Economic Sanctions: A Look Back and a Look Ahead

Andreas F. Lowenfeld
New York University

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Economic sanctions have always received bad press. They do not work, it is said, citing, first of all, the League of Nations' half-hearted effort to restrain Mussolini from invading Ethiopia shortly before World War II, and also the United States' failure to bring down Castro's Cuba and the survival for nearly fifteen years of white Rhodesia led by Ian Smith. Sanctions encourage bureaucracy, it is said, which is certainly true, and invite cheating, which is also true but could be said about almost any program of government intervention, beginning with taxation. Further, critics assert that economic sanctions merely divert markets without causing the target real deprivation, so that, for instance, the Soviet Union buys bulldozers and pipelayers from Japan instead of Peoria and wheat from Argentina instead of Kansas. Still, economic sanctions, or trade controls for political ends, as I have called them,[1] go on, a favorite tool of many countries and organizations. As in so many ways, the United States is like other countries, only more so. Why?

I think there are two reasons which sometimes blend into each other. There is certainly some fear, intensified by the continuing rush of technology that politicians (like lawyers) only dimly understand, that some weapon or, more likely, some technical advance such as a laser or an explosive or a computer-guidance system will be used against us, even as the steel from the Ninth Avenue El in New York City was said to have come back in Japanese bombs dropped at Pearl Harbor. Second, sanctions send a message of disapproval — less grave than the use of force but more serious than just a communiqué followed by business as usual. Many people laughed when President Carter forbade export of soccer balls and Coca Cola to the Soviet Union for the 1980 Olympics, and grumbled when he pulled the American teams out of the competition. I think President Carter was right to say "We don't play games with brutal aggressors"; as for the practical effect, we will never know. Were American sanctions a flop

* Charles L. Denison Professor of Law, New York University. A.B. 1951, LL.B. 1955, Harvard. — Ed.

1. *See* A. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS (2d ed. 1983).

because Soviet troops remained in Afghanistan almost ten years longer? Or did the American response help restrain Soviet activity in other parts of Central Asia, for instance Iran? When the United States imposed sanctions against Poland and the Soviet Union at Christmastime in 1981, martial law in Poland was not revoked. But Soviet tanks did not move in as they had in Hungary and Czechoslovakia in earlier years; eight years later, President Ronald Reagan's statement that "we're not letting them get away with it"[2] looks less foolish than it did at the time.

If one understands that economic sanctions take time to have effect, and that the effect is rarely crystal clear, the success rate of economic sanctions is rather impressive. Would Nelson Mandela have been freed and the African National Congress legalized without worldwide sanctions against South Africa? Did the electoral defeat of Daniel Ortega have nothing to do with denial of a U.S. market to Nicaragua? Is the recent increased exodus of Jews from the Soviet Union unrelated to the desire of Soviet leaders to make a new trade agreement with the United States? As these lines were written, the fate of Lithuania's drive for independence hung in the balance; was not the prospect that credits, joint ventures, and membership in international organizations such as GATT and IMF might be withheld a major factor in the calculations of President Gorbachev?

All of these thoughts are by way of introduction to the recent volume on the legal aspects of international economic sanctions, American style, by Professor Barry E. Carter of the Georgetown University Law Center. Professor Carter is not an opponent of sanctions. He points out that one of the well-known steps leading to the American Revolution was the colonists' boycott of English goods in response to the Stamp Act of 1765, and another was the American response to the Townshend Act that ended eventually in the Boston Tea Party (p. 8). He reminded me that I had never quite understood the sequence of events that led the United States to participate on the wrong side of the Napoleonic wars, but that, whatever the underlying causes, the immediate causes of the War of 1812 were clearly embargo and counter-embargo.[3] And Carter reproduces some facts and figures that indicate a higher success rate for sanctions imposed by the United States than one might have supposed (pp. 13-31). In any case, he writes, "Economic sanctions for foreign policy purposes are here to stay. Indeed, for various reasons — many good — the use of these

2. President's News Conference, 17 WEEKLY COMP. PRES. DOC. 1379, 1381 (Dec. 17, 1981).

3. It would be an unnecessary digression for this review to document all the above. But it is interesting to note that President Madison's message of June 1, 1812, calling upon Congress to declare war against Great Britain, closes with the observation that France has likewise "violated the neutral rights of the United States," and declares that "I abstain at this time from recommending to the consideration of Congress definitive measures with respect to that nation . . . ." 2 MESSAGES AND PAPERS OF THE PRESIDENTS 484, 490 (J. Richardson ed. 1897).

sanctions has increased, and no slackening is in sight" (p. 270). "Now is the time," he concludes, "to bring order and wisdom to the underlying U.S. laws."[4]

That the legal bases for economic sanctions imposed by the United States reflect a "haphazard legal regime," to quote from the book's subtitle, is clearly true. A mixture of historical accident, ambivalence, and deliberate obscurity has left the President — every President since Franklin Roosevelt — with almost (but not quite) unlimited discretion to control *exports*, a variety of stated reasons to deny or terminate *specific benefits* such as foreign assistance or preferential tariff treatment, plus expansive powers that, upon declaration of a national emergency, can be brought to bear on almost any activity carried out by American business or on American territory. Absent such a declaration, which is supposed to be based on an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States,"[5] the President has virtually no power to impose restraints on *imports* for political purposes, though of course he does have a good many such powers of retaliation for economic injury to the United States.[6]

Professor Carter thinks this situation is wrong on two major counts: In terms of *democratic theory,* Presidents have too much power to control exports, and the efforts of Congress to be part of the process have usually failed. In terms of *rational policy,* the lopsided shape of the President's authority has often led to resort to unsuitable but readily available measures, when a more effective measure should have been available. Both of these points bear exploration.

I. Congress and the Executive Branch: The Export Control Program

When the Export Control Act was enacted in 1949, it was only a few pages long, and contained not much more than a general delegation to the President to prohibit or curtail exports from the United

4. P. 271. Professor Carter does not discuss international law, and neither will this review. It is of interest, however, to recall that when the San Francisco Conference that drafted the United Nations Charter was considering the prohibition on the use of force that became article 2(4) of the Charter, it rejected by a 26-2 vote an amendment proposed by Brazil that would have added to the prohibition on the threat or use of force the words "and from the threat or use of economic measures . . . ." Doc. 215, I/1/10, 6 U.N.C.I.O. Docs. 559 (1945). *See* Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 334-35 (1945) (Summary Report of committee meeting at which the Brazilian amendment was discussed).

5. International Emergency Economic Powers Act, § 202(a), 50 U.S.C. § 1701(a) (1982).

6. See, for example, § 301 of the Trade Act of 1974, as amended to include "super 301," 19 U.S.C. § 2411 (1988); see also the various responses to dumping and subsidy practices regarded as unfair, 19 U.S.C. §§ 1671-1677k (1988), as well as § 337 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1337 (1988).

States,[7] and provision for fine or imprisonment of violators.[8]

On the basis of that brief statute, the U.S. Department of Commerce created an elaborate program of general and validated (*i.e.,* ad hoc) licenses, country groups, terms such as "unpublished technical data," and an enforcement system that operated almost entirely outside of judicial control. The Department also invented the concept of "export privileges," which by its own self-fulfilling definition meant that the business of exporting from the United States — or indeed participating anywhere in the chain of an export transaction — was not a right, but rather an opportunity that could be suspended, modified, restricted, or denied, for a period of a few months or for as long as the duration of controls.[9]

The legislation was probably right for the period when it was enacted: Congress was justifiably concerned about the Berlin blockade, the series of coups d'état in central and eastern Europe, and a powerful but technically backward Soviet Union led by Stalin. The United States at the time had a massive lead over the rest of the world not only in technology, but in wealth generally. Moreover, earlier distrust of excessive delegation had been stilled by the success of the war effort, and doubts about an imperial presidency had not yet begun to arise.

By the late 1960s many of these conditions — though not all — had begun to change. Stalin was long dead, the United States' technological edge had begun to shrink, the balance of payments had become a concern, and American business was beginning to feel that it was losing customers to suppliers in Western Europe and Japan who could often supply substantially equivalent products with less delay and greater security. Moreover, the perception grew — not uniformly, but in numerous places in and out of government — that by engaging the Soviet Union and its satellites (as they then were in greater or lesser degree) in trade, the chances for peace (usually called "lessening of tensions") could be improved. Congress, which had never adopted the Export Control Act as permanent legislation,[10] tried to change the system, or at least the underlying assumptions.

After a bitter battle in the first year of the Nixon administration, which did not end until the final day of the session, Congress passed a

7. Export Control Act of 1949, ch. 11, 63 Stat. 7 (1949) (codified at 50 U.S.C. app. §§ 2021-2032 (1964)) (repealed 1969). Section 3(b) authorized redelegation "to such departments, agencies, or officials of the Government as [the President] may deem appropriate," and on this basis the Office of Export Control (by various names) was established in the Department of Commerce. In fact no formal delegation was published until the administration of President Kennedy. *See* Exec. Order No. 10,945, 3 C.F.R. 473 (1959-63).

8. Export Control Act of 1949, ch. 11, § 5, 63 Stat. 8 (1949) (codified at 50 U.S.C. app. § 2025 (1964)) (repealed 1969).

9. For examples of how this worked, see A. LOWENFELD, *supra* note 1, at 29-69.

10. The Act was extended in 1951, 1953, 1956, 1958, 1960, 1962, and 1965.

new statute, renamed the Export Administration Act[11] to point up the interest in promoting as well as restraining U.S. exports. Legislative criteria were added for the grant or denial of licenses, detailed reports were required to be sent to Congress,[12] exporters were to be told why their requests were denied,[13] and there were to be consultations within the government and with industry about licensing policy, in particular about which products were available elsewhere so that restraint by the United States would not make much sense.[14] But in 1969 — as at nearly all other times — Congress left the executive branch a way out. For instance, the issue of foreign availability was addressed in the findings, declaration of policy, and provisions for consultation, but not in the operative portions of the Act; if, however, the President determined "that considerations of national security override considerations of foreign availability," he could control exports of products or technical data even if they were available elsewhere, provided only that he report his reasons (in quite general terms) to Congress in the next quarterly report.[15]

My impression, confirmed by reading Professor Carter's book, is that while the list of controlled products gradually shrank and the perception that the Commerce Department was in the forefront of the battle against communism gradually faded, the changes in the system of export controls were not great. To be sure, some of the earlier quarrels over licensing exports of tires (or factories to make tires) that might fit on cropdusters but also on warplanes, of V-8 engine blocks that were made for Ford sedans but might drive a tank, or of 8-row beet harvesters that might increase the Soviet Union's sugar production, receded into history. But they were replaced by interagency battles over whether computers sold to Intourist for use in its hotel and railroad reservations system might be used to set targets for intercontinental ballistic missiles, and whether at a given moment, Rumania was more like Hungary or like Poland for purposes of the Department's country groups. In a general way Congress knew about these disputes, and from time to time it changed the relative influence of the different agencies involved in the decision-making process, sometimes granting

11. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (expired 1979) (codified at 50 U.S.C. app. §§ 2401-2413 (1976)) [hereinafter Export Administration Act of 1969]. An earlier version, sponsored by Senators Muskie, Mondale, Packwood and Williams, was called the "Export Expansion and Regulation Act of 1969." S. 1940, 91st Cong., 1st Sess. (1969).

12. Export Administration Act of 1969, *supra* note 11, §§ 5(b), 10 (codified at 50 U.S.C. app. §§ 2404(b), 2409 (1976)).

13. Export Administration Act of 1969, *supra* note 11, § 9 (codified at 50 U.S.C. app. § 8 (1976)).

14. Export Administration Act of 1969, *supra* note 11, § 5(a) (codified at 50 U.S.C. app. § 4(a) (1976)).

15. Export Administration Act of 1969, *supra* note 11, § 4(b) (codified at 50 U.S.C. app. § 3(b) (1976)).

greater, sometimes lesser, authority to the Defense Department. But as the legislation grew longer and the requirements for reports, findings, and determinations multiplied, the essential pattern remained. The President could do with exports essentially whatever he wanted, so long as the magic words "national security" were pronounced often enough.

After several minor changes in the law in 1972,[16] 1974,[17] and 1977,[18] Congress undertook what it thought was a major overhaul of export control legislation in 1979.[19] The major items of discretion — *i.e.*, what products to license and which to restrain, and what countries belonged in which country groups — were not touched. But Congress divided export controls in two: those adopted for *national security* concerns,[20] *i.e.*, controls focused on products with potential for military or other strategic uses; and those adopted for *foreign policy* purposes,[21] *i.e.*, controls designed to punish (or deter) violations of human rights, support for terrorists, failure to control narcotics traffic, and similar objects of American anger. Foreign policy controls were to be shorter in duration unless explicitly renewed, and before imposing such controls, the President was to consult with Congress "in every possible instance."[22] Moreover, before the President imposed export controls for reasons of foreign policy, he was supposed to consider — not make a required finding, but to consider — six questions, framed in such a way as to make the President think twice before following his instinct to introduce a new control.[23] The authority to impose national security controls was also accompanied by eight pages' worth of

16. Equal Export Opportunity Act, Pub. L. No. 92-412, 86 Stat. 644 (1972).

17. Export Administration Amendments of 1974, Pub. L. No. 93-500, 88 Stat. 1553 (1974).

18. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977).

19. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C.A. app. §§ 2401-2420 (West Supp. 1990)) [hereinafter Export Administration Act of 1979]. This Act, though further amended as discussed below, remains the operative legislation as of 1990.

20. Export Administration Act of 1979, *supra* note 19, § 5 (codified at 50 U.S.C. app. § 2404 (1982)).

21. Export Administration Act of 1979, *supra* note 19, § 6 (codified at 50 U.S.C. app. § 2405 (1982)).

22. Export Administration Act of 1979, *supra* note 19, § 6(e) (codified at 50 U.S.C. app. § 2405(e) (1982)). The Act also provided for consultation with such affected industries as the Secretary of Commerce considers appropriate. 50 U.S.C. app. § 2405(c) (1982).

23. Export Administration Act of 1979, *supra* note 19, §§ 6(b)(1)-(b)(6) (codified at 50 U.S.C. app. §§ 2405(b)(1)-(b)(6) (1982)). For example:

> When imposing, expanding, or extending export controls . . . the President shall consider —
>
> . . . .
>
> (4) the likely effects of the proposed controls on the export performance of the United States, on the competitive position of the United States in the international economy, on the international reputation of the United States as a supplier of goods and technology, and on individual United States companies and their employees and communities, including the effects of the controls on existing contracts . . . .

50 U.S.C. app. § 2405(b) (1982).

advice from Congress, but the provision that the President could do essentially what he chose was retained, again subject to a determination "that the absence of export controls under this section would prove detrimental to the national security of the United States."[24]

Professor Carter criticizes President Carter (pp. 70-72) for, in effect, negating the distinction deliberately drawn by Congress between national security and foreign policy export controls when he proclaimed his grain embargo following the Soviet invasion of Afghanistan "in the national security and foreign policy interests of the United States."[25] Though I have been critical of presidents who abuse their powers in this area,[26] I must say that in this case I come out for the President. It seems to me that the effort to put national security in one pigeonhole and foreign policy in another is misguided, if not unconstitutional. To be sure, when the President restrained exports of grain and sports equipment and soft drinks to the Soviet Union in 1980, he was not acting "to restrict the export of goods and technology which would make a significant contribution to the military potential of [the Soviet Union]."[27] But a determination that there would be a threat to the security of the United States if the Soviet Union were not made to see the seriousness of the American reaction to the invasion of Afghanistan seems to me to fall well within the discretion of the President. Not only would no court ever challenge such a determination by the President,[28] it would seem to me wrong for Congress to try to do

24. Export Administration Act of 1979, *supra* note 19, § 5(f)(1) (codified at 50 U.S.C. app. § 2404(f)(1) (1982)).

25. Memorandum from the President for the Secretary of Commerce on Shipments of Agricultural Commodities to the Soviet Union, 16 WEEKLY COMP. PRES. DOC. 32-33 (Jan. 7, 1980), *reprinted in* 45 Fed. Reg. 1883 (1980).

26. *See, e.g., Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on Intl. Econ. Policy and Trade of the House Comm. on Intl. Relations,* 95th Cong., 1st Sess. 2-20, 43-51 (1977) (statement of Andreas Lowenfeld). This was the hearing on the effort led by Rep. Bingham of New York to repeal the Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 411 (codified at 50 U.S.C. app. §§ 1-44 (1976)), or at least restrict its use to wartime. The outcome was enactment of the International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (codified at 50 U.S.C. §§ 1701-1706 (1982)).

27. *See* Export Administration Act of 1979, *supra* note 19, § 3(2)(A) (codified at 50 U.S.C. app. § 2402(2)(A) (1982)) (providing the predicate for imposition of national security controls under § 5(a)(1) of the Act (codified at 50 U.S.C. app. § 2404(a)(1) (1982))).

28. Compare, for example, a decision by Judge Flannery denying relief to the French subsidiary of a U.S. company caught between conflicting government orders in connection with the pipeline sanctions of 1982:

> [T]his court is acutely aware that the Export Administration Act, and the regulations promulgated pursuant to that Act, were intended to give effect to important foreign policy objectives of the United States. The regulations were issued following the imposition of martial law in Poland. . . . An injunction barring enforcement of their regulations, or their application to plaintiffs, would deny to the President one means by which to influence the actions of the Soviet Union.

Dresser Indus., Inc. v. Baldridge, No. 82-2385 (D.D.C. Nov. 4, 1982) (order denying injunctive relief). For a longer excerpt and the setting of this case in context, see A. LOWENFELD, *supra* note 1, at 296-300.

so.[29] Indeed my perception — I do not have hard evidence in support — is that Congress understood this, and wrote the 1979 Act, as well as earlier export control, foreign aid, and other legislation in the foreign economic policy area with enough play in the joints so that Presidents would *seem,* but would not really *be,* reined in.[30]

The immediate technical advantage gained by President Carter by relying on both national security and foreign policy authority for the grain embargo was that a provision in the 1979 Act that subjected controls on agricultural exports to disapproval within a thirty-day period by concurrent resolution of Congress[31] applied only to foreign policy and apparently not to national security controls.[32] Congress wanted to be sure — or almost sure — that this did not happen again, and spent five years getting its point across. Though farmers who had been hurt by the 1980 embargo were quite generously compensated by the government, Congress wrote into law in 1981 that if there were another such embargo, farmers would be compensated at a high rate designed to discourage resort to such a measure, whether for national security or for foreign policy purposes.[33] In 1982, Congress sought to prohibit embargoes on agricultural products sold to major customers altogether, but, in the familiar pattern, left it open to the President to impose such an embargo anyway, if he declared a national emergency.[34] Finally, in 1985, Congress closed the door on agricultural embargoes a little more, though still not completely. It expressly excluded export controls on agricultural products under the national security section of the Export Administration Act;[35] it also provided (in a kind of substitute for the now discarded concurrent resolution de-

29. For a contrary view by an occasional teaching colleague of Professor Carter and former Deputy Assistant Secretary of Commerce, see Murphy & Downey, *National Security, Foreign Policy and Individual Rights: The Quandary of United States Export Controls,* 30 INTL. & COMP. L.Q. 791, 815 (1981).

30. For a detailed discussion of this theme, see Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair,* 97 YALE L.J. 1255, 1297-305 (1988).

31. This was, of course, before that device was held unconstitutional in INS v. Chadha, 462 U.S. 919 (1983).

32. Export Administration Act of 1979, *supra* note 19, § 7(g)(3) (codified at 50 U.S.C. app. 2406(g)(3) (1982)).

33. Agriculture and Food Act of 1981, Pub. L. No. 97-98, § 1204 (Agricultural Embargo Protection), 95 Stat. 1276 (1981) (codified as amended at 7 U.S.C. § 1736(j) (1988)). The Senate Committee on Agriculture, Nutrition, and Forestry wrote, "The Committee is hopeful that the provision adopted will not only provide compensation in the case of a future embargo which is not across the board but will act as a restraint on the imposition of such an embargo in the first place." S. REP. No. 126, 97th Cong., 1st Sess. 126, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 1965, 2091.

34. Futures Trading Act of 1982, Pub. L. No. 97-444, § 238, 96 Stat. 2294, 2326 (1983) (codified at 7 U.S.C. § 612c-3 (1988)).

35. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 105(j), 99 Stat. 120, 127-28 (1985) (codified at 50 U.S.C. app. § 2404(q) (Supp. 1985)) [hereinafter Export Administration Amendments Act of 1985] (adding § 5(q) to the Export Administration Act of 1979, *supra* note 19).

vice[36]) that controls on agricultural exports under the foreign policy section could be imposed only for sixty days unless Congress within that time adopts a joint resolution of approval.[37] But if all exports to the country in question were embargoed, then agricultural products could be included in the embargo as well.[38]

Apart from the issue of agricultural exports, which of course involved important domestic political concerns, Congress tried once again in 1985 to expand its role. The questions the President was to "consider" before imposing foreign policy controls were retained in the Act,[39] but for newly imposed controls (as contrasted with extension of existing ones), the President was required to make express determinations. For example, with respect to the question concerning the effect of proposed controls on the export performance of the United States,[40] the President was now required to *determine* that "the [adverse] effect of the proposed controls . . . does not exceed the benefit to United States foreign policy objectives . . . ."[41] Also, the provision for advance consultation, which had been required with respect to foreign policy controls "in every possible instance,"[42] was changed in the 1985 amendments to be mandatory in every case and to require a detailed report.[43] And so on . . . .

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36. *See supra* note 31.

37. Export Administration Amendments Act of 1985, *supra* note 35, § 110(d) (codified at 50 U.S.C. app. § 2406(g) (Supp. 1985)) (enacting a revised § 7(g)(3) of the Export Administration Act of 1979, *supra* note 19).

38. Export Administration Amendments Act of 1985, *supra* note 35, § 110(d) (codified at 50 U.S.C. app. § 2406(g)(3)(B)(ii) (Supp. 1985)).

39. *See supra* note 23 and accompanying text.

40. *See supra* note 23 and accompanying text.

41. Export Administration Amendments Act of 1985, *supra* note 35, § 108(b) (codified at 50 U.S.C. app. § 2405(b)(1)(D) (Supp. IV 1985)) (enacting a revised § 6(b) of the Export Administration Act of 1979, *supra* note 19).

42. *See supra* note 22 and accompanying text.

43. Export Administration Amendments Act of 1985, *supra* note 35, §§ 108(d)(1) and 108(e) (codified at 50 U.S.C. app. § 2405(f) (Supp. 1985)) (modifying Export Administration Act of 1979, *supra* note 19, to enact § 6(f)). The conference report on the bill says on this point:

> The conferees believe that actual consultation with Congress has rarely been within the spirit of the law. It has been perfunctory at best. That is why the Congress finds it necessary to strengthen this subsection. Under this amendment the President would be required to consult with the Congress prior to the imposition of foreign policy export controls.
>
> This should result in more meaningful consultation, which is in keeping with article I, section 8, of the Constitution which gives to the Congress the power to regulate international commerce. Export control authority is only delegated by Congress to the President, as provided in the Act, and the Congress intends that the President consult with the Congress in the conduct of that delegated authority.
>
> The conferees intend that this will result in greater deliberation given by the President to suggestions to impose foreign policy controls and that once imposed, the prior consultation with Congress will result in wiser control policies enjoying greater Congressional support.
>
> The conferees recognize that, under the provision, the President can still approach the Congress shortly before he wishes to take action imposing foreign policy export controls. In fact, on some occasions conditions may require that consultation take place no sooner than shortly before the controls are imposed.
>
> This consultation provision can be satisfied by means of consultation with the Chairmen

Does all of this matter? Would these restraints, for example, have prevented a fiasco such as the extraterritorial extensions of President Reagan's pipeline sanctions in response to martial law in Poland, which had the effect of turning an East-West issue into a West-West controversy?[44] I doubt it. So, I think, does Professor Carter. If a report is required, some staff member writes it; if a determination is needed, the word-processor spews it out; if the statute needs to be interpreted, the President, the Secretary of State, the Secretary of Commerce, and the Attorney General all have legal staffs ready to do so. And many of the criteria, notably the emphasis on alternate sources for controlled products (the "foreign availability" issue), do not mean much if the object of the controls is to send a message rather than to accomplish a genuine denial.

I have no quarrel with Professor Carter as he tells this story, and in a number of places he guided me through statutory changes that I had not fully understood until I read his book. Carter is no doubt right that presidents have taken advantage of loose language and broad delegations to impose export controls where other measures were closed to them, and where Congress would probably not have approved had its approval been required. In this respect export control measures resemble military adventures undertaken by Presidents in the exercise of their own judgment but on questionable legal authority, and the amendments described above resemble the largely unsuccessful efforts by Congress to check these adventures, notably by the War Powers Resolution.[45]

I am less convinced than Professor Carter that stricter legislation is the answer. Writing in 1988, Carter holds up the much tighter Comprehensive Anti-Apartheid Act of 1986[46] as an example of how Congress can get the upper hand on the President in this area. It is ironic that when Congress seeks to check the imposition of economic sanctions by the President it generally fails, while, at least in this instance, when it seeks to require the President to impose sanctions and to eliminate the opportunity for Presidential discretion, it succeeds over his veto.[47]

> and Ranking Members of the committee of jurisdiction in the Senate and the committee of jurisdiction in the House. Such consultation should also extend to the Chairmen and Ranking Members of the relevant subcommittee of these committees.

H.R. CONF. REP. NO. 180, 99th Cong., 1st Sess. 57-58, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 108, 119.

44. Carter treats this episode briefly. *See* pp. 83-85. For a more detailed account, see A. LOWENFELD, *supra* note 1, at 273-306.

45. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)) (passed over President Nixon's veto).

46. Pub. L. No. 99-440, 100 Stat. 1086 (1986) (codified as amended at 22 U.S.C. §§ 5001-5116 (1988)) (passed over President Reagan's veto).

47. Another instance of this pattern is the Jackson-Vanik Amendment to the Trade Act of 1974, Pub. L. No. 93-618, § 402, 88 Stat. 1978, 2056 (codified as amended at 19 U.S.C. § 2432

More important, where democratic theory meets practical politics, is it really desirable to tie the President's hands as tightly as the Anti-Apartheid Act did, because on this issue Congress (with justification) did not trust President Reagan? I am far from an expert on South Africa, and I have no well-informed views as to the wisest course for the Western democracies to follow in response to the liberalizing steps taken by the South African government in the early months of 1990. Nor do I know what the President of the United States thinks would be the wisest course. But unlike Prime Minister Thatcher of Great Britain, who concluded that partial relaxation of sanctions would be a wise response to President de Klerk's actions,[48] or President Mitterand of France, who did not think so,[49] our own President was not allowed to exercise his best judgment, because he has no discretion until the conditions for termination of sanctions set out by Congress three and a half years ago have been met.[50]

In short, Professor Carter makes a good case that Congress, having given the President a very long leash four decades ago with respect to export controls, has been trying for at least two decades to pull the leash in, without a great deal of success. Whether tighter laws are the solution seems to me problematic.

II. Expanding the Options: Import and Financial Controls for Political Ends

Professor Carter divides the economic sanctions available to the U.S. government into five categories: (1) export controls; (2) controls on financial transactions; (3) import controls; (4) reduction or cancelation of bilateral assistance; and (5) curbs on assistance furnished by multilateral financial institutions, such as the World Bank and the International Monetary Fund (p. 2). He concludes that American influ-

(1988)), which effectively killed the trade agreement negotiated in 1972 between the United States and the Soviet Union by requiring the President to determine that the emigration practices of the Soviet Union met the criteria set by Congress. In fact, the Jackson-Vanik amendment did contain a waiver authority which has been used from time to time (with respect to other nonmarket countries), but the waiver could not be granted without assurances from the Soviet Union that it was not prepared to give.

48. *Britain, in Split With Europe, Eases Pretoria Ban*, N.Y. Times, Feb. 21, 1990, at A7, col. 1.

49. *Id.* According to reports from the conference of heads of state or government of the EEC, only the Portuguese Prime Minister agreed with Thatcher. How this divergence fits with the Decision of the Council of Ministers of the European Community which called for measures by all member states is beyond the scope of this review. *See* Council Decision of 27 October 1986, 29 O.J. Eur. Comm. (No. L 305) 45 (1986) (Dec. 86/517/EEC concerning the suspension of new direct investment in the Republic of South Africa).

50. Some discretion is granted to the President by § 311 of the Act, 22 U.S.C. § 5061 (1988), if he determines that condition (1) and that three of the four conditions numbered (2)-(5) have been met, and if he determines that the government of South Africa has "made substantial progress toward dismantling the system of apartheid and establishing a nonracial democracy . . . ." Such a determination may be overturned, however, if Congress enacts within a 30-day period a joint resolution of disapproval.

ence in the multilateral organizations (except for the Inter-American Development Bank) is insufficient to make a difference (pp. 158-73), and that turning the foreign assistance faucet on and off is of limited usefulness, since the likely targets of U.S. annoyance may well not be receiving U.S. aid in the first place (pp. 32-62). That leaves three major categories. Carter's plan for the future (all of the final chapter) is to make the President's authority over these three types of controls roughly equal in scope. This could be accomplished by reducing the President's authority over the first category (export controls) to the level of his authority over financial and import controls; or by *increasing* the President's authority in regard to financial and import controls to the level of his authority to impose export controls; or, finally, it could be done by setting the President's power over all three categories at some new level in between. Carter even has a bar graph to illustrate these three options (p. 239), though what the bars measure is not clear. As one might guess, Carter prefers the third alternative: that is, increasing authority of the President to control imports and financial transactions while curbing the President's authority over exports.

Curbing the authority over exports turns out to be more of what we saw in the first part of this review, plus expanding the protection for existing contracts (I don't like the term "sanctity" in this context) and enlarging the sunset provisions of the Export Administration Act,[51] so that any major denial program against a given country would expire within a specified number of months unless Congress authorized its continuation. Furthermore, Carter suggests reining in extraterritorial application of export controls, not by abolishing the authorities that are contained in (or have been read into) the statute, but by requiring the President to make stated findings before applying export controls beyond the nation's frontiers, including an evaluation of the interests of the United States and of any other states that might be affected (p. 253). I am pleased that Professor Carter would have presidents follow the techniques suggested by section 403 of the Restatement (Third) of the Foreign Relations Law of the United States.[52] Whether one can achieve this by legislation, I am not sure. I would be worried if recital of section 403 were to become another routine to be followed by drafters of proclamations and notices in the *Federal Register.*

The second leg of Professor Carter's reform proposals, and the one closest to his heart, is to enlarge the President's authority to control

51. Compare the 60-day rule with respect to agricultural export controls, mentioned *supra* in note 37 and accompanying text.

52. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNIFIED STATES § 403 (1986). As most readers of this review will know, the Restatement sets out a series of criteria by which to evaluate *any* governmental action — legislative, executive, or judicial — that affects activity with links to more than one state, and concludes that an exercise of jurisdiction that is unreasonable in light of the criteria is unlawful.

imports for political ends (pp. 254-60). He rejects using the International Emergency Economic Powers Act[53] (the successor to the Trading with the Enemy Act), for this purpose, on the ground that emergency powers should be limited to genuine emergencies. I agree. He also rejects — wisely, I believe — using section 232 of the Trade Expansion Act of 1962,[54] a national security provision originating in the Eisenhower administration and used only to limit the import of oil.[55] Carter proposes a new statute (p. 255), modeled on the 1985 amendments to the Export Administration Act. The statute would contain a detailed list of criteria for imposition of import controls, and would require prior consultation with Congress and with affected industries, consumer groups, and other countries (p. 255). Further, the statute would include a requirement for full reports to the Congress, a provision to protect existing contracts, and a provision for termination of a sanction unless Congress gave its affirmative approval within a specified period, say, six months from its initial imposition (p. 255). Subject to these restraints, the President could prohibit or limit as to amount the importation of any or all products from any country to further the foreign policy goals of the United States.

Carter realizes that his proposal has some risks. He suspects that the American steel industry, for example, might suddenly become very concerned about human rights abuses in Taiwan or South Korea (p. 256). I recall a few years ago that American pistachio growers became the chief lobbyists in Washington against trade with Iran. Carter thinks the dangers of political controls for protectionist ends might be minimized by requiring what he calls "linkage;" *i.e.,* the prohibition on imports must be combined with other prohibitions — on aid or exports or investments — and the prohibition may not be focused on one product only, such as steel or rubber-soled footwear (pp. 257-59).

While I appreciate Carter's concern for symmetry, and while he is clearly right that export controls have often been used because other options were not easily available, I am reluctant to embrace this proposal. I believe our export control program has been tolerable because it always has been based on the proposition that it would be invoked only when an international situation or threat was so serious as to overcome mere commercial concerns. If commercial (*i.e.,* protectionist) concerns were to run parallel with the tendency of government to "do something," I am afraid that sanctions — along with findings, determinations, consultations, and reports — would proliferate. The

53. *See supra* note 26.

54. 19 U.S.C.A. § 1862 (West Supp. 1990) (as amended).

55. For a description of the Oil Import Program as it was administered from 1958 to 1973 — a model that no rational government would wish to emulate — see Dam, *Implementation of Import Quotas: The Case of Oil,* 14 J.L. & ECON. 1 (1971).

sanctions themselves would lose their force, and the position of the United States as the world's greatest market would begin to erode.

I had not known that a proposal similar to Professor Carter's made it through the Senate in 1984.[56] But even that bill, as approved by the Senate, would have contained a proviso that import sanctions could be imposed only if the President "determines and reports to the Congress . . . that such controls are consistent with the international obligations of the United States, including the General Agreement on Tariffs and Trade."[57] Carter acknowledges that GATT[58] presents a serious problem for his proposal, but he argues that the problem is not insurmountable (pp. 259-60). Except where the country to be sanctioned is not a member of GATT (such as the U.S.S.R., Libya, Iran, and Iraq, to name a few possible targets), I do not see how a proposed import control — presumably a quantitative restriction or embargo that violates at least the Most Favored Nation Treatment required by article I and the prohibition on quotas contained in article XI — could be reconciled with GATT. It might be possible to build on the Security Exceptions article (article XXI), but that boon to unilateral decisionmaking has never been attractive, and it seems doubtful that the United States would prevail in the GATT Council in the 1990s as it did at the height of the cold war when it announced that it would not grant Most Favored Nation treatment to products of Czechoslovakia.[59] As Carter himself points out (p. 136), when the United States imposed an embargo on trade with Nicaragua in 1985[60] (acting under emergency legislation [61]), a GATT panel was unhappy and frustrated with the action of the United States in relying on article XXI.[62]

Carter suggests that the statute to carry out his plan should *encourage,* but not *require,* adherence to GATT. That way, he writes, "if the President thinks the foreign policy issue is compelling, 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" (p. 259). If that

56. S. 979, 98th Cong., 1st & 2d Sess., 129 CONG. REC. 7648-51 (1984). This bill was passed by the Senate in revised form. *See* 130 CONG. REC. 4141 (1984).

57. S. 979, 98th Cong., 1st & 2d Sess. § 6(1), 130 CONG. REC. 4141, 4144 (1984). It was not adopted in the House of Representatives and the whole act was not passed until 1985 — without the provision in question.

58. General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948).

59. *See* II GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 28 (June 8, 1949); *id.* at 36 (Sept. 27, 1951).

60. *See* Exec. Order No. 12,513, 3 C.F.R. 342 (1986).

61. *See supra* note 5.

62. The report of the panel was not adopted and so is not a formal decision. For a detailed account, see Note, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua,* 19 LAW & POLY. INTL. BUS. 603 (1987).

sounds cynical, I don't think such a charge fits Professor Carter. He does worry about what such a policy might do to the always fragile GATT, and suggests that his plan might be accompanied by other efforts to strengthen GATT in the international trading system generally (pp. 259-60). The more I think about the proposal, however, the less I like it. Symmetry is nice, and Carter's point about the distorted set of options available to a President looking for a sanction to impose is valid. I am afraid, however, that Carter's proposal would simply put more arrows in the quiver of an executive branch that is already insufficiently devoted to the international trading system, without straightening out the arrows it presently possesses.

For the third leg of his plan, Carter proposes to give the President increased authority over financial transactions, short of emergency controls (p. 260). He would permit controls over trade financing, such as dealing in letters of credit and acceptances tied to imports and exports, even where (if I understand him correctly) the imports or exports were not themselves prohibited. Further, he would permit restrictions on loans by U.S. banks to proscribed countries or entities, such as was done recently with respect to South Africa,[63] and he would perhaps also authorize the freezing of deposits by target countries or entities in U.S.-owned banks.[64]

Of course, as Carter recognizes, money is fungible and U.S. banks no longer have a monopoly on transnational credit. Still, being on a credit blacklist maintained by the U.S. government might well be disagreeable enough to encourage some countries to mend their ways to escape the blacklist, or perhaps to decide not to do something bad (for instance, using chemical weapons) to avoid being put on the list in the first place.

Again, Carter has a point. Again, however, I would be reluctant to give the U.S. government more means to cause trouble. As we have seen in connection with retaliation against Iran and Libya undertaken under emergency powers, financial controls can indeed cause trouble, not only for the target country but also for the global banking system and for commercial relations among friendly nations.[65] It is true that as the issuer of the world's principal transaction currency, the United States has greater opportunity to inflict pain on target nations than does any other country. But dollar dominance is not assured for all time — who, for example, remembers the pound sterling? In a period

63. *See* Comprehensive Anti-Apartheid Act of 1986 § 305, 22 U.S.C. § 5055 (1988).

64. Pp. 265-67. Here, too, Carter cites bills introduced in Congress to provide the President with authority along the lines he suggests, first with respect to controlled (*i.e.*, communist) countries, and later with respect to other countries, such as those that harbor or support terrorists. P. 263 n.94.

65. For a brief account of the U.S. freezing actions focusing on the ensuing litigation, see Smedresman & Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733, 746-61 (1989).

when U.S. trade and budget deficits are financed so heavily by foreigners who have confidence in the dollar, tinkering even a little bit with financial instruments denominated in dollars or issued by United States persons would, in my view, be taking a very large risk for relatively little benefit.

* * *

I do not want to end this review on a negative note. Carter's book is well informed, well written, and thorough, and his review of the existing jumble of U.S. authorities for economic sanctions makes a significant point. Carter has had the courage to make suggestions where others, including this reviewer, have only asked questions and offered criticism. For anyone interested in the legal framework for U.S. economic sanctions, *International Economic Sanctions* is an excellent source, both of information and of ideas. If Carter's cure is not to my liking, I nevertheless respect both his undertaking and his diagnosis.