions and the underlying U.S. laws in a comprehensive fashion, rather than looking myopically at only a few possible vehicles for sanctions, such as U.S. foreign assistance or exports.

Comprehensive analysis of existing U.S. laws reveals a haphazard situation. These laws can skew the President's choice of sanctions or encourage him to resort off-handedly to sweeping emergency powers.

The present legal "framework" is obviously not the only possible arrangement, and U.S. national interests can be better served. Most compelling is the need to correct the present disparity between the President's broad nonemergency authority over exports and his very narrow authority over imports and private financial transactions. The President's powers over the latter two activities should be substantially increased, while his authority to stop exports should be trimmed.

These changes will require a careful mix of statutory provisions to avoid encouraging excessive use of sanctions. Especially difficult is the problem of how to provide the President new authority over certain private financial transactions. Nevertheless, substantial improvements are possible by hedging any new presidential authority with restrictions such as sunset provisions and contract sanctity clauses.

These changes should be undertaken with an eye toward reducing

454. The proposals above for amending IEEPA constitute an admittedly ambitious agenda, but one justified by the analysis here. Trying to further limit the use of IEEPA would not only fail to obtain the necessary congressional support in the foreseeable future, but it would also raise serious questions about limiting the flexibility that the President needs in a *genuine* national emergency.

the President's incentives to invoke emergency powers. Indeed, his ability to use IEEPA should be cut back.

Whatever one thinks of the United States employing economic sanctions, they are an unavoidable reality. Now is the time to bring order and wisdom to the underlying U.S. laws.